

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ROSEVILLE CITY ELEMENTARY
SCHOOL DISTRICT.

v.

PARENTS on behalf of STUDENT,

OAH CASE NO. 2009101222

DECISION

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings, heard this matter in Roseville, California, on November 23, 24 and 30, 2009.

Attorneys Marcy Gutierrez and Joseph Spector represented the District. The District's Director of Student Services, Timothy Ribota, was present on behalf of the District throughout the hearing.

Father represented Student, and Mother was present throughout the hearing.¹

The District filed the request for due process hearing (complaint) on October 19, 2009. On November 30, 2009, a continuance was granted to December 16, 2009, to permit the parties to file written closing arguments. Upon receipt of the closing arguments on December 16, 2009, the record was closed, and the matter was submitted for decision.²

¹ Mother and Father shall be referred to collectively as Parents.

² The Student's written argument has been designated as Student's Exhibit 8 and the District's closing argument has been designated as District's Exhibit 20.

ISSUE

At the individualized educational program (IEP) meeting of June 4, 2009, did the District offer Student an educational program for the 2009-2010 school year that addresses her unique educational needs, is reasonably calculated to provide Student with educational benefit and is in the least restrictive environment (LRE)?

CONTENTIONS

The District claims that Student has mild to moderate autism spectrum disorder (ASD) and mental retardation (MR). The District also contends that Student has serious maladaptive behaviors that include physically assaulting other students, and disrupting her classes by spontaneous loud vocalizations. At an IEP team meeting on June 4, 2009, the District offered to place Student in a special day class (SDC) operated by the Placer County Office of Education (PCOE) for children with ASD at Creekview Ranch Middle School (Creekview). In addition, the District offered Student 60 sessions of 30 minutes each in length of speech and language therapy to address pragmatic language deficits. The District claims that this placement will meet Student's unique needs, and provide her with educational benefit in the LRE.

Student acknowledges that she has disabilities, but denies having either ASD or MR. Further, Student agrees that she engages in maladaptive behaviors, but contends that these behaviors are not as severe as portrayed by the District. Student argues that the District's offer of placement and services is not the LRE for her. She contends that she can receive educational benefit if she is placed at a District middle school, possibly in a program for children with communication disorders, accompanied by her mother as a one-to-one aide. Student argues that this placement is the LRE for her, and will meet her unique needs. Student took no position in regards to the District's offer for speech and language therapy.

FACTUAL FINDINGS

JURISDICTION

1. Student is 12 years old and resides within the boundaries of the District with her parents. She is a child with a disability who was already receiving special education services from her previous school district, when she was enrolled as a student in the District in January 2004. Student was home-schooled by Mother from November 2006 to the end of the 2007-2008 school year, and is currently being home-schooled by Mother.³

PLACEMENT AND SERVICES OFFERED

2. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. For a school district's IEP to offer a student a substantive free appropriate public education (FAPE), the proposed program must be specially designed to address the student's unique needs, and must be reasonably calculated to provide the student with some educational benefit. To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents.

Autism Spectrum Disorder

3. Student contends that she does not have ASD. The District conducted a triennial assessment of Student in May and June 2008. As part of this assessment, Kristen Baisden, the District's school psychologist, conducted the Behavior Assessment System for

³ Mother has a K-8 teaching credential, and was a tenured teacher for the District until Student's birth. However, Mother does not have a special education credential.

Children, Second Edition (BASC-2), and the Adaptive Behavior Assessment System, Second Edition (ABAS-II).⁴ These are assessment instruments in which parents and teachers complete questionnaires about the social-emotional status and behaviors of the student being assessed. Mother completed both questionnaires and, although her responses reflected less serious behaviors in all domains than the responses of Student's teacher from the 2006-2007 school year, the results were indicative of a child with ASD. Parents did not permit Ms. Baisden to conduct ASD-specific assessments. However, based on the results of the testing she was able to conduct, Ms. Baisden found that Student met the criteria for ASD. Her findings were similar to those contained in a 2005 report from the Northern California Diagnostic Center in Fremont (Diagnostic Center), which conducted a comprehensive assessment of Student at that time.

4. During the psycho-educational assessment by Ms. Baisden, Student perseverated on Ms. Baisden's broken fingernail, repeatedly asking her to explain how the nail had been broken, even when Ms. Baisden had given the explanation just minutes before. Student also repeatedly talked about going to the dentist and Hannah Montana, although neither subject was pertinent, and she had to be redirected to complete the testing. Perseveration is common in children with ASD. Also, Student's teachers from the 2008-2009 school year reported that some of Student's verbal outbursts in class seemed to be repetitions of lines from movies or television shows Student had seen, another common behavior of children with ASD.

5. Matt Quinn, a speech and language pathologist for the District, completed a speech and language assessment of Student for the triennial assessment in 2008 and

⁴ Ms. Baisden has been a school psychologist for six years. She has a Pupil Personnel Services credential, a bachelor's degree, and a master's degree in school psychology.

found that Student had significant deficits in both expressive and receptive language.⁵ She scored below the seventh percentile in the Receptive One-Word Picture Vocabulary Test and also the Expressive One-Word Picture Vocabulary Test.⁶ Student was also administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4). Student's scores on six out of eight subtests were below the first percentile, with the accumulated scores placing her in the severely impaired range. Overall, Mr. Quinn found that Student had a four to five year delay in speech and language. Her scores in the area of pragmatic language were very low. Pragmatics are everyday social skills that are very difficult for children on the autism spectrum.

6. Aaron Stabel, a behaviorist who conducted a functional behavior assessment (FBA) of Student for the triennial evaluation in May 2008, also observed Student engaging in many behaviors common to children with ASD. This information was confirmed by reports of other behaviorists from previous school years.⁷ Accordingly, the evidence established that Student has mild to moderate ASD. There was no evidence that Student does not have ASD, other than Parents' testimony.

⁵ Mr. Quinn has been a speech and language pathologist for nine years. He holds a California license as a speech pathologist, and also holds a Clinical Rehabilitation Services credential, and a Certificate of Clinical Competence.

⁶ Scores below the seventh percentile on speech and language assessments establish a threshold for speech and language services.

⁷ Mr. Stabel has worked as a behaviorist since 2002. He is a Board-Certified Behavioral Analyst, and has a Master's degree in psychology with an emphasis in applied behavioral analysis. He has his own consulting business and is also on the staff of the MIND Institute, University of California, Davis Medical Center.

Mental Retardation

7. Student contends that she is not mentally retarded. However, the evidence did not support this contention. Ms. Baisden used the Kaufman Assessment Battery for Children, Second Edition (KABC-II) to assess Student's cognitive functioning as part of the triennial assessment in 2008. Student's scores were in the below average to significantly below average range, and her full scale IQ was 58. A child with a full scale IQ score below 70 is generally considered mentally retarded. In addition, the responses of Mother and Student's teacher for the 2006-2007 school year to the BASC-2 and ABAS-II support a finding of MR. Although Mother's ratings were higher than the teacher's ratings, the overall results of both the BASC-2 and the ABAS-II reflect deficits in Student's adaptive skills, which also are indicative of MR. Adaptive skills include daily living skills, communication skills, social skills, and other similar skills. Ms. Baisden's findings were similar to those in the assessment report prepared by the Diagnostic Center, which found Student's cognitive functioning "well below average."

8. Student was also administered the Woodcock Johnson Test of Achievement – Third Edition (WJ-III ACH) as part of the triennial assessment in 2008. Her scores showed that Student had difficulties in reading, written expression, math calculation and math reasoning which might indicate specific learning disabilities. In light of other assessments, these scores support a finding of mild to moderate MR. Although Student had average abilities in spelling and decoding words when reading out loud, these splinter skills are not sufficient, provided all the other testing results, to support a finding that Student is not mentally retarded.

Behavior

2005-2006 AND 2006-2007 SCHOOL YEARS

9. Student has a history of extreme maladaptive behaviors. In 2005, Student

was described as engaging in frequent incidents of pulling the hair of other students, kicking them, throwing objects, and leaving an area without permission. In 2006, Student's behaviors escalated with incidents of hitting adults, having tantrums, and targeting specific students for assault. Student was accompanied at all times by a one-to-one aide for behavior support, and had a behavior support plan. Nevertheless, her aggressive incidents increased at the beginning of the 2006-2007 school year. In November 2006, the District recommended that Student be placed in a non-public school (NPS). Parents then removed Student from school and began home-schooling her. She was home-schooled by Mother for the remainder of that school year and for the 2007-2008 school year.

10. Mr. Stabel, as part of his FBA in 2008, hypothesized that Student's maladaptive behaviors were to escape or avoid non-preferred tasks. He recommended that Student be placed in a small classroom with individualized instruction and predictability, where behavioral strategies could be implemented. He also recommended that once Student was placed back into school, her behavior be re-assessed so that appropriate behavioral interventions could be formulated to address any maladaptive behaviors that might occur.

2008-2009 SCHOOL YEAR

11. The IEP team met on June 4, 2008, and based on the results of the triennial assessment, the District recommended that Student be placed in an ASD SDC operated by PCOE. Parents rejected this proposed placement, but subsequently entered into a memorandum of understanding (MOU) with the District that provided that for Student's sixth grade year, the 2008-2009 school year, she would attend Cooley Middle School (Cooley), a District middle school with a predominately mainstream population of students. Mother was to accompany Student as her one-to-one aide.

12. Student was initially enrolled at Cooley in one period of a general education class taught by Carin Marsey, and one period in an SDC classroom taught by Kellie Devore

for math instruction. Ms. Marsey has taught for ten years, and teaches social studies and language arts. She has a Master's degree in humanities and religious studies, and a California teaching credential. Ms. Marsey's mother was a special education teacher and she often volunteered in her mother's SDC as a teenager. As a result, Ms. Marsey often volunteers to have SDC students mainstreamed into her classes. Ms. Devore has a Master's degree in special education, and holds both a General Education credential and a Mild to Moderate Special Education credential. She has taught for eight years.

13. After a few weeks of the school year, Student's attendance time at Cooley was increased so that she attended two periods in Ms. Marsey's class for language arts and social studies instruction, and sometimes she remained at school for the lunch period. Ms. Marsey modified most assignments and tests for Student because she could not access the standard sixth-grade curriculum. Ms. Marsey determined that Student was comprehending her reading material at a mid-second grade level. Ms. Devore's SDC students were generally working to meet fourth grade standards in the SDC math class, and Student had some difficulty with that material.

14. Student exhibited serious aggressive behaviors during the 2008-2009 school year, especially in Ms. Devore's class, where Student targeted another student. Student physically attacked the other student at least seven times during the school year when adults could not restrain her. Student ran over to the targeted student and pinched, kicked or hit her with her fists. In addition, Student loudly made derogatory statements about this other student in class. This behavior escalated in December or January 2009. In both the general education classroom and the SDC, Student had other spontaneous verbal outbursts, including screaming and shouting, that were generally disruptive to the other students in her classes throughout the school year. Her verbal outbursts in both classrooms occurred several times a week.

15. Mother's service as a one-to-one aide for Student significantly reduced the

number of such incidents. Because she was a parent, Mother could physically restrain Student by putting her hand over Student's mouth during verbal outbursts, or grabbing her arm and physically restraining her from bolting away to attack the targeted student. Often Mother removed Student from the classroom to go for a walk outside when Student became agitated and potentially disruptive. However, Mother's intervention did not eliminate these behaviors.

16. In January 2009, Ms. Marsey, Ms. Devore, and the school psychologist from Cooley devised a behavioral contract for Student in an attempt to address her behavioral issues. Student was given a chart with 40 boxes. For every 30-minute period Student used her "indoor voice, appropriate language and [kept her] hands to [her]self," she colored in one of the squares on the chart. When a designated number of squares were filled in, Student was then able to stay at school to eat lunch with other students, and if a greater number of squares were filled in, Student could attend her elective class after lunch. There was no evidence that Student ever attended the elective class.

17. In March 2009, when Mother was briefly away, Student bolted away from adult staff, and attacked the student who was her target in the SDC, hitting the child in the head six or seven times. When Mother returned, Student announced to her in a matter-of-fact manner that she had hit the other student. When the other child was moved to another SDC several weeks later, Student began targeting another student in the SDC and made derogatory comments about that child to the rest of the class.

18. The MOU parents entered into with the District in the summer of 2008 provided that Student's time in school would gradually be increased as her behavior improved. However, when student was removed from Cooley by her parents in June 2009, she still was not attending Cooley for more than three periods on most school days, and she never achieved full-time attendance.

IEP TEAM MEETING OF JUNE 4, 2009

19. As the 2008-2009 school year came to a close, staff at Cooley, including Ms. Marsey, Ms. Devore, the school psychologist and the principal, concluded that placement of Student for the seventh grade at Cooley was not appropriate. Staff testified that seventh graders experienced an increased number of classroom changes and teachers, larger classes, and more focus on intensive instruction through lectures and reading. All of these factors would create greater challenges for Student than she had experienced as a sixth grade student at Cooley. The evidence established that Cooley's personnel made extraordinary efforts to maintain Student's placement at Cooley during the 2008-2009 school year. However, they correctly concluded that her needs could not be met in the seventh grade. Due to the number of classroom changes, and larger classes, the amount of individual instruction that could be provided to Student would be reduced. As a result, she would be unlikely to achieve educational benefits if she continued at Cooley. District personnel were also concerned that Student's serious behavioral issues required her to have Mother as her one-to-one aide at all times, which made it impossible for Student to establish any independence.

20. On June 4, 2009, an IEP team meeting was held. Parents attended the meeting. The District offered to place Student in the ASD program operated by PCOE at Creekview, which is located in another school district, and further offered Student 60 sessions of speech and language for 30 minutes each. Parents disagreed with this offer, as they preferred to have Student placed at either Cooley or another District middle school with multiple opportunities for mainstreaming. Parents were adamantly opposed to Student being placed in the ASD program at Creekview because they believed her abilities were greater, and her behaviors were less extreme than those of other students in the ASD program. Parents asked the IEP team to consider placing Student at a different middle school in the District--suggesting two different schools--and providing Student with

instruction for part or all of the day in either an SDC for students with communication disorders, or an RSP program. After making their own suggestions for placement, parents left the IEP meeting before it was finished, and Student did not return to Cooley after that date.

PROPOSED PLACEMENT AT CREEKVIEW

21. The evidence established that Student requires a small classroom that is very structured, with behavioral and social supports and a high adult-to-student ratio. An SDC for students without significant behavioral issues would not be appropriate because Student's behavioral needs are too great to be served in such an SDC. The evidence established that Student has academic strengths, such as spelling and public speaking, and weaknesses, such as math, which require a highly individualized program for academic instruction. In addition, her behavioral issues necessitate placement in a classroom with a focus on positive behavioral interventions, to address negative behaviors that often manifest themselves when Student is feeling academically overwhelmed. Ms. Baisden's psycho-educational assessment established that Student is very deficient in adaptive skills, and can benefit from a program in which functional living skills are taught. In addition, Student shows social skills deficits which also need to be addressed in the school setting.

22. The PCOE ASD program at Creekview consists of two SDCs, each with nine students, a special education teacher, and four classroom aides. In addition, the program has a speech and language pathologist, an occupational therapist, a school psychologist, a school nurse, and a behaviorist assigned to work with the students and provide consultation services to the teachers and staff. At any given time, the student/adult ratio is one to one-and-one-half students per adult in each classroom. In addition, the SDC classrooms have access to a kitchen and laundry room so students can learn functional living skills.

23. All of the students in the ASD program at Creekview have ASD, and some

are also mentally retarded. Many of the students have individual academic strengths and deficits, so instruction is highly individualized. The classrooms are very structured with consistent routines. Socialization is a focus in the program. Many of the students require behavioral interventions which are utilized to change maladaptive behaviors, not just to manage those behaviors. The difference between managing behavior and changing behaviors is that managing bad behaviors maintains them at an acceptable level, whereas changing behaviors teaches the students socially acceptable replacement behavior in place of maladaptive behaviors. Behavioral interventions are integrated into the ASD program, reducing or eliminating the need for students to have one-to-one aides. The ASD program is designed to provide the students with opportunities to grow and change so that they can be mainstreamed for greater parts of the day. The goal of the program is to return students to the schools in their own school districts where they can function independently without the need for one-to-one aides to manage behaviors. The District does not have any comparable programs in its own middle schools.

LEAST RESTRICTIVE ENVIRONMENT

24. A special education student must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Placement must foster maximum interaction between students with disabilities and their nondisabled peers. The law favors mainstreaming, although it recognizes that a less restrictive setting may not always meet a child's unique needs. For some students, a more restrictive setting may be necessary to provide a student with a FAPE.

25. The test of whether a particular placement is the LRE for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of

placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. Student contends that the District's June 4, 2009 offer of placement and services does not meet her unique needs, and is asking that she be placed in a regular District middle school, with a combination of SDC or RSP classes and general education classes. The District contends that its proposed placement in the PCOE ASD program is appropriate and in the LRE.

26. The PCOE ASD class is located on the campus of a typical middle school. The SDC students eat lunch with general education students in the cafeteria. They are routinely mainstreamed into general education classes as appropriate. Once Student is placed in the PCOE ASD program, a plan for mainstreaming her in one or more general education classes will be formulated. In addition, during several periods each school day, three to five specially trained peer tutors spend 45-minute blocks of time in the SDCs to converse with the SDC students, as well as to play games with them to encourage conversation. These peer tutors or mentors for the SDC students are a vital part of the ASD program.

27. Parents propose that Student be placed in a typical District middle school in either an SDC classroom for children with communication disorders, or an RSP program. Mother would accompany her at all times as a one-to-one aide to manage Student's behaviors. During the 2008-2009 school year at Cooley, Student obtained some academic benefit from placement in Ms. Marsey's general education classroom where she was provided with modified schoolwork by Ms. Marsey. She also made academic progress in Ms. Devore's SDC. There was evidence that Student worked on class projects in groups or partnerships with other students in Ms. Marsey's classroom, and ate lunch with other students in the cafeteria on occasion, which provided her with social benefits.

28. Student disrupted the other students in Ms. Marsey's classroom with vocal outbursts when she cried, spoke loudly or shouted things that were unrelated to the classroom instruction, such as asking Ms. Marsey about a recent haircut or change in nail polish color, or loudly asking her mother repeatedly if she could go play at a friend's house after school. These vocal outbursts occurred several times a week, sometimes several times during a single class period. That caused interruptions in Ms. Marsey's instruction, and also resulted in the other students losing focus. She also disrupted Ms. Devore's SDC with similar outbursts. Student also had to be restrained in Ms. Devore's classroom to prevent her from physically attacking a targeted SDC Student.

29. The presence of Mother as Student's one-to-one aide greatly reduced the number of disruptive incidents, as Mother was quick to intervene by covering Student's mouth when she vocalized in class, or restrained Student from getting up and leaving her seat. In addition, when Student needed a "break" from class, Mother removed her from the classroom and accompanied her for a walk outside. Nevertheless, the evidence established that Student's disruptive behaviors impeded her own education, as well as that of others. The evidence established that Student's need for Mother as her one-to-one full-time aide in a regular middle school program is very restrictive, more so than placement in the PCOE program where she will not require a one-to-one aide at all times. Appropriate behavioral supports in the PCOE program will teach Student replacement behaviors and reduce her need for adult supports in many settings.⁸

30. Based on Factual Findings 24 through 29, the social and academic benefits to Student in mainstream classes, combined with an SDC or RSP setting where other

⁸ There was no evidence concerning the respective costs of placement in the PCOE program and placement in a District middle school with placement in a combination of SDC, RSP and/or general education classes.

students do not engage in extreme behaviors, are outweighed by Student's disruptive behaviors and need for a one-to-one aide for behavioral support. On balance, the District's proposed placement in the PCOE ASD program will meet Student's unique needs, including addressing her extreme maladaptive behaviors, and provide her with educational benefit in the LRE.

APPLICABLE LAW AND LEGAL CONCLUSIONS

BURDEN OF PROOF

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

ELEMENTS OF A FAPE

2. A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, constitute an appropriate program, and conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code § 56040.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (Id. at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related

services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley*, supra, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Id.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, supra, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) There was no evidence that the District procedurally violated Student's rights under the IDEA, thereby denying her a FAPE.

6. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d

1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

7. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, and must be reasonably calculated to provide the student with some educational benefit. (20 U. S.C. § 1401(9).) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents. (Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F. 2d 1307, 1314.) "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was drafted." (Adams v. State of Oregon, supra, 195 F.3d 1141, 1149, quoting Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1041 (3d Cir. 1993).)

At the IEP meeting of June 4, 2009, did the District offer Student an educational program for the 2009-2010 school year that addresses her unique educational needs, is reasonably calculated to provide her with educational benefit, and is the LRE?

8. As established by Factual Findings 2 through 23, and Legal Conclusions 2 through 7, Student is mildly to moderately autistic and mentally retarded, and has significant maladaptive behaviors. She requires placement in a classroom that is highly structured, and designed to provide individualized instruction to meet her varied educational needs. In addition, she requires significant behavioral interventions to address her maladaptive behaviors of physical aggression towards other students and adults, and inappropriate disruptive vocalizations. She needs to gain independence, which is not likely to occur if she is constantly accompanied by a one-to-one aide to manage her behavior. Instead, her behavior needs to be changed by initiating appropriate behavioral interventions that can be implemented throughout the day. This will occur in the ASD Program at Creekview.

9. Federal and state law require school districts to offer a program in the least

restrictive environment for each special education student. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114, et seq. (2006).) A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (20 U.S.C. § 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; *Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045.) However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley*, supra, 458 U.S. at p. 197.)

10. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting.

11. It was established by Factual Findings 24 through 30, and Legal Conclusions 9 through 10, that Student received educational benefits in both Ms. Marsey’s and Ms.

Devore's classrooms. She also received social benefits in Ms. Marsey's class when she worked on projects with other students, and when she ate lunch in the cafeteria. However, Student's maladaptive behaviors are disruptive in a general education classroom, as well as in an SDC with children who do not exhibit extreme maladaptive behaviors. Although Student gained some academic benefits in her sixth-grade classes at Cooley during the 2008-2009 school year, the evidence established that she was not likely to do so if she continued to be placed in a regular middle school general education program because there are more teachers and classroom changes for seventh grade students, and academic instruction is more intensive than at lower grade levels. In addition, Student's behavioral issues preclude her placement in an SDC or RSP class in a regular middle school where other students do not have intense behavioral issues like hers. Student's need for a one-to-one aide throughout the day in regular middle school general education and special education classrooms to manage her behavior will not foster independence or change her behaviors.

12. Factual Findings 2 through 30, and Legal Conclusions 2 through 11, establish that the PCOE program will provide Student with a highly structured classroom, multiple opportunities for individualized instruction, and behavioral supports. In addition, Student will be exposed at lunch and in class to typical peers who are trained to act as tutors or mentors for the SDC students. Accordingly, the evidence established that the District's proposed placement in the PCOE ASD program, with 60 sessions of 30 minutes each of speech and language therapy to address pragmatic language and socialization issues, will provide Student with a FAPE in the LRE.

ORDER

The District's proposed placement of Student in the PCOE ASD program at Creekview Ranch Middle School for the 2009-2010 school year will provide Student with a

FAPE in the LRE.

PREVAILING PARTY

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

RIGHT TO APPEAL

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: December 23, 2009

_____/s/_____
REBECCA P. FREIE
Administrative Law Judge
Office of Administrative Hearings