

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OAKDALE JOINT UNIFIED SCHOOL

DISTRICT.

OAH CASE NO. 2011120409

DECISION

Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH), heard this matter in Oakdale, California, on February 27-29, 2012, and March 1, 2012.

Natashe Washington, Attorney at Law, appeared on behalf of Student. Ms. Washington was assisted by Hee J. Kim, Attorney at Law, on February 28-29, 2012, and March 1, 2012. Student's father and stepmother (Parents) were present throughout the hearing.¹

Peter Sturges, Attorney at Law, appeared on behalf of Oakdale Unified School District (District). Tracey Jakubowski, Special Education Director, was present throughout the hearing on behalf of District.

¹ Student's father and biological mother share educational rights. Father has custody and Student lives with her father and stepmother. Student's biological mother resides in another state and did not participate in the due process hearing. Student's father, her stepmother, or both, were present during the hearing. Father and stepmother are collectively referred to as "Parents" in this decision.

Student filed her due process hearing request (complaint) on December 12, 2011, naming District. OAH granted a continuance on January 18, 2012. At the close of the hearing on March 1, 2012, the matter was continued to March 19, 2012, for the submission of closing briefs. The parties timely submitted their closing briefs on March 19, 2012, and the matter was submitted for decision.^{2 3}

ISSUES⁴

1. Did District commit procedural violations of the Individuals with Disabilities in Education Act (IDEA) that denied Student a free appropriate public education (FAPE) by significantly impeding Parents opportunity to participate in the decision-making process regarding the provision of a FAPE to Student by:

- a. Predetermining its offer of placement and services contained in the September 13 and 30, 2011 individualized education programs (IEP's); and

² To maintain a clear record, Student's brief has been marked as Student Exhibit S-19, and District's brief has been marked as District Exhibit D-12.

³ The ALJ limited the parties' closing brief to 25 pages, double spaced with 12 point font, with one inch margins. Student filed an objection to District's closing brief on March 19, 2011, contending District's brief exceeded the page limit by four lines per page, which the ALJ calculates to be a total of four pages. District filed a rebuttal to Student's objection on March 21, 2012. The ALJ finds that the District's closing brief exceeded the 25-page limit, but that amount was de minimus and did not prejudice Student and, therefore, the ALJ considered District's entire brief.

⁴ The ALJ has reworded and renumbered the issues for clarity. No substantive changes have been made.

- b. Failing to consider and discuss a continuum of placement options?
- 2. Did District's offer of placement and services contained in the September 13 and 30, 2011 IEPs, deny Student a FAPE because District failed to offer placement in the least restrictive environment (LRE)?

PROPOSED RESOLUTIONS

Student requests the following resolutions:

- a) District shall provide Student with a full inclusion placement with appropriate supplementary aids and services, including but not limited to a full time one-to-one trained instructional aide to assist Student year round.
- b) District shall reimburse Parents for tuition and travel to Big Valley Christian School from October 2011 to the present.
- c) District shall reimburse Parents for private speech and occupational therapy services from October 2011 to the present.
- d) District shall provide compensatory education in all areas of need, including but not limited to one-to-one intensive instruction in all core academic areas with services provided by a non-public agency.

CONTENTIONS OF THE PARTIES

Student contends that in determining its offers of placement, District failed to properly consider her prior placements in Texas, wherein she was able to participate in, and receive educational benefit from, placements with typically developing peers. Student further contends that District predetermined its offer of placement and services in the September 13 and 30, 2011 IEP's and denied Parents the opportunity to participate in the decision making process concerning the provision of a FAPE to Student by coming to the team meetings with a draft IEP document; failing to have a regular education teacher attend the September 13, 2011 IEP team meeting; and failing

to discuss and consider lesser restrictive placement options for Student than the Special Day Class (SDC) that was offered. Finally, Student contends that District's offer of placement in the SDC for the 2011-2012 school year denied her a FAPE because it did not provide her with maximum opportunity to be educated with typically developing peers in the LRE.

District contends that it carefully and thoroughly considered the information from Student's prior placements in Texas and information provided by Parents at Student's IEP team meetings. It further contends that the placement and services offered in the September 13 and 30, 2011 IEPs were based upon discussion among all members of the IEP team, including Parents, and therefore, it did not predetermine Student's placement and services or impede Parents' participation in the IEP process because of the absence of the general education teacher. Finally, the District asserts that its SDC for moderate to severely handicapped students is the LRE because Student required a specialized education program, and not a general education program.

FACTUAL FINDINGS

JURISDICTIONAL AND BACKGROUND

1. Student is a 5-year-old girl who lives with Parents within the District's geographical boundaries and attended District's kindergarten through grade three SDC for severely handicapped students during the 2011-2012 school year. Student has Down's Syndrome and is eligible for special education and related services under the category of intellectual disability (ID) and the secondary category of speech or language impairment (SLI).

PRIOR PLACEMENTS IN TEXAS

2. Student was four years old when she transferred to District from Texas in August 2011, and became five years old shortly thereafter. While living in Texas, Student

attended the KinderFrogs School at Texas Christian University, a laboratory school for children with Down's Syndrome. The school's program takes children starting at 18 months old and prepares them for general education kindergarten. Student enrolled when she was two years old and attended until January 2011 when she was four years old. Student had approximately 10 other students in her class and received speech therapy, occupational therapy, oral motor therapy, and music therapy. Although Student had speech therapy once a week, she worked with an aide on speech skills every day. While attending KinderFrogs, Student had an Individual Family Service Plan (IFSP), similar to an IEP.⁵

3. Ms. Marilyn Tolbert, Director of KinderFrogs, testified that she found Student to be extremely high functioning when compared to the 27 other students with Down's Syndrome at the school. Student was almost toilet trained, could put on her own clothes, and ate with utensils. Student exhibited no behavior issues, was pleasant and compliant, and got along very well with others. She was learning to play and interact

⁵ Marilyn Tolbert, Director of KinderFrogs Program, testified telephonically. At the hearing, Student moved to have Ms. Tolbert testify as an expert witness. District objected to this witness testifying as an expert and to the admission of her curriculum vitae. Ms. Tolbert has been the director at KinderFrogs for nine years. She has a master's degree in special education, has been working in the education field for thirty years, and is working on her dissertation on transitioning children with Down's Syndrome. Both the witness and her CV were timely disclosed prior to hearing and there is no prejudice to District. Both parties presented hypothetical questions to the witness. The witness possessed the special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which the testimony relates and the objections to the expert testimony and admission of her CV are overruled.

cooperatively with her peers. She knew colors and shapes, and could label objects.

KinderFrogs is an early intervention preschool with a demanding environment where its goal is to prepare students for general education kindergarten. Ms. Tolbert testified that she attended Student's IEP team meeting at Keller Early Learning Center, where the team's goal to include Student with general education was consistent with what she did at KinderFrogs and that Student was making educational progress. Ms. Tolbert testified that children cannot attend general education public school in Texas if less than five years of age. Ms. Tolbert did not consider IQ tests to be reliable indicators for disabled children's abilities.

4. Based on when she last saw Student in May 2011, Ms. Tolbert testified that Student would benefit from a small structured class (12 students) with inclusion support such as occupational therapy, speech therapy, and adaptive physical education. Ms. Tolbert considered a special education program for 95 percent of the day with five percent in general education to be inadequate for Student.

5. In January 2011, Parent enrolled Student in the Keller Early Learning Center (ELC), a Texas public school. Keller ELC prepares children with learning delays for kindergarten. Students who attend Keller ELC are not necessarily disabled, nor do they necessarily receive special education. Student attended a half day program. While at Keller ELC, Student had an annual IEP dated May 20, 2011. In addition to enrolling Student in Keller ELC, Parent also enrolled her in the Primrose School (Primrose), which she attended in the afternoon in class of 19 other students. Primrose is a private early general education school. According to stepmother, Student did well at Primrose School and exhibited no behavioral problems. Parents testified that Student also participated in tap dance and ballet class with general education students. While it was unclear if Parents informed District that the dance and gymnastics classes were with typically functioning children, District was on notice that Student was participating in extra

curricular activities that may be with typically functioning children. Student's biographical profile provided to District indicated that her dance teacher called her a "rock star" and that Student helped keep the other dance students on task.

STUDENT'S INTERIM PLACEMENT

6. If a child with a disability transfers from a school district located outside the State of California to a district within California in the same academic year, the local educational agency (LEA) must provide the child with a FAPE, including services comparable to those described in the student's previously approved IEP, in consultation with the parents, until the LEA develops a new IEP that is consistent with federal and state law. The LEA may provide the interim program for a period not to exceed 30 days, by which time an IEP team meeting must be held.

7. Student and Parents moved from Texas to California at the beginning of the 2011-2012 school year. Student enrolled in District on August 22, 2011. The District gave Student an interim placement in a mixed grade (kindergarten through third grade) SDC for severely handicapped students at Sierra View Elementary school, taught by Ms. Lindsey Moore. This placement was consistent with the special education placement set forth in the May 20, 2011 Keller ELC IEP. Student does not contest the adequacy of the interim placement and it is not discussed further herein.

DISTRICT'S KNOWLEDGE OF STUDENT'S ABILITY TO BE EDUCATED IN LRE

8. A special education student must be educated with non-disabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. The Individuals with Disabilities Education Act (IDEA) requires that a student with a disability be placed in the LRE in which the student can be

educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers while still obtaining educational benefit. Whether a student is placed in the LRE requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive setting; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class, and (4) the costs of the less restrictive setting.⁶

9. Stepmother contacted District by email in late July 2011 while still in Texas and sent the Keller ELC IEP. Stepmother also prepared and sent a biographical profile of Student describing Student's personal characteristics, interests, accomplishments, strengths, and deficits. Student's profile stated that she was currently participating in tap and ballet dance class, where the instructor reported Student helps keep the other students "on task." Student's profile also stated that she participated in gymnastics, but there were too many distractions and she will try again in a year or two. In August 2011, stepmother spoke with Tracey Jakubowski, District's Special Education Director. Stepmother told District about the programs in Texas Student had participated in, including Primrose general education class, and asked about District's programs. Stepmother told District that Student was not in general education at Keller ELC, but if she stayed she would have been ready for general education kindergarten at Keller.

⁶ Larry Mendonca, District Director of Pupil Services, credibly testified that cost was not a factor in Student's placement in the SDC since it costs more to educate a student in a SDC than in a general education setting with supports. Under the applicable test, cost is an affirmative defense. Because District has conceded that cost was not a consideration in its offer of placement to Student, it is not an issue in this case and will not be addressed further.

Stepmother testified that it was always Parents' goal to have Student in general education.

10. Stepmother further asserted that she discussed with District Parents' goal to have Student enter a general education class in the future, as stepmother believed KinderFrogs had prepared Student adequately and Parents wanted Student to be placed with typically developing peers. Ms. Jakubowski testified that District relied on the Keller ELC IEP and stepmother's biographical profile of Student to determine her initial placement.⁷ Based on the testimony of stepmother and Ms. Jakubowski, review of the Keller ELC IEP, and the subsequent District IEP team meeting notes on September 13 and 30, 2011 discussed below, the weight of the evidence establishes that Parents did not ask for general education as an interim placement. However, as discussed below,

⁷ Ms. Jakubowski is District's Programs Specialist and in her fifth year as special education director. Ms. Jakubowski has a bachelor's degree in speech pathology, a master's degree in special education, and holds a multiple subject teaching credential. Ms. Jakubowski has experience teaching general and special education classes and spent four years as special education director at another district. Ms. Jakubowski testified that District currently has approximately 690 special education students, including ten students with Down's Syndrome, and she attends all of their IEP team meetings. District does not have a separate policy to place students with Down's Syndrome. Ms. Jakubowski testified that the initial interim placement for all students transferring into the district with an IEP is an interim "like kind" placement based on the student's existing IEP. Then the district follows the IEP process to determine the student's appropriate permanent placement. District has less than ten special needs students with aide support in general education classes assigned there by the IEP process.

subsequent to the interim placement, Parents did state to District that Student was not being sufficiently educated with typically developing peers.

11. Parents provided District with documents from Texas, which included private speech therapy notes, the Keller ELC IEP with assessments, and Student's biographical summary. District interpreted the Texas IEP Category 1 to mean Student had an Intellectual Disability (California equivalent) and that the Texas IEP Category 2 meant she had Speech and Language Impairment (California equivalent). District did not see any records from Primrose or the Kinderfrogs program, but understood that Primrose was an afternoon general education class and the Kinderfrogs program was a Texas Christian University laboratory school for Down's Syndrome children working towards placement in a general education setting.

Student's Functioning Level

12. Student's Keller ELC IEP included results from a psycho-educational evaluation, a physical therapy assessment, a student history, and transportation information.⁸ The Keller ELC IEP, dated May 20, 2011, indicated that Student met the criteria for special education in two disability categories, "Condition 1: Non-categorical Early Childhood," and "Condition 2: Speech Impairment."

13. The psycho-educational evaluation was done the prior year, in May 2010, when Student was newly referred to Keller while she was attending Kinderfrogs. The evaluation incorporated reports and observations from the multi-disciplinary team

⁸ The Keller ELC IEP uses different terminology from what is typically seen in California IEP documents. For example, the "Full and Individual Evaluation" in the Keller IEP is recognizable as a psycho-educational evaluation, and the "Admission, Review, and Dismissal (ARD) Meeting" is what is typically referred to in California as an IEP team meeting.

consisting of the diagnostician, speech pathologist, teacher, occupational therapist, physical therapist, and Student's stepmother. The evaluation included the results of three standard tests that were given to Student.

14. Student was given the Preschool Language Scale-4 (PLS-4). The PLS-4 is a full language assessment that contains scales for receptive and expressive language and gives a total language score to indicate overall language function. Student received a total standard score of 61, placing Student in the one percentile ranking, which indicates significantly delayed functioning when compared to same-age peers.

15. Student was also given the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI – III). Student's verbal intelligence score was 81, placing Student in the tenth percentile, or low functioning. Student's performance score was 57, placing Student in the two-tenths percentile, or extremely low functioning. Student's composite full score of 66, placed Student in the one percentile, or extremely low functioning when compared to same-age peers.

16. Student was also given a Developmental Profile 3 (DP – 3). The DP – 3 assesses the development and functioning of children in a full range of skills in the areas of physical, adaptive behavior, social-emotional, cognitive, and communication. The DP – 3 was done using parent reports and examiner observations. Student's overall score of 83 indicated that she was delayed in her developmental skills when compared to same-age peers. The DP-3 indicated that Student would require special education to make progress towards age-appropriate developmental skills.

17. The evaluation overall concluded that Student demonstrated below average skills in the areas of language, physical, social-emotional, cognitive, and adaptive behavior, and that specially-designed instruction is warranted to address her deficits. The evaluation concluded that Student met the criteria for disabilities in non-categorical early childhood and speech impairment.

18. The physical therapy assessment report in the Keller ELC IEP was also completed in May 2010 using the Peabody Developmental Motor Scales – Second Edition (PDMS-2), observations, and record review. The assessment indicated that Student had substantial deficits in her motor skills. The PDMS-2 scored her gross motor skills as 68 (85-115 within normal limits) and fine motor skills as 64 (85-115 within normal limits). The PDMS-2 indicated that Student was functioning below her age level and would need occupational and physical therapy services in an educational setting.

19. The Keller ELC IEP team discussed the LRE for Student. The IEP states that the team considered a general education placement, but agreed that Student's delays warranted provision of a full time special education class "despite the impact of any potential harmful effects" of non-inclusion with general education students. The team also indentified nonacademic inclusion opportunities Student would have to participate with general education students, such as lunch, recess, assemblies, transportation, etc. While the IEP does not specify to what extent Student would spend with general education students, the IEP states that the team determined that Student was being educated with general education students to the maximum extent appropriate to Student's needs and would not benefit from education with non-disabled students to any greater extent.

20. The IEP team placed Student in a full time early childhood special education class in the preschool program at Keller ELC. The placement consisted of 180 minutes per day of special education instruction, 20 minutes of speech therapy twice per week, 20 minutes of occupational therapy twice per week, and physical therapy on a consultation basis. Despite the fact that the IEP team placed Student in a special education class, the IEP also showed it discussed Student's ability to function in a general education setting.

21. Father testified that the Keller ELC IEP was written in a way that did not reflect the inclusiveness of Student's placement there. District learned during the initial communication with stepmother that Primrose was a general education program, but was unaware of its academic program. Stepmother said Student was high functioning. Ms. Jakubowski interpreted the Texas documents to mean Student was a delayed high functioning Down's Syndrome student.

22. The District timely gathered information during Student's interim placement. Prior to holding the September 13, 2011 IEP team meeting, District was aware of the Keller ELC placement in Texas. District was also aware of the KinderFrogs placement. Pertinent to the inquiry here, District had knowledge of the Primrose placement, and therefore knew that for half of the day Student had been attending a preschool setting with typically developing peers. Finally, District had knowledge that Student was able to participate in extracurricular tap and ballet dance class and gymnastics. A school district bears the burden for making an offer of FAPE to a child with a disability. The offer is analyzed based upon the information available to the school district at the time of the offer and not in hindsight. Here, the evidence established that prior to the September 13, 2011 IEP team meeting District had knowledge that Student had been placed in educational and extra curricular settings with typically developing peers while in Texas, immediately preceding her transfer to California.

THE SEPTEMBER 13 AND 30, 2011 IEP's

September 13, 2011 IEP Team Meeting

23. District conducted the 30-day IEP team meeting for Student on September 13, 2011, to review her placement and services. Parents and Ms. Jakubowski attended

the meeting. Also attending were Ms. Lindsey Moore, Student's SDC teacher,⁹ Miriam Berman, District's occupational therapist, and Karen Sparkman, District's speech and language therapist.

24. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A school district is required to conduct an IEP team meeting that is meaningful. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. Procedural violations results in a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.

ATTENDANCE OF A REGULAR EDUCATION TEACHER

25. An IEP team must include a regular education teacher of the child if the child is, or may be, participating in the regular education environment. The attendance

⁹ Ms. Moore currently teaches the Sierra View Elementary School SDC for severely handicapped students where Student was placed. She has a bachelor's degree in history and has teaching credentials and a master's degree in special education for the moderate to severely handicapped students. Ms. Moore has been teaching a SDC for five years total (two years at District). Ms. Moore's SDC class consists of 12 students and four aides in grades ranging from kindergarten through third grade. Her students range from four to five-years old, on average, up to nine-years old. Her students have a wide range of conditions, including intellectual disability, autism, deaf, and visually impaired. Students in her class are provided behavioral and speech support.

of required IEP team members is excused if the parent and the school district consent in writing, and the IEP team member provides input in writing to the IEP team prior to the meeting.

26. Here, the general education teacher scheduled to attend the IEP team meeting was sick and did not attend the meeting. District notified Parents, who did not object to the teacher's absence because they did not know they could object. The District did not obtain a written waiver from Parents excusing the general education teacher from attending the meeting. The absent regular education teacher did not provide input in writing to the IEP team prior to the meeting either.

27. The IEP team recommended placing Student in Ms. Moore's SDC for severely handicapped for 95 percent of the school day, with five percent inclusion with general education students during recess, common time in common area pod, assemblies, field trips, and library time.¹⁰ The IEP team also recommended speech and language therapy twice a week (40 minutes total per week), and occupational therapy once a week (30 minutes total per week). Student would also attend an extended school year program during the summer with twice weekly speech and language therapy (40 minutes total per week). District IEP team members credibly testified that there was no discussion of placement in a general education classroom, with or without aide support.

28. However, there was no general education teacher available to provide input, in order for the IEP team to consider a general education placement. Failure to consider a lesser restrictive placement establishes a deprivation of educational benefit to Student. District was on notice from the Keller ELC IEP and Parent's communication regarding Primrose, KinderFrogs, and extracurricular activities such as the tap and ballet dance class and gymnastics, that Student was capable of being educated with typically

¹⁰ Kindergarten students in District do not eat lunch.

developing peers. Therefore, District was legally obligated to include a regular education teacher as part of Student's IEP team so as to ensure that the team discussed potential placements in a lesser restrictive environment for part, or all, of Student's educational program. By failing to ensure the attendance of a regular education teacher and failing to obtain written waiver of such attendance from Parents, District denied Parents and the IEP team the ability to discuss and consider placement in the LRE. Therefore, the failure to include a general education teacher at the September 13, 2011, IEP team meeting significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student.

PREDETERMINATION

29. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives, or arrives at an IEP meeting with a "take it or leave it" offer. However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting.

30. Parents were presented a written IEP at the September 13, 2011, IEP team meeting. The evidence established that this was prepared prior to the meeting, but was intended to be a draft as the team revised the IEP during the meeting. Parents signed the IEP at the conclusion of the meeting showing that they agreed with the IEP. Parent's contention that they did not understand the IEP was for severely handicapped students was unpersuasive as the IEP team meeting notes clearly identifies the SDC is for severely handicapped students. District discussed Student's placement prior to the IEP team meeting, but did not predetermine Student's placement. While the IEP team was presented with a draft IEP document, the evidence established that all members, including Parents, participated in the development of the IEP document. Parents were able to express their agreements and disagreements. Therefore, the evidence

established that Parents meaningfully participated and that District did not predetermine Student's placement.

September 30, 2011 IEP Team Meeting

31. Two or three days after the September 13, 2011 IEP team meeting, Parents had concerns with the five percent mainstreaming ratio in Student's IEP. On September 19, 2011, Parents requested another IEP team meeting, and District held the meeting on September 30, 2011

32. Parents and Ms. Jakubowski attended the September 30, 2012 IEP team meeting. Ms. Moore, Student's SDC teacher, Ms. Berman, District's occupational therapist, and Ms. Sparkman, District's speech and language therapist, also attended. The school psychologist Kristen Hoagland attended, as did general education teacher Linda Ghourley. Student's biological mother participated in the meeting by telephone. The evidence showed that the IEP team was properly assembled with the required members.

33. The September 30, 2001, IEP team meeting notes show that Parents wanted to discuss a general education placement for the 2012 – 2013 school year. Parents indicated that the SDC placement was preparation for Student to enroll in general education kindergarten the next school year. The IEP team discussed general education for 2012 – 2013 school year. Father assured the team that Student would be ready for general education in 2012 – 2013 school year and agreed to a follow up IEP team meeting in January 2012.

34. While the discussion, at the September 30, 2011 meeting, initially focused on placement for 2012 – 2013 school year, Parents shifted the discussion to a general education placement in January 2012, and then to an immediate placement in general education with aide support. The District team members recommended that Parents

observe a general education kindergarten class to better understand what would be expected of Student in a general education setting.

35. The IEP team meeting concluded with the same placement offer as the September 13, 2011 IEP. District team members indicated that the best course of action would be to assess Student in the spring of 2012, after a full school year of instruction, which would be closer to the start of the next school year. At the end of the meeting, Parents accepted Student's continued placement in the SDC, however, Parents were to observe a general education kindergarten classroom. Parents told Ms. Moore they liked her SDC class. While Parents accepted the continued placement, District was on notice that Parents wanted increased time in general education for Student.

PREDETERMINATION

36. Parents have also alleged that District predetermined Student's placement at the September 30, 2011 IEP team meeting. However, the evidence established that all members of Student's team participated in the discussion regarding Student's placement in various settings. Parents were able to express their concerns, their agreements and disagreements. While the District did not change Student's placement to a general education setting, it does not establish that District predetermined Student's educational placement. Therefore, Student was not denied a FAPE on the grounds of predetermination.

Determination of LRE

EDUCATIONAL BENEFIT OF PLACEMENT IN LRE

37. Parents contend that once they read Student's September 13, 2011 IEP at home they realized it was not appropriate as Student since she was only included with general education students for five percent of the day. In addition, Parents observed District's SDC class and found they did not like the environment as it was less nurturing,

more direct, a more "military" style of class, than what they had experienced in Texas. Parents noticed that Student reacted negatively. For example, Student would look at her feet when asked to do something. By late September, Parents noticed that Student no longer wanted to come to school, which was a very different response in that Student had always enjoyed school before.

38. District contends it did not rely solely on Student's intelligence assessment for her placement, although it categorized Student in its IEP's as intellectually disabled. It contends that Student's IEP team observations of her skills level and distractibility, as described at the IEP team meetings were consistent with the Keller ELC IEP and District appropriately determined that Student's needs would be met in District's SDC class. District provided Student with the SDC placement and considered the LRE when making this placement in both the September 13 and 30, 2011 IEP's.

39. There is no dispute that Student is intellectually disabled and cognitively delayed. Ms. Moore and her classroom assistants, Marcie McWilliams and June Gibson, observed that Student required substantial assistance and re-directing in the SDC, with an estimated 20 prompts in a 10 minute period. Student needed assistance with English, math, and writing. Student needed help eating and dressing. Student also had problems with social skills. Student had trouble conversing with others due to her delayed speech, limited vocabulary, and reliance on sign language. Ms. Moore partly attributed Student's difficulties to the stress of transitioning and adjusting to a new school.

40. However, these difficulties by themselves fail to establish that Student could not be satisfactorily educated in a general education class. The evidence established that while in Texas, Student was provided both a special education and a general education placement, even though the Primrose placement was provided privately. Great emphasis is placed upon the statement in the Keller ELC IEP that Student was being placed in a SDC with the acknowledgement that it could be detrimental to

her when compared with placement with typically developing peers. However, in Texas Student was also provided placement at Primrose to provide inclusion with typically developing children. The evidence established that prior to entering District's educational jurisdiction, Student had attended KinderFrogs, designed to ready Student for placement with typically developing peers, and the Keller ELC special education placement, supplemented with general education placement in Primrose. The evidence further established that Student benefited from these placements. Finally, in developing Student's September 2011 IEP's District was on notice that Student was capable of participating in extra curricular activities such as tap and ballet dance class and gymnastics.

41. Here, District accepted Student's assessment results from Texas and accepted Student's special education placement in Keller ELC, when designing its offer of a FAPE to Student. District did not attempt to place or seriously consider placing Student in a substantial general education setting and therefore, did not present any evidence that Student was incapable of receiving an educational benefit in a general education setting. Therefore, at the time of the September 2011 IEP team meetings, the evidence known to District established that Student had obtained some educational benefit when placed with typically developing peers. Accordingly, District's failure to consider this information in designing its IEP offer to Student resulted in District's failure to offer Student a FAPE in the LRE because it resulted in an offer that provided nothing more than nominal opportunities for Student to be educated with typically developing peers.

NON-ACADEMIC BENEFITS

42. As discussed above, the evidence established that prior to entering District's school setting, Student had attended school with typically developing peers and had participated in extracurricular activities such as tap and ballet dance class and

gymnastics. Student received non-academic benefit by being with typically developing pupils. According to the uncontested testimony of stepmother, Student did well in both the Primrose setting and the tap and ballet dance class, and gymnastics. With only a five percent opportunity for inclusion with general education students, District's education program provided only nominal or cursory opportunities to interact with general education students, essentially isolating Student with just special education students. District did not establish that Student was unable to receive non-academic benefit in the limited amount of time District provided Student with typically developing peers. District's IEP offers were not calculated to provide Student with an opportunity to participate in activities with typically developing peers such that she could receive non-academic benefit from those interactions. Accordingly, District's September 2011 IEP offers denied Student a FAPE as they did not offer placement in the LRE.

EFFECT OF STUDENT ON A LESSER RESTRICTIVE PLACEMENT

43. Because District did not place Student in a general education setting for any measurable period of her educational day, there is no evidence to establish that Student had a negative impact on either her typical peers or the general education teacher in District's school setting. The relevant evidence to be considered is from Student's time in Texas. That evidence established, that while at Primrose, Student was not disruptive or interfered with the educational process to the extent that it infringed upon her typically developing classmates ability to access their educational environment. There is no evidence to establish that Student would have negatively impacted the educational experience of her typically developing peers or interfered with the regular education teacher's ability to deliver instruction had she been placed in a regular education setting within District.

44. A balancing of the LRE factors establishes that the District's SDC for moderately to severely disabled students is not the LRE for Student. While District may

believe its SDC may be a “better program” for Student, the issue at hand is whether she can be satisfactorily educated in a general education setting. An appropriate program for Student has to consider the least restrictive environment within which Student can receive an educational benefit. Congress’ strong preference is that students be included to the maximum extent possible with general education students. Student requires aide support because she lacks the skills to independently access her education. However, there is insufficient evidence to conclude that Student is incapable of accessing education in a lesser restrictive setting, such as a general education class, with adequate supports and modifications. In fact, the evidence established that the information available to District from the Texas placements showed that Student could benefit from placement in a general education environment. Further, Student will be able to interact more with other general education students in a lesser restrictive setting such as a general education class.

PLACEMENT IN BIG VALLEY CHRISTIAN SCHOOL

45. After the September 30, 2011, IEP team meeting, Parents and Mr. Moore visited a general education classroom. On October 12, 2011, Father sent an email to Ms. Jakubowski expressing concerns regarding Student’s placement and requested an IEP team meeting to discuss Student’s placement. Father did not specify what his concerns were. On October 14, 2011 (a furlough Friday), Father emailed the principal at Sierra View Elementary School a similar unspecified request to meet to discuss Student’s special education placement.

46. The principal responded on the following Monday, October 17, 2011, offering to meet on October 20, 2011. Parents never responded to the offer to meet with the principal. After confirming the schedules for its staff, the District offered Parents to have an IEP team meeting on November 10, 2011 to address Parent’s concerns. Parents never responded to the offer.

47. On October 19, 2011, District received a letter from Parent announcing Student's removal from District and unilateral placement in an unnamed private school in Modesto. Parents removed Student from District on October 21, 2011. On October 26, 2011, District responded with a prior written notice letter to Parents outlining the history of their actions regarding Student's placement and repeating its offer of the SDC as a FAPE. District's letter also acknowledged Parent's request at the September 30, 2011 IEP team meeting to place Student in a general education class with a one-to-one full time aide.

48. Parent placed Student in Big Valley Christian School (Big Valley) in Modesto. Although Big Valley is a private religious school, it follows state curriculum standards, which it modifies for Student as needed.¹¹ District does not contend that placement at Big Valley was based upon Parents' religious beliefs. The evidence established that Parents placed Student at Big Valley because of their disagreement with the nominal opportunities to be educated with typically developing peers provided by the placement in District's SDC.

49. Student began attending Big Valley on or about October 26, 2011. Valerie Oehrke is Student's teacher.¹² Ms. Oehrke testified that Student is only one with an IEP,

¹¹ For example, during the thrice weekly writing sessions, Student is unable to participate with the other students so she is assigned more appropriate tasks.

¹² Student also sought to have Ms. Oehrke testify as an expert witness. District objected to this witness testifying as an expert and to the admission of her curriculum vitae. Ms. Oehrke has been a kindergarten teacher at Big Valley Christian School for 13 years. She has a bachelor's degree in elementary and special education from West Virginia. Mr. Oehrke held a California multiple-subject teaching credential, which recently expired. She also has an Association of Christian Schools International Educator

or with Down's Syndrome, in her general education kindergarten class. Ms. Oehrke was excited to work with a special needs student and requested Student to be placed in her class. Ms. Oehrke prepared the other students before Student arrived, showing yearbooks from KinderFrogs and Student's biographical profile. The class discussed Student's differences and similarities. The general education students accepted Student from the start.

50. Stepmother assists in the class as Student's aide. She sits nearby in case Student needs help when participating in small group instruction such as writing, scissors, and art, but does not assist during large group instruction, such as "circle time." Ms. Oehrke testified that having stepmother as an aide is not a distraction as she helps other students too. The evidence showed that having an aide does not segregate Student or hinder her inclusion. The only time Student is excluded is during writing tasks. Otherwise, Student is with her peers or in close proximity. In addition, the students are accustomed to seeing Parents so Student is not teased for having an aide.

Certificate for Elementary Teacher (general education), and a West Virginia Board of Education Credentialed for mentally handicapped students for grades Kindergarten through 12th grade, and elementary education for grades one through six. She has worked for three years as a RSP in another state and guidance counselor for grades six through eight and grades three through five, where she met with students to review their specific skills and work on their IEP's. Both the witness and her CV were timely disclosed prior to hearing and there is no prejudice to District. The witness established the special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which the testimony relates and the objections to the expert testimony and admission of her CV are overruled.

51. Student has made academic progress at Big Valley. She can count from one through 10, and recognize zero through 10. Student knows all letters by sounds and name. Student can also sort things by color. Student communicates by talking mostly, and is understood about one half of the time, communicating by sign language when needed. Student did lower and upper case letter recognition which other general education students were unable to do.

52. Student has no negative impact on teaching in the class because she has aide support. Student needs support when they break into small groups. Student would easily work with another aide. Having Student in the class is a benefit to the other students because they can learn to work with students who may be different from themselves. Student had no problem transitioning during class, or learning the class routine.

53. Student learns from and mimics behavior from other children at Big Valley. She socializes well with the other students. Her classmates will pick her for their group activities and integrate her completely in the class. Student has not exhibited any disruptive behaviors such as tantrums, injuring other children, interrupting educational instruction, and throwing objects.

54. Since October 2011, Student has been receiving private speech therapy for one hour, twice per week. Student received speech and language therapy at TheraCare, Inc, a private provider. Student's progress report dated January 30, 2012, states that although Student is significantly delayed in speech and language compared to typically developing children, she is making progress. Specifically, Student now speaks in longer sentences and demonstrates greatly improved letter and sound recognition and writing skills. Student can now use complete sentences to make requests and states emotions and understands age appropriate humor. Student has either met or is making progress in 10 of 12 goals. Student received benefit from the speech therapy.

55. Student has also been receiving occupational therapy for one hour, once a week at Sutter Gould Medical Center. Student worked on improving fine motor skills, self-care activities such as dressing, and integrating home and school activities into her therapy. Student showed progress in her improving her wrist strength so she could to hold items such as scissors and pencils for a longer period of time, which will help her progress towards the long term goal of writing and using scissors. Student received benefit from the occupational therapy.

56. Ms. Oehrke's credible testimony about Student's ability to participate in her classroom shows Student was able to benefit from and access the education at Big Valley. Student also received benefit from the private speech and language and occupational therapies. The evidence establishes that Student's needs have been addressed by the placement at Big Valley and the supplementary services provided by Parents. The credible testimony from Ms. Tolbert and Ms. Oehrke established that Student would benefit from placement in a general education class with support from a one-to-one aide.

REMEDIES

57. Parents paid \$739 to place Student at Big Valley in October 2011. Their monthly tuition is \$402. Parents also paid \$541.95 for a private speech and language assessment. Student's speech and language and occupational therapies are covered by Parent's health insurance, with Parents paying the deductible out-of-pocket. Parents' speech therapy deductible is \$7,200 because the therapist is an out-of-network provider. Parents' health insurance pays 100% of Student's occupational therapy because the occupational therapist is a network provider. Parents testified that they drive 30 miles per day to transport Student to and from school, five days per week.

58. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide

a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide.

59. The appropriateness of the private placement is governed by equitable considerations. The placement need not provide the specific educational programming required by the IDEA of a local education agency, provided it demonstrates that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child and the child benefitted from the instruction.

60. A unilateral placement does not have to offer every service needed to maximize a student's potential. However, the unilateral placement does have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. The above evidence concerning Student's experience at Big Valley establishes that placement there was appropriate.

61. However, reimbursement may be reduced or denied in a variety of circumstances, including when parents fail to give written notice to the local educational agency of their rejection of the proposed public placement and their intent to enroll a student in a private school at public expense at least 10 business days prior to removing the child from the public school, and when a parent acted unreasonably with respect to the unilateral private placement.

62. Parents notified District on October 19, 2011, of their intent to remove Student from public school and to enroll her in a private school in Modesto. Two days later, Parents removed Student from District, essentially denying District eight business days of notice. Therefore, Parents did not provide the required 10 day notice to District of their intent to remove Student from public school and place her in a private school at public expense. However, there was no prejudice to District. District had adequate notice from the September 30, 2011 IEP team meeting that Parents were dissatisfied with

Student's placement and wanted Student in a general education class. Father's emails to District staff on October 12 and 14, 2011, with concerns over Student's placement reinforced adequate notice to District.

63. Neither did Parents act in a way to hinder District's response. The fact that Parents did not respond to District's proposal for an IEP team meeting on November 10, 2011, did not make Parents' actions unreasonable as District repeated the same offer of a SDC in its letter to Parents on October 26, 2011. In addition, Parents did not delay the process and expeditiously filed their request for a due process hearing on December 12, 2011, soon after placing Student at Big Valley.

64. Weighing the equities, Parents are entitled to reimbursement, but it shall be reduced. As set out below in the Order, District shall reimburse Parents for costs of Student's placement at Big Valley in the form of tuition reimbursement and mileage to and from Big Valley. The mileage shall be calculated at the applicable mileage reimbursement rate set forth by the Internal Revenue Service for the applicable time, for the use of a personal vehicle. District shall reimburse Parents for the costs of speech therapy.¹³ Reimbursement shall be calculated from the date of November 11, 2011, through the date of Student's next IEP team meeting. Parents shall provide proof to District for all costs incurred and District shall reimburse Parents within 30 days of submission of proof. "Proof" shall be any documentation that would be reasonably relied upon such as copies of canceled checks, invoices marked "Paid," credit card or bank statements and attendance records.

¹³ District is not ordered to reimburse Parents for the costs of occupational therapy, as that cost was covered by Parents' insurance. However, if Parents paid any co-payments out of pocket, District shall reimburse Parents in that amount, according to proof.

65. The remedy ordered herein is ordered as compensatory education for District's denial of a FAPE. It shall not be construed as a prospective FAPE placement at Big Valley or private supplementary services.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

ELEMENTS OF A FAPE

2. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) 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(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require LEAs to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 949-954.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination of whether a district has complied

with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, there must be a determination of whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. The Ninth Circuit has endorsed the "snapshot" rule, explaining that "...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031 (*Fuhrman*), 1041).)

5. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student's parent preferred another program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2006010204.)

CONSEQUENCES OF PROCEDURAL VIOLATIONS

6. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding of a FAPE denial. A procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making

process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); (*Target Range, supra*, at p. 1484.)

PARENTS' RIGHT TO PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS

7. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

8. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479 (*Target Range*, 1484.); *Fuhrmann supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, at p. 1036.)

ISSUE 1(A): DID DISTRICT DENY STUDENT A FAPE BY SIGNIFICANTLY IMPEDING IN PARENTS OPPORTUNITY TO PARTICIPATE IN THE DECISION MAKING PROCESS REGARDING THE PROVISION OF A FAPE TO STUDENT BY PREDETERMINING THE OFFERS OF PLACEMENT AND SERVICES CONTAINED IN THE SEPTEMBER 13 AND 30, 2011 IEP's?

Predetermination

9. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist., supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

10. In accordance with Factual Findings 23, 24, 27, and 29 through 36 and Legal Conclusions 1 through 9, District did not predetermine Student's placement at either of the September IEP Team Meetings. While the September 13, 2011 IEP team was presented with a draft IEP document, the evidence established that all members, including Parents, participated in the development of the IEP document. Parents were able to express their agreements and disagreements. Therefore, Parents meaningfully participated and that District did not predetermine Student's placement. Parents have also alleged that District predetermined Student's placement at the September 30, 2011

IEP team meeting. However, the evidence established that all members of Student's team participated in the discussion regarding Student's placement in various settings. Parents were able to express their concerns, their agreements and disagreements. While the District did not change Student's placement to a general education setting at the September 30, 2011 IEP team meeting, it does not establish that District predetermined Student's educational placement. Therefore, Student was not denied a FAPE on the grounds of predetermination at either the September 13 or 30, 2011, IEP team meetings.

ISSUE 1(B): DID DISTRICT DENY STUDENT A FAPE BY SIGNIFICANTLY IMPEDING IN PARENTS OPPORTUNITY TO PARTICIPATE IN THE DECISION MAKING PROCESS REGARDING THE PROVISION OF A FAPE TO STUDENT BY FAILING TO CONSIDER AND DISCUSS A CONTINUUM OF PLACEMENT OPTIONS?

Continuum of placement options

11. A district is required to have a continuum of program options available for a child. (Ed. Code, § 56360.) 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 settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Required Members of an IEP Team

12. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise

regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

13. The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil, and supplementary aids and services and program modifications or supports. (20 U.S.C. § 1414(d)(2)(C).)

14. The attendance of required IEP team members is excused if the parent and the school district consent in writing, and the IEP team member submit input in writing to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C).)

15. In accordance with Factual Findings 23 through 28 and Legal Conclusions 1 through 8 and 11 through 14, District committed a procedural violation that denied Student a FAPE by significantly impeding upon Parents opportunity to participate in the decision making process when it failed to include a general education teacher at the September 13, 2011, IEP team meeting. The evidence showed that District should have known that the discussion regarding Student's placement should include consideration of a general education class. The lack of a general education teacher on the IEP team meant that a general education placement could not be adequately considered, which meant the team was unable fully to consider placing Student in a general education setting with services and supports.

ISSUE 2: DID DISTRICT'S OFFERS OF PLACEMENT AND SERVICES CONTAINED IN THE SEPTEMBER 13 AND 30, 2011 IEP'S DENY STUDENT A FAPE BECAUSE DISTRICT FAILED TO OFFER PLACEMENT IN THE LRE?

16. Federal and state law requires a school district to provide special education in the LRE. A special education student must be educated with nondisabled

peers “to the maximum extent appropriate,” and may be removed from the general education environment only when the nature or severity of the student’s disabilities is such that education in general education classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398 (*Rachel H.*), 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student. The Ninth Circuit determined the appropriate placement for a well-behaved, popular, moderately mentally retarded nine-year-old student was in a regular second grade classroom, with some supplemental services, as full-time member of that class, despite the fact that the student had an I.Q of 44, and operating at the level of a four year old child. The court held that the school district's proposal that the child be in a special education class fifty percent of the day ran directly counter to Congress’ preference that children with disabilities be educated in regular classes with children who are not disabled.

17. In accordance with Factual Findings 2 through 22, 27, 28, 33 through 35, and 37 through 44 and Legal Conclusions 1 through 5, 16, and 18, District’s offer of a SDC placement in the September 13 and 30, 2011 IEP’s denied Student a FAPE in the LRE. Based on the “snapshot” rule taking into account what was, and what was not, objectively reasonable known at the time the IEP’s were drafted, District was on notice from the Keller ELC IEP and Parent’s information regarding Primrose general education class, and extracurricular activities such as tap and ballet dance class and gymnastics, that Student could be capable of obtaining educational benefit in a general education

setting. Parents discussed with District that general education placement as a long term goal, that Student attended a general education preschool (Primrose) and participated in ballet and tap classes. District was also aware that Student attended KinderFrogs, a school specifically to prepare Down's syndrome children working towards placement in a general education setting. By the September 30, 2011 IEP team meeting, District knew that Parents wanted increased general education placement for Student. All of the evidence available to District established that Student was capable of receiving an educational benefit in a lesser restrictive setting than the SDC, with five percent mainstreaming, that District offered. District's failure to consider and offer placement in a general education setting denied Student a FAPE in the LRE.

18. In *Rachel H.*, the student was a nine year old at the level of a four year old child, with an IQ of 44. The court rejected the school district's proposed placement for the student to attend a special education class for fifty percent of the day. (*Rachel H.*, *supra*, at p. 1405.) By contrast, Student in this case has a higher IQ of 66 and has shown the ability access a general education class with appropriate aide supports. Yet, District proposed to place Student in a special education class for ninety-five percent of the day. The testimony of the District staff established that Student needed support in the SDC, but did not show that Student was unable to access the preferred placement in general education, with necessary support. The inquiry here does not turn on whether the SDC was a more appropriate program for Student, but rather upon what is the least restrictive environment in which this pupil can receive an educational benefit. Given the strong Congressional preference that students be included to the maximum extent possible with general education students, the evidence establishes that Student is capable of accessing education in a less restrictive general education class with adequate supports and modifications. Accordingly, District's IEP offers of September 13 and 30, 2011, denied Student a FAPE in the LRE.

REMEDIES

19. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

20. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. Of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).)

21. Parents may receive reimbursement for a unilateral placement if the placement is appropriate. (34 C.F.R. § 300.148(c)(2006); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) The appropriateness of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) However, the unilateral placement does have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. (*Gagliardo v. Arlington Cent. Sch. Dist.* (2d Cir. 2007) 489 F.3d 105, 112.) To qualify for reimbursement, parents need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped

child and the child benefitted from the instruction. (*C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159-60.)

22. Reimbursement may be reduced or denied in a variety of circumstances, including when parents fails to give written notice to the local educational agency of their rejection of the proposed public placement and their intent to enroll a student in a private school at public expense at least 10 business days prior to removing the child from the public school, and when parents act unreasonably with respect to the unilateral private placement. (Ed. Code, § 56176.)

23. Pursuant to Factual Findings 45 through 47 and Legal Conclusions 19 through 22, Parents did not provide the required 10 day notice to District of their intent to remove Student from public school and place her in a private school at public expense. Therefore, Parents should not be reimbursed for the costs of the initial placement at Big Valley in October 2011. However, their actions to remove Student only two days after providing notice and their failure to respond to District's offer for an IEP team meeting did not deprived District of the opportunity to address Parent's concerns. The evidence established that Student's placement at Big Valley, and the supplementary services provided by Parents, addressed her needs and that Student benefitted from that placement. Therefore, Parents are entitled to reimbursement for the cost of tuition and travel to and from Big Valley, and supplemental private speech and occupational therapy services from November 11, 2011, the day after the proposed IEP team meeting, as set out in Factual Findings 48 though 65.

ORDER

1. District denied Student a FAPE in the September 13, 2011 IEP when it failed to consider and discuss placement in general education because a general education teacher did not attend IEP team meeting.

2. District's offer of placement and services contained in the September 13 and 30, 2011 IEP's, denied Student a FAPE because District failed to offer placement in the LRE.

3. District shall reimburse Parents as follows:

- a. For the cost of placement and transportation to and from Big Valley starting on November 11, 2011, through Student's next annual IEP team meeting, consistent with the terms and conditions set out in the Factual Findings;
- b. For the costs of speech therapy starting on November 11, 2011, and through Student's next annual IEP team meeting, consistent with the terms and conditions set out in the Factual Findings;
- c. For the costs of any co-payments associated with occupational therapy, incurred by Parents from November 11, 2011, through the date of Student's next annual IEP team meeting, consistent with the terms and conditions set out in the Factual Findings.

4. All other requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issue 1.a. Student prevailed on Issue 1.b. and Issue 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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, 2012

_____/s/____

TROY K. TAIRA

Administrative Law Judge

Office of Administrative Hearings