

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009070061

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Los Angeles, California on September 29 and 30, 2009.

Student was represented by his mother (Mother). Student's stepfather attended each day of hearing and Student attended the first day of hearing. Los Angeles Unified School District (District) was represented by Assistant General Counsel Patrick Balucan. Due process specialist Cynthia Shimizu attended each day of hearing.

Student filed a Request for Due Process Hearing on June 29, 2009. On August 4, 2009, the parties were granted a continuance of the initial hearing date upon joint request and based upon good cause. The record was closed on October 14, 2009 after receipt of closing briefs from the parties.

ISSUE

Did the District offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) in the May 13, 2009 IEP?

FACTUAL FINDINGS

BACKGROUND

1. Student is a 17 year old young man born February 3, 1992. Student is eligible for special education under the category of emotional disturbance. He first became eligible for special education in June of 1998 under the category of speech and language impairment as a six-year-old entering first grade. In first grade, District determined that Student also qualified for special education as a child with a specific learning disability (SLD). In second grade, Student was placed in a special day class for the learning disabled (SDC-LD). Student's behavior became aggressive and unpredictable over time. He was violent with peers, ran away from adults and refused to follow directions. District implemented a behavior support plan (BSP) and placed a one-to-one aide in the SDC with Student. In March of 2005, during Student's seventh grade year, the IEP team determined that Student qualified for special education under the category of emotional disturbance (ED) based upon his inability to build and maintain satisfactory interpersonal relationships with peers and teachers and inappropriate types of behavior or feelings under normal circumstances exhibited in several situations. Student attended an SDC class for the emotionally disturbed (SDC-ED) in seventh and eighth grades. During seventh and eighth grade Student was involved in several physical altercations with others both on and off campus. At Student's triennial IEP in his eighth grade year, District IEP team members recommended placement in a non-public school (NPS) with a therapeutic program due to the intensity of Student's behavior needs. Student's academic achievement scores were within the average range, but his behavior severely impacted his performance in the classroom. Mother did not agree with the NPS placement. Accordingly, Student completed eighth grade in an SDC-ED class at Emerson middle school, his neighborhood school. District conducted a functional analysis of Student's behavior and made revisions to

Student's BSP. Student's grades continued to deteriorate.

2. Student enrolled in ninth grade at Hamilton High School (Hamilton) for the 2006-2007 school year. Student was placed in SDC classes for all academic subjects. District attendance records showed 6 unexcused absences, 94 tardies and two days of suspension. There were 52 incidents of partial day absences or absences from specific classes when Student had been on campus, but did not attend some of his classes. In the 2007-2008 school year, while in tenth grade, Student was found eligible for Los Angeles County Department of Mental Health (DMH) services under AB 3632.¹ DMH set goals for counseling to decrease oppositional and non-compliant behavior and increase social adaptability. Student did not attend the DMH counseling sessions. In tenth grade District records reflected 2 excused absences, 10 unexcused absences and 42 tardies. The attendance records also reflected 54 partial day or specific class absences when Student had been on campus, but did not attend some of his classes. District attendance records reflected six days of suspension and four days of in-school suspension for Student in tenth grade.

TRIENNIAL ASSESSMENT AND IEPs: NOVEMBER 2008 TO FEBRUARY 2009

3. School Psychologist Deborah Glezer (Glezer) conducted a triennial assessment of Student in October of 2008. Glezer received a Bachelor of Arts degree in Psychology from the University of Southern California in 2003 and a Master of Arts degree

¹ Mental health services provided to special education-eligible students (under the Individuals with Disabilities Education Act (IDEA)) are frequently referred to by the Assembly bills that created the law that governs the interagency responsibilities for the provision of such mental health services (AB3632 and AB2726).

in Education and Psychology from Loyola Marymount University in 2006. Glezer holds a Pupil Personnel Services credential. Glezer utilized a variety of assessment tools including: the Cognitive Assessment System (CAS); Comprehensive Test of Phonological Processing; Test of Visual Perceptual Skills-3rd Edition; Developmental Test of Visual Motor Integration-5th Edition; Behavior Assessment System for Children 2 Self-Report, Teacher Report and Parent Report; Child Depression Inventory; and the Attention Deficit Hyperactivity Disorder Test teacher report.² She also reviewed reports of teachers and administrators, reviewed Student's records and interviewed Student, Mother and staff members. Glezer also reviewed special education teacher Karen Sterling's testing results from administration of the Kaufman Test of Educational Achievement-II (KTEA-II). Based upon the testing and assessment measures, Glezer concluded that Student performed in the average range of cognitive abilities with strengths in his attention processing, auditory processing and visual processing. Student performed in the average range in spelling, low average range in letter word recognition, passage comprehension and math concepts and applications. Student performed in the below average range in math computation and written expression.

4. Student's annual/ triennial IEP was convened on November 12, 2008. At that time, the IEP team discussed Student's present levels of performance (PLOPS) and considered Glezer's report. Teachers reported that although Student had strong reading and higher thinking skills, his written expression and passage comprehension were areas of weakness. Additionally, his attention, concentration skills, flexibility, organizational skills, ability to follow directions, and assignment completion were only fair. Student's grades at the time of the IEP were: a "C" in United States History, "D" in English and Chemistry, and

² Mother did not complete and return the Parent report form.

"F" in Math, Body Dynamics, and Health. Student had completed 90 credits toward graduation. At the time of the IEP, he was enrolled in 30 credits, but as shown above was not passing the majority of them. Student had not passed the California High School Exit Examination (CAHSEE), but scored a 329 in English and a 326 in Math, somewhat short of the necessary 350 score required to pass the examination. According to the IEP team, Student failed to meet the goals of his prior IEP because of his poor attendance. Student did not meet his counseling goals because Student did not access the DMH services and was not receptive to the counseling offered at school.

5. For the November 12, 2008 IEP, goals were set in the areas of vocational education, reading, writing, math, DMH counseling, school counseling and behavior. A transition plan and a BSP were developed and incorporated into the IEP. The IEP team noted that Student defied authority, left classrooms without permission, engaged in fights, and pressured a teacher about raising his grade. Teachers reported main areas of concern as Student's poor attendance, trouble staying focused, incomplete assignments and negative relationships with peers and adults. According to Salvador Davila (Davila), the Dean of Students, Student was absent from classes, refused to follow teacher directions, refused to follow school rules and policies, and engaged in physical and verbal confrontations with teachers and peers. The District members of the IEP team discussed Student's history of poor attendance, defiance, fights, use of profanity, and disrespect of authority. According to the District members of the IEP team, Student was not able to control his emotions under normal circumstances. Consistent with Davila, the District members of the IEP team also noted that Student had great difficulty following directions, rules and policies. The District members of the IEP team recommended that Student attend an NPS with a therapeutic environment and a higher level of structure than a comprehensive, 3200 student campus like Hamilton. The IEP meeting was recessed to give the District's NPS office time to research and make an offer of placement at a specific NPS.

Mother and Student were advised that in order to be accepted at an NPS, Mother and Student must interview and student must meet admission criterion for the NPS.

6. The IEP team reconvened on February 23, 2009. Student and Mother had interviewed with The Kayne Eras Center (Kayne Eras). The IEP notes indicate that Student was accepted at Kayne Eras. However, in testimony at hearing, Mother disputed that Student was ever accepted at Kayne Eras. Mother did not agree to placement at an NPS. The IEP team discussed other placement options including placement at Dorsey High School, another comprehensive high school campus, on an "opportunity transfer" to give Student a fresh start. The team also discussed instructing Student at home through "teleteaching." Mother did not consent to the "opportunity transfer" or teleteaching. After discussion, Mother agreed to a placement and transfer to a community day school (CDS). The meeting was recessed while District personnel researched an opening in a CDS program for Student. The IEP team reconvened on April 3, 2009 at which time placement was offered and accepted at West Hollywood Opportunity Center; a CDS. The placement was made with a contract with terms and conditions for Student's return to Hamilton. According to the contract Student had to earn 30 or more academic credits, maintain academic eligibility of a 2.0 or higher grade point average and meet attendance and behavior guidelines according to the CDS' guidelines.

CDS PLACEMENT: MARCH TO MAY 2009

7. Student appeared to be off to a good start at the CDS, but within a few weeks his behavior deteriorated dramatically. On May 11, 2009 an IEP team meeting was held at the CDS with an IEP team consisting of Mother, Student, West Hollywood

Community Day School administrative designee McIntosh³, special education teacher Nina Lee and general education teacher Patricia Merrell. The IEP meeting was held for a suspension review and a change of placement for Student from the CDS back to Hamilton. According to the IEP notes, the IEP team members did not think the CDS could meet Student's needs. The CDS did not have the resources to offer Student the intensive behavioral management, counseling and therapeutic environment that he needed. Consistent with the above, Student testified that he was told by the CDS administrator that the school could not provide him with the level of counseling he needed and that it was not an appropriate placement for Student. During Student's four week tenure at the CDS his behavior had deteriorated rapidly, to the point where Student had almost daily conflicts and difficulties, which seemed to increase in frequency and duration. CDS believed that Student's behaviors were a risk to himself, peers, and staff. The IEP team offered Student a return to the Hamilton SDC for the 2009-2010 school year and ESY. Student was to receive all of his academic classes in the SDC with physical education and electives in the general education setting. Student was to be provided with DIS counseling once a week for 30 minutes and accommodations and supports including preferential seating, use of a calculator, dictionary, spell-check and graphic organizer when appropriate. The general education teachers were to collaborate and consult with the special education teacher as needed. Student was also eligible for counseling and medication management from DMH one to five times a month for a total of 220 minutes per month. Mother agreed and signed the IEP on May 11, 2009.

³ McIntosh's first name was not legible on the IEP document and no additional evidence was introduced as to his first name.

MAY 13, 2009 IEP MEETING

8. Student returned to Hamilton on May 13, 2009 at which time an IEP meeting was held. The May 13, 2009 IEP team consisted of Mother, Student, administrative designee/special education coordinator Giselle Khazzaka (Khazzaka), special education teacher Karen Sterling (Sterling), General Education teacher/dean of students Davila, school psychologist Glezer, school counselor Shari Makkar (Makkar), an administrator and an additional school psychologist.⁴ At the IEP meeting, the team discussed Student's history of behavior, attendance, and interventions offered at Hamilton. Past interventions included counseling, conferences with Mother, a BSP with reinforcement, consistent encouragement, prompting, and reinforcement to switch to replacement behavior and a change of setting to the CDS. The District members of the IEP team reached consensus that a comprehensive campus such as Hamilton was not appropriate for Student. District team members did not believe that a comprehensive campus offered the resources and support that Student needed and offered placement at Kayne Eras, an NPS. Mother consented to all aspects of the IEP except the placement at Kayne Eras. Mother noted on the IEP that "This is the middle of May. School is over. I'll wait until September to check him into a nonpublic school."

9. At hearing, IEP team member Glezer credibly testified about her interactions with Student and her opinions on his placement based upon her professional experience and knowledge of Student. Student was on Glezer's caseload for counseling pursuant to his IEP. According to Glezer, Student demonstrated behavioral problems which were unpredictable and rapidly escalated in to physical and verbal confrontations. Student also

⁴ The signatures for these two individuals were not legible on the IEP document and no additional evidence was introduced as to their identity.

attempted to intimidate others. He often left his assigned classroom on the pretense of going to the Dean's office or with no permission and wandered in the hallways. Glezer attempted to counsel Student using role play, social scripts and self-monitoring techniques, but Student was not responsive. Mother encouraged Student to engage in the counseling sessions, but he refused. Glezer opined that Hamilton did not have the resources and staff to meet Student's intensive needs and erratic, escalating behaviors. Glezer believed that Hamilton staff had exhausted all of the tools and behavioral consequences available to them for managing and modifying Student's behavior on a comprehensive campus without success. Glezer opined that Student needed motivation and intensive behavioral support and counseling imbedded in his curriculum and throughout his school day. Glezer testified that a therapeutic NPS such as Kayne Eras would have social scripts and regulation tactics as part of a core curriculum and she believed that Kayne Eras was the LRE for Student at the time of the May 13, 2009 IEP.

10. IEP team member Makkar, a Hamilton counselor, also credibly testified about her interactions with Student and her opinion about appropriate placement for Student based upon her professional experience and personal knowledge of Student. Makkar earned a Bachelor of Arts degree in psychology in 2003 and a Master's degree in science in 2006 from California State University at Northridge. She holds a Pupil Personnel Services credential in school counseling and is a registered marriage and family counseling intern. Student was placed on her caseload after he refused to engage in counseling with Glezer. Makkar attended several of Student's IEPs and had known him since his ninth grade year. At the beginning of 11th grade, Student was 15 credits short of the appropriate number of credits for his grade level and to be on schedule for graduation. She felt that it was possible for Student to make up enough credits to graduate on time if he attended class consistently and completed his assignments. Makkar described Student as defiant when he did not agree with directions. According to Makkar, Student also "shut down" and left the

classroom when frustrated or not in agreement with teachers or peers. Makkar observed that Student seemed to be in a state of "constant emotional overload." Makkar opined that Student needed help with attending his classes regularly, remaining in the classroom once there, and managing his emotions and frustration. According to Makkar, Student was often on campus, but frequently not in class or tardy. Makkar also opined that Student needed to learn appropriate strategies to seek clarification, complete assignments, and remain on task. Although she had not experienced the same disrespect and defiance from Student that others had experienced, she supported the IEP team's recommendation of placement in a therapeutic NPS such as Kayne Eras, where his IEP could be implemented. Makkar believed that Kayne Eras was the LRE for Student at the time of the May 13, 2009 IEP.

11. IEP team member Davila, the Dean of Students, handled discipline, policy and procedures and security for Hamilton. Davila earned a Bachelor of Science Degree in Science and Economics in June 1995. He has a clear credential. Davila taught Math at Hamilton for five years and has served as the Dean of Students for five years. According to Davila, Student came to the Dean's office about once a month when he needed to take a break from class. Student often left class without using the appropriate procedures and roamed the halls instead of going to the Dean's office. Davila opined that a therapeutic NPS such as Kayne Eras was the LRE for Student and could implement his IEP. According to Davila, a comprehensive campus like Hamilton had too large of a campus for Student and presented too many distractions for Student.

12. IEP team member Sterling was one of Student's SDC teachers and his case carrier. She received a Bachelor of Arts in English from the University of Massachusetts in 1973 and a Master of Arts in Education from Portland State University in 1985. She holds a secondary school credential in English and a Kindergarten through 12th grade special education credential for mild to moderate disabilities. She also holds a resource specialist program (RSP) certificate. Sterling had 30 years of experience as a special education

teacher with 16 years of her experience in the Hamilton SDC. Sterling's duties include conducting academic testing and teaching five academic subjects each semester including preparation for the CAHSEE examination. According to Sterling, Student performed better in class than he did on standardized testing. Sterling agreed with the IEP team recommendation of placement in a therapeutic NPS such as Kayne Eras and believed that it was the LRE for Student. She believed that Student's IEP could be implemented at Kayne Eras. Sterling found Student highly distractible and difficult to refocus. Sterling opined that the distractibility impacted Student's reading comprehension and his writing. She reported that his attendance deteriorated and that effected his grades and his academic performance. She opined that his behaviors impeded his access to his education. According to Sterling, Student did not get to his classes on time, left classes, and teachers had a difficult time coping with his physically aggressive behavior. Sterling opined that it was necessary for Student's behaviors to be addressed so that he could access his curriculum. She further opined that he needed to break a cycle of bad habits and to have fewer distractions. Sterling emphasized that Student needed structure, consequences for behavioral issues and praise and support as encouragement. Sterling asked for the counseling office to transfer Student from her World History class to a class taught by another teacher after an incident where he "exploded" in her classroom and insisted that she was a racist. Sterling felt that she and Student have a good relationship at this time and they speak in passing in the hallway.

13. IEP team member Khazzaka is a special education program specialist at Hamilton. Khazzaka received a Bachelor of Science Degree in Business Administration from the Lebanese University, and a Master's Degree in Leadership and Educational Policy from California State University at Northridge. She has both an administrative credential and special education teaching credential for mild to moderate disabilities. Her professional experience included five years as a special education teacher and five years as a special

education coordinator at Hamilton. Khazzaka attended Student's last three IEP meetings. At hearing, Khazzaka testified about her experience with Student and her views about an appropriate placement for Student. Khazzarra opined that despite interventions, Student had only minimally complied with school rules and continued his attempts to intimidate others. Khazzaka cited an incident in which she claimed Student threatened her in a stairwell and told her he did not think she would make it down the stairs "because every dog has its day." Khazzaka opined that Student was making a choice to engage in negative behaviors and was not motivated to do otherwise. She opined that a more structured, small environment with the availability of immediate intervention would benefit Student. According to Khazzaka some of the reasons that an NPS would be a more appropriate setting for Student were the smaller classrooms, smaller campus, and more human resources available to address his intensive behavioral needs. Khazzaka believed that Student's behavioral problems and attendance issues were his main challenges. Once resolved, Student should be able to perform at a level commensurate with his cognitive abilities. Khazzaka opined that Kayne Eras or a similar therapeutic NPS would be able to implement Student's IEP and provide him with the level of support that he required.

14. Student expressed at hearing that he wanted to remain at Hamilton to graduate with friends and neighbors that he had known since elementary school. He also explained that he had hopes of raising his grade point average to the point of permitting him to be eligible to play football. Student asserted that he followed proper procedures when he needed a break from the classroom or felt himself becoming too frustrated. Student testified that he remained in the doorway or seated at a desk immediately outside the classroom when he left the classroom or went to Dean Davila's office. Student's testimony on this issue is not credible when viewed with his documented attendance record of missing classes and the observations of multiple staff members. Student also expressed the he felt that certain teachers and administrators did not like him. He cited an

instance wherein Vice Principal Roberta Mailman (Mailman) called the police and accused him of crashing his body into hers and pushing her several times on the way to the counseling office. Student claimed that it was Mailman that did the pushing and that he was the victim. Ultimately, the Los Angeles Superior Court dismissed all charges against Student arising from the incident due to insufficient evidence.

15. Mailman credibly testified that although she was shocked by the incident, she had no dislike for Student. Mailman did not think that Student belonged at Hamilton because of his behavior and attendance issues. She felt he needed a smaller campus, smaller student body population and more supervision than Hamilton was able to provide.

16. Mother and student's stepfather wanted Student to remain at Hamilton because it was close to home and made it easier to locate Student in case of an emergency. Student's older sibling had attended Kayne Eras and did not like it. Mother and Student's stepfather were concerned that Kayne Eras did not offer sufficient academic resources or a football program for Student.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (Schaffer v. Weast (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Student contends that the SDC class at Hamilton High School is the LRE and that he should be allowed to complete his twelfth grade year and graduate with his friends and classmates at Hamilton rather than attending a therapeutic NPS such as Kayne Eras.

3. District contends that it does not have the resources or staff to meet Student's needs at Hamilton High School and that Student requires a therapeutic program such as the one offered by NPS Kayne Eras in order to receive FAPE.

4. Under the Individuals with Disabilities Education Act (IDEA) and companion

state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Ed. Code, §§ 56001, 56040, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services, which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

5. The Supreme Court in *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207 [73 L.Ed. 2d 690] (Rowley), 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. (Rowley, *supra*, 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.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some" benefit. (Walczak v. Florida Union Free School District (2d Cir. 1998) 142 F.3d 119, 130.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (Mrs. B. v. Milford Board of Education (2d Cir. 1997) 103 F.3d 1114, 1121.)

6. A school district must review an eligible child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) An IEP is

evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁵ An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F. 2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*) To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the district actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

7. School districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, §§ 56031 & 56033.5; 34 C.F.R. 300.114 (a).) This requirement is referred to as LRE. The IEP team shall document its rationale for placement in other than the school and classroom in which the pupil would otherwise attend if the pupil were not handicapped. The district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the

⁵ Although *Adams* involved an Individual Family Services Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212) and district courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salelm-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.) The IEP documentation shall indicate why the pupil's handicap prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services. (Cal. Code Regs., tit. 5, § 3042, subd. (b).)

8. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had 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: regular 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 setting other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

9. Here, Student failed to prove by a preponderance of the evidence that the District's offered placement at Kayne Eras is not the LRE for him. To determine whether a special education student could be satisfactorily educated in a regular education environment, one must evaluate and balance the educational benefits of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student had on the teacher and children in the regular class; and the costs of mainstreaming the student. Here, the parties agree that general education classroom is not an appropriate placement for Student. Instead, the question is whether or not, considering the continuum of placement options, a therapeutic NPS such as Kayne Eras, is the LRE for Student. Here, District has tried a series of placement options and supports and aides to maintain Student on a comprehensive high school campus and in a community day school without success and Student did not access available DMH counseling. Student's lengthy discipline history, his increasingly unpredictable explosive behavior, and failing marks show that Student is not receiving an academic benefit from the placement. The intensity of Student's needs and his unpredictable and escalating behavior taken together with the history of failures in alternative settings dictate that Student requires a more restrictive setting to receive FAPE. At the time of the May 13, 2009 IEP, Student was receiving little academic benefit from the placement, was not attending all of his classes and was displaying serious behavior problems. Any social benefit that Student might have received from remaining at Hamilton with friends and neighbors or possibly playing football, if

eligible, was vastly outweighed by the seriousness of his behaviors and the lack of academic progress. After consideration of options, Student's needs and previous interventions, the IEP team recommended that Student be placed in a therapeutic NPS such as Kayne Eras where his IEP could be implemented. Kayne Eras was the LRE for Student. Accordingly, the May 13, 2009 IEP offered Student a FAPE in the LRE. (Factual Findings 1-16; Legal Conclusions 1-9.)

ORDER

All of Student's requests for relief are denied.

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. District prevailed on all issues.

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: November 5, 2009

_____/s/_____
GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings