

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

In the Matter of:

SIERRA UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007080370

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 6 through 8, 2007, in Prather, California.

Sierra Unified School District (District) was represented by Lauri A. Lafoe, Attorney at Law, of Lozano Smith. Mr. A.J. Rempel, Director, Special Education, District, was present throughout the hearing.

Student was represented by Taymour Ravandi, Attorney at Law, of Protection & Advocacy, Inc. Student's Mother¹ was present throughout the hearing.

District's due process hearing request was filed on August 14, 2007. On August 31,

¹ Student's parents shall be referred collectively as Parents, or separately, where appropriate, as Mother or Father.

2007, OAH granted a continuance of the due process hearing. Sworn testimony and documentary evidence were received at hearing. At the conclusion of the hearing, the parties stipulated on the record that closing briefs would be filed by December 3, 2007, and reply briefs would be filed on December 10, 2007. The parties timely filed their closing and reply briefs and the matter was submitted on December 10, 2007. The parties waived the 45-day period for issuance of a final decision and stipulated that the decision would be issued no later than January 9, 2008.

ISSUE²

Does District's offer of placement for the 2007-2008 school year provide Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

CONTENTIONS OF THE PARTIES

District alleges that it offered Student a placement for the 2007-2008 school year in the least restrictive environment. District offered Student placement at Ramacher Education Complex (Ramacher), a school site devoted almost exclusively to the education of severely disabled pupils (referred to as a center-based site). Ramacher is operated by the Fresno County Office of Education (FCOE) on behalf of the Fresno County Special Education Local Plan Area (Fresno SELPA). District alleges that its offered placement provides Student a meaningful educational benefit in the least restrictive environment. District wishes to transfer Student from his current enrollment in intensive resource specialist program (IRSP), a special day class, at Sierra High School (Sierra), a District school. Sierra is a regular education campus. At Sierra, Student spends the majority of his time in the IRSP, but also attends two regular education music classes and general school

² The issue was re-framed to accurately reflect that Student's placement was the only substantive aspect of Student's IEP in dispute.

assemblies and events, with regular education peers. District contends that the transfer is required because Student's current placement does not provide him with a meaningful educational benefit. District further alleges that Student gets minimal benefit from interaction with regular education peers and that his current placement unduly diverts resources from other pupils and is disruptive. Finally, District avers that the transfer is economically-justified as the proposed placement will cost District less than the current placement.

Student maintains that his current placement satisfies his unique educational and social needs for an environment rich in auditory and social stimulation and is the only available placement which can provide him with a meaningful educational benefit in the least restrictive environment. Student also maintains that his presence on campus and in the two nonacademic regular education classes he attends is beneficial to the regular education Students. Student further maintains that District's cost-analysis is inapplicable to placements other than mainstream placements. Moreover, Student maintains that even if the cost of placing Student in special education, as opposed to regular education, is an appropriate factor, District's cost analysis only addresses the cost to District of his current placement and fails to properly account for the cost of its proposed placement. Finally, Student claims that Student was denied a FAPE because District's placement offer was predetermined by Fresno SELPA outside of the IEP team meeting and accordingly violated Parent's procedural rights.

JURISDICTION AND BACKGROUND

1. Student reached his sixteenth birthday in October 2007. Student lives with his Parents within the boundaries of District and is enrolled in an intensive resource specialist program (IRSP), at Sierra High School (Sierra), a regular education campus. He is now in 11th grade. He began attending the IRSP at Sierra in the 2005-2006 school year when he was in ninth grade. During each school year, Student participated in music classes

outside of the IRSP classroom. During 2006-2007 he participated in two music classes, chorus and jazz.

2. Student has been diagnosed with multiple disabilities including Cerebral Palsy (CP), (spastic quadriplegia), hydrocephalus, right scoliosis with pelvis rotated to the right, and a seizure disorder. His CP has significantly affected his muscles causing severely increased spasticity in all four limbs as well as contractures.

3. Student is also severely visually impaired. Other than some light perception and peripheral vision, his eyes are not aligned and he suffers from visual disorders. Based upon District's multi-disciplinary assessment of April 16, 2007, District determined that Student's primary eligibility for special education was orthopedic impairment (OI). District also determined that Student met the statutory qualifications for eligibility under the categories of mental retardation (significantly below average intellectual functioning with concurrent deficits in adaptive behavior), and visual impairment. Although District found Student eligible in the category of mental retardation, his true intellectual capabilities could not be accurately tested due to his verbal and physical limitations.

4. Student has a good attendance record at Sierra and is in good health despite his disabilities. His medical and physical conditions have been addressed with surgery, surgical devices and medication. Student had spinal surgery in 2006 and takes medications to address his spasticity. A shunt was inserted to address his hydrocephalus. Since 2006, after a swallowing study revealed that he aspirated pureed food, Student has been receiving all his nutrition through a gastrostomy tube (G-tube). He is only permitted small tastes of liquid by mouth.

5. Student's seizure disorder has been successfully controlled by medication. As of the April 16, 2007 multi-disciplinary assessment, there were no known reports of seizures due to external stimuli. As of that date, his last known seizure was related to adjustments in his medications.

6. At the high school level, District does not administer an SDC class exclusively

for severely disabled pupils like Student. In February 2007, District, with Mother's authorization, referred Student to the Fresno County Office of Education (FCOE), an administrative arm of the Fresno County Special Education Local Plan Area (Fresno SELPA) to explore placing Student in a severely disabled program operated by Fresno SELPA. District is one of 33 school districts that are members of Fresno SELPA. Mother expressly requested that Student be referred to a severely handicapped SDC on a regular education campus, referred to as a site-based placement. At that time, District also recommended a site-based placement. Within the geographical region closest to Student's home, Fresno SELPA maintains one severely handicapped SDC (SH-SDC) at Sanger High School (Sanger), a regular education campus.

7. In August 2007, District offered placement at the Ramacher Education Complex (Ramacher) located in Fresno, California. Ramacher is operated by FCOE for pupils with severe disabilities. Ramacher is referred to as a center-based special education campus. With the exception of a Head Start program for preschool aged children, there are no regular education pupils on campus. There are no opportunities for mainstreaming pupils in regular education classes or for random interactions with regular education peers. Mother disagreed with the placement offer.

8. School districts provide a FAPE when they offer special education programs that: address pupil's unique educational needs; are designed to provide the pupil meaningful educational benefit; and are provided in the least restrictive environment. School districts' offers are measured independent of parents' preferred programs, even if the program or placement preferred by parents would have resulted in a greater educational benefit. Offers must also be evaluated in light of information available at the time the offers were made, not in hindsight.

UNIQUE NEEDS

9. During the 2006-2007 school year, District held an IEP team meeting on April

16 2007 to review Student's progress, establish goals and objectives and discuss his placement for the 2007-2008 school year. An addendum to the April 16, 2007 IEP was prepared on August 8, 2007. The IEP team members, in documents and in testimony at the hearing, were in general agreement about Student's unique needs and goals and objectives.

10. Student is profoundly disabled and requires intensive support for all his daily activities. Due to his medical condition, Student has unique medical needs that must be addressed for him to access his education. District personnel, including the bus drivers, must be trained to quickly and appropriately intervene in the event he has a seizure. District personnel must be trained to feed him through a G-tube.

11. Student has unique needs in the area of self-help. He needs assistance in all areas of daily activity. He is wheelchair-bound and is not able to reposition himself or travel in his wheelchair without assistance. An aide feeds Student through a G-tube three times daily. He cannot independently use the bathroom facilities and an aide is required to change his undergarments and clean him twice daily.

12. Student has unique needs in the area of motor skills. He has limited motor skills. He must rely on hand-on-hand assistance to utilize computer-assisted educational tools such as intellikeys. He can only move objects in front of him with effort and prompting.

13. Student has unique needs in the area of communication and language development. Student's communication skills are limited. He understands what is being communicated to him and to others around him. He verbalizes with sounds and can vocalize about 25 words with varying degrees of clarity.

14. Student has unique visual needs. Student has limited vision. He has some light perception and some perceptual vision. It is unclear how much he can actually see and at what distance he can see an object.

15. Student has unique social needs that are also related to his communication,

language, and sensory needs. Student's relies principally on his auditory sense to learn and to engage with adults and peers at Sierra. Student is responsive to people speaking to him and around him. He is most happy when he is in the company of peers and adults speaking to him or to each other.

16. Student has unique transportation needs. District must supply a school bus outfitted with a wheelchair lift and wheelchair lock. Personnel must be trained and equipped to intervene if Student has a seizure during the bus ride to school. Given Student's orthopedic needs care should be given to decreasing his exposure to the bumps and turns of a long bus ride.

17. Student has unique needs for predictability and stability. Student needs a predictable and familiar environment. His health and communication skills have noticeably improved since his home and school environment stabilized.

GOALS AND OBJECTIVES

18. District and Mother also reached consensus on Student's goals and objectives. District and Mother agreed to several goals and objectives set forth in the April 16, 2007 and August 8, 2007 IEPs. The IEP team developed a social integration goal which required Student to integrate/participate in mainstream classes deemed appropriate by the IEP team, considering Student's physical limitations and inability to perform at grade level.

19. The IEP team established several listening and speaking goals for Student. Goals were designed to increase Student's functional vocabulary and use of meaningful responses and gestures from one to three words when asked to make choices.

20. The adapted physical education (APE) goal provided for Student to grasp various small objects of his preference with physical prompts and place them on designated areas. A designated instruction service (DIS) goal confirmed Student's participation in various DIS services such as speech and language and occupational therapy. A daily care goal confirmed that Student would be changed on an as needed basis

in the IRSP room. A goal to address Student's vision impairment with materials provided by the teacher was also included.

MEANINGFUL EDUCATIONAL BENEFIT AT RAMACHER

21. District maintains that Ramacher can provide Student with a meaningful educational benefit unavailable at his current placement. Ms. Patricia Deroian, the program manager at Ramacher, testified about the facilities. She was knowledgeable about the facilities and her testimony about the program offered at Ramacher was carefully considered. Mr. Deroian had never personally observed Student. Her knowledge of him was generally restricted to her review of his educational records. During direct examination Ms. Deroian stated that she was familiar with Student from his previous attendance at a SELPA operated center-based facility and at Ramacher. However on cross-examination she conceded that she never worked with him and never participated in his IEP team meetings. Accordingly, her testimony was not given great weight in determining whether Ramacher provided Student a FAPE in the least restrictive environment.

22. Approximately 75-80 pupils are enrolled at Ramacher in eight classes. There is one teacher and two paraeducators in each classroom. Except where a pupil requires 24 hour nursing assistance, pupils are not assigned one-to-one aides. Ramacher's teachers are trained and possess credentials or provisional credentials to teach severely disabled pupils. In addition to working on each pupil's functional skills, the teacher or paraeducators are also responsible for feeding, changing and cleaning each pupil as required.

23. In the classes envisioned for Student, the pupils are between 18 and 22 years of age. There is little prospect for Student to be joined by pupils his age. Pupils in his age group used to be placed at Ramacher by Fresno Unified School District (Fresno), a large LEA within Fresno SELPA. Fresno now has its own severely disabled program and therefore no longer refers pupils to Ramacher.

24. The school day at Ramacher is regimented and predictable. Students are first

directed into a multi-purpose room where they salute the flag, go over news and the events of the day, have breakfast, and share a daily joke. Throughout the school year each class is responsible for various parts of the common program including the daily joke. Pupils also participate in elections for school government positions. Nonverbal pupils also participate in all activities in the multi-purpose room and elsewhere by using switches which can be manipulated to indicate their preferences. A variety of switching devices are available for pupils as a means of indicating their choices throughout the day.

25. Ramacher's pupils have limited functional skills and lesson plans are developed for each pupil to work on their unique functional needs. During classroom time, teachers concentrate on improving each pupil's independent functional skills that can be transferred to the home and the community. The whole program is designed to encourage each pupil to be independent and to make decisions. Functional skills areas are divided into several core areas: functional, academic, communication, vocational (including English language arts, math and science); recreation and leisure (including school wide functions); self care/independent living; motor skills/mobility (physical education); and social emotional (history/social studies).

26. The curriculum at Ramacher is highly structured around the core functional areas. Teachers share a common lesson plan that is designed to meet common state standards. The program is divided into four, nine week sessions. Each teacher receives the lesson plan on Friday for the next week. Quarterly progress is reviewed to ensure that quarterly goals have been met. Using this review process ensures that all goals are met by the end of the school year. There are different ways to meet the state standards. The manner in which pupils are directed to meet common state standards varies according to the class and each pupil's IEPs. Teachers meet as a group regularly to review the curriculum. Paraeducators are also trained to understand the curriculum.

27. In addition to classroom activities, pupils are provided opportunities to work on their IEP goals and objectives in its sensory room. Ramacher's sensory room was

designed to provide opportunities for sensory integration and to advance kinesthetic, tactile, fine motor and communication skills. The sensory room is equipped with balls and other items which afford pupils the opportunity to work on stretching, balancing, strengthening. A Ramacher employee is responsible for overseeing the sensory room. It is changed each week to provide unique experiences for pupils. The equipment in the sensory room can also be brought to the classroom on a cart if the pupil cannot physically access the sensory room.

28. Ramacher offers pupils with physical limitations a wide variety of equipment and tools to ensure that they will not be wheelchair bound all day. Adapted swings, bean bags, tandem bicycles, and platform beds are especially designed to comfortably position severely disabled pupils. A heated vibrating mat is available in the sensory room to comfort pupils.

29. In an effort to increase pupils' life skills and prospects for employment in the community, pupils 18 through 22 years of age are afforded opportunities to travel to stores and businesses in the community neighboring Ramacher. Twice monthly, Ramacher retains a wheelchair accessible bus to travel about twenty minutes into the neighboring community of Fresno where pupils might shop, see a movie, or participate in an activity like bowling.

30. Nursing care is also available at Ramacher. Certain pupils requiring full-time nursing care are provided with their own nurse. Nurses provide all G-tube feeding. Licensed vocational nurses, (LVNs) are also available to perform procedures that do not require a nurse.

31. Student maintains that Ramacher cannot provide a meaningful educational benefit to Student especially in view of his visual limitations and unique auditory needs. Student principally relied upon the expert testimony of Lynn A. Smithey. Ms. Smithey received her Masters in Special Education from the Teachers College at Columbia University. Ms. Smithey consults with individuals and agencies serving pupils with severe

disabilities. She has extensive professional experience with school districts and SELPAs in developing programs for pupils with severe disabilities with an emphasis on integration of these pupils in the community. She holds several teaching credentials, including the California Severely Handicapped Specialist (Life) credential. She has taught a variety of college and university-level special education courses.

32. Ms. Smithey was well qualified to opine about Student's placement options. She prepared a thorough written analysis contrasting the Ramacher and Sierra placements. She spent a full day at Ramacher speaking with administrators and teachers and observing the classes proposed for Student. At Sierra, Ms. Smithey spent a full day following and observing Student, speaking with members of his IEP team, including the school psychologist, Dustine M. Rojas (Ms. Rojas), his special education IRSP teacher, Mr. Terry Therkildsen (Mr. Therkildsen), and his one-to-one aide. She reviewed extensive documentation concerning Student's family history, and medical condition. Likewise, she reviewed Student's educational history, including assessments, IEPs and written observations. Ms. Smithey's opinion was generally corroborated by District employees at Sierra, including the school psychologist, his special education teacher, and his regular education music teacher. Based upon her education, professional background, comprehensive written analysis, direct observations, and responsiveness as an expert witness when questioned at trial, Ms. Smithey's opinion about the appropriate placement for Student was given greater weight than the testimony of District representatives.

33. Ramacher does house a concentrated level of expertise and resources for severely handicapped individuals, but as structured it does not adequately address Student's unique auditory needs given his visual impairments. Ms. Smithey observed two classrooms at Ramacher which were identified as probable alternative placements for Student. Verbal interaction between pupils and teachers or caregivers, or between pupils, was minimal. In one class a large percentage of time was spent on custodial care instead of meaningful activities. Only one pupil vocalized during Ms. Smithey's observation. Little to

no effort was expended on enhancing pupils' verbal skills. In another class, Students were clearly engaged in a variety of appropriate activities under a set curriculum. However, that class was also nonverbal; pupils used switches to say goodbye. Overall, pupils worked in isolation from each other, were not moved together to encourage communication, and did not have any opportunity to interact with each other.

34. Ramacher's abundant inventory of assistive technology and adaptive physical exercise equipment does not justify Student's placement in a segregated facility. In one classroom, pupils were performing functional activities by using switches to activate a fan, computer software, and a tape player. Ramacher also has a play yard with two wheelchair swings, four adaptive swings, two tandem bikes, a par course, and a basket that can be lowered.

35. While the assistive technology and wheelchair swings are appropriate for Student, for the most part, aside from the switches, Ramacher's sensory activities are not necessary to advance Student's IEP goals. Student needs to work on basic functional communication and motor skills. Ramacher's sensory activities provide isolated opportunities to work on tactile, motor and communication skills. For example, activities such as handling latex gloves filled with material, smelling flavorings added to clay, do not directly encourage his interaction with his environment.

36. Ramacher's community-based activities do not enhance Student's IEP goals or provide the only opportunities for him to obtain life skills so that he can interact with his community. Student does not yet have an applicable IEP goal. Student will have access to Ramacher's community-based activities only when his IEP requires his participation. Ramacher's community-based activities are inappropriate to Student since Ramacher is not located in the community where Student lives. Student needs to develop skills to interact and gain familiarity with his home community, not the community where Ramacher is located.

37. Ramacher's nursing staff is not necessary to serve Student's unique medical

needs. Student is not required to be G-tube fed by a nurse. Mother trained Student's aides to feed Student by G-tube. District's nurse also provides training to District's bus drivers on the appropriate care of Student in the event of a seizure.

38. Student also maintains that Ramacher cannot provide a meaningful educational benefit because his unique orthopedic needs limit the distance in which he can regularly ride a school bus. Ms. Smithey is not an expert on Student's orthopedic needs and did not form an opinion about whether the bus ride to Ramacher would be detrimental to Student's health.

39. The bus ride to Ramacher is estimated to be one hour and fifteen minutes, approximately one-half hour longer than Student's current bus ride to Sierra assuming Student is transported alone, more if he is transported with another Student.

40. Dr. Ved is a board certified medical doctor and a Medical Director of the Charlie Mitchell Children's Clinic at Children's Hospital Central California. She has been Student's primary care physician since August 2005. Student has been a patient of the clinic since November 2000. Dr. Ved was familiar with Student's medical history at the clinic. She had reviewed his file and notes from his specialists in neurology, neurosurgery and orthopedics. At trial, Ms. Ved testified telephonically. Although there weren't any visual cues from which to measure her credibility, she spoke with an even and assured tone and she was generally forthcoming about the source of her information and the basis of her opinion. For these reasons, her opinion about Student's medical condition and the dangers of prolonged travel was accorded deference. However, Dr. Ved's testimony was not accorded deference on the issue of whether District's offer of placement at Ramacher was inappropriate due to the prolonged bus ride.

41. Student already travels by bus. Ms. Ved offered conflicting testimony on the amount of time Student can tolerate a bus ride. Dr. Ved provided two letters to District concerning Student's transportation limitations. In the first letter she stated that it was harmful for him to travel for more than thirty minutes by school bus. In the second letter

she stated that it was harmful to travel for more than 45 minutes. Dr. Ved relied upon Mother for information concerning the timing of his current bus ride. She first understood it to be thirty minutes. When she discovered that he was currently tolerating 45 minutes she amended her estimate, but at trial indicated that 45 minutes was already at the upper limit of his tolerance. Student has been withstanding between 45 minutes and one hour of travel by school bus each day without any recorded physical consequence.

42. Whatever the distance, what was plainly evident from her testimony is that Student's physical condition places him at risk for injury whenever he travels. His muscles are very stiff or spastic. With a long bus ride, Student faces a greater risk of increasing his spasticity and suffering from pain, contractures, scoliosis and dislocation of the hip. Being in one position for an hour or two results in stiffer muscles. Dr. Ved posited that given how difficult it is for a regular education pupil to travel long distances by school bus it would be "cruel and unusual punishment" for a child with the physical limitations of Student to withstand the constant movement associated with long school bus rides.

43. While the length of the bus ride should be a concern in any placement decision, given the amount of time Student has already been traveling to Sierra without incident, it cannot justify a rejection of District's proposed placement. Dr. Ved established that Student must be repositioned regularly during the day. The longer the Student stays in one position, the more likely his muscles will contract and become frozen in that position. Any bus ride is taxing on Student. Student must also wait for upwards of thirty minutes in his wheelchair before boarding the bus home from Ramacher. However, there is no indication that Student will be deprived of opportunities to be repositioned at Ramacher.

44. Student does require a bus driver or bus assistant trained to handle his seizure disorders competently and expeditiously. Sierra has trained its bus driver to intervene appropriately if Student has a seizure. Ramacher's current practice is to call 911. In the event of a seizure Student must be attended to immediately with the appropriate

medication. If Student is deprived of the appropriate medication he could suffer oxygen deprivation to his brain resulting in further brain damage or death.

45. There is no evidence that Student has yet suffered a seizure on the bus requiring medical intervention. Nevertheless, Student cannot travel on a school bus without a bus driver or other assistant trained to provide appropriate and immediate intervention in the event Student suffers a seizure. Although Ramacher has full-time nurses that understand seizure protocol, unlike Sierra's bus drivers, Ramacher's bus drivers are not trained to provide pupils direct assistance.

46. District has failed to provide sufficient evidence that a center-based placement at Ramacher, devoid of opportunities for daily regular education peer and adult interactions, can provide a meaningful educational benefit for this Student.

MEANINGFUL EDUCATIONAL BENEFIT AT SIERRA

47. Student's program at Sierra is designed to enhance his basic functional, communication and motor skills. The IRSP class is designed for the lowest functioning pupils, pupils with IQs between 40 and 80. Pupils participating in the IRSP class have a variety of significant learning disabilities. Many of them participate in regular education academic classes part of the day and return to the IRSP class for certain instruction. Although Student's cognitive abilities cannot be measured, Student is considered to be the lowest functioning pupil in the class. With the exception of one other pupil who is also severely disabled, IRSP pupils divide their time between regular academic classes at Sierra and the IRSP room. Those with higher cognitive abilities go to regular education classes unassisted. Other lower-functioning pupils may participate in mainstream classes or regular resource-based classes for part of their day. Some pupils might need to be accompanied to the bus or the bathroom, but aside from Student and one other severely handicapped pupil, the pupils in the IRSP class do not require one-to-one assistance for all of their daily needs.

48. In the IRSP room, the special education teacher, Mr. Terry Therkildsen (Mr. Therkildsen), and his classroom aides work with pupils individually and in small groups on academic subjects. Mr. Therkildsen divides his time between academic subjects and vocational skills. He spends two periods in the IRSP room guiding IRSP pupils in language arts and in math. Pupils also participate in a vocational program in the community, referred to as the "workability" program. Student is not ready to participate in this program because he is still working on basic functional communication skills. Further, Student cannot access this program at this time because the bus utilized by District to transport pupils around the community is not equipped with a wheelchair lift.

49. Student receives support from a one-to-one aide for all his daily needs and to access his education. He spends a portion of two periods a day in regular education music classes. He also participates in school-wide assemblies and events. He spends the remainder of the day in the IRSP class or exploring campus with his one-to-one aide. During his time in the IRSP he works with his aide on various computer programs using the Intellikeys keyboard. Using a hand-on-hand approach, his aide is able to execute Student's choices. Aside from the Intellikeys, with the hand-on-hand method, Student can indicate his choices using a single switch that is pushed either left or right.

50. Mr. Therkildsen, a self-described "computer geek," has enhanced Student's educational experience by providing him with a computer and equipping it with Intellikeys and various software music and reading programs supplied by FCOE and private donors. Student enjoys working on the computer and utilizing the software. Given Student's vision impairment, he needs someone to read to him or a program with an audio component. The computer reading programs have an audio component. Mr. Therkildsen has also secured a Braille program from FCOE and three dimensional objects for Student to have further tactile experiences.

51. To address Student's physical and orthopedic needs, Student has available a swing, a pad and a large vibrating mat for him to lie on.

52. In addition to his daily routine in the IRSP and regular education class, Student is provided DIS in the following areas: speech and language (30 minute sessions, 20 times a year); APE (20 minute sessions, 18 times a year); health and nursing (15 minutes, one time a year); occupational therapy (30 minutes, four times a year with an increase to twenty-five times a year offered in the August IEP); and visual impairment services (20 minutes, six times per year).

53. Student's current program at Sierra is predictable and fairly regimented, with some flexibility to accommodate the competing needs of other pupils in the IRSP class, the regular education classes, or to provide time for additional school wide inclusion opportunities. Student spends the first two periods or one-and-a-half hours of his day in the IRSP room listening to music, working with his aide on some physical activity, such as a squeeze toys or working with the computer. He is tube fed and by third period leaves the room with his aide to attend regular education chorus. During times he does not attend chorus he still leaves the room during third period so that Mr. Therkildsen can work directly with higher functioning pupils on their school projects. After third period, Student returns to the IRSP room and is changed, using Mr. Therkildsen's side office. If the office is being used, Student waits until it is available. Student joins other pupils in the IRSP room for lunch time. He is fed by G-tube, but often sits at a table with the other pupils. After lunch, Student is accompanied to a regular education jazz class. His time in regular education music classes varies depending on the day. During the same period of one music class, Student might be taken to the ceramics room to work with clay with his aide. After this period, Student returns to the IRSP room to be changed and to complete his school day. He travels by bus to his home at approximately 2:45 p.m.

54. Throughout the day, Student is regularly exposed to verbal communication with adults and with peers. Student's one-to-one aide continually speaks to Student and wherever she takes Student on campus, she takes advantage of opportunities for him to interact with other individuals, or to listen to verbal communication between other people.

Student has been observed laughing at appropriate times when his aide shares a joke with another person. Student recognizes certain individuals and it is apparent that he is particular fond of females. Student understands what is being said to him and around him.

55. Student has made meaningful educational progress since he enrolled at Sierra. District and Mother agreed that Student made progress on his goals at Sierra. On April 16, 2007, District psychologist Dustine M. Rojas (Ms. Rojas) completed a multi-disciplinary assessment of Student. The objectives of the assessment were to determine how much progress Student made during the last three years, determine whether his current program was appropriate and determine what changes, if any, should be made to his program. In addition to Ms. Rojas, Student's multidisciplinary assessment team included: Sierra High's principal and assistant principal, guidance counselor, Mr. Therkildsen, Bruce Weinberger, (Mr. Weinberger), Student's regular education music teacher, Susan Ludwig (Ms. Ludwig), the school nurse, his APE provider, and his vision specialist.

56. Ms. Rojas was also part of the IEP process. Ms. Rojas was knowledgeable about Student's IEP and the referral process. As District's witness, she did not exhibit any bias in her testimony. Where her opinion was based upon her personal observations and interviews, and recommendations, it was carefully considered. She did not observe District's proposed placement at Ramacher to determine whether it was appropriate for Student. Her testimony was relevant to a determination of Student's progress at Sierra, and the recommendations of the IEP team as to what type of placement constituted the LRE for Student.

57. Summarizing observations of Student and interviews with the team and Student's aide, Ms. Rojas noted that Student has made "notable growth socially, emotionally, and in practiced skills." She stated that Student was making "great strides and can continue to obtain skills." Ms. Rojas described Student as an "amazing and joyful" pupil. She concluded that Student benefits "from the presence of students without

disabilities" in order to "stimulate multiple senses."

58. At the April 16, 2007, IEP team meeting, Student's speech and language therapist reported that Student had made "steady progress" in the areas of functional communication skills and making choices for activities and toy/object preferences. She noted that Student "has been enjoying the Intellikeys" and was "independent with this activity", demonstrate[ing] the ability to access different music and characters," as well as "verbaliz[ing] his choice of programs." She also noted that [Student] is social and really has demonstrated good progress in the classroom setting." Apart from the IEP team meeting, the speech and language therapist reported in notes sent home, that Student was using words he heard at school and names of family and pupils. Student was also reported to verbally request the computer.

59. The April 2007 and August 2007 IEPs confirm Student's progress on his IEP goals in the four principal areas of communication skills, socialization, choice-making and adaptive physical education. Student used functional vocabulary to make choices 60 percent of the time, an increase from his October 30, 2006 IEP, Student met his IEP communication goals for making toy choices and activity choices by using one to three word utterances 50 percent of the time. Student progressed on his IEP goal for adaptive physical education. The April 16, 2007 IEP reports that Student was able to grasp items and place them in designated spots in 1 out of 5 and 2 out of 5 trials.

60. Student's consciousness of his environment and progress in life skills was confirmed by Mother's testimony. Mother was especially pleased with Student's progress at school and its impact on his communication skills at home. Coextensive with his progress at school was a demonstrable increase in his use of words to express himself and to make choices in his home environment. District personnel took care at the hearing to complement Mother on her dedication and skill in caring for Student, and her participation in his education. Mother is respected by Sierra staff. She trained school staff to feed Student using the G-tube and regularly communicated and guided Student's aide. Mother

spoke plainly and sincerely, without an iota of hyperbole. She is not an educator, but as a vigilant parent and IEP team member, her views of Student's social and communication progress and overall physical and emotional well-being were given due weight.

61. Mother's familiarity with Student in the home setting confirmed that he is capable of understanding his environment and progresses best in an environment rich in communication and social interaction. Student shares his home with many siblings who have a range of disabilities and special needs. Mother described placing an infant sibling on Student's lap and his apparent awareness of the infant's fragility.

62. Sierra personnel are quick to recognize Student's progress at their school. However, they insist that they cannot continue to provide him a meaningful educational experience given the competing demands on Mr. Thirkeldsen, his more limited experience with severely handicapped pupils like Student, and District's limited resources.

63. Mr. Thirkeldsen testified at the hearing. He clearly had an affection for Student and was concerned about Student's welfare. From his testimony and his interview with Ms. Smithey, it was apparent that Student's educational and social well-being was in the forefront of his recommendation that an alternative placement be found for Student. Mr. Thirkeldsen maintained that he wasn't equipped to provide Student a meaningful educational program. He stated that he did not know how to measure Student's educational progress and that he made decisions about Student's educational program based upon Student's responses, particularly whether it appeared that Student was enjoying himself, not a set curriculum. For example, last year Student discontinued art class because he clearly disliked it. However, this year he appeared to be engaged in ceramics and his aide started taking him to the class so that he could work on his motor coordination by moving the clay.

64. Overall, Mr. Thirkeldsen testified that with the increasing and disparate demands on his time, and growing class size, it was getting more difficult to modify the IRSP class to accommodate Student's unique needs with the needs of his other higher

functioning pupils. Mr. Therkildsen is no longer available to directly interact with Student on a regular and daily basis. Student's care is largely left to aides. He explained that the nature of his class and teaching responsibilities shifted from the time Student was first enrolled in his class. He now spends a significant time out of the classroom working with pupils on developing job skills. With his background in theatrical set design, he now teaches construction two periods a day. Another portion of the day is spent with IRSP pupils in the community participating in the "workability" program where they are exposed to various jobs. When he is in the classroom his time is committed to working with other IRSP pupils on academic subjects including language arts (where he teaches research skills) and math.

65. Mr. Therkildsen also insists that he is not qualified to develop a meaningful educational program for Student because his education and certification is in moderate to mild disabilities, not severe disabilities. Whether or not Mr. Therkildsen is appropriately credentialed is outside the scope of this proceeding.³ As an essential member of District's IEP team Mr. Therkildsen's ability to deliver a FAPE to Student is relevant. Mr. Therkildsen has actively procured and commandeered computers, software and assistive technology for Student. Student uses a switch device, computer programs with a reading component, Braille and three dimensional objects to address his visual impairment. Given Student's unique needs, Student's educational progress thus far, the availability of one-to-one aides to implement Student's program, District has failed to establish that a set amount of time for Mr. Therkildsen to provide daily direct instruction to Student was necessary to provide him a FAPE.

³ District and Student examined and cross-examined witnesses about the necessity of having a severely handicapped credential. It is outside the scope of this hearing to determine whether Mr. Therkildsen is appropriately credentialed.

66. Student's use of Mr. Therkildsen's office for changing presents logistical challenges as this office is also used for testing and photocopying. Student has always been changed in Mr. Therkildsen's office. It is not an ideal changing area, but there are no known medical or regulatory restrictions barring its use. In fact, at Ramacher Students were observed being changed in classroom settings, in one instance, in full view, without a privacy screen. Student's changing times are adjusted to accommodate testing, photocopying and other office activities.

67. Sierra personnel are convinced that Mr. Therkildsen's IRSP room was not an appropriate placement. District's personnel at Sierra High are engaged with Student, work hard to understand him, and appreciate his individual character. Sierra personnel testifying at the hearing were clearly conflicted about the prospect of him being transferred to a center-based placement which would deprive him of participation with typical peers on a daily basis. Sierra personnel preferred to place Student in a severely handicapped program on an integrated campus like Sierra. Their primary motivation for recommending him to the Fresno County SELPA for placement was their belief that, aside from his social interactions, the IRSP program at Sierra could no longer provide him an educational benefit as a severely disabled a pupil in its IRSP.

68. Dustine Rojas, the school psychologist, completed Student's triennial evaluation. It was her first referral for a placement with SELPA that she did as an employee of the District. Ms. Rojas was knowledgeable about the decisionmaking process involved in referring Student to the County SELPA and her testimony was relevant and considered in determining whether Student was offered placement in the least restrictive environment by design (as District alleges) or by default (as Student maintains). At the time she completed the triennial evaluation, Dr. Rojas recommended that a site-based SH-SDC on an integrated campus like Sierra was the least restrictive environment for Student necessary to his progress "toward academic, behavioral, and/or social-emotional goals and objectives." Mr. Therkildsen recommended a similar placement. Mother concurred with the

recommendation of District personnel. However, District's recommendation was rejected by Fresno SELPA. Instead, Fresno SELPA offered Ramacher. Based upon the foregoing factual findings, District failed to meet its burden of proving that Ramacher is an appropriate placement.

LEAST RESTRICTIVE ENVIRONMENT AND CONTINUUM OF PLACEMENT OPTIONS

69. District contends that its offer of placement at Ramacher satisfies its obligation to offer pupil a FAPE in the least restrictive environment. A placement must foster maximum interaction between disabled pupils and their nondisabled peers in a manner that is appropriate to the needs of both. Four factors are instructive in determining whether a Student receives an appropriate placement in the least restrictive environment: (1) the educational benefits to Student; (2) the non-academic benefits to Student; (3) the effect Student has on the teacher and other pupils 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. To meet its obligation to provide Student special education and related services in the least restrictive environment, District is also required to provide a continuum of specified placement options ranging from the least restrictive to the most restrictive.⁴

⁴ Student contends that District failed to fulfill its statutory obligation to provide a continuum of placement options. District admitted that its resources were limited and that it relies on Fresno SELPA to fulfill its obligations. The relative responsibilities of District and Fresno SELPA to provide a continuum of placement options is irrelevant to this proceeding. As of August 8 it appears that District with Fresno SELPA had available a continuum of options, including resource specialist support, assistive technology support and the site-centered IRSP at Sierra, but offered only the most restrictive.

NONACADEMIC BENEFITS OF INTERACTING WITH REGULAR EDUCATION PEERS

70. Nonacademic benefits include social and communication skills. There is significant evidence that Student benefits socially and emotionally from the language-rich environment available at an integrated campus. It is apparent from the reports of District employees at Sierra, that Student benefits socially from the presence of pupils without disabilities and higher functioning special education pupils. Student needs to interact with his peers and neurotypical adults to stimulate multiple senses. Student is responsive to conversation around him, even laughing at appropriate times when people around him exchange funny stories. He recognizes people who communicate with him regularly. In the IRSP room, he is visited by regular education volunteers and enjoys their company. Student demonstrates a heightened response to females who communicate with him. He responds to other pupils in many ways: by raising his arm as high as he can, by trying to touch their hand, by looking at them directly and attentively when they speak to him; and by smiling and vocalizing when they engage him.

71. Student indicates his enjoyment of music and responds to the vocalists and musicians in the regular education music class by vocalizing or moving his head. It is clear from Student's body language that he appreciates the music he hears and that he can discriminate between instruments and musical pieces. He turns his head toward the music, moves his head back and forth and smiles. He showed particular interest in the violin in orchestra class last year. When given the opportunity to touch the strings, his eyes "lit up." In jazz band this year he also enjoyed having his hands guided over the piano keys. In chorus and instrumental music classes, his reaction varies according to whether he enjoys the music presented.

72. Student receives positive feedback from pupils in his music class. When he is present at the end of class, pupils walking past him will tap his shoulder, touch his hand, or say goodbye. He looks toward their voices and smiles.

73. Student is generally happy, even “joyful.” To those surrounding him during his school day he appears most happy when he is around people engaged in communication, whether it is conversation or music.

74. Student also benefits from his interaction with higher functioning special needs Students in his IRSP class. Although he is fed through a G-tube, he often joins other pupils during lunch time in the IRSP room. He has a special female friend in the IRSP class. When she visits, he “lights up” and smiles. He recognizes her voice and distinguishes her from other individuals.

75. In contrast to Sierra, at Ramacher there are no regular education peers or even higher functioning special needs pupils for Student to communicate with on a daily basis. There is a Head Start preschool program on campus. Head Start houses the only students without disabilities on the Ramacher campus. In an effort to increase pupils’ exposure to regular education peers, Ramacher invites the community on campus. Students from a local high school visit twice yearly. In addition, about twelve times yearly, members of the community, enter campus to participate in theme-based events, which are carefully tied into the functional skill curriculum in each classroom. Ramacher hosts a Fall Fun Day, featuring pumpkins, a Halloween Dance, tasting contests, a water play day, and a Take-Me-Out-to-the-Ballgame day.

76. Annually, one popular off-campus activity sponsored by local businesses brings about one thousand Ramacher pupils, other severely disabled pupils in FCOE programs, and their families, together with local businesses, the fire department and local government agencies. An array of activities are offered and the pupils leave with backpacks filled with giveaways.

77. Ms. Deroian is proud of her efforts to expand community involvement with Ramacher pupils. It is her desire to bring more regular education peers on campus. However, at this time, the interaction between pupils and regular education peers is intermittent and restricted to special on-campus and off campus events. Ramacher cannot

provide the daily interaction with regular education pupils that Student needs.

THE EFFECT STUDENT HAS ON THE TEACHER AND OTHER PUPILS

78. Student's effect on other pupils is measured by whether pupil is disruptive, distracting and unruly, and whether the pupil takes up so much of the instructor's time that other pupils would suffer from lack of attention. Student does not attend general academic education classes. Student only attends nonacademic classes and does not interfere with pupils in these classes. On the contrary, there is substantial evidence that he benefits and his presence also benefits the regular education population.

79. Student regularly attends two music classes. Mr. Weinberger testified that he knows Student well from his attendance in his ninth and tenth grade music classes. He described how Student's presence changed him and his pupils. He admitted that Student's presence in his classes initially disturbed him. Mr. Weinberger was initially distracted by Student's vocalizations.

80. Mr. Weinberger adjusted to Student's vocalizations and grew to appreciate Student's positive effect on his pupils. At the beginning of each school year the pupils giggle at Student's vocalizations and generally appear to be uncomfortably around Student. After a few weeks, pupils adjusted; many pupils speak to him, and all become more compassionate in his presence. Under the guidance of Mr. Weinberger, Student participates as an active listener when his pupils prepare for choral performances. Before each public performance, choral members surround Student in a semi-circle and sing their full program. His reaction to their singing strengthens their resolve to do their best. As Mr. Weinberger explained, high school students are particularly hard to reach emotionally. Student brought out the best in his pupils. Mr. Weinberger described his effect on pupils as "profound" and "life changing."

81. Student does not interfere with the music classes. Student's participation in music is carefully arranged so as not to interfere with the pupils' practice. Mr. Weinberger

notifies Mr. Therkildsen when he believes it would be inappropriate for Student to attend class. Student does not come to music class when pupils are performing solos or when pupils are receiving special instruction from guest lecturers. The regular education population benefits from Student's participation in nonacademic activities on campus.

82. District claims that Student unduly interferes with the other pupils in the IRSP class and that his interference with these other pupils justifies a change of placement.⁵ Mr. Therkildsen clearly had a hard time testifying that Student unduly interferes with the operation of his IRSP class. When asked if Student screams, Mr. Therkildsen responded that it was more accurate to describe his vocalizations as loud yelling. Student vocalizes loudly at times, especially when he is wet and needs to be changed. Mr. Therkildsen taps him gently on the chest to quiet him down. When asked if his loud sounds were disruptive, Mr. Therkildsen responded that the sounds weren't "bad," but that they were continuous.

83. Student does not continually vocalize loudly. Ms. Smithey observed him for a full school day at Sierra in a variety of settings including school assemblies. At no time did she observe him to make inappropriately loud utterances. The music teacher testified that

⁵ This *Holland* factor was designed to address whether a pupil should remain fully mainstreamed with regular education pupils in a regular education class to the instant situation where Student is enrolled in a special day class, on a fully integrated campus. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402.) Whether Student interferes with the education of other higher functioning special education students in a special day class may indicate that another special day class may be more appropriate to Student. However, evidence that Student interferes with other special day class pupils does not resolve the issue of whether District's offer of another special day class on a completely segregated campus constitutes the least restrictive environment for educating Student.

he makes low moaning sounds to express his enjoyment.

84. The audio output on Student's computer can be heard by other Students. In the past Student has not been willing to wear headphones. Mother testified that Student wears headphones regularly at home. Mr. Therkildsen admitted that he hasn't tried to place headphones on Student since his initial negative experience. Instead Mr. Therkildsen adjusted Student's computer time so that he works on the computer when the other pupils are not in the class.

85. Significantly, at no time during his enrollment in the IRSP class did the IEP team recommend a behavior goal for Student. On the contrary, the IEP team determined that Student's behavior was appropriate to his level of functioning and that he did not need behavior intervention. There is no evidence that Mr. Therkildsen requested behavior intervention assistance from the IEP team or Fresno SELPA. Instead Mr. Therkildsen successfully handled Student's vocalizations by designing Student's schedule so that it created the least interference with higher functioning pupils, asking Student's aides to remove him from the classroom, or using gentle physical reminders, like tapping Student on the chest

86. Mr. Therkildsen described the reaction of other higher functioning pupils as "hot and cold" but did not identify any consistent negative reaction from other pupils. Mr. Therkildsen described some concern that Student was dominating the computers. However, Mr. Therkildsen has five computers in the class and there was only one computer dedicated to Student. Student had a positive impact on many of the higher functioning Students in the IRSP class. In particular, Mr. Therkildsen noted that Student brings out a side of one pupil he had never seen before.

COST TO THE DISTRICT

87. District has a duty to place Student in the least restrictive environment. Cost is a factor when a full inclusion placement in regular education classes is considered for a

pupil with severe disabilities. The cost analysis involves a determination of whether it is significantly more expensive to educate the pupil in a regular education setting than in the proposed setting. It is also appropriate to consider in placement decisions in addition to all other factors that are considered. However, cost factors cannot override District's duty to provide FAPE in the least restrictive environment.

88. District has accounted for its costs of educating Student in its current IRSP placement at Sierra. Student's transfer to Fresno SELPA results in considerable cost savings to District, because Fresno SELPA becomes financially responsible for Student's special education and related services. District currently spends \$21,000 dollars annually for Student's one-to-one aide. District leases a specially equipped bus to transport Student because it does not own a bus that can transport wheelchair-bound pupils like Student. It costs \$30,000 dollars to transport him in a bus specially equipped for wheelchairs, (or \$125 dollars per day multiplied by 180 school days.) In addition, District spends about \$200 dollars a year for his occupational therapist. District obtains approximately \$7,700 dollars in property tax revenue for Student. Accordingly, District's cost for Student's current placement is approximately \$45,000 dollars.

89. District's accounting is inappropriate to Student's situation and incomplete. Student is not fully included in a regular education placement. District has an obligation to provide the one-to-one aide. Student requires a one-to-one aide for all his needs whether he participates in the IRSP or in nonacademic regular education music classes or campus events. There are other aides in the IRSP class that assist Mr. Therkildsen. District's cost of providing services to Student in his current placement is the difference between the cost of providing a one-to-one aide and the cost of providing aides shared by other pupils in his class. Similarly, District has an obligation to provide transportation services to special education pupils. District's cost of transporting Student is the difference between the cost of transporting other special education pupils and the cost of transporting pupil in a specially-leased bus. District failed to accurately represent its current cost of educating

Student as a pupil in an SDC in a fully integrated campus.

90. District's accounting is incomplete because it failed to compare the cost of educating Student at Sierra with the cost of educating Student at its preferred placement, Ramacher. District does not directly pay for special education and related services to Student once he is transferred to Fresno SELPA so District claims that it does not have to show the costs of educating Student at Ramacher. However, costs savings due to Student's transfer to a Fresno SELPA school does not support a finding that the other placement is appropriate.

91. District claims that to provide Student a meaningful educational program it must hire a teacher credentialed to instruct severely handicapped pupils. District indicated that there are at least seven severely handicapped Students in the District from preschool through high school. It also indicated that it receives a large property tax endowment from each pupil it retains in the District. District has not explored other cost-saving options or presented them in an IEP team meeting, such as consultation services, and increased resource, assistive technology and technical assistance from Fresno SELPA. District has failed to provide sufficient evidence that the cost of educating Student in an SDC on an integrated campus justifies transferring him to a site-centered facility operated by Fresno SELPA.

PREDETERMINATION OF PLACEMENT AT RAMACHER

92. Student contends that District predetermined Student's placement outside the IEP process. Predetermination of an educational placement occurs when an educational agency has made its determination prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. Predetermination is a procedural violation which amounts to a denial of FAPE if the violation results in a loss of educational opportunity for the pupil, or seriously infringes upon the parents' opportunity to participate in the IEP process.

93. As a result of her discussions with District, In February 2007 Mother authorized District to refer Student to Fresno SELPA. Mother expressed a desire to explore the availability of a program devoted to severely-handicapped pupils like Student on an integrated campus.

94. On April 16, 2007, an IEP team convened to discuss Student's IEP goals and objectives and placement. The IEP team report did not record the discussion about placement, but Ms. Rojas's uncontradicted testimony confirms that the IEP team members, including Mother, participated in a discussion of Student's placement options. At that time, consistent with Ms. Rojas psychoeducational assessment, the IEP team agreed to refer Student to Fresno SELPA's SH-SDC at Sanger.

95. Ms. Rojas admitted that the Fresno SELPA referral was her first and that District did not follow the usual IEP process in making its August 2007 offer of placement at Ramacher. Some time after the April 2007 IEP Fresno SELPA informed Ms. Rojas, that District's IEP team did not have the authority to decide where Student should be placed in Fresno SELPA. Against the IEP team's recommendations, Fresno SELPA determined that Student should be placed at Ramacher. At no time did any representative of Fresno SELPA participate in an IEP team meeting where the placement options within Fresno SELPA were discussed. Ms. Deroian testified that it is not Fresno SELPA's practice to participate in District's IEP team meetings. Fresno SELPA convenes an IEP team meeting with parents only after it finalizes its placement decision and Student transfers to the jurisdiction of Fresno SELPA by enrolling in its chosen placement.

96. Ms. Deroian and Sharon Masee of Fresno SELPA spoke with Ms. Rojas about a severely handicapped special day class at an integrated campus and Ramacher. Ms. Rojas included a one-page note in the August 8 IEP summarizing the information they provided to her. Although there is no indication in the note that Ramacher was the recommended placement, at the bottom of the one page note, Ms. Rojas indicated that an offer was communicated to Mother as she noted that Mother "would like to continue to mediate

placement for [Student] for the 2007-2008 school year.”

97. Ms. Rojas explained that the August 8 IEP was prepared for the purpose of memorializing District’s offer and Student’s disagreement so that District could continue to provide services to Student at Sierra in the absence of a signed IEP. She indicated that Mother and District were in constant communication about Student’s placement. Consistent with Ms. Rojas testimony, District personnel and Mother signed the IEP and Mother did not check the appropriate box indicating that she was absent from the IEP team meeting. Mother signed the IEP team report on August 9, 2007, indicating her disapproval of the offered placement. On August 13, 2007, Ms. Rojas sent a confirming letter notifying Mother that Ramacher is the official offer of placement for Student. The letter also confirmed District’s understanding that Mother rejected the placement offer.

98. Student also maintains that District convened an IEP team meeting without notice to Mother and without her participation. There is overwhelming evidence that in all respects Mother was an active participant as an IEP team member and that she was kept apprised of all matters related to Student. It appears from Ms. Rojas testimony and Mother’s conduct that Mother was complicit with Ms. Rojas plan to create an IEP document which amended the April 16 IEP without an IEP team meeting to ensure that Student had an operative IEP. However, Mother’s limited waiver of an IEP team meeting does not cure District and Fresno SELPA’s predetermination of Student’s placement. The decision to place Student at Ramacher did not occur within an IEP team meeting. Mother did not have an opportunity to directly speak with representatives of Fresno SELPA and discuss their placement recommendations. She did not have an opportunity to review with them Student’s unique needs and his goals and objectives. She did not have an opportunity to present her reasons why Student required a site-based placement on a regular education campus close to his home community. She did not have an opportunity to discuss other options to enhance Student’s educational experience in his current placement. Fresno SELPAs and District’s predetermination of Student’s placement at

Ramacher significantly impeded the Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE for her child. Accordingly, District's offer of August 8 denied Student a FAPE.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. District filed for a due process hearing and bears the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.)

THE GENERAL PRINCIPLES OF THE IDEA

2. Pursuant to California special education law⁶ and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) Special education is defined as specially designed instruction, at no cost to parents, to

⁶ The California Education Code was amended to conform to the amended IDEA and applicable federal regulations set forth in Title 34 of the Code of Federal Regulations, effective October 14, 2006. The amendments to the California Education Code are effective October 10, 2007. This action was filed prior to the effective date of the amended California Education Code. Accordingly, the most recent amendments to the California Education Code are not applicable to this action.

meet the unique needs of the student. (20 U.S.C. § 1402(29).) Similarly, 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.)

3. FAPE consists of special education and related services that are available to the student in conformity with the individual education plan (IEP), under public supervision and direction, pursuant to State educational standards, and includes an appropriate preschool, elementary school, or secondary school education in the state involved. (20 U.S.C. § 1402(9).) (*Winkelman v. Parma City School Dist.* (2007)____U.S.____[127 S.Ct. 1994,*2000-2001,167 L.Ed. 2d 904].) A district must provide a basic floor of opportunity consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the child with a disability. (Bd. of Ed. of *Hendrick Hudson Central School Dist. v. Rowley*, (1982) 458 U.S. 176. 200-201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp.198-199.) However, in providing the "basic floor" school districts are obligated to provide programs that produce at least some meaningful academic advancement. (*See Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001)(quoting *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985)("Congress did not intend that a school system could discharge its duty . . . by providing a program that produces some minimal academic advancement, no matter how trivial.").)

4. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if Petitioner's parents preferred another program and even if his

parents' preferred program would have resulted in greater educational benefit. In Gregory, supra, the pupil's parents believed "emphatically" that his private tutor helped him learn. The court concluded that "[e]ven if the tutoring were better for Gregory than the District's proposed placement, that would not necessarily mean that placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide Gregory with educational benefits." (*Ibid.*)

LEAST RESTRICTIVE ENVIRONMENT

5. Federal and state law requires school districts to provide a program in the least restrictive environment to each special education student. (See 34 C.F.R. §§ 300.14, et. seq. (2006).) A special education pupil 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 and 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." (§1412(a)(5)(A); 34 C.F.R. §300.114(a)(2)(i) 7 (ii).) 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 Educ.* (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.) The child's placement must be in the LRE based upon the pupil's IEP, and as close as possible to the pupil's home. (34 C.F.R. § 300.522 (a)(2), (b)(2), (3).)

6. The determination of whether the removal of a pupil from full-time involvement in regular education, or mainstreaming, constitutes the "least restrictive environment" for that pupil involves an analysis of four factors: (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 the 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. Whether a child educationally benefits from special education placements is based upon a determination that special education is better or equal to the regular education classroom. Non-academic benefits of placement in an inclusive setting include social, communication and self-confidence. To determine the disabled child's effect on regular education pupils, evidence of disruptive, distracting or unruly behavior is reviewed as well as evidence that the pupil dominates the teacher's time resulting in his neglect of his regular education pupils. The cost factor compares the cost of educating the disabled pupil in a regular education class with the cost of education that pupil in the proposed special education setting. (*Sacramento City Unified School Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398, 1400-1402.*)

7. In *Rachel H.*, the court considered whether a pupil with special needs should be fully integrated, or mainstreamed, into a regular education program, with the support of a one-to-one aide. In that case, the intent was to have pupil spend all her time in the regular education program and not be removed at all for specialized instruction. In contrast to *Rachel H.*, Student spends the majority of his time in an SDC and only a small portion of his time in a nonacademic regular education program. Unlike *Rachel H.*, the controversy in this case does not involve a choice between a placement which fully integrates Student in regular education and a placement in a special education program. This case concerns two special education placements which offer different degrees of participation with regular education students. Accordingly, the factors used to determine whether District's offer of placement in *Rachel H.* constituted the LRE are instructive, but is not controlling. For example, as with all special education placements, it is presumed that exposure to typical peers "to the extent practicable" has educational and non-academic benefits to Student. It follows, that one consideration of the "extent" it is "practicable" to

expose Student to typical peers, is his “effect on the teacher and the children” in any regular class, not just academic classes. Moreover, *Rachel H.* factored in cost when comparing full inclusion of a severely disabled pupil to placement in a special education program. Given that all the placements considered in this case are special education placements, it is inconsistent with *Rachel H.* to compare the cost of educating the child in one special education placement to the costs of educating the child in another special education placement. In decisions relating to the placement of individuals with exceptional needs, the ALJ does consider costs, in determining placement in addition to other factors that are considered. (Ed. Code, § 56505(i).) However, cost is one factor and it cannot override the IDEA’s mandate to provide FAPE in the least restrictive environment.

CONTINUUM OF PLACEMENT OPTIONS

8. A special education local plan area must have a continuum of program options available to special education students to meet their needs. (Ed. Code, § 56360.) The continuum of program options includes, but isn’t limited to “regular education programs, resource specialist programs, DISs, special classes, nonpublic, nonsectarian school services, state special schools, instruction in settings other than classrooms where specially designated instruction may occur, and instruction using telecommunications, instruction in the home, in hospitals and other institutions, instruction in the home, in hospitals, and in other institutions. (Ed. Code, § 56361.)

PREDETERMINATION OF PLACEMENT

9. Predetermination of an educational placement “occurs when an educational agency has made its determination prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” (*H.B. v. Las Virgenes Unified School District*, 2007 WL 1989594 (9th Cir. 2007). Predetermination is a procedural violation which amounts to a denial of FAPE if the

violation results in a loss of educational opportunity for the student, or seriously infringes upon the parents' opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School* (9th Cir. 1992) 960 F.2d 1479, 1484; see also Ed. Code, § 56505, subd. (f)(2).) The IDEA contemplates that decisions will be made by the IEP team during the IEP meeting. It is improper for the district to prepare an IEP without parental input, with a preexisting, predetermined program and a "take it or leave it" position. (*W.G., supra*, 960 F.2d. at p. 1484.)

PARENTAL PARTICIPATION

10. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist., supra*.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. *Target Range, supra*, 960 F.2d 1479, 1482.)

11. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693;

Fuhrmann v. East Hanover Bd. of Educ. (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

12. Parents are an important part of the IEP process. Parents have the right to participate in the development of the IEP for their child and “to be informed of the availability under state and federal law of free appropriate public education and of all available alternative programs, both public and nonpublic.” (Ed. Code, § 56506, subd. (d).)

DID DISTRICT’S OFFER OF PLACEMENT FOR THE 2007-2008 SCHOOL YEAR PROVIDE STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE LEAST RESTRICTIVE ENVIRONMENT (LRE)?

13. Based upon Legal Conclusions 1 through 4 and 6, and Factual Findings 1 through 68, District failed to meet its burden of proving that its offer of Ramacher provided Student a meaningful educational benefit. Student’s unique communication, language, visual and social needs and related IEP goals require that he be educated in an environment that is verbal. As set forth in these same Factual Findings, Ramacher is too restrictive an environment for Student to obtain a meaningful educational benefit. Student needs to be in a site-based SDC with daily opportunities for inclusion with the regular education population so that he can accommodate his unique needs and IEP goals. Further his unique medical needs require that he be transported to school by bus drivers trained to directly intervene in the event he has a seizure.

14. Based upon Legal Conclusions 1 and 5 through 8, and Factual Findings 69 through 91, District failed to meet its burden of proving that its offer of Ramacher was the least restrictive environment for Student. Student receives nonacademic social benefits from his participation in an inclusive regular education campus. In addition, the regular education population is enriched by his presence. Finally, District has failed show that the costs of educating Student in a site-based SDC are substantial or outweigh other factors

considered in determining whether Student should be transferred to a more restrictive placement.

15. Based upon Legal Conclusions 9 through 12, and Factual Findings 92 through 98, District predetermined Student's placement at Ramacher and committed a procedural violation which seriously infringed upon Mother's opportunity to participate in the IEP formulation process. Fresno SELPA unilaterally determined Student's placement outside of the IEP process and apart from the IEP team.

16. Based upon the foregoing Legal Conclusions and Factual Findings, District's August 8 offer of Ramacher was not an offer of FAPE in the least restrictive environment.

ORDER

District'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. Pursuant to this mandate, it is determined that Student prevailed on the sole issue heard in its due process hearing request.

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: January 8, 2008

A handwritten signature in black ink, appearing to read "Eileen M. Cohn", written over a horizontal line.

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division