

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LA MESA-SPRING VALLEY SCHOOL  
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2010020341

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky of the Office of Administrative Hearings (OAH), State of California, heard this matter on April 26, 2010, in La Mesa, California.

Sarah Sutherland, Attorney at Law, represented the La Mesa Spring Valley School District (District). Heather DiFede, Coordinator of Special Education for the District, was present during the hearing.

Student was represented by her mother. Student was present during the majority of the hearing.

The District filed a request for an expedited due process hearing (complaint) on February 9, 2010. OAH calendared two hearings in the matter. The first hearing was calendared on an expedited basis as to the issue of whether the District's proposed interim alternative educational setting (IAES) was appropriate for Student based on the substantial likelihood of injury to Student or others if she was maintained in her then present educational setting. The expedited hearing was held on March 9 and 10, 2010. OAH issued a decision in that case on March 24, 2010, finding that Student's present placement was substantially likely to result in injury to Student or others and also

finding that the District's proposed IAES at La Presa Elementary School (La Presa) was appropriate.

The non-expedited portion of this case was originally scheduled to be heard on April 1, 2010. On March 16, 2010, OAH granted the parties' joint request for a continuance. The hearing took place as scheduled on April 26, 2010, at which time the ALJ closed the record and the matter was submitted for decision.

## ISSUE

Is the District's proposed placement at La Presa, as offered in the individualized educational program (IEP) dated January 8, 2010, an appropriate placement for Student and does it constitute the least restrictive environment (LRE) for her?

## PROCEDURAL ISSUES

### SCOPE OF THE ISSUES FOR HEARING

The District's original complaint requested an order from OAH that its IEP of January 8, 2010, offered Student a free appropriate public education (FAPE) in the LRE. At issue in the complaint was the validity of the entire IEP, including goals and objectives, placement and services including counseling and guidance for Student and her parents, and the proposed plan to transition Student from her previous educational placement at Fletcher Hills Elementary School (Fletcher Hills) to the proposed placement at La Presa. At the beginning of the hearing on April 26, 2010, the parties informed the ALJ that Student's parents had agreed to all aspects of the IEP—including the provision of mental health services by the San Diego County Children's Mental Health Department—other than placement. Therefore, the parties stipulated that the only issue still in dispute was whether the proposed placement at La Presa was appropriate for Student and whether it was the LRE for her. The ALJ has therefore reframed the issue for

hearing in accordance with the parties' agreement as to the scope of the issue to be heard and decided in this proceeding.

#### ADMINISTRATIVE NOTICE OF PRIOR TESTIMONY

At hearing, the District made a motion for the ALJ to take administrative notice of the prior testimony of school psychologist Michael Laddon and Student's general education teacher Leah Goergens from the expedited hearing held on March 9 and 10, 2010. Student's mother did not oppose the motion. The ALJ therefore has listened to the prior testimony of Mr. Laddon and Ms. Goergens, both of who testified on March 10, 2010, and takes administrative notice of it.

#### CONTENTIONS OF THE PARTIES

The District members of Student's IEP team recommended that her placement be changed from a general education classroom with one-on-one aide support and a behavioral intervention plan (BIP) to that of a behavioral cluster mild-to-moderate special day class (SDC) taught by a special education teacher with aide support and behavioral therapist support. The only classroom of that type in the District for primary school children like Student is at La Presa. The District believes that Student's behaviors that result in self-injury and injury to others interfere with her ability to access her education in the general education environment. The District contends that it has exhausted all possible supports for Student in her present educational setting and that she requires the more restrictive environment of an SDC classroom with behavioral support.

Student contends that the proposed placement at La Presa is inappropriate for several reasons. First, she contends that it is not the least restrictive environment for her because Fletcher Hills and not La Presa is her home school and the law mandates that students should be placed in their school of residence. Student contends that the

neighborhood where La Presa is located has a significantly higher crime rate than does her home neighborhood and that her family specifically chose to live where they do in order to be in a safe environment. Student also contends that the SDC at La Presa is inappropriate for her because the five other students presently enrolled in the class are all boys. Student also asserts that her behaviors will be more controlled in the future because her parents have agreed to accept the county mental health counseling services as stated in her IEP. Student further maintains that if she is to be placed in a classroom other than her general education classroom at Fletcher Hills, it should be in a non-public school.

For the reasons explained below, the ALJ finds that the District's behavioral cluster SDC at La Presa is an appropriate placement for Student which will provide her with a free appropriate public education (FAPE) in the LRE.

## FACTUAL FINDINGS

1. Student is a five-and-a-half-year-old girl who attended kindergarten at Fletcher Hills until approximately late March 2010, when her parents removed her from school. She is eligible for special education and related services under the category of emotional disturbance (ED) due to an inability to build and maintain satisfactory interpersonal relationships with peers and adults, inappropriate types of behavior or feelings under normal circumstances, and a general pervasive mood of unhappiness or depression. This disability adversely affects Student's academic and social achievement at school.

2. Student attended two private daycare centers up to the age of approximately three years, four months. She began to display aggressive behaviors towards other children at daycare and also engaged in self-injurious behaviors such as hitting, scratching, and biting herself. Student was asked to leave the daycare.

3. In June 2008, when she was approximately three-and-a-half years old, Student was hospitalized in a psychiatric unit due to self-injurious and aggressive behaviors. Student thereafter received a medical diagnosis of anxiety disorder not otherwise specified. It was at this time that Student's doctors first prescribed medication, such as Prozac, to treat her mental health issues.

4. During the 2008–2009 school year, Student attended the District's Smart Steps preschool program at Fletcher Hills, her neighborhood school. Her teacher there observed Student having difficulty with controlling her emotions when she was denied something by either the teacher or her classmates. Student exhibited behaviors that included hitting, kicking and scratching other children, and using profanity when she was frustrated. She also engaged in self-injurious behaviors such as scratching herself. Although the District administered assessments to Student during this school year, it did not find that she was eligible for special education or related services because she was still able to access her education at the time in spite of her behavioral issues.

5. Student began attending kindergarten in August 2009 for the 2009–2010 school year in teacher Leah Goergens's general education classroom. Ms. Goergens has been a kindergarten teacher for 15 years. From the beginning of the school year, she noted that Student demonstrated significant difficulty controlling her behavior. As early as August 20, 2009, soon after the start of the school year, Ms. Goergens called the school office asking that Student be removed from class. Student had started crawling around the floor, talking in a strange voice and mumbling profanity when asked to get the bathroom sign to use the restroom. When a health technician arrived in the classroom, Student knocked over a chair and threatened to spank the teacher. Student's mother was called to take Student home.

6. Ms. Goergens attempted to implement strategies in the classroom to address Student's behavior. As Student's parents were using a point-reward system at

home which they also tied in to Student's classroom behavior, Ms. Goergens tried using a classroom incentive system with Student as well. She instituted a daily communication system by sending home indications of Student's daily behavior. Additionally, she seated Student in the back of the classroom and allowed her to "wiggle." However, Student engaged in disruptive behavior at school several more times during August 2009 that was significant enough to have her teacher call the office and have Student removed from the classroom. This behavior included being verbally disruptive in class and refusing to be redirected, yelling at the teacher, yelling profanities, and kicking a student in the back with such force that she left a mark on the child's back. In response to the last incident, which occurred on August 27, 2009, the District suspended Student from school for a day.

7. Subsequent to the suspension, the District held a student study team meeting on September 2, 2009, to discuss how to address Student's escalating behaviors. The team, which in this case consisted of Ms. Goergens, Student's parents, resource specialist (RSP) teacher Sharon Klein, a speech pathologist, and school psychologist Michael Laddon, meets when general education students are having behavioral or academic issues that impede their education. The purpose of the team is to attempt to develop strategies to deal with a student's issues within the context of the general education environment.

8. Mr. Laddon first became involved with Student when she was in preschool and the principal asked him to assist Student's preschool teacher in developing strategies to address Student's behavior that was interfering with her education. He has been a school psychologist for approximately 11 years. His job duties include assessing students to determine if they qualify for special education, providing services to children at school, consulting with teachers, students, and parents, and attending IEP meetings.

Mr. Laddon conducts about 100 assessments a year and attends IEP meetings three to four times a week.

9. The student study team noted that since beginning school, Student had been observed crying, going under tables, shoving chairs, sub-vocalizing, swearing, using foul language, and hurting other children when frustrated. The team also noted that Student's maladaptive behaviors were inconsistent and depended on her level of frustration. The team determined that the areas of concern they had for Student were that her behaviors appeared to impede her ability to learn, that she had difficulty with attention and focus in class, that she was impulsive, was hurting other students in class, had difficulty coping with frustration, with task-completion and transitions, had difficulty with being a perfectionist, and had occasional fixations. To address these issues, the team recommended that Mr. Laddon develop a behavior support plan for Student in her classroom and that Ms. Goergens continue the modifications, accommodations and strategies she was already implementing. Additionally, the team referred Student for an assessment to determine if she qualified for special education and related services.

10. Mr. Laddon administered a psychoeducational assessment to Student during the month of September 2009. His assessment included a review of her school records as well as informal observation and teacher interviews. Mr. Laddon also administered standardized assessments to Student: the Behavioral Assessment System for Children, Second Edition (BASC-2) for ages four and five, which consisted of rating scales filled out by Student's parents and teacher; the Wechsler Individual Achievement Test, Second Edition (WIAT-II); and the Test of Auditory Processing Skills, Third Edition (TAPS-3). Mr. Laddon also attempted to administer the Motor-Free Visual Perception Test, Third Edition, but had to discontinue it because Student was randomly guessing answers. Mr. Laddon also reviewed test scores for Student from the previous year which indicated that she had an average intelligence quotient.

11. The results of the WIAT-II indicated that Student was in the average range for academics, although her class performance indicated that her academic skills were below California state standards for kindergarten students. Student also measured in the average range for auditory processing on the TAPS-3.

12. It was the results of the BASC-2, as well as observations of Student and interviews with Student's teacher, that impressed upon Mr. Laddon Student's need for assistance in the classroom. The composite scales on the BASC measure externalizing problems, internalizing problems, adaptive skills, and a behavior symptoms index. Both parents rated Student's externalizing problems as clinically significant, although they differed in their assessment of Student as it related to internalizing problems. Student's mother rated her as being average while Student's father rated her as being at-risk. Both parents rated Student's adaptive skills as being very high. On the behavior symptoms composite scale, Student's mother rated her as average while Student's father rated her as very low, meaning he did not see many issues in that area.

13. However, the rating scales done by Ms. Goergens rated Student as either clinically significant or at-risk for all four composite areas. The composite score for externalizing problems includes hyperactivity and aggression, and Ms. Goergens rated Student as clinically significant in this area based on her observation of Student's aggressive behavior in teasing others, annoying others on purpose, and hitting other children. She also noted Student's hyperactive behavior including having consistent problems remaining seated, acting out-of-control, bothering and interrupting others while they were working, and being overly active and unable to wait to take her turn.



14. Ms. Goergens also rated Student as clinically significant in the cluster area of internalizing problems. This cluster includes anxiety, depression and somatization.<sup>1</sup> In the behavioral symptoms index, which is a combination of all clinical composites that reflect an overall level of problem behaviors, Ms. Goergens also rated Student in the clinically significant range. This cluster area is characterized as measuring abnormal behaviors noted during normal circumstances. Examples of Student's behavior included acting strangely, acting as if other children are not there, acting confused, saying things that did not make sense, showing feelings that did not fit the situation, and babbling to herself. In the cluster area of adaptive skills, which includes prosocial, organizational, study skills, and other adaptive skills, Ms. Goergens rated Student as at-risk. In particular, Ms. Goergens rated Student as having significant difficulties with functional communication, and social skills.

15. Mr. Laddon also observed Student as part of his assessment. When he entered Student's classroom to observe her, the children were seated on a rug listening to the teacher. Student was sitting a few feet away from the other children, softly crying because her shoe was off. Mr. Laddon assisted Student in putting her shoe back on. When told to write her name under the name of one of three stories she wanted to read that was listed on a sheet of paper, Student wrote under all three even when the teacher directed her to just one of the stories. When the teacher asked her for the pencil back, Student began crying and went under a table for a minute. Student then proceeded to turn over six or seven chairs that were located near the table she was under. The teacher and other students were ignoring Student. Mr. Laddon visually prompted Student to

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<sup>1</sup> To somatize means to convert anxiety to physical symptoms.  
(<http://dictionary.reference.com/browse/somatization>)

come out from under the table but she ignored him. Student did not get up until 10 minutes later when the teacher changed activities and directed the children to color with crayons. Student got markers from the teacher's desk instead of crayons and began drawing. Ten minutes later, the teacher directed the children to return to the carpet; Student only complied after two minutes. When the teacher later directed the children to go to their desks and use pencils to write in their journals, Student returned to coloring with the marker and would not follow the teacher's directions. The teacher took the marker away from Student but as soon as the teacher went to help another child, Student got the marker again from the teacher's desk and continued drawing with it.

16. Ms. Goergens also informed Mr. Laddon that she had observed Student on many occasions engaging in the self-injurious behaviors of scratching herself and others, banging her head, hitting, kicking, using profanity, and calling her names. Student had thrown a shoe at Ms. Goergens, would frequently sit away from the other children, walk around the classroom, get under tables, and talk to herself.

17. During the individual assessments that he administered to Student, Mr. Laddon attempted to talk to her about her family, but he could not tell what was fantasy and what was reality during her conversation with him. In his assessment report, Mr. Laddon also noted that he had observed Student on occasion babbling to herself, seeming out-of-touch with reality, and having other behavior difficulties on the playground. Based upon his review of all areas of assessment, Mr. Laddon concluded that Student qualified for special education under the category of emotionally disturbed and that her disability could not be addressed without the support of special education services.

18. The District convened an IEP meeting for Student on September 30, 2009. Present at the meeting were Student's parents, Mr. Laddon, Ms. Goergens, RSP teacher

Sharon Klein, a District representative, a program specialist, and a speech and language pathologist.

19. Between September 2, 2009, when the student study team met, and September 30, 2009, when the District convened the IEP meeting, Student had at least five more days where her behavior was notably poor. On one occasion, discipline notes indicated Student was whining, crying, easily frustrated, was throwing things in the classroom and at other students, and had to be sent home at lunch for the remainder of the day. The following week, Student had a tantrum in class when the teacher would not give her paper when she wanted it. Student yelled, screamed profanity, and threw things. Student was again sent home from school. A few days later, Student began pushing chairs into another child during rest time. When the teacher tried to move her, Student began yelling, saying profanities, throwing things, and moving her body around. The RSP teacher took Student to the RSP room and kept her there for the rest of the afternoon. The next incident occurred three days after the last; Student again would not stay where she was supposed to in the class, used profanity, hit a child on the head and ignored the teacher. Student was taken to the school office for 20 minutes and then returned to the classroom. Finally, on September 29, the day before the IEP meeting, Student began the day by calling the teacher names and asking a boy to show her his underwear. She then had a "meltdown" when she wanted to take another child's pencil grip. Student moved her chair away from the other children and began grabbing papers from a desk and crumpling them up. When approached by the teacher, Student began crying, screaming profanities, and throwing things. Ms. Goergens walked Student to the office, and had Student's parents contacted to take her home.

20. The IEP team concluded on September 30, 2009, that Student qualified for special education and related services under the category of emotional disturbance, characterized by an inability to build and maintain satisfactory relationships with peers

and adults, inappropriate types of behaviors or feelings under normal circumstances, and a general pervasive mood of unhappiness or depression which severely affected her academic and social achievement in the classroom. The team developed annual goals for Student in the areas of reading, math, written expression, vocational and three goals in the area of social emotional. The team also determined that Student would receive small-group instruction for reading, written expression and math in an RSP classroom, but would spend 84 percent of her time in the general education classroom.

21. Mr. Laddon, had developed a behavior support plan (BSP) for Student because her behaviors were interfering with her learning and the learning of the other children in her classroom. The BSP noted that Student loudly talked to herself and called her teacher names on a daily basis. It also noted that episodes of use of profanity had occurred four to five times since school began and that Student had been noted scratching herself five to seven times, scratching peers twice, and kicking someone once, since school had begun. The BSP noted that Student engaged in these type of behaviors when other students said something she believed was unfair, when she was frustrated, or when she was angry or trying to calm herself, or when trying to get attention. To help address the behaviors, the BSP directed that the teacher remain close to Student to redirect her if necessary, that an area on the rug be designated as Student's "special spot," that Student be permitted to move away from the other children, stand up, lie down, and get under a desk if she needed to and was not bothering others, and that Student be monitored on the playground. The BSP also indicated that the teacher would attempt to have Student verbalize her needs and discontent instead of physically responding to feelings of frustration. The BSP also established that Ms. Goergens and Mr. Laddon would concentrate on teaching Student appropriate strategies for learning to talk to peers and to deal with her frustration and anxiety, including using a card system with words to indicate Student's displeasure, the use of visual strategies in the

classroom, and the use of positive reinforcements. The IEP team found that this BSP, which Mr. Laddon had developed on September 14, 2009, was still appropriate and would continue to be implemented for Student.

22. Recognizing that Student's behavioral issues were significant, the IEP team also recommended that Student be referred to the county mental health department for assessment, that a functional analysis assessment be administered to determine if Student required a behavior intervention plan (BIP), and that the District administer a special circumstances instructional assistant (SCIA) assessment to determine if Student required aide support in her classroom. Student's parents agreed to the IEP and to all referrals for additional assessment.

23. Mr. Laddon sent the mental health referral on October 2, 2009, to Sharon Massoth, who is a licensed clinical social worker and who is the mental health program manager for the children's mental health department in San Diego County. Ms. Massoth has 27 years of experience in the field of mental health. Her education includes a master's degree in clinical social work and administration. The referral packet Mr. Laddon sent to Ms. Massoth included Student's IEP, her District assessments, and a health history form filled out by Student's mother which noted that Student had problems with tantrums, head-banging, impulsivity, aggression toward peers, adults, animals, and property, that Student engaged in self-mutilation and physical self-abuse, and that she had destroyed property at home.

24. County Mental Health determined that a mental health assessment was warranted for Student based upon her psychiatric hospitalization at age three, her aggressive conduct, and injury to self, others, property and her teacher. Ms. Massoth, in reviewing Student's file, was very concerned given Student's young age, the seriousness of her problems, and the clear indication that Student had significant social/emotional issues which interfered with her academic success. At the time she received the referral

in early October 2009, and read Student's IEP which indicated that Student was in a general education placement with some RSP support, Ms. Massoth already began questioning whether the placement was appropriate for Student. As will be discussed below, County Mental Health eventually assessed Student and recommended out-patient treatment for her as well as family counseling services.

25. Mr. Laddon also assessed Student's need for a one-on-one classroom aide, known as a special circumstances instructional aide (SCIA) in the District. The assessment, dated November 2, 2009, included further review of Student's records, further observations of her, and more interviews with Ms. Goergens and Ms. Klein. Both teachers indicated that Student's aggressive and injurious behaviors were continuing in the classroom. Student continued to hit, pinch, scratch, and kick other students as well as continued to scratch herself which caused cuts on her arms, neck and stomach. She also continued to use profanity in the classroom. Mr. Laddon's observations of Student indicated that she became easily frustrated, did not like leaving preferred activities, often spoke to herself using profanities (which indicated that the self-talk was not for calming purposes), became agitated easily, and, when agitated, became physically abusive to herself and others. Mr. Laddon recommended that Student receive frequent motor breaks throughout the school day to calm her down. He also recommended that an SCIA be assigned to Student to monitor her behavior, help calm her down, and to protect Student and the other children from injury by Student.

26. The District also conducted a functional analysis assessment (FAA) of Student. The report is also dated November 2, 2009. The report noted all of Student's problem behaviors, as described above, dividing the behaviors into mild, moderate, and severe. Moderate problem behaviors included throwing items, pushing over chairs, yelling at the teacher, and using loud profanity toward peers and adults. Severe problem

behaviors included hitting, kicking, scratching, squeezing, and pinching other children, and self-injurious behaviors of scratching herself on her neck, stomach, and legs.

27. The FAA report described the potential reasons or antecedents for Student's behaviors, and the frequency, duration, and intensity of the problems. For example, in the 17 days during which data was taken on Student's behaviors between September 3 and September 28, 2009, Student would talk to herself loudly and/or cry loudly approximately three times a day, with a low occurrence of no incidents in a day to a high occurrence of five incidents in one day. The intensity was enough to impede the learning of the other children. During that same period, Student threw her shoes twice at her teacher, threw other objects four times, and pushed chairs over four times. The intensity could have injured others, but did not. Student also engaged in physical aggression which injured other children six times and was noted as engaging in self-injurious behavior twice.

28. The District developed a BIP in response to the results of the FAA. The goal of the BIP was to decrease Student's problem behaviors by verbally prompting her to walk out of the classroom with an adult when she began to engage in aggressive behavior, crying, or using profanity. The District also proposed a positive reinforcement plan, such as giving Student stickers and verbal praise, when she behaved well. The plan also called for the psychologist and RSP teacher to use calming techniques with Student when she engaged in maladaptive behaviors and to teach Student self-calming strategies, for which Student would be rewarded when used. Additionally, the BIP proposed using structured choices for Student where she could have control over which activity to do. Finally, Student's teachers were given precise instructions as to what phrases to use with Student to help her follow directions and do her assigned tasks.

29. The District convened an IEP meeting on November 2, 2009, to discuss the results of the SCIA assessment and the FAA, as well as to discuss placement options for

Student and the need for further classroom support. The District team members suggested placing Student in a special day class, but Student's parents did not agree to the proposal. Therefore, the IEP team, including Student's parents, agreed that a SCIA would be assigned to Student to facilitate her participation in the general education environment and to assist in keeping Student and her classmates safe. The IEP team, including Student's parents, also agreed to the implementation of the BIP. The team agreed to meet no later than December 18, 2009, to review Student's progress in school with all the added supports.

30. Between October 19 and December 7, 2009, the District suspended Student three more times, for hitting other children, poking a child in the eye, using profanity, swearing at the teacher, the school nurse and other students, causing physical injury to a child, throwing her shoes, and taking off her clothing in front of other children. In one incident, she tore at her underwear so much she destroyed them. Student then turned around and showed her buttocks to a health clerk and other students in the health office. During that same time period, Student engaged in self-injurious behaviors like head-banging, scratching and biting herself, and tore up books in the school health office. Many of the incidents occurred after the District placed the SCIA in Student's classroom and started implementing her BIP.

31. The District noticed an IEP meeting for December 8, 2009, to discuss the County Mental Health assessment and to discuss placement options for Student. Although all other team members were present, including the assessor from County Mental Health, Student's parents did not appear. The District then rescheduled the meeting for January 8, 2010.

32. The IEP team meeting convened on January 8, 2010. Ms. Klein and Ms. Goergens, Student's RSP and general education teachers, were present, as was Heather DiFede, the District's Coordinator of Special Education. Also present was another District



representative, school psychologist Laddon, and Ms. Massoth representing the County Mental Health department. Student's mother attended with a legal representative.

33. Ms. Massoth presented the mental health assessment administered by County Mental Health. The assessment consisted of review of Student's records, interviews with Student and her mother, and consultation with Student's RSP teacher, a District program specialist, the Fletcher Hills principal, school psychologist Laddon, and Student's private therapist. The assessment noted that Student had been receiving private mental health services through her family since 2008. It also noted Student's behavioral issues at school and at home and that, even with medication prescribed by her psychiatrist, Student's behavior continued to be unmanageable and her moods unpredictable.

34. Ms. Massoth, on behalf of San Diego County Children's Mental Health, informed the IEP team that Student qualified for county mental health services. Although Ms. Massoth evaluated Student for placement in a county day treatment facility, she ultimately did not recommend the placement because she felt it was too restrictive to start with especially given Student's young age. She felt that it was better to attempt a less restrictive environment such as an SDC and see if Student could be successful there before turning to a county day treatment program. The county program consisted of educational instruction in the morning with a teacher and therapist and afternoon group and individual counseling sessions. Ms. Massoth did not believe Student, at age five, would be able to participate in group therapy. Additionally, the group was presently made up of all boys, the youngest of whom was in fifth grade. Therefore, she did not believe it was an appropriate setting for Student at the time.

35. Ms. Massoth also did not believe that Student should remain in the general education environment. She felt that neither Student, the educators in the classroom, or the other children were safe given Student's aggressive behavior. Ms.

Massoth believed that Student required more structure and containment and more individualized instruction than she could get in the general education classroom, even with two aides.

36. County Mental Health recommended Student be placed in an SDC with supports at school. It also recommended that Student receive outpatient mental health services consisting of 45 to 50 minutes of individual therapy a week and family therapy as needed. County Mental Health also recommended that Student receive family-oriented services in the home.

37. Student's aggressive and self-injurious behaviors had continued through the date of the IEP meeting. Ms. Goergens was late for the IEP meeting because Student had a behavior episode where she had tried stabbing herself with a pair of scissors, had screamed, yelled profanity, and tried taking off her clothes. Based upon these continuing uncontrollable behaviors and the recommendations of County Mental Health, the District proposed that Student's placement be changed to a behavioral cluster SDC for children her age. The District has only one such classroom, which is located at La Presa. This particular SDC is specifically designed to serve children who have behavior issues that impede their ability to access their education. Not all of the children are designated as emotionally disturbed but all have behavior concerns which need to be addressed in a more individualized and structured setting. It is a "mild-to-moderate" SDC whose teacher has a special education credential and is specifically trained in behavior issues. There are two full-time classroom aides, both of whom have also received specific behavior intervention training. Additionally, a behavior therapist is assigned to the classroom. The students also receive counseling from a school counselor on an on-going basis. The SDC would provide Student with the direct, small-group instruction she required as well as with an environment specifically designed to meet her social, emotional, and behavior needs. The placement would also provide Student

with continued access to typical peers from the general education setting at recess, lunch, and during school assemblies.

38. At the time of the hearing in this matter, there were five children enrolled in the classroom: two kindergarten students, one first grader, and two second graders. All are boys. Fletcher Hills, Student's home school, does not have a behavioral cluster SDC or any mild-to-moderate SDC classes. The District offered either to transport Student to La Presa by school bus or to reimburse Student's parents for the cost of driving her to and from school.

39. Student's parents accepted the goals proposed in the IEP and accepted the proposed County Mental Health services. However, they rejected the placement at La Presa. Student's mother was concerned because it is not Student's home school and because the neighborhood where La Presa is located has a higher crime rate than does the neighborhood where Student and her family live. Additionally, Student's mother was concerned because there were only boys in the classroom. Although Student's mother credibly testified that La Presa has a higher crime rate than does her own neighborhood, she did not have any evidence that there were any incidents at the La Presa school campus that affected the children there or that the SDC would be unsafe for Student. Ms. DiFede, Mr. Laddon, and Ms. Massoth all persuasively testified that the fact that Student would be the only girl in the SDC class would not negatively affect her ability to access her education. They all believed that the advantages of the classroom such as the high ratio of adults to students, the behavior training of the teacher and aides, the assignment of a behavior therapist to the class, and the on-site availability of counseling services offered in addition to County Mental Health services, outweighed the fact that Student would be the only girl in the classroom at least for the remainder of the 2009–2010 school year.

40. In order to address the concerns of Student's parents, Ms. DiFede took Student's mother and legal representative to observe the proposed SDC at La Presa. Student's mother still was not agreeable to the placement, so Ms. DiFede explored other options. She contacted several other school districts that are close to La Mesa-Spring Valley to determine if they had comparable SDC classrooms. Those that did have a similar type of SDC did not have any kindergartners in the program and, in any case, none had space availability for Student.

41. Ms. DiFede also contacted a couple of non-public schools to inquire about openings for Student, although she believed an NPS would be too restrictive an environment given the absence of typical peers at the schools. However, neither of the schools Ms. DiFede contacted had space available at the time. Student went to a third school for a trial day to see if it would be an appropriate placement, but she began to engage in behaviors that caused the school to call Student's mother to pick her up and take her home. Ms. DiFede also had concerns about one of the schools which Student claimed had availability as of the day of the hearing in the instant matter because there were no children under second grade enrolled at the school and because the small school campus enrolled students from second to 12th grade. She believed it would not be beneficial for Student to be around children so much older than herself.

42. Student was suspended again on January 19, 2010, after a day in which she used profane language and had a "meltdown" when no one laughed at her use of the bad language, and then hurt a child's cheek when the other child tried to help Student with something. On January 21, 2010, Student received another suspension for having a tantrum after becoming frustrated trying to cut paper. She ran around the room, scribbled on the carpet with a glue stick, began scratching herself, ran away from one of her aides, and called her RSP teacher a profane name. Student was suspended again on January 28, 2010, for being disruptive in the classroom, using profanity, hitting

the teacher, hitting her head against the wall, and scratching herself. The District placed a second aide in Student's kindergarten class after the last suspension so that more adults would be present in the classroom to attempt to anticipate and intervene in Student's behaviors. Student however continued to engage in her aggressive and self-injurious behaviors.

43. The District eventually held a manifestation determination for Student. Student's parents declined to participate in the meeting. The manifestation team determined that Student's behaviors were a manifestation of her disability. The District subsequently filed for the instant due process hearing. OAH ultimately found that Student's behaviors were substantially likely to cause injury to herself or others and that the proposed IAES at La Presa was appropriate. Between the time of the manifestation determination meeting on February 9, 2010, and OAH's issuance of its decision regarding the IAES at La Presa on March 24, 2010, Student had four more incidents where she had tantrums, screamed profanities, ripped at her clothing, scratched herself, banged her head against the wall or floor, and threatened to get a knife and hurt a health clerk with it. The District again suspended Student on March 15, 2010. After OAH issued its decision finding La Presa to be an appropriate IAES for Student, Student's parents removed her from school.

44. Student's aggressive and self-injurious behaviors did not subside in spite of the many levels of support, accommodations, modifications, and interventions attempted by the District in Student's general education classroom. Student's behavior has resulted in injury to her classmates and injury to herself. It has interrupted and interfered with her learning process and interrupted and interfered with that of her classmates both because of disruptions in the classroom and because the teachers have often had to remove the other students from the classroom in order for another adult to address Student's behaviors, calm her down, stop her from injuring herself, or stop her

from continuing to remove clothing. Student has been unable to participate completely in her kindergarten class and, as a result, is not able to access her education.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. As the petitioning party, the District has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### PARTIES' CONTENTIONS

2. The District contends that it offered Student a FAPE in the January 8, 2010 IEP because the La Presa behavioral cluster SDC is the least restrictive environment available to meet Student's needs. The District asserts that it tried and exhausted all available levels of supports, modifications, and accommodations in the general education setting before proposing to change Student's placement to the SDC. The District maintains that the only way to address Student's needs is through the support offered in the SDC.

3. Student agrees that the goals and related services offered in the January 8, 2010 IEP are appropriate and offer her a FAPE. However, she contends that the La Presa SDC is not the least restrictive environment for her. She objects to placement there because it is not her neighborhood school and because the students presently enrolled in the class are all boys. She believes that she can learn to control her behavior if the supports are continued at Fletcher Hills. In the alternative, she believes that the District should place her at a non-public school.

### LEGAL REQUIREMENTS FOR A FAPE

4. A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and

conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "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); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

5. 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] (hereafter *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.)

6. 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 of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement 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 meaningful educational benefit in the least restrictive environment. (*Ibid.*)

7. Whether a school district denied a student a FAPE is determined by looking to what was reasonable at the time, not in hindsight. The courts have consistently found that a school district can only be held responsible for developing an IEP based on the information it had available at the time it developed it. (*Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983; *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.)

8. Both federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. §§ 300.114, et seq.)<sup>2</sup> A special education student must be educated with non-disabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5), 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) A placement must foster maximum interaction between disabled students and their non-disabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031; see also 20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181, fn. 4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) In determining the educational placement for a child with a disability, a school district is charged with ensuring that the placement is as close as possible to the child's home.

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<sup>2</sup> All references to the Code of Federal Regulations are to the 2006 regulations unless otherwise noted.



Unless the child's IEP requires another arrangement, the child is to be educated in the school that he or she would attend if non-disabled. (34 C.F.R. § 300.116(b)(3), (c).)

9. When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary paraprofessionals and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (hereafter, *Rachel H.*))

#### DETERMINATION OF ISSUE

10. Student has stipulated to the validity of the January 8, 2010 IEP except for its proposed placement. Based upon Factual Findings 1 through 43, and Legal Conclusions 1 through 9, the District has met its burden of proof that placement at its La Presa behavior cluster SDC offers Student a FAPE in the least restrictive environment.

11. The District persuasively demonstrated that Student has significant behavioral issues which impede her ability and the ability of her classmates to access the curriculum and to learn. From the time she began kindergarten in August 2009, until her parents removed her from school in late March 2010, Student engaged in behaviors that caused injury to herself, injury to her classmates, and had the potential for causing injury to adults as well. Student's low tolerance for frustration caused her to easily escalate from anxiety to frustration to tantrums in the matter of moments. She had numerous instances of losing control to the point where she ran around the classroom, would push over furniture, throw things at her classmates and teachers, and scream profanities. Her

self-injurious behaviors included scratching various parts of her body, banging her head against the wall or floor, and even stabbing herself with scissors. Student often would claw at her clothes and occasionally succeeded in removing them in front of classmates before she could be stopped. She caused injury to other students by hitting them, kicking them, scratching them, and pushing them. Her behaviors often required her teachers to remove the other children from the classroom to ensure their safety and in order to address Student's behavioral issues.

12. The District has also persuasively established that it attempted and exhausted less restrictive measures before determining that it could not serve Student at her home school. In response to Student's behaviors at the beginning of the school year, the District held a student study meeting within about two weeks of the start of school. It almost immediately developed and implemented a behavior support plan for Student and referred Student for a special education assessment. At the IEP meeting held September 30, 2009, the District, in conjunction with Student's parents, found Student eligible for special education and related services under the category of emotional disturbance. It attempted to serve Student in the least restrictive environment by maintaining her placement in the general education classroom with RSP support. After conducting both a SCIA assessment and a functional analysis assessment, the District suggested for the first time that Student's needs would be best met in an SDC. When Student's parents rejected the SDC placement, the District developed a behavior intervention plan for Student and assigned a one-on-one aide to her in her general education classroom. It was only after all these interventions were unsuccessful and Student's behaviors continued in spite of the interventions, modifications, and accommodations that the District proposed the La Presa SDC placement and filed for due process to have the placement validated.

13. Student's mother was heartfelt in her concerns about the higher crime rate in the La Presa neighborhood and the lack of girls in the classroom. She and her family chose a different neighborhood in which to live and she expected her children to go to school there. However, the Individuals with Disabilities Education Act and corresponding state law and federal regulations only require that a child with a disability be placed at his or her neighborhood school if an appropriate program is available there. In this case, the District has shown that it is not appropriate to maintain Student in a general education classroom even with significant supports. Unfortunately, it has only one SDC that is appropriate for Student and that class is at La Presa Elementary School.

14. Nor has Student demonstrated that she would be unsafe at La Presa because of the neighborhood's crime rate or because the other five children in the class are presently boys.

15. In accord with the requirements of *Rachel H.*, the District has demonstrated that Student is failing to derive any academic or non-academic benefit from placement in the general education classroom. Additionally, it has shown that Student's continued presence in the general education environment adversely impacts the ability of the other children to learn and the ability of the teacher to educate her students.

16. In sum, the District has met its burden of proof that its proposed placement at La Presa, as offered in the individualized educational program (IEP) dated January 8, 2010, is an appropriate placement for Student and that it presently constitutes the least restrictive environment for her.

## ORDER

The District's January 8, 2010 IEP offered Student a FAPE in the least restrictive environment. Should Student return to the District, the District may implement the IEP in

full over the objections of Student's parents if Student's parents wish for Student to continue receiving special education and related services.

## 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. The District prevailed on the sole issue heard in this portion of the 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 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: April 30, 2010

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DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings