BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: ALHAMBRA UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH No. N 2006030363

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on June 20-23, 2006, at Alhambra, California.

Alhambra Unified School District (District) was represented by Attorney Cyndi L. Dalton, The Dalton Law Group. Dr. Laurel Bear, District Director of Pupil Services also appeared for the District.

Student was represented by Advocate, Matthew Pope, Office of Client's Rights Advocacy and Student's mother (Mother).

The District filed a Request for Due Process Hearing on March 9, 2006. A continuance was granted on March 24, 2006. The ALJ received the oral and documentary evidence at the hearing. The record was held open until the close of business June 30, 2006. for submission of post hearing briefs. District's post hearing brief is identified for the record as Exhibit 43. Student's post hearing brief is identified as Exhibit H. The matter was submitted for decision on June 30, 2006.

ISSUE

Did the District offer Student a free appropriate public education (FAPE) for the 2005 – 2006 school year by recommending placement at the Lincoln Severely Handicapped Special Day Class (Lincoln SHSDC) operated by Los Angeles County Office of Education (LACOE)?

CONTENTIONS OF THE PARTIES

The parties do not dispute Student's eligibility for special education and related services because of his multiple disabilities.

District asserts the Triennial Individual Education Program (IEP) with various dates, completed on October 7, 2005, includes a comprehensive offer of placement and services to Student designed to meet Student's unique needs. District further asserts that based upon the assessments, Student's placement in the Lincoln SHSDC is designed to meet Student's unique educational needs and is more appropriate than the current placement. Student's mother would not consent to the IEP.

Student is currently receiving Designated Instruction Services (DIS) pursuant to the Triennial IEP and those services are not in dispute. Student disagrees with the IEP team's offer of placement in the Lincoln SHSDC. Student asserts that a program incorporating his inclusion in general education is more appropriate. Student further asserts that the proposed placement in the Lincoln SHSDC is calculated to segregate him from non disabled students and is not adequate to meet his educational needs. Student contends the District should retain Student in his current placement and provide additional services.

FACTUAL FINDINGS

1. Student was born December 12, 1989, and lives with his parent within the boundaries of the District. Student is diagnosed with multiple disabilities including Global Severe Development Delays-Mental Retardation; Cerebral Palsy; Macrocephaly; Intractable Seizures; and Cortical Visual Impairment, Hyperobia and Photophobia. Student is also diagnosed as legally blind. He has received special education services from the District since Kindergarten.

2. Student is currently enrolled at Mark Keppel High School (Mark Keppel). Mark Keppel has an enrollment in excess of two thousand students. The school has a general education curriculum and a Special Day Class (SDC) operated by LACOE. Student attends the SDC.

3. At Mark Keppel, Student was included in the general education art and music classes in addition to the SDC at his mother's request. Student attended these classes with the assistance of a One-to-One health aide/Paraeducator (1:1 aide).

District's Assessments of Student:

4. The District conducted a series of comprehensive multidisciplinary assessments in the spring of 2005. Student's mother consented to the assessment plan. On June 17, 2005; July 6, 2005 and October 7, 2005, the IEP team met to review the comprehensive multi-disciplinary assessments and developed Student's Triennial IEP.[1] The District and Student agree that District has complied with the procedural requirements in the Triennial IEP as set forth in the Individuals with Disabilities Education Act (IDEA).[2]

5. The District implemented the assessment plan to determine Student's then-present levels of performance and to draft appropriate goals and objectives in the areas of speech and language-communication development, assistive technology, psycho-motor development, social/adaptive behavior, orientation and mobility, occupational therapy, intellectual development and academics. The plan included a health assessment.

Student's Unique Needs

6. The speech and language assessment noted that Student had the language skills of a three to four month-old child. Student was nonverbal at school and was not at a functional or symbolic level of communication. The Student did not yet demonstrate the intent to communicate and his academic skills were commensurate with his language skills. Student was at the pre-linguistic stage of development. Student needed activities, stimuli, things to explore, computer programs, and entertaining items in a more closely supervised environment than in his current placement in order to develop his pre-linguistic skills.

7. The assistive technology assessment noted that Student had access to assistive technology since 1996 and had also been provided with assistive technology support in the SDC classroom at Mark Keppel. Student was ambulatory with assistance, had frequent seizures and his fine motor skills were adequate for activating switches and buttons on the assistive technology devices provided to him. Student needed verbal and physical prompts to perform most tasks. Student was often sleepy and apparently unaware of his environment. Student continues to have severe delays in adaptive behavior and he functioned in the four to twelve month age range in the areas of communications, functional daily living skills, social interaction skills, motor skills and academic skills. Student's skill level had not changed, since District had initially provided special education services, because of the limitations of Student's cognitive functioning.

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[1] These three dates jointly constitute the Triennial IEP and will hereinafter be referred to as the Triennial IEP

[2] While the parties stipulated to District's compliance with the procedural requirements established in *Bd. Of Ed. Of the Hendrick Hudson Sch.Dist. v.* (1982) 458. U.S., the factual findings address the assessments leading to the Triennial IEP to show the extent to which the District sought to determine Student's unique needs. The assessments formed the basis, in part, for the offered SHSDC placement.

8. The adaptive physical education assessment was designed to examine balance, locomotion and object control, such as throwing and catching a ball, noted Student lacked the ability to balance himself and lacked locomotion skills. Student was at a standard 1, the lowest standard for walking, and was at the developmental level of walking. Student needed to develop his ability to walk and to navigate up and down the stairs. It was not safe for him to walk with the general education students around the campus and during class changes or in the event of fire drills because of his medical condition. Student was moved by either walking with the assistance of his 1:1 aide or in a wheel chair before the class changes and ahead of others during fire drills. Student was required to wear a helmet and a gait belt for his safety to prevent injury from falling because of his unsteady gait and seizure activity.

9. Student's ability to ambulate around the school campus and to move even with physical prompting by the 1:1 aide had deteriorated since he began attending Mark Keppel. Student was involved in a few incidents where he had fallen while at school. Student had not progressed in this area and usually needed full or partial physical prompting to execute motor skills. He lacked the energy to engage in physical activities at school.

10. Student was medically fragile as he had numerous health concerns as compared to the other special education students in the SDC program at Mark Keppel. The health assessment noted that Student suffered from seizures. He experienced multiple petite mal seizures virtually every day at school. Student also suffered grand mal seizures at school on a less frequent basis. The seizures placed Student into a dream-like state rendering him unresponsive. These seizures could last seconds to several minutes. The seizures were indicated by Student staring and stiffening or exhibiting jerking movements. Depending on the type of seizure Student might have returned to the state of awareness that preceded the seizure or could appear tired and sleepy. Student often slept in class after a seizure. The times and duration of Student's seizure activity while at school during March to September of 2005 was recorded. The seizure records indicate Student had up to twelve petite mal seizures daily while at school usually lasting up to three minutes.

11. Student functioned at a lower level than other students in the classroom and had no interest in interacting with others in the classroom. He had tremors which caused Student to spill his food when attempting to eat. He required physical prompting by stroking the side of his mouth to make him aware that his 1:1 aide was attempting to feed him. In addition to meeting his nutritional needs Student required partial or full physical prompting and needed assistance in the areas of learning activities in the classroom; toileting needs, including changing Student's diapers, and with all other daily living skills.

12. Student's ability to walk in and out of the classroom and to move even with physical prompting by the 1:1 aide had begun to deteriorate since he began attending Mark Keppel.

13. Student was in the sensory motor stage (the beginning developmental stages of an infant) of processing his visual environment. Student had limited vision, only having the

ability to see items fifteen to sixteen inches away. The vision assessment noted that Student needed a more age appropriate multi-sensory environment than that offered at Mark Keppel.

14. Student needed to be placed in a smaller, safer environment than at Mark Keppel with smaller classroom and where his medical and other needs could be more effectively met. The nursing staff at Mark Keppel, consisting of one nurse, was not adequate to attend to Student's needs as compared with Lincoln SHSDC with two nurses to attend to the student's medical needs.

15. Student needed more extensive support and supervision in the classroom requiring hand over hand and full physical prompts to perform most tasks. Student showed no desire to interact with or acknowledge his nondisabled peers.

16. Student was provided an opportunity to attend an art and band class with his nondisabled peers. The academic assessment noted that Student was not able to perform simple art related tasks without hand over hand prompting. Student was observed hitting the table in art class and making noises that disturbed the nondisabled art students. Student showed no connection to what he was doing or making. Bonnie Bostwick, Student's general education art teacher related an incident on April 12, 2005, in which the non disabled students were working on a "color theory" project. Ms. Bostwick included Student in the project to work on Student's ability to model the behavior of the nondisabled students. Ms. Bostwick reported that the 1:1 aide did the work as Student could not hold or use the scissors and glue to complete the project. In Ms. Bostwick's words "this was a stretch as far as saying he was modeling anything from the rest of the class. [Student] began to disrupt the students at his table with his pounding on the table, grunting and shaking the table, and as the students became less tolerant of his behavior [the 1:1 aide] and I agreed to have [Student] work in a more isolated area (ceramic studio) where they could be less disruptive and more focused." As noted in Factual Finding No. 10 Student frequently suffered seizures and often slept in class and Student's 1:1 aide was often observed spending most of the time in art class with student monitoring and timing his seizures. Student had similar experiences in general education music class.

17. The overall assessment results noted Student's then-present level of performance since his placement at Mark Keppel had not improved. Student continued to have delays in adaptive behavior, including communication, functional daily living skills, social interaction skills, motor skills, and academic skills consistent with continuing severe delays in cognitive ability. Student had not progressed in his development of the enumerated skills. Student's special needs were such that they could not be addressed by interventions within general setting alone and Student required a more focused support of special education services in order to adequately address his special education needs

Placement in the Least Restrictive Environment

18. The first Triennial IEP Team meeting was held on June 17, 2005. The team reviewed the adaptive physical education assessment results and discussed the Student's

options under a general education program, SDC, and participation in general education classes. The IEP team discussed the option of placement at the SHSDC at Lincoln School which had no more than two hundred students and smaller classrooms. The IEP Team recommended Student's mother visit the proposed school site. The IEP team meeting was continued to June 27th. Student's mother could not attend and requested the meeting be rescheduled. The meeting was continued to July 6, 2005 to permit Student's mother to attend.

19. The IEP team reconvened on July 6, 2005. Multiple assessment reports were presented at the meeting. The team discussed the results and recommendations of the assessments. The IEP team meeting was continued to September 13, 2005. Student's mother could not attend and requested a continuance. The meeting was rescheduled to October 7, 2005.

20. The final IEP team meeting took place on October 7, 2005. Student's mother did not attend the meeting. The District IEP team members discussed the assessment results and recommendations of the assessors and concluded that Student continued to need full physical prompting, Student had a propensity to fall asleep in class and while walking down the school corridors, and Student's lack of awareness of his personal safety required Student be provided with maximum support. The District IEP team members recommended the continuation of the 1:1 aide to help Student transition to a more appropriate classroom setting.

21. The District IEP team members submitted a written offer of DIS services and placement at the Lincoln SHSDC to Student's mother. The justification for the recommended placement was based on Student's persistent developmental delays in all areas, his seizure disorder, severe mental retardation and cerebral palsy. The District IEP team members concluded that Student's placement at Mark Keppel did not provide an educational benefit and Student's needs could not adequately be met in a general education program.

22. Lincoln SHSDC was an appropriate offer of placement to respond to Student's intensive health care needs, to provide more staff to meet Student's high level of support physically and provided more programs that were necessary to meet Student's sensory motor level of awareness needs. Lincoln had no more than 200 students, who like Student, needed additional support and services that could not be provided in a general education program. Lincoln also had more medical staff than Mark Keppel, a specially trained SDC teacher, and a special multi-sensory classroom designed to allow visually impaired students like Student to explore and develop their motor, sensory, and pre-linguistic skills in an unfettered and safe environment. Lincoln also had a community based instruction program designed to involve students in community activities designed to teach daily living skills. In contrast, Mark Keppel had an enrollment of more than two thousand students, a primarily general education curriculum, no specially designed classrooms to respond to the needs of severely disabled students, and one nurse to service the students.

23. On October 19, 2005 and again on January 17, 2006, the District made a written request to Student's mother for her consent to implement the IEP. Student's mother did not want Student's placement changed from his inclusive environment at Mark Keppel. Student's mother would not consent to the District IEP team members' offer.

24. June Downing. Ph.D., a Psychologist, was retained by Student's mother to prepare a Consultation Report in which she concluded that Student's current placement was the least restrictive environment. Dr. Downing opined that based upon her many years of experience working with severely disabled children, Student would be much better off staying at Mark Keppel with more capable nondisabled peers. Dr. Downing had not assessed Student in approximately three years prior to the Triennial IEP. She had not observed Student in his general education art and music classes. She observed Student in the SDC class at Mark Keppel for approximately thirty minutes. Dr. Downing indicated that she was prevented from staying any longer than thirty minutes. Upon further examination Dr. Downing confirmed that Student had a seizure around the time of her observation. She did not return to Mark Keppel to observe Student on another day.

25. Dr. Downing observed classroom activity at the Lincoln SHSDC for approximately thirty minutes. Based upon her observation she opined that Lincoln SHSDC was too restrictive a placement for Student. She opined further that based upon her experience and research that severely disabled students tended to thrive and develop in more inclusive environments. She further opined that full inclusion with nondisabled peers tended to benefit disabled students as well as their nondisabled peers. Student offered administrative hearsay evidence of a research study to support this conclusion. The research study was not considered because it was not supplemented or corroborated by direct admissible evidence to support Dr. Downing's conclusions.

26. The District's School Psychologist, Bonita Sharma-Nagn, worked at Mark Keppel and observed Student in the classroom setting for at least ten hours. She participated in some of the testing administered to Student and reviewed the assessments and test results. She also observed classes at Lincoln School. Based upon her observations she concluded Lincoln School was a more appropriate setting for Student. Lincoln School, a highly specialized school, offered more comprehensive services for children with moderate to severe disabilities such as Student. To her knowledge Lincoln School did not have a general education student population. Ms. Sharma-Nagn worked with the SDC teacher at Lincoln and knew the teacher had twenty years of experience working with severely disabled students. In her opinion Student's needs would be more appropriately met at Lincoln School.

27. While Dr. Downing had more than twenty years experience as a psychologist her opinion testimony and recommendations regarding Student's placement as compared to Bonita Sharma-Nagn, was not persuasive. No greater weight is given to Dr. Downing's opinion because of the absence of a recent assessment of Student by Dr. Downing, the brevity of her observations of Student in the classroom, her failure to observe Student in the general education art and music classes, which was critical to support her opinion, and the brevity of her observations at Lincoln SHSDC. The weight of the evidence supports the

conclusions reached by the District IEP team and the opinion of Ms. Sharma-Nagn who was found to be more credible in every aspect of her testimony.

LEGAL CONCLUSIONS

The Elements of FAPE

1. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a) (1) (A); Educ. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

2. There are two parts to the legal analysis in suits brought pursuant to the IDEA- Procedural and Substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [*Rowley*].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* At pp. 206-207.)

3. An IEP must include, in pertinent part, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. (§ 1414(d) (1) (A) (i), (ii), (iii) and (vii) (I); 34 C.F.R. § 300.347(a) (1), (2), (3) and (7) (i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G., supra*, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

4. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. V. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether or not to accept the offer. (*Ibid*.)

5. The second prong of the Rowley test analyzes substantive appropriateness, specifically, the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The *Rowley* Court determined that a student's IEP must be designed to meet the student's unique needs, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. (*Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a) (5) (A); Ed. Code § 56031.) *Board of Education of La Grange School District v. Illinois State Bd. of Educ.*, (7th Cir 1999) 30 IDELR 891 p. 4; 184 F.3d 912;

6. United States Code section 1412(a) (5) indicates a preference that students with disabilities are provided with an appropriate education within the regular education setting. The statute provides that to the maximum extent appropriate, children with disabilities be educated with non disabled children and special classes, separate schooling or other removal of children with disabilities occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily. The court in *Daniel R.R. v. State Board of Education* (5TH Cir 1989) 874 F.2d 1036 concluded that the law sets forth "a strong preference for mainstreaming which rises to the level of a rebuttable presumption."

7. The courts have considered the following factors in determining whether a proposed placement satisfies LRE requirements: 1) Educational benefit available to the student in a regular classroom setting, supplemented with appropriate aids and services, compared to educational benefits of a special education classroom; 2) Nonacademic benefits to the disabled child of interaction with non disabled children; 3) The effect of the presence of the disabled child on the teacher and other children in the regular education classroom; and 4) The costs of supplemental aids and services necessary to mainstream a disabled student in a regular classroom setting. *Sacramento City Unified School District v. Rachel Holland* (9th Cir 1992) 786 F.
Supp. 879 (*Rachel H)*.

Burden of Proof

8. The District has the burden of proof on the essential elements of its claim. *Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 126 S.Ct. 528, 163 L.Ed 2d 387.)

DETERMINATION OF ISSUES

Did the District offer Student a free appropriate public education (FAPE) for the 2005 – 2006 school year by recommending placement at the Lincoln Severely Handicapped Special Day Class (Lincoln SHSDC) operated by LACOE?

1. Based upon the substantive rights standard enunciated in *Rowley* set forth in Legal Principle numbers 2-5 in order for the Triennial IEP to constitute a FAPE the recommended placement in the Triennial IEP must meet a four pronged test to constitute an appropriate placement. To be an appropriate placement it must (a) be designed to meet Student's unique needs; (b) be reasonably calculated to provide Student with some educational benefit; (c) comport with the IEP; and (d) be provided in the least restrictive environment. Each prong of the test is addressed separately below.

2. It is undisputed that Student has extraordinarily unique needs. Based upon Factual Findings numbers 1, 6-17, and legal conclusions 1-8, the evidence supports the conclusion that the Triennial IEP offering placement at Lincoln SHSDC is designed to meet student's unique needs.

3. Student is by all accounts a pleasant young man whose mother has worked tirelessly to provide Student with every possible opportunity for his education and development. The evidence established that because of Student's extensive developmental delays and severe disability Student derived no educational benefit from his inclusion and mainstreaming in general education art and music classes as requested by Student's mother. Moreover, his continued inclusion in the general education curriculum at Mark Keppel would confer upon him any educational benefit. The IEP clearly addressed whether Student's continued placement at Mark Keppel was of educational benefit and correctly concluded that it was not. Based upon Factual Findings numbers 1-17, 18-23 and 26-27 and, legal conclusion number 1-8 the findings of fact support the conclusions of law that the placement is reasonably calculated to provide student with some educational benefit.

4. Applying the factors set forth in *Rachel H, supra,* the evidence persuasively established that Student derived no educational benefit even with all the supplemental aids and aide provided him in a regular classroom setting. Because of Student's severe developmental delays the evidence established that he could not derive a nonacademic benefit from interaction with his nondisabled peers. Even more persuasive is the evidence that Student's presence in the regular education classroom setting was disruptive. Through no fault of Student's his outbursts in class like the incident in general education art class and his frequent daily seizures were disruptive to the daily classroom activity and served as a distraction to the teacher and students. The fourth element under *Rachel H, supra,* of the

cost of mainstreaming will not be addressed because neither the District nor Student raised cost as an issue. Based upon Factual Findings numbers 6-17, 18-23 and 26-27 and legal conclusions numbers 5-7, the Triennial IEP provided a FAPE in the least restrictive environment.

5. The evidence supports Student's removal from Mark Keppel because the nature and severity of Student's disability is such that education in regular classes with the use of supplemental aids and services could not be achieved satisfactorily. Based upon the Factual Findings numbers 1-17, 18-23 and 26-27 and, legal conclusion number 1-8 Student's placement at the Lincoln SHSDC is appropriate.

ORDER

The District's offer of placement in the Triennial IEP dated June 17, July 6, 2005 and October 7, 2005 was appropriate and constitutes a FAPE in the least restrictive environment.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues in this matter.

RIGHT TO APPEAL 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 receipt of this decision. (Education Code section 5605, subdivision (k).

Dated: July 27, 2006

STELLA L. OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings
Special Education Division