

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009040365

DECISION

Administrative Law Judge (ALJ) Steven Charles Smith, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Los Angeles, California on June 8 and 9, 2009.

Donald Erwin, Assistant General Counsel, appeared on behalf of the Los Angeles Unified School District (District). Julie Hall attended on behalf of District on June 8 and 9, 2009, and Joyce Kantor attended on behalf of District on June 9, 2009. Robert Cuen, Assistant General Counsel for District, briefly attended on June 9, 2009.

Mother appeared on behalf of Student. Student did not appear. OAH provided Mother with a Portuguese language interpreter throughout the hearing.

On April 8, 2009, District filed a Request for Due Process Hearing (District's Complaint) naming Student as Respondent. A continuance was granted for good cause on April 20, 2009. Following the parties' closing arguments on June 9, 2009, the record was closed and the matter was submitted.

ISSUE

Did the District offer Student a free, appropriate, public education (FAPE) in the February 10, 2009 individualized education program (IEP), by offering placement in a

Special Day Program (SDP) for students with mentally retarded-moderate (MRM) cognitive abilities? ¹

INTRODUCTION

Since Student's initial IEP of January 10, 2001, Student, who was eligible for special education as a child with mental retardation (MR) due to Down syndrome, had attended general education classes with various supports and accommodations, modified curricula, and one-to-one aides. As Student was promoted to each successive grade level, the gap between her cognitive, social and behavioral abilities, and those of her typically developing peers, widened. Student's cognitive level was approximately that of a two-and-one-half to three year old child. Over time, Student had failed to progress academically, and had become increasingly disruptive in the classroom by making continuous, unintelligible sounds and by intermittently yelling when frustrated or bored. By May, 2008, Student could no longer access her educational opportunities, or make any academic, social or behavioral progress in the general education environment. She had become so disruptive that she often interfered with the ability of other students to access their educational opportunities. By the fall of 2008, Student had become physically aggressive toward other students and District staff.

As a result of Student's deteriorating circumstances, an IEP team met on February 10, 2009 (February 10, 2009 IEP), and, after considering Student's unique needs, recommended an MRM/SDP placement for Student during the annual term of the IEP

¹ Because Mother agreed with the goals and related services of the IEP, only placement remains at issue. Therefore, the issues originally set out in District's Complaint have been restructured into one.

including the summer of 2009 ESY. The IEP team's placement recommendation became the District's offer of FAPE to Student.

Mother, who clearly loved Student and wished for Student an educational experience as close as possible to that available to Student's typically developing peers, refused to consent to the proposed placement. Instead, Mother insisted that Student was not mentally retarded, but developmentally delayed, with, at most, a specific learning disability. Mother said Student needed to stay in the general education environment, or be placed in some environment mid-way between an MRM/SDP and general education classes. The following Factual Findings and Legal Conclusions will detail Student's unique needs and establish why Mother's characterization of her daughter's cognitive, social and behavioral abilities was erroneous.

FINDINGS OF FACT

JURISDICTION AND GENERAL BACKGROUND SUMMARY

1. At the time of the hearing, Student was a twelve-year-old, fifth grade girl with Down syndrome who, at all relevant times, resided with Parent within the boundaries of District. Student's public school of attendance was Baldwin Hills Elementary School (Baldwin Hills). Throughout her lifetime, Student's primary home language was English, although Mother sometimes spoke to Student in Portuguese, Mother's first language.

2. Since the age of three years, eight months, Student had been eligible for special education services under the primary category of mental retardation (MR) due to her Down syndrome. Student's degree of MR was moderate to severe. Student's secondary eligibility was speech and language impairment (SLI). Student's degree of speech impairment was also severe.

2005-2006 SCHOOL YEAR (SECOND GRADE)

3. In spring 2006, Student, then a second-grader, aged nine years, undertook the California Alternate Performance Assessment, Level II (CAPA-II). The CAPA-II was designed to test the academic achievement of second and third grade students with cognitive impairments, as an alternative to the California Standards Test (CST) which tested the academic achievement of typically developing students. The CAPA-II was divided into the categories of English-Language Arts (ELA) and Mathematics (Math). Student scored at the bottom of the "advanced" range in ELA, and the top of the "proficient" range in Math, on this alternative test. The relevant qualitative description of the advanced classification for ELA was: "Students performing at [this] level can recognize their names, letters of the alphabet, and a few printed words or symbols. They are able to follow two-step directions using symbols or words. They are able to communicate in single words and short phrases. They can write or produce a symbolic representation of their first name. They are able to communicate basic information in response to questions." For Math, the relevant qualitative description was, "... students should be able to identify more of a quantity and indicate one or two more. They are able to sequence numerals up to 5 and demonstrate quantitative concepts up to 5. They can sort objects by a single attribute. They can identify the function of a calendar and a clock. They demonstrate early concepts of probability by copying a simple (ABAB) pattern."

2006-2007 SCHOOL YEAR (THIRD GRADE)

4. In spring 2007, Student, then a third-grader, aged ten years, again undertook the CAPA-II. This time, Student scored at the bottom of the "proficient" range in both ELA and Math. While the qualitative Math description remained the same as for Student's spring 2006 CAPA-II test, the ESL description revealed a declining

performance: "Level II students performing at the Proficient level show interest in print or symbols. They can recognize their names, some letters, and one or two printed words or symbols. They can follow one-step directions of two words or more using symbols or words. They can write or produce a partial representation of their name. When asked to choose between two options, they can indicate a preference. They can communicate using single words and an occasional phrase."

2007-2008 SCHOOL YEAR (FOURTH GRADE)

5. On November 21, 2007, the District held an IEP for Student who was then a fourth-grader, aged ten years, six months. The IEP team's observation notes were generally consistent with the spring, 2007 CAPA-II results for Student. Student was able to identify the letters of the alphabet and could read a few high-frequency words. Student's mental retardation and communication skills deficits severely impeded her ability to access her education in all areas of academics. Student was unable to retain information or learn independently. Student's math abilities consisted of copying numbers one through twenty, with modeling and assistance. Student was making minimal, if any, academic or social progress in the general education environment, even with inclusion supports, such as a one-to-one aide, language and speech therapy, and modified curriculum. Student would become disruptive in her class when she was bored or frustrated and needed consistent one-to-one adult supervision to refocus her and to assist with all academic and behavioral learning attempts. Student's basic "life skills" were deficient. For example, although she was able to make her restroom needs known, Student would return to class having forgotten to pull her pants up, or having left them open. Student needed to be reminded to wipe drool from her mouth. The IEP team consensus was that Student required, and the team therefore recommended, an MRM/SDP placement to meet Student's unique needs. Mother declined consent. Mother stated that she did not want Student to be in a special education program based on

what Mother termed “a bad experience” with such a program when Student was approximately five years old. Accordingly, Student remained in general education.

6. In spring 2008, Student, then a forth-grader, aged approximately 11 years, again undertook the CAPA-II. According to Student’s grade level, Student should have advanced to the CAPA-III. Student’s performance was such that no score could be reported for either the ELA or Math sections of this alternative test.

7. On May 23, 2008, District held a re-evaluation² IEP for Student who was then still a fourth-grader, aged eleven years. The IEP team notes were generally consistent with the spring, 2008 CAPA-II results for Student. Despite years of speech and language therapy, Student’s articulation deficits negatively impacted her ability to communicate across the curriculum in her general education placement. Student continued to require intensive one-to-one support to try to access the curriculum and manage some basic life skills issues. It was the consensus of the IEP team that Student was not making adequate progress in the general education environment and required an SDP to access her education. Mother again denied consent for an SDP. Mother said that she was satisfied with Student’s progress and happy just for Student to “see” the fourth grade standard curriculum; that it was not necessary for Student to actually access her curriculum. Due to Mother’s continuing position regarding Student’s education, District’s offer of FAPE was “general education with inclusion support.” That support included instruction by a certified special education teacher in the school’s MR program, with language and speech therapy (LAS), adapted physical education (APE),

² “Evaluation” and “assessment” have the same legal meaning in this Decision and are used interchangeably, consistent with the terminology used by the parties, the witnesses and documentary evidence. (See 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

additional adult assistant (AAA), and school bus transportation to and from school with the AAA. Parent consented to the May 23, 2008 IEP.

2008-2009 SCHOOL YEAR (FIFTH GRADE)

Examinations, Assessments and Educator Observations of Student

8. On October 15, 2008, Student, then a fifth-grader, aged eleven years, five months, undertook the California English Language Test (CELDT), 2008-2009 Edition. The CELDT was a test of language proficiency, not an academic achievement test. CELDT scores for "Overall Student Performance Levels" ranged from 230 to 700 points. Student scored close to the bottom of the range with an overall score of 264 points. This score fell into the performance classification of "Beginning." The relevant qualitative description of the beginning classification was: "Students performing at this level of English language proficiency demonstrate little or no English skills. They are beginning to understand a few concrete details during unmodified instruction. They may be able to respond to some communication and learning demands, with many errors. Oral and written production is limited to isolated words and memorized statements and questions. Frequent errors make communication difficult."

9. On October 21, 2008, at Mother's request, the District held another IEP for Student who was then a fifth-grader, aged eleven years, five months. (October 21, 2008 IEP) The purpose of the October 21, 2008 IEP was to discuss placement options for Student because Mother disliked Student's general education teacher and wanted Student to have a "nicer class."

10. During discussions among the October 21, 2008 IEP team members, including Mother, it was again emphasized that Student was not effectively accessing either her general education or her modified education in the full-time general education setting. Student had become more disruptive in class. She had become

aggressive toward her AAA whom she had begun hitting, and toward some of her classmates, none of whom had been hit my Student. Student was consistently late to class, which disrupted the class. Student inappropriately tried to play with peers during classroom instruction sessions and further disrupted the class. Although her classmates were tolerant of her, Student had no friends in her class. Student needed additional, extensive supports to access her education, including increased support for her personal hygiene needs as a sexually-developing, pre-teen girl. Given these observations and Student's history, the IEP team consensus was that Student required an intensive MRM/SDP that was not available at Student's home school of Baldwin Hills, but was available at Cienega Elementary School (Cienega), the closest elementary school with the needed support staff and facilities. Mother agreed that Student needed an MRM program, but would not consent to Cienega. Mother preferred Marvin Avenue Elementary School (Marvin), which did not have the MRM program Student needed. At the conclusion of the October 21, 2008 IEP meeting, District offered MRM/SDP at Cienega as Student's FAPE for the balance of the 2008-2009 SY and 2009 ESY. Mother refused placement of Student at Cienega, but did consent to the recommended goals and to services being given to Student at Baldwin Hills, insofar as that was possible.

11. At Mother's request, an independent psycho-educational assessment was performed by Francisco Rocco, Ph.D., on December 8-11, 2008. Dr. Rocco's educational credentials included: Doctor of Philosophy in psychology with specialization in child clinical and school psychology from University of California at Santa Barbara (UCSB), 2005; Master of Education with emphasis in counseling, clinical and school psychology from UCSB, 2001; Bachelor of Arts (honors; Phi Beta Kappa) in psychology from Florida State University, 1999. His licenses included: California Clinical Psychology and California School Psychology. Dr. Rocco's relevant professional experience included: Bilingual Psychologist, University of California at Los Angeles, since 2005; Clinical Psychology

Intern, Children's Hospital, University of Southern California, 2004-2005; Bilingual Psychologist 2001-2004, Hosford Clinic, UCSB; and, school psychology practicum, Frank Junior High, Oxnard, California and San Marcos High School, Santa Barbara, California, 2001-2002. Dr. Rocco was fluent in English and Portuguese. Given Dr. Rocco's education, experience, testing thoroughness, ability to communicate with Student and Mother in either English or Portuguese, as either might require, selection and approval by both parties, and credible testimony, his professional opinions regarding Student were given great weight.

12. Dr. Rocco tested Student and evaluated her adaptive, cognitive, emotional, and academic functioning levels in order to recommend an appropriate educational placement for Student, given her unique needs. He administered a battery of age and grade appropriate, standardized tests such as Wechsler Intelligence Test for Children – Fourth Ed., Wechsler Individual Achievement Test – Second Ed., Expressive One Word Picture Vocabulary Test, and Parent and Teacher versions of Vineland Adaptive Behavior Scales – Second Edition. Dr. Rocco reviewed all of Student's IEP's from October 2, 2002 through October 21, 2008. He interviewed Student's Mother, Student's general education teacher and her AAA. He conducted classroom and clinical behavior observations of Student. Based on the foregoing, Dr. Rocco determined that Student, then a fifth-grader, aged eleven years, seven months:

- a) Had a general cognitive ability in the extremely low range, with her overall thinking and reasoning abilities at less than 0.1 percentile,³ with a full scale IQ

³ "Percentile" rank refers to the level of performance measured against other test participants where the number expressed as a percentile indicates the percentage number of other test takers whose scores were less than the expressed percentile rank. Student's "less than 0.1" percentile rank meant that approximately one-tenth of one percent, or less, of test takers would have scored below Student, and approximately

of 40, where the standardized mean average was 100, with a range of 85-115. Student's verbal and non-verbal reasoning were, likewise, in the extremely low range.

- b) Had verbal reasoning abilities in the extremely low range, with her overall ability at less than 0.1 percentile. Examples of Student's testing in this area included categorical thinking where she was asked to explain how sets of items were alike (red and blue; apple and banana; milk and water). Student was not able to respond to any of the items and seemed not to understand what was asked of her. When asked, "what is a clock," or "what is a hat," Student was unable to respond. When asked general knowledge questions such as, "why should people brush their teeth," Student responded by babbling and did not appear to understand.
- c) Had non-verbal reasoning abilities in the extremely low range, with her overall perceptual ability at less than 0.1 percentile.
- d) Had an ability to sustain attention, concentrate and exert mental control in the extremely low range, with her overall working memory at less than 0.1 percentile.
- e) Had an ability to mentally process simple or routine visual material without errors in the extremely low range, with her overall processing speed at less than 0.1 percentile.
- f) Had a general overall cognitive ability of less than 0.1 percentile, when tested using non-verbal alternative tests, based on age-approximated outcomes in

ninety-nine and nine-tenths percent, or more, would have scored above Student. Put another way, for every 1,000 students tested, only 1, or fewer, would have scored lower than Student.

several subtests, which placed Student at a cognitive level of approximately two-and-one-half to three years of age.

- g) Had academic achievement in reading that categorized her as a non-reader who had an 85% letter identification accuracy; no ability to recognize combined consonant sounds such as "st, dr, sh"; and no ability to recognize high frequency words such as "you."
- h) Had academic achievement in mathematics that fell into the extremely low range, with an overall skill level at less than 0.1 percentile. Student could not accurately discriminate between numbers and letters. She could not place the number 7 in the correct sequence of 5, 6, _, 8, 9. The only numerical operation Student was able to complete was the counting of eight pennies, with prompts and coaching, after multiple tries.
- i) Had oral language skills in the extremely low range at less than 0.1 percentile. Student showed significant and pervasive expressive and receptive language deficits. She was able to repeat two word sentences such as "Jim smiled," and was able to communicate basic needs, wants, and feelings. She was unable to communicate ideas, describe scenes, give directions, or sustain a conversation.
- j) Had written language skills in the extremely low range at less than 0.1 percentile. Student was not able to correctly write her first or last names, and was not able to write any words. She was able to write some of the letters of the alphabet.
- k) Had an unexpected and significant differential between her actual and predicted performances, scoring much lower than predicted for her cognitive level.

- l) Had an average age equivalency range of two years, two months to four years, eight months for real-life, adaptive behaviors in communication, daily living skills (i.e., self-care, grooming, hygiene, household chores, transportation, money counting), and socialization (i.e., social networking, leisure time, problem coping).

13. Based on the foregoing, Dr. Rocco found that "mental retardation is the category that best matches [Student's] profile." He then recommended the following educational placement and services:

- a) An SDP to provide: intensive academic focus; independent living, community and vocational skills; social skills; and, intensive language development focus.
- b) Speech therapy, the frequency and intensiveness of which would be provided according to the determination of a speech therapist.
- c) APE, ESY and home-to-school transportation.

14. Ms. Staci Holmes was a special education teacher and Student's inclusion facilitator at District since September 2008. An inclusion facilitator was an experienced special education teacher who assisted assigned special education students to access the general education environment. Inclusion facilitation included such assistance as "whole group" participation, "small group" participation, one-to-one AAA, curriculum modification and accommodation. Since being assigned to Student, Ms. Holmes had interacted with Student at least one hour per day, three days per week. Ms. Holmes' educational credentials included: Master of Arts in education from Chapman University, 2000; and, Bachelor of Arts in media and film from Morris Brown College, 1995. Ms. Holmes held a California multi-subject teaching credential. Her relevant professional experience included: special education teacher at District, with emphasis on learning disabilities in pre-school, 2000 to 2009; general education teacher at District, kindergarten through fifth grade, 1997-2000.

15. As an inclusion facilitator, one of Ms. Holmes duties was to administer the Kaufman Test of Educational Achievement (K-TEA) for which she had received specialized training. The K-TEA was designed to measure school achievement of children in kindergarten through twelfth grade. In February 2009, Ms. Holmes administered the K-TEA to Student to measure Student's skills in reading decoding and comprehension, mathematics applications and comprehension, and spelling. Initially, Ms. Holmes followed the required test protocol. However, when Ms. Holmes had completed the test as designed, she tried reading portions of the K-TEA to Student to determine whether Student could respond any better than when under the proper protocol. On February 10, 2009, using the results of Student's K-TEA tests, Ms. Holmes completed her Inclusion Report of Student's present levels of performance for consideration in the development of Student's triennial IEP. Those results were consistent with Dr. Rocco's December 2008 psycho-educational evaluation of Student. Student's scores in all areas of the K-TEA indicated a grade equivalency of "below 1st" an age equivalency of "below 6 [years]," and a descriptive level of "extremely low." Student scored at less than 0.1 percentile in all academic areas, except where the test was invalidated by Ms. Holmes reading questions to Student as an alternative testing procedure, because Student could not respond to the K-TEA in the manner intended. Based on Student's K-TEA results, Ms. Holmes independently recommended educational supports and placement consistent with those recommended by Dr. Rocco (MRM/SDP).

16. By February 10, 2009, Floyd Webb had been Student's fifth grade general education teacher at Baldwin Hills for approximately five months. Mr. Webb had earned a Bachelor of Arts in elementary education from Dillard University, 1991. He held a California clear teaching credential and had taught general education in grades three, four and five for nineteen years. He had taught general education fifth grade at Baldwin Hills for four years.

17. During his five months of daily interaction with Student, Mr. Webb had observed that Student could not comprehend any of the general education subjects taught in his classroom. He placed Student's educational and cognitive levels at pre-school, aged three to four years. At those levels, even with supports and accommodations, such as her one-to-one aide, her inclusion specialist and additional time, Student simply could not understand the fifth grade curriculum. Examples of subjects taught in Mr. Webb's class included correspondence writing and proofreading the correspondence writings of classmates, pre-algebra, chemistry, general science, life science, and earth science. Additionally, Mr. Webb had observed that Student's behavior was so disruptive to her classmates that it interfered with their learning as well. Mr. Webb's opinion was that Student had not benefited, and could not benefit, from the general education environment. He believed that to continue her in that environment would be a disservice to her and to the other general education students. Mr. Webb was also concerned for Student's safety in the general education environment, as she seemed to have no safety awareness at all.

18. On February 10, 2009, Kimberly Bridges was Student's Assistant Principal at Baldwin Hills. Ms. Bridges had earned both a Master of Arts and a Bachelor of Arts in education from California State University, Los Angeles. She held a California multi-subject teaching credential and preliminary administration credential. Ms. Bridges had taught general education and special education from 1994 through 2000, then acted as a literacy coach and literacy advisor until 2006, at which time Ms. Bridges became an assistant principal for District. Ms. Bridges' main responsibilities as an assistant principal for Baldwin Hills included oversight of general and special education teachers and their interaction with students. Accordingly, she was very familiar with Student. Based on her observations of Student, consultations with Student's educational providers, and review of Student's educational records, Ms. Bridges had concluded that Student was not

progressing in her education and was not benefiting from her current educational placement in the general education environment. In summary, Ms. Bridges held essentially the same opinion as did Dr. Rocco, Mr. Webb and Ms. Holmes regarding Student's unique needs.

DISTRICT'S FEBRUARY 10, 2009 OFFER OF FAPE AND MOTHER'S DISAGREEMENT

19. On February 10, 2009, District held a triennial IEP team meeting for Student. The February 10, 2009 IEP team included Mother, Dr. Rocco (IEE psychologist), Mr. Webb (Student's fifth grade general education teacher), Ms. Holmes (special education teacher and Student's inclusion specialist), a District school psychologist, Ms. Bridges (Baldwin Hills' Assistant Principal), a school nurse, and other District representatives. The IEP team considered Student's educational records, Dr. Rocco's psycho-educational IEE, Ms. Holmes' Inclusion Report, the statements of all team members, including Mother, and Student's failure to progress in the general education environment. For example, the IEP team took notice that during the fall 2008 academic period leading to the February 10, 2009 IEP, of the eighteen agreed goals and objectives of the operative IEP, Student had met none.

20. The February 10, 2009 IEP team discussed their opinions and observations of Student, then developed and recorded comprehensive, written statements of present levels of performance that reflected Student's performances in the classroom, on standardized testing and during her assessments. The IEP team likewise discussed, developed and recorded written measurable goals and objectives for Student's proposed IEP that were appropriate to Student's unique needs and circumstances.

21. The IEP team, excepting Mother, reached a consensus as to Student's unique needs and the most appropriate, least restrictive, special education placement and services for Student. Accordingly, in summary, on February 10, 2009, District made the following written offer of FAPE:

- a) Student's Classroom Placement: MRM/SDP.
- b) Curriculum: Alternative curriculum for students with moderate to severe disabilities.
- c) Supports for Student: Verbal and physical prompts, additional time to master skills, modeling of skills, peer tutoring, strong visual cues when verbal directions are given, modeling and repeating words in context, use of literature to support concepts and time to process information, differentiated instruction, scaffolding⁴, hands-on activities, reduction of distractions, frequent contact, alternative assignments, small group instruction, modeling of language, use of books that address feelings, adult to facilitate peer interactions, explicit instruction in area of need, modeling of desired behaviors, visual schedules, and any required communication tools.
- d) Supports for Teachers: Co-planning and co-teaching of general education sessions.
- e) Related Services: APE – thirty minutes per week; non-public agency (NPA) provided speech therapy – thirty minutes per week.
- f) Duration and Schools: Remainder of 2008-2009 SY and 2009 ESY at Cienega; 2009-2010 SY at Audubon Middle School (Audubon).
- g) Partial mainstreaming, with supports, into the general education environment for activities such as music, art, computer lab, library, all assemblies, and appropriate field trips (approximately 175 minutes per week).
- h) Transportation: From home to school and return.

⁴ "Scaffolding" is a general reference to additional supports and strategies to assist Student's access of her education.

22. At the February 10, 2009 IEP, Mother, who was given a copy of Dr. Rocco's report, disagreed with his psycho-educational evaluation of Student and his identification of Student as mentally retarded. Mother perceived that Student was an independent reader, that she could "do math," and that she needed to be in a general education placement, or possibly a placement for typically developing students who had specific learning disabilities (SLD's). Apart from her testimony, Mother presented no evidence that contradicted District's evidence regarding Student's unique educational needs.

23. Mother, who had been given a written copy of her procedural safeguards, refused to consent to District's offer of placement. However, Mother did consent to the interim implementation of the February 10, 2009 IEP goals and services to Student, at Baldwin Hills, then Audubon, in the general education setting, pending resolution of Mother's concerns by informal or formal process

CONCLUSIONS OF LAW

1. In Individuals with Disabilities Education Act (IDEA) due process hearings, the petitioning party bears the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].) In this case, District was the petitioning party and so, bore the burden of proof. As discussed below, District met its burden of proof that it offered FAPE to Student in the February 10, 2009 IEP.

2. District contends that its February 10, 2009 offer to Student of placement in an MRM/SDP, constituted FAPE. Student contends that District's offer denied FAPE to Student in that the proposed placement: was based on an erroneous psycho-educational evaluation of Student as mentally retarded; was based on an erroneous assessment of Student's academic achievements (i.e., reading and mathematics achievements); unreasonably removed Student from her typically developing classroom

peers; required an unreasonable transfer of Student to another school; and, did not provide the least restrictive environment.

3. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent or guardian, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from his or her education. (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26).) In California, the term designated instruction and services (DIS) means "related services." (Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not

required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer to a disabled pupil of special education services and placement to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit, in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. In determining the educational placement of a child with a disability, a school district must ensure that: the placement decision is made by a group of people, including the parents and others, who are knowledgeable about the child, about the meaning of the evaluation data, and about the placement options, and who will take into account the requirement that children be educated in the least restrictive environment (LRE); placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; unless the IEP specifies otherwise, the child attends the school that he or she would attend if non-disabled; in selecting the LRE, consideration is given to any potentially harmful effects on the child or on the quality of services that he or she needs; and, that a child with a disability is not removed from education in age-appropriate general classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

7. To provide the LRE, school districts must ensure, to the maximum extent appropriate: that children with disabilities are educated with non-disabled peers; and, that special classes or separate schooling occur only if the nature or severity of the disability is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, §

56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a general education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular [general education] class"; 2) "the non-academic benefits of such placement"; 3) "the effect [the student would have] on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: general education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

8. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

9. For purposes of evaluating a child for special education eligibility, the District must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child’s educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); 34 C.F.R § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

10. Assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student’s native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements that they: 1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; 2) are used for purposes for which the assessments or measures are valid and reliable; and 3) are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

11. "The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

12. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

13. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

14. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses 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].)

15. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

16. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, §

56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

17. Here, District's assessments were appropriate and administered by District's well-qualified, specially-trained staff. Ms. Holmes (special education teacher and Student's inclusion specialist), who held an MA in Education and had received specific testing procedure training for the K-TEA, administered it to Student to measure Student's skills in reading decoding and comprehension, mathematics applications and comprehension, and spelling. Test protocol was initially followed, then Ms. Holmes attempted a modification of testing protocol to determine whether Student could do better with an alternative approach. The results of the K-TEA placed Student at less than 0.1 percentile in all validated test categories. The K-TEA results were properly reported in writing. When they were viewed in light of other standardized tests administered to Student, the observations of Student's teachers and AAA, and Student's educational performance records, the K-TEA results affirmed that proper placement for Student was the MRM/SDP which Ms. Holmes then recommended to the IEP team. District's assessments were consistent with, and reaffirmed by, the IEE of Student, undertaken by Dr. Rocco. From his IEE, Dr. Rocco concluded that Student presented as moderately to severely mentally retarded, with a cognitive age of approximately two to three years, and required placement in an SDP. (Legal Conclusions 1-7 and 9-12; Findings of Fact 1-8 and 10-18.)

18. District convened the February 10, 2009 IEP team meeting to consider Student's educational program and placement. The IEP team composition materially complied with state and federal special education law and included Mother, Dr. Rocco, Mr. Webb (Student's fifth grade general education teacher), Ms. Holmes, a District school psychologist, Ms. Bridges (Baldwin Hills's Assistant Principal), a school nurse, and

other District representatives. All significant procedural requirements were met in the development of Student's IEP. Mother was given a copy of Dr. Rocco's IEE and Mother's procedural safeguards, Mother participated in the IEP meeting, and the rest of the team considered her remarks in reaching its placement consensus. Further, the entire team also considered: Student's educational records; the opinions, comments and observations of Students educational providers; her active IEP goals and objectives, including her inability to meet any of them; her classroom performance and challenges; her performance on District administered tests; and, the results of Dr. Rocco's evaluation. From the foregoing, the team developed a written IEP, with measurable goals and objectives appropriate to Student's unique needs and circumstances. The IEP included District's written, detailed, offer of FAPE, which was reasonably calculated, based on information known at the time, to provide Student an educational benefit, in the least restrictive environment, in light of her unique disabilities and educational needs. (Legal Conclusions 1-8 and 13-16; Findings of Fact 1-22.)

19. District's offer of FAPE included placement in an MRM/SDP at Cienega for the balance of the 2008-2009 SY and the 2009 ESY, then an MRM/SDP at Audubon at the beginning of the 2009-2010 SY. District based its offer of FAPE on the recommendations of the IEP team, which had reached its consensus, in part, by considering those LRE factors required by *Rachel H.* (*supra*, at Legal Conclusion 7). It was determined that Student, given her cognitive impairment and pre-school academic level, could not make academic progress in the general education environment, even with modifications, accommodations and supports. Student's impact on her classmates and teacher had become significantly disruptive, and Student's aggressiveness toward her AAA had become physical. Student's non-academic benefits from a general education setting were, at most, negligible, in that she had no friends among her classmates and her safety in the general education setting was in question. Taken together, these

factors made continued, full-time placement of Student in the general education environment, inappropriate. Although full-time placement in the general education environment was inappropriate, in keeping with *Daniel R. R.*, (*supra*, at Legal Conclusion 7), District's offer of FAPE included significant and appropriate mainstreaming for portions of Student's school day. (Legal Conclusions 1, 3-8 and 13-16; Findings of Fact 1-21.)

20. In sum, the IEP was reasonably calculated to provide Student an educational benefit in light of her unique needs. The District offered Student a FAPE in the February 10, 2009 IEP. (Legal Conclusions 1-19; Findings of Fact 1-23.)

ORDER

District's February 10, 2009 IEP offer to Student of placement in an MRM/SDP, constituted FAPE.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District has prevailed on the only issue in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 3, 2009

/s/

Steven Charles Smith

Administrative Law Judge

Office of Administrative Hearings