

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 05-8949-GHK (VBKx)	Date	April 10, 2008
Title	<i>R.V., et al. v. Simi Valley Sch. Dist., et al.</i>		

Presiding: The Honorable	GEORGE H. KING, U. S. DISTRICT JUDGE
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Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:

None

Attorneys Present for Defendants:

None

Proceedings: (In Chambers) Order re: Parties' Joint Brief

This matter is before the Court on the Parties' Joint Brief ("Jt. Brief"). We have considered the arguments contained in the Jt. Brief, and we deem this matter appropriate for resolution without oral argument. *See* L.R. 7-15. As the parties are familiar with the facts of this case, we will repeat them only as necessary.

This case is a consolidated action involving appeals from administrative decisions rendered on September 27, 2005 and January 30, 2007. Plaintiffs argue that R.V., a high-functioning autistic ("HFA") child, was denied a Free Appropriate Public Education (FAPE) under the Individuals with Disabilities Education Act ("IDEA"). The Hearing Officer's ("HO") September 27, 2005 decision encompassed the 2004-05 school year ("2005 Decision"). The Administrative Law Judge's ("ALJ") January 30, 2007 decision involved the 2006-07 school year, based on an individualized education plan ("IEP") created on June 9, 2006 ("2006 Decision").¹

Plaintiffs made numerous arguments, both procedural and substantive, at the due process hearings. However, Plaintiffs' appeal only appears to argue that R.V. was substantively denied a FAPE. Although Plaintiffs raise a number of specific objections to the decisions, which are discussed below, all of Plaintiffs' objections relate to their contention that R.V. was denied a FAPE because she was not placed in a self-contained, specialized program for autistic students – such as a non-public school ("NPS") type program – where social and emotional skills are incorporated into the curriculum. As such, we do not address arguments that may have been made by the parties at the due process hearings but are not argued on appeal in the Jt. Brief.

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¹ Prior to July 1, 2005, administrative due process hearings were conducted by Hearing Officers from the Special Education Hearing Office ("SEHO"). After July 1, 2005, the hearings were conducted by Administrative Law Judges from the Office of Administrative Hearings ("OAH").

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I. Legal Standard

A. FAPE

Congress enacted the IDEA “to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs” 20 U.S.C. § 1400(c). The term “related services” is defined as transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(22).

An “appropriate” public education does not mean the absolute best or “potential-maximizing” education for the individual child. *See Board of Educ. Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 197 n. 21, 200 (1982). Rather, states are only obliged to provide “a basic floor of opportunity” through a program “individually designed to provide educational benefit to the handicapped child.” *Id.* at 201. The law only requires that the program in place “be reasonably calculated to confer a meaningful benefit on the child.” *Adams v. State of Oregon*, 195 F.3d 1141, 1150 (9th Cir. 1999) (citation omitted). Additionally, “[a]ctions of the school systems cannot. . .be judged exclusively in hindsight. . .[A]n individualized education program. . .is a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” *Id.* at 1149 (citation omitted).

Additionally, there is a “statutory preference for mainstreaming,” and school districts are to provide a program in the “least restrictive environment” to each special education student. *M.L. v. Federal Way School Dist.*, 394 F.3d 634, 657 (9th Cir. 2005); 34 C.F.R. §§ 300-114, *et seq.* A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate” and may be removed from the regular education environment “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 cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A).

B. Level of Review

The IDEA provides that a party aggrieved by the findings and decision made in a state administrative due process hearing has the right to bring an original civil action in federal district court in order to secure review of the disputed findings and decision. *See* 20 U.S.C. § 1415(e)(2), (i)(2). The statute states that in an action challenging an administrative decision, “the court (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(i)-(iii).

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The preponderance of the evidence standard “is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S. at 206. Judicial review of state administrative proceedings under the IDEA is less deferential than the review of other agency actions. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1992). However, “[b]ecause Congress intended states to have the primary responsibility for formulating each individual child’s education, [courts] must defer to their ‘specialized knowledge and experience’ by giving ‘due weight’ to the decisions of the states’ administrative bodies.” *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 888 (9th Cir. 2001) (quoting in part *Rowley*, 458 U.S. at 206-08).

“Due weight” means that we are “to consider the findings ‘carefully and endeavor to respond to the hearing officer’s resolution of each material issue.’” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995) (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)). When determining how much weight to give the hearing officer’s findings, we consider the thoroughness and care of the findings, *Wartenberg*, 59 F.3d at 891, and give substantial weight to the state hearing officer’s decision “when it ‘evinces his careful, impartial consideration of all the evidence and demonstrates his sensitivity to the complexity of the issues presented.’” *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996) (citation omitted). After such consideration, we are “free to accept or reject the findings in part or in whole.” *Wartenberg*, 59 F.3d at 891. When we have all the evidence regarding the disputed issues before us, we make a final judgment in what “is not a true summary judgment procedure [but] a bench trial based on a stipulated record.” *Ojai*, 4 F.3d at 1472. The party challenging the administrative decision bears the burden of persuasion on his claim. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), superseded by statute on other grounds.

II. Discussion

A. Administrative Decisions

1. 2005 Decision

The HO’s decision shows that he carefully and impartially considered all the evidence and was sensitive to the issues presented by the parties. After considering the evidence and hearing testimony, the HO produced a thorough 38-page order detailing the factual and legal bases for his decision. We accord substantial weight to the HO’s findings.²

² Plaintiffs appear to attack the HO’s decision, in part, because the hearing took place during the transition from SEHO to the OAH. They contend that R.V. was the victim of the “perfect storm” because the decision in her case was rendered during a transitional period, and few hearing officers were on staff. Plaintiffs provide no evidence that SEHO was understaffed. However, even if it were true, it is highly speculative to suggest that this HO’s decision was negatively impacted as a result. To the contrary, the detail and thoroughness of his decision suggest that considerable time, work, and thought

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The HO noted that R.V. is a HFA adolescent of average intelligence. She was placed in general education with Resource Specialist Program (“RSP”) services to improve her writing skills. She was also assigned an aide for almost an entire day, inclusion support, social skills instruction, and speech and language services. According to her teachers, R.V. made good progress during the school year. R.V.’s scores on the WJTA-III show that she was a good reader and able to work near grade level, but that she needed accommodations such as extra time and additional support in mathematics and written language. R.V. also tended to be distractible, but could be redirected. Additionally, she needed some assistance with study skills and was resistant to doing and completing her homework. The HO further noted that it is undisputed that R.V. is generally independent in self-care but lacks social skills. The parties disagreed on how to meet R.V.’s need for social skills training but they did agree that it needed to be addressed through a coordinated effort between school and home.

After considering the evidence and testimony before him, the HO concluded that R.V. had been provided with a FAPE, except that he found she was denied certain required services because the District failed to offer her goals related to her Occupational Therapy (“OT”), written language, auditory processing, and short-term memory deficits. As a result, he ordered the District to convene an IEP for the purposes of creating appropriate goals in these areas and to provide 90 minutes of OT consultation to R.V. during the 2005-06 school year.³ On all other issues, the HO found in favor of the District.

The HO held that R.V. did not require placement in a specialized environment, such as an NPS type setting. The HO noted that before he could require the type of placement requested by Plaintiffs, he would have to conclude that no appropriate public education is available. *See* Cal. Educ. Code §§ 56365 and 56505.2(b). He stated that there was no evidence to suggest that R.V. could only receive a FAPE through placement in an NPS setting. Even though the District’s placement needed to be augmented as the HO ordered, it does “not necessarily require the abandonment of District programs.” The HO also stated that he was persuaded that the District offered R.V. adequate opportunities for facilitated social interaction.

Based on our independent review of the record and the substantial weight we accord to the HO’s decision, we adopt the HO’s findings and conclude that except for the deficiencies discussed above, R.V. was provided with a FAPE during the 2004-05 school year.

2. 2006 Decision

Although the ALJ’s decision is not as long as the HO’s 2005 decision, it nevertheless reveals that she carefully, thoroughly, and impartially considered all of the evidence, and was sensitive to the

went into the decision.

³ Neither party is appealing the HO’s decision on this particular issue.

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issues presented by the parties. Therefore, we will also afford substantial weight to the ALJ's findings.⁴

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The ALJ's decision involved three issues: 1) whether the District provided R.V. with a FAPE in its June 9, 2006 IEP for the 2006-07 school year, 2) whether the placement offered by the District is the least restrictive environment, and 3) whether R.V. is entitled to compensatory educational services. The ALJ held that the District prevailed on all three issues. The ALJ found that R.V. made progress in her social skills and communications with other students, and that she benefitted from her speech and language class designed to teach her about eye contact, body posture, initiating conversations, etc. She also found that R.V. worked well with others in small group projects, as evidenced by the observations of her algebra teacher. R.V. progressed academically and a comparison of her "STAR Student Reports" for 2005 and 2006 demonstrates that R.V. made educational progress in math and English-language arts. Additionally, R.V. had a one-to-one aide who helped her both academically and socially. R.V. was also placed in two RSP classes which were smaller than her general education classes. The ALJ also concluded, based on R.V.'s testimony, that she has become more comfortable at her school. The ALJ concluded that R.V.'s placement was appropriate and that it was the least restrictive environment for her.

After reviewing the record and the according substantial weight to the ALJ's decision, we adopt the ALJ's findings in their entirety. Our review of the record shows that the ALJ's decision is supported by the evidence and hearing testimony.

B. Plaintiffs' Objections

Plaintiffs object to the HO and ALJ's decisions and argue that they were wrong in their conclusions that R.V. was provided, or substantially provided, with a FAPE. We have considered all of Plaintiffs' objections in reaching our conclusion that we accept the administrative findings. We discuss these objections below.

1. 2005 HO Decision

Plaintiffs' main contention is that R.V. needs to be in a specialized, self-contained setting similar to an NPS in order to be provided a FAPE. They argue that the HO's decision that such placement was not required is erroneous because such an environment is needed to foster R.V.'s social and emotional skills. Plaintiffs make four arguments as to why they believe the HO's decision was wrong. First, they

⁴ Plaintiffs argue that the ALJ was not impartial because she read the HO's 2005 decision. Plaintiffs allege that reading the decision "created a pre-disposition to suspect the credibility of the witnesses, especially as it related to the alleged influence of the Parents over the experts." Plaintiffs' allegation is entirely speculative, and they provide no evidence of bias by the ALJ. Additionally, a reading of the ALJ's decision shows that it was well-reasoned and gave fair and thoughtful consideration to the evidence presented at the hearing.

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argue that the HO incorrectly relied on testimony that was not competent or credible. Second, Plaintiffs argue that the HO failed to address or give weight to the testimony of their expert witnesses. Third, they argue that the District IEP members had a duty to explore appropriate placement options including a specialized, self contained setting. Lastly, in a related argument, Plaintiffs argue that the HO incorrectly concluded that R.V. does not need a contained educational setting. Although some of these arguments overlap in some areas, we will address each one in turn.

a. The HO’s Purported Reliance on Evidence that Was Not Competent or Credible

i. Gayne Nishino

Plaintiffs contend that the HO improperly relied on the testimony of Gayne Nishino (“Nishino”), a school psychologist for the District. Nishino has a master’s degree in school psychology, a credential from the state of Rhode Island, a pupil personnel services credential in school psychology, a certificate from the state of California, and 19 years of experience as a school psychologist. Nishino conducted numerous assessments of R.V. She reviewed the District’s file for R.V., spoke with R.V. and her social skills instructor, and administered questionnaires to all of RV.’s teachers. Based on her assessments, Nishino testified that R.V. was functioning in the average range of cognitive/intellectual ability. She further testified that there was not a significant impairment in R.V.’s language or the “social areas.” Additionally, Nishino’s “Psychoeducational Report” states that R.V.’s teachers “do not report significant language. . .or social impairments.”

Plaintiffs argue that Nishino’s testimony was not credible because she had only tested 3 or 4 students with HFA, and that therefore, she did not have sufficient knowledge to conduct an appropriate assessment. As a result, Plaintiffs argue that she utilized the Universal Nonverbal Intelligence Test (“UNIT test”), which was an inappropriate testing measure. Additionally, they argue that Nishino failed to speak with R.V.’s parents as part of her evaluation. Although Nishino had only conducted a few assessments on HFA students, her other qualifications discussed above are extensive. Additionally, as discussed below, Plaintiffs have failed to show that the assessments were actually administered improperly.

Plaintiffs’ specific criticisms of Nishino’s assessments – as a result of her purported lack of experience – are overstated. First, Plaintiffs state that Nishino’s testimony reveals that she was unfamiliar with the population and purpose for which the UNIT test was developed, that she was unable to articulate her understanding of the significance of the lower scores R.V. achieved on the UNIT test when it was compared to the Weschsler Intelligence Scale for Children (“WISC”), and that the HO “questioned the competence of Ms. Nishino regarding her selection of assessment instruments.” The hearing transcript does not support Plaintiffs’ characterization of Nishino’s testimony. First, the portion of the hearing testimony cited by Plaintiffs simply shows counsel asking if the UNIT test was designed to assess intelligence of individuals with speech, language or hearing impairments as well as those who are verbally uncommunicative. Nishino responded that it was intended for those populations and that it

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can also be used as an intelligence test. This does not support Plaintiffs contention that Nishino was “unfamiliar” with the population and purpose of the test. Second, Nishino testified that there was not a significant difference between the IQ score based on the UNIT test and the score on the WISC test and that there were similarities between the two results. Additionally, she stated that the difference was within the average range, which is very broad. Lastly, Plaintiffs cite an exchange between the HO and Nishino in which he asked clarifying questions regarding her use of certain tests and how they were administered. We do not view this exchange as questioning the “competence” of Nishino. Rather it was the HO’s attempt to clarify her testimony and ask questions that may not have been asked by counsel. This simply demonstrates the care and thoroughness with which the HO approached the hearing and the issues involved, and further demonstrates that substantial weight should be given to his decision.

Plaintiffs also rely on the testimony of their expert, Dr. Kaler, to argue that Nishino was not competent to testify. Plaintiffs argue that Nishino did not question R.V.’s parents during her assessment. Dr. Kaler testified that if she were performing the assessment, she would have tried to get information from many sources, and that she did not see any type of rating given to “others outside of the actual education” environment. However, as noted by the HO, Dr. Kaler did not explain why it was necessary to speak to R.V.’s parents in this case. Dr. Kaler also had other concerns about Nishino’s use of the UNIT test, such as her use of a range rather than a composite score for the test as it related to R.V.’s IQ. However, Dr. Kaler testified that she is unfamiliar with the UNIT test and has not given the test. This substantially undermines Dr. Kaler’s criticisms of the test and how it was administered. Moreover, Nishino administered the UNIT test as only one part of her overall evaluation, and it does not appear that the HO based his conclusion about R.V.’s social/emotional functioning solely on the results of the UNIT test.

ii. Dr. Kenneth Williams

Plaintiffs also argue that the HO improperly relied on the testimony of Dr. Kenneth Williams (“Dr. Williams”) from Ventura County Behavioral Health. Dr. Williams performed a mental health assessment at the request of R.V.’s parents. The purpose of the assessment was to see if R.V. needed mental health services in order to benefit from her Special Education program. Dr. Williams interviewed R.V., her mother, two of her teachers, her school counselor, her Independent Aide, and the inclusion specialist, and he observed R.V. in three of her classes. Additionally, he assessed R.V. under the Child Behavior Checklist and the Children’s Depression Inventory. Dr. Williams concluded that R.V. did not need mental health services to benefit from her Special Education program. He also stated that if there were issues related to self-esteem and secondary depression, they had no evident impact on school function. He observed R.V. and found that her behavior did not deviate significantly from the other students because she raised her hand with about the same frequency as other students, knew her way around school, and was fairly self-directed with the assistance of her aide.

It is not entirely clear what Plaintiffs are objecting to with respect to Dr. Williams’s testimony other than to assert that his assessment was limited to R.V.’s qualification for mental health services that might be necessary for her to benefit from her Special Education program. Implicit in this argument is

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the contention that Dr. Williams's testimony was not useful to the HO in making a determination regarding R.V.'s social/emotional functioning. We reject any such argument because, despite the stated purpose of Dr. Williams's assessment, he nevertheless provided testimony that is relevant to R.V.'s social/emotional functioning. As the HO noted, Dr. Williams's testimony included an evaluation of R.V. for self-esteem issues and depression secondary to social deficits. Despite the purpose of Dr. Williams's evaluation, the HO is not prohibited from relying on any aspect of his testimony that is relevant to R.V.'s social/emotional functioning. Additionally, when Dr. Williams's testimony is viewed in conjunction with Nishino's testimony and the record as a whole, there is more than sufficient evidence to support the HO's finding that there was an adequate assessment of R.V.'s social/emotional needs. Dr. Williams's testimony was simply one component of the HO's decision, and he did not rely on the testimony for any improper or irrelevant purpose.

As noted by the HO, Plaintiffs' witnesses disagreed with the District's view of how well R.V. was functioning socially and emotionally at school. He concluded that this was an insufficient basis for concluding that the assessments performed by the District were inappropriate. We find that Plaintiffs have failed to show that the District's witnesses were incompetent to testify or that the HO erred in relying on their testimony as part of his decision.

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b. The HO's Purported Failure to Address or Give Weight to Plaintiffs' Expert Witnesses

Plaintiffs contend that the opinions of R.V.'s treating doctors should be given more weight than the District's witnesses. They argue that it is inappropriate for the HO to reject a treating doctor's opinion without "specific and legitimate reasons" supported by substantial evidence in the record. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). However, the Supreme Court has expressly ruled that the so-called "treating physician rule" is expressly reserved for Social Security Administration decisions, and the Court has rejected attempts to expand the rule to other administrative contexts. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). Therefore, the HO was under no obligation to give special weight to Plaintiffs' witnesses solely because they were R.V.'s treating physicians.

Insofar as Plaintiffs may be arguing that their witnesses were *more* qualified and therefore should have been given more weight than the District's witnesses, we also find this argument unavailing. Contrary to Plaintiffs' contention, the HO's decision shows that he thoughtfully and carefully considered the testimony of Plaintiffs' experts and he explained why he rejected their testimony or why it failed to undermine the opinions of the District's witnesses. There is no question that there was disagreement between the testimony and opinions of Plaintiffs' witnesses and the District's. However, the mere fact that Plaintiffs can point to disagreement between the witnesses is insufficient to meet their burden on appeal that R.V. was denied a FAPE. Moreover, in light of the

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HO's careful consideration of all of the testimony, both positive and negative, we give substantial weight to his determinations regarding the credibility and persuasiveness of witness testimony, which may have been affected by their demeanor and manner while testifying – something that we are unable to re-assess by reviewing the transcripts. Accordingly, we conclude that the HO gave due consideration to Plaintiffs' experts.

c. The District's Obligation to Explore Appropriate Placement Options

Plaintiffs argue that the District had an obligation to consider and explore appropriate placement options for R.V., including specialized, self-contained settings alternative to the general education setting. They cite 34 C.F.R. § 300.115, which states that "each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." Plaintiffs argue, but cite no evidence, that the District did not consider alternative placement for R.V., as opposed to considering such placement and rejecting it as unnecessary.

Additionally, Plaintiffs appear to argue that the District was under the obligation to tell R.V.'s parents about every conceivable placement and service available to R.V. However, the only issue is whether or not the District provided a FAPE for R.V. in the program that was offered to her, not whether it discussed all of the District's available options with her parents. Plaintiffs cite no authority for the proposition that the District must inform them of every available service and placement within the District. Plaintiffs cite a policy letter from the Office of Special Education Programs called *Letter to New*, EHLR 211:383 (OSEP 1986). However, *even if* this policy letter were binding authority, which we doubt, it specifically states that "[d]uring the IEP meeting, school district personnel are not required to inform parents of all of the options in the continuum of alternative placements that are available for handicapped children. . . For example, it would not be necessary for school district personnel to initiate a discussion about residential placements at an IEP meeting for a hearing impaired child if the special education and related services needed to appropriately serve the child are available in the regular education setting. . ." If anything, the policy letter cited by Plaintiffs supports our conclusion that the District was not required to discuss all available programs with R.V.'s parents, so long as R.V. was provided with a FAPE.

d. The HO's Conclusion That R.V. Does Not Need a Contained Educational Setting

Plaintiffs allege that R.V. required placement in a specialized setting specifically designed to meet the needs of students with autism, in which she would be in a self-contained environment, such as an NPS or similar program. The HO concluded that there was no evidence to suggest that R.V. can only receive a FAPE through a placement at Village Glen⁵ or a similar NPS. Plaintiffs simply assert that this

⁵ Village Glen is a private school that has a small program specialized for students with Autism and Asperger's Syndrome.

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conclusion was wrong. Plaintiffs make no argument on this issue other than to repeat their previous argument that the District was required to explore alternative placement options to the general education setting.⁶

Insofar as Plaintiffs might be arguing that their experts and witnesses felt that such placement was either beneficial or necessary, we have already addressed this argument above. It is insufficient to meet their burden of showing that R.V. was denied a FAPE to simply point to the fact that there was disagreement regarding to R.V.'s performance in school. Additionally, the HO correctly noted that there is a "strong bias" in favor of educating disabled children with those who are not disabled. There is a "statutory preference for mainstreaming," and school districts are to provide a program in the "least restrictive environment" to each special education student. *Federal Way School Dist.*, 394 F.3d at 657; 34 C.F.R. §§ 300-114, *et seq.* A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate" and may be removed from the regular education environment "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 cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A) (2003). Thus, even if a student is denied a FAPE because certain services were not included in her IEP, it does not mean that the appropriate remedy is placement in an NPS type setting. So long as the general education setting can be appropriately adapted, there is a preference for students to remain in the least restrictive environment. Especially in light of this strong preference for placement in the general education setting, Plaintiffs have failed to meet their burden of showing that R.V. was denied a FAPE because she was not placed in an NPS type program.

2. 2006 ALJ Decision

Plaintiffs' arguments as to why the ALJ's decision is erroneous are similar to the arguments made against the HO's 2005 decision. Plaintiffs again argue that the ALJ incorrectly relied on testimony that was not competent or credible, that the ALJ failed to address or give weight to the testimony of their expert witnesses, and that the ALJ incorrectly concluded that R.V. does not need a contained educational setting. Plaintiffs also argue that the District's failure to consider a report by Dr. Schmidt-Lackner in making a placement recommendation denied R.V. a FAPE.

a. The ALJ's Purported Reliance on Evidence that Was Not Competent or Credible

Plaintiffs contend that the ALJ inappropriately relied on the testimony of witnesses who were not

⁶ Plaintiffs argue that unbeknownst to them, a self-contained autism-specific program existed within the District. In our November 21, 2007 Order re: Plaintiffs' Motion for an Order Permitting Supplementation of the Record, we rejected Plaintiffs' request to supplement the record with evidence about this alleged program. Although we note that the existence of this program would not change our analysis for the reasons already discussed in Section II.B.1.c, we reject Plaintiffs' improper attempt to argue evidence outside the administrative record in contravention of our Order.

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competent and credible. Specifically, they object to the ALJ's reliance on the testimony of Ms. Susan Roberts ("Roberts") and Dr. Lauren Franke ("Dr. Franke") because they lacked sufficient personal knowledge of R.V. Roberts is a Program Specialist for the District who is responsible for facilitating IEPs and supervising the delivery of IEP services. Plaintiffs fail to explain why Robert's testimony is not credible or why she lacks personal knowledge of R.V. In fact, Roberts has known R.V. for about two and a half years. She testified regarding R.V.'s IEP and her activities at school, as well as her observations of R.V. and discussions with her aides etc. It is unclear to us, and Plaintiffs fail to explain, why Roberts is incompetent to testify on this subject matter.

With respect to Dr. Franke, it is undisputed that she had never met R.V. when she gave her testimony. Plaintiffs state that Dr. Franke testified that she "was uncomfortable with testifying about a student she had never met." However, this characterization of Dr. Franke's testimony is misleading. Rather, she testified that she would not want to be placed in the position of making a recommendation about a child she has not met. At the hearing, Dr. Franke testified about her review of R.V.'s school file and also noted that some of Plaintiffs' experts failed to use "best practices" in performing their analyses of R.V.⁷ Because Dr. Franke was testifying based on a review of R.V.'s records, it is appropriate for her to comment on what the file reveals about R.V. She also stated that the data she reviewed did not support a placement in an NPS and that the District's placement was appropriate. Even if we were to determine that the ALJ should have discounted Dr. Franke's ultimate recommendation regarding R.V.'s placement because of her statement that she was uncomfortable making such a recommendation, this in no way shows that Dr. Franke was incompetent to testify as to her views on matters shown in the record, or her opinion of the propriety of the methodology used by Plaintiffs' experts as contained in the record.

b. The ALJ's Purported Failure to Address or Give Weight to Plaintiffs' Expert Witnesses

As with the HO's 2005 decision, Plaintiffs also argue that the ALJ failed to give appropriate weight to the testimony of Plaintiffs' witnesses. Specifically, they argue that the ALJ rejected the opinions of Dr. Susan Schmidt-Lackner ("Dr. Schmidt-Lackner") and Dr. Sandra Kaler ("Dr. Kaler"). Dr. Schmidt-Lackner testified that R.V. was experiencing social delays. She also felt that R.V. should be placed in a school such as Village Glen because it is a more self-contained environment and it includes social skills as part of the curriculum. She testified that R.V. is taking medication for depression and anxiety, and that the anti-depressants would mask some of her signs of depression.

Dr. Kaler also testified that R.V. was experiencing social delays and recommended a small, self-contained NPS for R.V., like Village Glen. She felt that R.V. would thrive in an environment where social skills were built into the curriculum. She stated that although R.V.'s academic delays do not meet

⁷ We also note that Plaintiffs cite Dr. Kaler's criticism of Nishino's testing methods in an attempt to undermine Nishino's conclusions. It is unclear why Plaintiffs would argue that their experts may attempt to undermine other witnesses by reviewing their reports and criticizing their methods, while simultaneously arguing that it is inappropriate or error for the District to do the same.

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CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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the “criteria of quote unquote, a learning disability,” she is concerned that in the real world she is not doing what other kids are doing and that this could have implications for her in high school and college. She did acknowledge that the District was trying to remediate this with a classroom assistant, but she stated that in her view a “classroom assistant is not a teacher.” She was also concerned that she did not observe R.V. getting preferential seating and appropriate homework modifications. Dr. Kaler testified that her recommendation that R.V. be placed in an NPS was based on R.V.’s standardized test scores and her observation of R.V. at school.

However, as discussed above in Section II.B.1.b., the “treating physician rule” does not apply to FAPE hearings, and the ALJ was under no obligation to give special weight to the testimony of Plaintiffs’ experts. *See Black & Decker*, 538 U.S. at 833. Like the HO, the ALJ nevertheless explained her reasons for according more weight to the testimony of the District’s witness, Dr. Franke. The ALJ specifically discussed the testimony of Drs. Schmidt-Lackner and Kaler, and found the District’s witness, Dr. Franke, to be more persuasive. She stated that Dr. Franke’s testimony was analytical and that Plaintiffs’ witnesses appeared to be swayed by the desire of R.V.’s parents that she be placed at Village Glen.

The ALJ also described, in detail, the testimony of Dr. Franke that led her to find it more persuasive and analytical. She noted that Dr. Franke testified that R.V.’s scores showed no symptomatology of depression and her medication was effective. Dr. Franke also criticized how the Vineland and Achenbach tests given by Dr. Kaler were administered. She noted that Dr. Kaler failed to employ the best practices of interviewing both parents and noting discrepancies between their reporting and those of R.V.’s teachers as to how R.V. adapts in school and home environments. She testified to the importance of these practices because of the nature of the test and what they were designed to measure. Dr. Franke also testified that R.V.’s behavior appeared to be different at school and at home. Her teachers and aide did not observe some of the behaviors and concerns noted by Plaintiffs’ witnesses.

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Based in part on this testimony, the ALJ concluded that an NPS was not required for R.V. A review of the testimony supports the ALJ’s decision to rely on Dr. Franke’s testimony.⁸

Our independent review of the record also shows that the testimony of Roberts casts some doubt on the opinions of Plaintiffs’ witnesses. Dr. Kaler testified that her recommendation was based in part on her observation of R.V. at school. However, Roberts testified that the day that Dr. Kaler observed

⁸ To the extent that the ALJ may have relied on any ultimate recommendation by Dr. Franke that R.V.’s placement was appropriate, we do not find that such a recommendation was necessary for the ALJ to determine that R.V. received a FAPE and that an NPS placement was not necessary. For purposes of our decision, we do not rely on any such recommendation by Dr. Franke.

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R.V. was not a typical school day. First, she noted that it was the beginning of the second semester and R.V. had mistakenly been placed in classes with unfamiliar students. However, once this was discovered, she was placed back into classes with students she knew from the first semester. She also testified that there were changes made to R.V.'s homework assignments, which was one of the areas of concern for Dr. Kaler.

As discussed below in Section II.B.2.c., a letter from Dr. Schmidt-Lackner was given to the IEP team which stated her concerns as well as described R.V.'s alleged behavior. The District investigated the letter and found that it contained factual inaccuracies about R.V.'s placement, and no one observed her engaging in these reported behaviors. We find that the weight the ALJ gave to the testimony of the hearing witnesses was appropriate. Her decision clearly shows that she carefully considered the testimony of all of the witnesses, and she discussed her basis for accepting or rejecting their testimony. Plaintiffs' showing of disagreement between the District and Plaintiffs' witnesses is insufficient to show that the ALJ erred or that Plaintiffs carried their burden of demonstrating that R.V. was denied a FAPE.

c. The District's Purported Failure to Consider the Report of Dr. Schmidt-Lackner

Plaintiffs also argue that the District failed to consider the report of Dr. Schmidt-Lackner in making a placement recommendation for R.V. in connection with the June 9, 2006 IEP meeting. Plaintiffs' "argument" on this issue consists almost entirely of a lengthy quote from the testimony of Roberts. However, the testimony cited by Plaintiffs clearly demonstrates that the District *did* consider the report of Dr. Schmidt-Lackner.

Roberts testified that the IEP team received the letter and investigated it thoroughly. They met to discuss the letter, and spoke to teachers, service providers, aides and others to determine whether or not the information in the letter regarding R.V.'s behavior that was described by Dr. Schmidt-Lackner was accurate. For example, the letter stated that R.V. engages in "ritualistic" behavior and shakes her head to get cuss words out of it. The District's investigation revealed that no one witnessed these alleged behaviors taking place. Additionally, the IEP team discussed the letter with R.V.'s parents at the IEP meeting. Although Roberts testified that they did not call Dr. Schmidt-Lackner to discuss the letter, she also testified that no such request was made by R.V.'s parents. Additionally, as noted in the ALJ's decision, Roberts also testified that the "IEP team noted that there was information in the letter that was factually incorrect about R.V.'s current placement and that there was information from a prior assessment, performed by Dr. Kaler a year earlier." Based on this testimony, the ALJ found that the district had considered the letter, but discounted it because it was not entirely factually correct and no one at the school observed R.V. engaging in the described behaviors. Based on the testimony of Roberts, Plaintiffs are incorrect that the District failed to consider the letter. They may not agree with the District's decision to discount the letter, but the testimony reveals that this decision was made after the IEP team fully considered and investigated its contents.

d. The ALJ's Conclusion That R.V. Does Not Need a Contained

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Educational Setting

As with the HO's 2005 decision, Plaintiffs again argue that R.V. was denied a FAPE because she was not placed in a specialized setting for autistic students. However, Plaintiffs simply repeat the arguments already rejected above, including the argument that the IEP team ignored the letter from Dr. Schmidt-Lackner and failed to investigate its claims.

Additionally, Plaintiffs quote testimony from R.V. in which she describes her understanding of what a friend is and states that she does not really have a friend at school. She also testified that she went to see a doctor in the fall because she is having thoughts about killing her parents, getting pregnant etc. However, other than quoting from R.V.'s testimony, Plaintiffs make no attempt to explain how this testimony leads to the conclusion that she requires placement in an NPS type program or how it is a result of improper placement in the general education setting.

Presumably Plaintiffs are arguing that R.V. requires an NPS type setting because she does not have friends or adequate socialization in her current placement. However, Roberts testified that R.V. made progress in her ability to socialize with her peers. She improved in her ability to work in small group situations and participated successfully in extracurricular activities such as drawing club and drama club. She also testified that R.V. was observed initiating conversations with her peers and eats regularly with a group of girls etc. She is also enrolled in a social skills class that meets each week. Plaintiffs' experts testified that although the school has taken many steps to help facilitate social experiences for R.V., she has not developed friendships that extend outside of school. They argue that the need for the school and R.V.'s parents to "prompt" or initiate social experiences for her does not teach her how to have a friend. Dr. Kaler testified that if R.V. were to have friends calling her at home and getting together with her over the summer it would be a "more appropriate" outcome measure to determine whether she was establishing friendships. However, Plaintiffs fail to show that R.V. has been denied a FAPE because she does not have friends that she socializes with outside of school.

Additionally, insofar as Plaintiffs may be arguing that R.V. needs an NPS type setting because she is experiencing negative thoughts or "psychosis," they have failed to show that these thoughts are caused by an inappropriate placement. Dr. Schmidt-Lackner testified that she was concerned that R.V. was progressing toward psychosis. However in her May 11, 2006 letter to the IEP team she did not use the word "psychosis" and stated instead that she was extremely high risk and was exhibiting obsessive behaviors. As noted above, Roberts testified that the IEP team found no evidence these behaviors were taking place. Dr. Schmidt-Lackner also acknowledged that she had never observed R.V. outside of her office or at school. Moreover, Dr. Kaler evaluated R.V. two months before Dr. Schmidt-Lackner and testified that at the time of the evaluation she had no reason to assume that she was psychotic and that she did not "present with psychotic processing." She later testified that R.V. was suffering from psychosis, but this opinion was based on what she was told by Dr. Schmidt-Lackner and R.V.'s mother. Even if Plaintiffs' experts concluded that R.V.'s alleged behaviors were caused by inappropriate placement and that she requires an NPS type setting, the fact that they disagree with the District's experts on this issue is insufficient to meet their burden of showing that R.V. was denied a FAPE in her

