

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

In the matter of:

SIERRA UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007080374

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Prather, California on October 23-26, 2007.

Attorney Lauri LaFoe of Lozano Smith represented the Sierra Unified School District (District). A.J. Rempel, Ph.D., District's Director of Educational Services and Special Programs, was present throughout the hearing.

Attorney Michael Kluck of Protection & Advocacy, Inc., represented Student. Also attending throughout the hearing was attorney Taymour Ravandi of Protection & Advocacy, Inc., and Student's mother (Mother).

The District called Dustine Rojas Williams (Rojas), Terry Therkildsen, Patricia Deroian, Susan Ludwig, Dr. Rempel, and Bruce Weinberger as witnesses. Student called Mother, Lynne Smithey, Richard D. Jones, M.D., John L. Grow, Jr., and Bobbie Coulbourne as witnesses.

The District filed its request for due process hearing on August 14, 2007. At the close of the hearing, the parties requested time for written arguments. Closing briefs was filed by the District on November 13, 2007, and by the Student on November 14, 2007. Rebuttal briefs were filed by the parties on November 20, 2007. The matter was submitted on November 20, 2007. The parties agreed to waive the 45 day time limit and the ALJ agreed to issue his decision no later than December 20, 2007.

ISSUE

Does the District's Individualized Education Program (IEP) offered on July 3, 2007 and August 8, 2007, which placed Student at the Beth Ramacher Center, constitute a free appropriate public education (FAPE) for the 2007-2008 school year?

CONTENTIONS OF THE PARTIES

The District contends that its July 3, 2007 and August 8, 2007 IEP offers constitute a FAPE in that Student's current placement in an Intensive Resource Specialist Program class is no longer appropriate. The District avers that the District program fails to meet Student's unique needs and that he requires the more restrictive environment of a site based program for severely handicapped students at the Beth Ramacher Center (Ramacher), which is operated by the Fresno County Office of Education. The District also contends that Ramacher constitutes the least restrictive environment for Student.

Student contends the proposed placement at Ramacher is inappropriate as he is making notable progress in his current placement at Sierra High School, that Ramacher is not the least restrictive environment as it offers no regular opportunities to have contact with non-disabled peers, and the curriculum at Ramacher fails to meet current standards. Student further contends that the procedure utilized to develop the IEP offer is flawed because the Fresno County Office of Education determines which program a referred student is placed without an IEP meeting and input from the IEP team including a student's parents.

FACTUAL FINDINGS

1. Student was born on April 10, 1991, and resides within the District with his parents and siblings. He is eligible for special education services under the categories of mental retardation, hard of hearing, orthopedic impairment, and visual impairment.

Student's unique needs

2. Student has multiple disabilities and has been diagnosed with cerebral palsy, seizure disorder, scoliosis, mild to moderate hearing loss, nearsightedness, and global development disorder resulting in significant cognitive and physical disabilities. Student is non-verbal and is learning to communicate his wants or desires. He has spastic quadriplegia, has minimal functional movement of his hands, and requires physical assistance for his basic needs including toileting and transferring in and out of his wheelchair. Student's scoliosis was treated by surgically inserting a rod to his spine.¹ He also has a mild to moderate

¹ The rod is attached by screws to his spine. Following the surgery, one of the screws has loosened in his neck which causes Student pain.

hearing loss which can be alleviated by wearing hearing aides. Student's nearsightedness impairs his vision, but it is evident that he utilizes his vision to obtain information from his surroundings. Because of the severity of his disabilities, progress for Student is agonizingly slow. Because of his physical state, Student may be inattentive and resistant at times as he may be in pain, uncomfortable or tired.

3. Student's unique needs are being able to be taught to assist in feeding himself, improving his range of motion, socially to relate to peers and the community, and to communicate his preferences and desires. Additionally, Student needs assistance in toileting and moving out of his wheelchair.

4. Student is capable of responding to others by making eye contact, occasionally smiling, making sounds, and moving one hand over the other. Student's reaction is more animated when he knows the individual.

Student's former educational placements

5. For approximately nine years prior to the 2005-2006 school year, Student attended special day classes (SDC) for students with severe disabilities on a public school campus operated by the Fresno County Office of Education (FCOE) at Liberty Elementary School in Clovis and the Auberry Elementary School, which is within the District and close to Student's home. The FCOE program included mainstreaming in music classes, lunch, recess, and assemblies. FCOE discontinued the Auberry Elementary School special day class following the 2004-2005 school year.

February 9, 2005 and June 1, 2005 IEP Meetings

6. On February 9, 2005, Student's IEP team convened its annual meeting. The IEP team noted that Student was doing "very well with all of his goals." Student's present levels of performance showed that he (1) utilized the Intellikeys program (switches) to elicit responses from items presented to him, (2) used an adaptive spoon to scoop up food and with assistance to put the food in his mouth, (3) took part in reciprocal play by batting at objects, (4) was able to sit in a cube chair for 10 minutes without a safety belt with adult supervision, (5) was able to play with toys placed in front of him and, at times, scoot himself around a mat to get the desired toy, (6) was able to be in a stander for 30-40 minutes and walk with assistance in a walker, (7) was learning to drink with a straw, (8) was beginning to reach for one of three items placed in front of him and to insist that favorite items be placed within his visual field, and (9) was beginning to communicate his wants through the use of pictures by the use of his eyes. Student participated in mainstreaming activities and regular education students often read to him in the classroom and on the playground. He appeared to enjoy circle time and story time and was wearing his hearing aid. The IEP team noted that Student needs to be mainstreamed with age appropriate regular education students, to work on communication, sensory integration and daily living skills. The IEP team reviewed placement options including FCOE programs at the Beth Ramacher Educational Complex for the severely handicapped and at Sanger High School as well as an Intensive Resource

Specialist Program (IPSP) at Sierra High School operated by the District. The team agreed that Student would complete the current school year at the Auberry SDC and that the team would re-convene to determine placement for the 2005-2006 school year.

7 On June 1, 2005, the IEP team reconvened and offered Student placement at the Sierra High School IRSP with mainstreaming because of parental concerns regarding the long bus ride to the Ramacher program in Fresno and parental desire to participate in Student's educational program. The offered placement was for the 2005-2006 school year with the intention of having Student transfer to a FCOE program the for the 2006-2007 school year.²

Sierra High School Intensive Resource Specialist Program Class

8. In August 2005, Student began attending, and still attends the IRSP class at Sierra High School taught by Terry Therkildsen.³ The class contains five to 12 pupils including one other severely handicapped student who is also confined to a wheelchair. There is one aide to assist Mr. Therkildsen plus an aide for Student and an additional aide for the other student. Student's program is designed to teach him to feed himself and communicate and does not include academic instruction.

9. Student arrives at school, after a 15-20 minute ride, at approximately 8:15 a.m. and arrives at his class at 8:25. He is taken out of his wheelchair and fed breakfast. At approximately 9:15, Student is placed in his stander or walker. During the day, aides primarily work with Student utilizing switches and picture books to teach him to communicate his choices. Occupational Therapy is done in the classroom and includes playing with squeeze toys. At times, student volunteers assist in instructing Student. Of the seven period school day, Student attends general education classes in music during the third period, jazz during the fifth period, and a sixth period ceramics class.⁴ The teacher and the aides are all trained to follow a seizure protocol drafted by the school nurse, Susan Ludwig, and approved by Student's physician.

10. Also, Student attends school assemblies, pep rallies and functions including football games, water polo matches (his brother is on the school team), and some basketball games. Student is often approached by other students who speak to him, shake his hand or pat him on the back. He responds visually and occasionally also by reaching out to the

² FCOE makes the determination of which program the student is placed without input of the parents or IEP team.

³ Mr. Therkildsen received a B.A. in 1974 from Humboldt State University. In 1991, he received a general education teaching certification from Fresno State University. In 1993, he received a B.A. in early childhood education, an RSP certificate and a Learning Handicap Credential for mild to moderate disabled from Fresno State. Mr. Therkildsen has been teaching for 12 years at Sierra High School and is the only IRSP teacher at the school.

⁴ In addition, Student eats lunch in the cafeteria three days a week. Occasionally, he will attend drama class during the sixth and seventh periods when a play is being rehearsed.

individual. At home, Student exhibits many of the skills worked on at school. Mother believes that the interaction with his non-disabled peers is of great benefit to Student.

April 3, 2006 IEP Meeting

11. On April 3, 2006, the IEP team conducted its annual meeting. Mr. Therkildsen reported that Student was working on basic semi-independent life skills activities based primarily on feeding and making choices. Student continued to work on using an adaptive spoon to feed himself with assisted support and was able to hold a sipper cup and drink from a straw. Student also worked on his object control skills including reaching, grasping, holding and pushing various balls and objects. Student's progress was frequently inconsistent depending on his level of motivation and the stimulation of his interest. He did demonstrate an ability to extend his right arm and reach, grasp, and hold small objects with tactile or auditory stimulus and verbal cues. Student did improve his utilization of switches from visual stimulus, and he made progress in computer activities using intellikeys and pictures. Student required moderate to maximum cues in using a talker with recorded messages (e.g., "Good morning, how are you?") to communicate to others. Although he made progress on his goals set forth in the prior year's IEP, he failed to meet any of his goals. The IEP team decided to continue Student's placement in the IRSP class at Sierra High School due to the parents' desire for their son to attend Sierra.

April 2007 evaluation reports and subsequent IEP meetings

12. On April 10, 2007, a multi-disciplinary evaluation report was submitted by Dustine Rojas, the school psychologist (Rojas report). Other members of the evaluation team were Melissa Ireland, the Sierra High School principal; Mr. Therkildsen; Ms. Ludwig; Lisa Martin, a speech and language pathologist; Bruce Weinberger, the Sierra High School music teacher; Camille Edinborough, Sierra High School assistant principal; and Diana Proter, a guidance counselor. The report noted that Student has "made notable growth socially, emotionally, and in practiced skills," and that he has become "more comfortable and safe in his environment." The report observed that Student (1) demonstrates increased eye contact with familiar staff members and students, (2) is able to vocalize some desires by vocalizations and movement familiar to Student's aide, (3) on occasion, has made indications of his like or dislike of musical selections in his music class, (4) is able to roll over on his own and struggle to a sitting position without assistance since March 2007, (5) is able to push off the wall while in his swing so as to initiate swinging and assists in moving from a seated position to standing in his stander, and (6) enjoys being able to self-feed and practices with appropriate utensils. Ms. Rojas recommended the appropriate placement for Student would be a site-based SDC and/or severely handicap program. But the report also recommends that "[t]o stimulate multiple senses [Student] would benefit from the presence of students without disabilities."

13. An accompanying Occupational Therapist Progress Report, prepared by Occupational Therapists John Goodfellow and Heather Cappas, concluded that Student has made "minimal functional gains" in activities of daily living and functional mobility. The

report also noted that Student requires coaxing to utilize a spoon or straw, move himself in his walker, or reach for objects.

14. Ms. Rojas is the school psychologist at Sierra High School.⁵ Ms. Rojas recommended a change in placement for Student to a FCOE run program because the severity of Student's disabilities impedes his ability to meet his IEP goals in the District's IRSP class and in the general education setting as she is not sure that District personnel fully understand Student's needs and how to meet them. Ms. Rojas observes Student monthly in the IRSP class and sees him on the Sierra High School campus two to three times per week. Ms. Rojas provided information to FCOE which decides which placement a student is assigned. This is done by FCOE without an IEP meeting or input from the parents or the referring district. Ms. Rojas admitted that she believes that Student has made notable progress at Sierra High School. She testified that at first Student was resistant to others and reluctant to interact with persons he was not familiar with, but that Student is no longer resistant and has made "notable growth socially." Although Student may not be consistent in his practiced skills, he has shown noticeable growth in this area as Student is trying to stretch what he is physically able to do. Ms. Rojas admitted that it is important for Student to be on a high school campus and have contact with typically developing peers.

15. The IEP team met again on April 27, 2007 to review the evaluation reports and recommendations. Present were Dr. Rempel, Mr. Therkildsen, Ms. Ludwig, Cecile Reynolds, Student's one-to-one aide, Mother, and Heather Cappas, Student's occupational therapist. On July 3, 2007, the IEP team met again.⁶ Present were Lisa Martin, speech and language pathologist, Mr. Therkildsen, Dr. Rempel, Ms. Rojas, Mother, and Bobbie Coulbourne, an advocate and Project Director of Exceptional Parents Unlimited. The FCOE placed Student at a site-based SDC at the Ramacher. Sharon Masee of FCOE appeared by telephone and described FCOE programs. Patricia Deroian, FCOE program manager at Ramacher, attended and described the program being proposed for Student at Ramacher. The team discussed the lack of mainstreaming opportunities at Ramacher with Ms. Deroian. Mother did not consent to the new placement and requested to further consider Student's placement for the 2007-2008 school year. The IEP document states that Student will spend zero time in general education, but it also lists Student as participating in general education by attending school rallies/assemblies, "mainstream [classes] per IEP team (music, art), lunch and school breaks." The IEP contains two goals. The first is that Student will continue to work on "SDC goals written and administered by previous program." The second is that Student will continue to participate in mainstream classes. It was agreed that Student would attend the Extended School Year program at Sierra High School.

16. On August 8, 2007, another IEP team meeting was held. Only Mother, Ms. Rojas, and Dr. Rempel attended. The IEP document noted that Student's program would be

⁵ Ms. Rojas received a B.S. in psychology from California State University, Bakersfield and an M.S. in psychology from Fresno State University. She holds credentials as a school psychologist and pupil services. She has been a school psychologist with the District for over two years.

⁶ The IEP document mistakenly lists the date of the meeting as June 3, 2007.

changed by “referral to FCOE.” Although the IEP document again states that Student would spend zero time in general education, it also again states that he would participate in general education by “attending after school rallies/assemblies, mainstream per IEP team (music, art), lunch and school breaks.” The following goals were adopted:

(A) Social integration – Student will integrate and participate in mainstream classes which the IEP team finds appropriate;

(B) DIS service and implementation – Student will participate in the DIS services listed in the IEP coordinated by the teacher and aides;

(C) Daily Care – Student will participate in daily feeding activities in the SDC room and in the school cafeteria three times per week. Student’s toileting needs will be attended in the SDC room as needed;

(D) Independent Living Skills – Student will (a) use a specially designed spoon to self-feed twice daily with five percent completion of food to his mouth with assistance, and (b) drink from a glass using a one-way straw with ten percent completion of self-initiating drinking;

(E) Audiological – Student will wear his hearing aide for 60 minutes per day in the classroom setting as measured by observation maintaining a criteria of 80 percent accuracy;

(F) Listening and Speaking – Student will communicate wants and needs with the use of an assistive device in the classroom as measured by observation maintaining a criteria of 60 percent;

(G) Listening and Speaking – Student will use eye gaze or physical movement directed to target stimulus from a field of one to two objects as measured by observation maintaining a criteria of 70 percent accuracy; and

(H) Visual – Throughout the 2007-2008 school year, using consultation and materials provided by the teacher for students with visual impairments, Student will meet his IEP goals.

The Ramacher program

17. The Ramacher campus is located in Fresno and contains 75-80 students including a class with pupils on the Autistic Spectrum and a pre-school class of typically developing children. There are eight classes containing severely handicapped students with a maximum of eight students per class. There is a registered nurse and two vocational nurses on campus to assist in the health needs of the students. A lesson plan is developed for each student weekly. Assistive technology is utilized throughout Ramacher. After arrival on campus, all students attend a morning program in the multi-purpose room where announcements and school news are read. Following the morning program, staff takes care

of the hygiene needs of the pupils. The students then proceed to their classrooms. Each classroom contains workstations where the students work on their individual goals relating to cognitive and communication skills. Approximately one hour each day, the class will go to the sensory room where students work on their motor skills and auditory, visual, olfactory and tactile senses. A speech and language pathologist is on campus one day per week. All classes eat lunch in the cafeteria.

18. There is limited, if any, contact between Ramacher students and their typically developing peers and the community. Some students, who are physically capable, are bused twice monthly to activities in the community when a wheelchair accessible bus is available. There are several campus visits and activities each year including by the police and fire departments and the Fresno Grizzlies minor league baseball team. Twice per year, students from the Pershing School, a high school level continuation school, visit the campus. Thus, Student's ability to interact with normally developed persons is limited to Ramacher staff.

Opinion of Student's expert

19. Student's expert, Lynn A. Smithey,⁷ conducted an independent evaluation regarding the appropriate placement for Student. Ms. Smithey observed the Ramacher program and interviewed Ms. Deroian and other Ramacher staff on September 27, 2007. On September 28, 2007, Ms. Smithey observed Student at Sierra High School and interviewed Sierra staff. Ms. Smithey opines that the Ramacher program is not appropriate for Student because he would have little or no contact with non-disabled peers, Ramacher is far from his community, and the Ramacher curriculum is outdated and inappropriate. Ms. Smithey believes that should Student be placed at Ramacher, the result would be that Student would likely regress in his skills. Ms. Smithey made the following observations:

(A) It is widely agreed in special education and supported by the literature and research that it is vitally important for individuals with moderate/severe disabilities to participate in an environment with non-disabled peers who provide role models, communication partners, and acquaintances.⁸ Because there would be no chance for Student to have contact with non-disabled peers at Ramacher and the suggested classes for Student contain non-verbal students, Student's social integration goals could not be addressed.

⁷ Ms. Smithey received a B.A. in Biology from Carleton College and an M.A. in early childhood special education from the Teachers College at Columbia University. She holds teaching credentials from New York in elementary education and special education, and in California for multiple subjects, learning handicap and severely handicapped. She had been a teacher and administrator in special education from 1977 through 2000. Since 1985, Ms. Smithey has taught courses in special education at several colleges in southern California. Since 2000, she has been a consultant in special education with an emphasis on students with severe disabilities.

⁸ In her written report, Ms. Smithey cites eight sources of literature.

(B) Based on her observations at Ramacher and staff interviews, Ms. Smithey testified that the time of actual instruction was low. Students spend much of their time alone and not engaging in meaningful activity especially since staff is constantly meeting the physical and health needs of the students.

(C) The Ramacher curriculum does not meet current standards for moderate/severe disabled students as discussed in recent literature which emphasizes the teaching of functional skills integrated with non-disabled persons in a natural environment such as a general education or community setting.⁹ The Ramacher program focuses on sensory simulation in an isolated context.

(D) Based on her observation, staff and parent interviews and review of District records, Ms. Smithey concluded that Student was making progress on his goals and was benefiting from the District program and would continue to make notable progress at Sierra High School, which was the appropriate placement for Student.

Ms. Smithey was qualified to offer her opinion and her testimony was clear and unrefuted.

Whether the IEP provides FAPE

Procedural Violations

20. In analyzing whether a FAPE was offered to a student, a two-prong approach is utilized. The first prong is to determine whether or not the district complied with the procedures set forth in the federal Individuals with Disabilities Act (IDEA). A procedural violation constitutes a denial of a FAPE where the violation (a) impedes the child's right to a FAPE; (b) significantly impeded the student's parents' opportunity to participate in the decision making process regarding the provision of a FAPE; or (c) caused a deprivation of educational benefits. Central among the procedural safeguards is the process of developing the IEP.

21. When a student is referred to FCOE for services by a district, there is a three step process to determine the individual's placement. First, the written referral package is directed to Pupil Personnel and the Director to determine whether the student is eligible to receive FCOE services. Secondly, Health Services reviews the referral, and then, the referral goes to the Director of Special Education to determine which actual program the student is placed in. Because, the actual selection of placement is done outside the IEP process, Student's parents had no opportunity to participate in the decision making process regarding placement. Thus, Student has been denied a FAPE.

⁹ Ms. Smithey cites three sources in her written report.

Substantive FAPE

22. For an IEP to constitute a FAPE, it must (1) be designed to meet the unique needs of the student, (2) be reasonably calculated to provide the student with some educational benefit, (3) comport with the student's IEP, and (4) the district is required to provide a program in the least restrictive environment (LRE). A special education student should be educated with nondisabled peers to the maximum extent, and may be removed from the regular education environment only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be accomplished satisfactorily. The IEP is to be viewed based on what was objectively reasonable at the time the IEP was drafted and not in hindsight.

23. In order to meet Student's unique needs, it is necessary that he participate in general education by attending school functions, appropriate classes, lunch and school breaks. Ms. Rojas, the Rojas report multi-disciplinary team, Student's IEP team, Mother and Ms. Smithey have all concluded that this component of the IEP is essential to Student continuing to make progress on his goals. The placement at Ramacher, which does not include any opportunity for Student to maintain regular contact with his non-disabled peers, does not comport with Student's IEP and fails to provide him a FAPE.

Least Restrictive Environment

24. When determining whether a placement is the LRE, four factors must be evaluated and balanced: (1) the educational benefits of the proposed placement; (2) the non-academic benefits of such placement; (3) the effect of the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. However the preference for "mainstreaming" (i.e., educating the handicapped child alongside non-handicapped children in a regular educational environment) is not an absolute commandment. In some cases, such as where a child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In this situation, continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment.

25. Ramacher and the Sierra High School IRSP class offer similar services. The difference between the two placements is Student's opportunities to interact and have contact with non-disabled peers. At Ramacher, there would be little, if any, such opportunities. At Sierra, Student spends two to three of the seven class periods each day in a general education class, eats lunch and takes breaks with his non-disabled peers, attends various school functions, and has student volunteers assisting his aides. The IEP team, the multi-disciplinary team, Mother and Ms. Smithey all agree that it is necessary for Student to have regular contact with his non-disabled peers to meet his social interaction and other goals. Non-disabled peers are role models and it is vital that Student learn to communicate with others in his community. Student has made "notable progress" in communicating with others and in feeding himself. Non-disabled students have accepted Student who is now part of the

community. Thus, Student has benefited from his current placement. Without such contact, Student may not progress and may regress as predicted by Ms. Smithey.

26. Student's presence in the IRSP class has been a distraction to the other students when he is in his swing, using his computer, receiving verbal cues from his aides, and when he requires toileting. Toileting for Student and the other severely handicap student is done in a small adjoining room where a large table is situated. This room is used as an office by Mr. Thredkilsen and as a testing room. When the room is needed for Student's toileting, this can be disruptive. On the other hand, the presence of Student and the other severely handicapped student has been of great benefit to other students who have learned to accept those with severe handicaps.

Ms. Smithey suggests that these problems could be easily overcome by turning a near-by handicap bathroom into a changing room and placing Student's swing there.¹⁰ By coordinating schedules, Student could be in a general education class or other activity when the IRSP teacher conducts lessons which may be disrupted by Student's activities.

27. The District estimates that the cost for educating Student, should he continue at Sierra High School, exceeds \$100,000. Dr. Rempel believes that it would be necessary to hire a special education teacher with a moderate-severe credential to effectively work with Student because of Student's needs and to offer relief to the current teacher who is over stressed.¹¹ Dr. Rempel estimates that the cost to hire an additional teacher, including benefits to be approximately \$78 thousand. The cost of Student's one-to-one aide is approximately \$22 thousand. The cost to rent a school bus from a neighboring district plus the driver's salary equals \$30 thousand. The cost of Occupational Therapy and Speech and Language services total approximately \$2 thousand. The District's cost to have Student attend the FCOE program totals approximately \$13 thousand.¹² The entire District budget totals \$21 million.¹³

Of the District's 3,000 students, 15 to 20 are in the moderate to severe category. Seven of these students are being serviced outside of the District. The District does not have a special education teacher who holds a moderate-severe credential. With the number of such students, the District does require a special education teacher credentialed in moderate-severe. Thus, the cost to educate Student is far less than the District's estimate.

¹⁰ There are male and female handicap bathrooms within 60 feet of the IRSP classroom. Ms. Smithey proposed that one of the bathrooms be converted to a unisex handicap bathroom and the other utilized for the two severely handicapped students.

¹¹ Mr. Thredkilsen has done an exceptional job for Student.

¹² The District would tender its revenue limit of \$7,738 plus transportation fee of \$5,150.

¹³ The District did apply to the Fresno County Special Education Local Plan Area (SELPA) for funding in May 2005 to start a moderate-severe program for the middle school/high school level. The SELPA denied the request.

28. The bus ride for Student to Ramacher would be approximately 45 to 50 minutes plus the 10 minutes required to place Student into the bus. This is opposed to the 17 minute bus ride he now has to Sierra High School for a total of 27 minutes. Dr. Richard D. Jones, Student's physician, opined that the longest bus ride that Student could safely tolerate was 20 to 30 minutes because of his scoliosis and the surgically installed spinal rod. Dr. Jones says that Student can not stay in one position for more than 20 minutes comfortably. Because he will be in one position for considerably longer, this will cause fatigue and stress which leads to an increased risk of seizure. In the 2005-2006 and 2006-2007 school years, Student had two seizures and one suspected seizure, all which occurred during bus rides.

29. Student's proposed placement at Ramacher is not the least restrictive environment as he will have no contact with non-disabled peers, be unable to complete his IEP goals (specifically in social integration), and pose a threat to his health because of the increased likelihood of seizures while any disruptions to the IRSP class can be managed by taking modest measures. The benefits to Student from the current placement far out weigh the costs to the District. Thus, the offer of placement at Ramacher does not constitute the least restrictive environment for Student.

LEGAL CONCLUSIONS

1. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S. Ct. 528, 163 L.Ed.2d 387].) Accordingly, the District has the burden of proof as to all issues.

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, a child with a disability has the right to a FAPE. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) FAPE means special education and related services that are available to the student at no charge to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9).) "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. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) California's definition of special education includes both specially designed instruction to meet the unique needs of the student with exceptional needs and related services to enable a student to benefit from such specially designed instruction. (Ed. Code, § 56363.) "Related services" or "designated instruction and services" (DIS) means transportation and other developmental, corrective and support services, such as speech language pathology, as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*) the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a

student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 201.) The Court stated school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Ibid.*)

4. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.)

5. The Supreme Court established a two-prong analysis to determine whether a FAPE was provided to a student. (*Rowley, supra*, 458 U.S. at p. 200.) First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. The second prong of the *Rowley* test requires the court to assess whether the IEP was designed to meet the child's unique needs, reasonably calculated to enable the child to receive an educational benefit, and comported with the child's IEP. (*Capistrano Unified School District v. Wartenburg* (9th Cir. 1995) 59 F.3d 884, 893, citing *Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) The term "unique educational needs" is to be broadly construed to include the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No.1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

Procedural Violations

6. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation does not constitute a denial of a FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE; or (c) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(E)(i) and (ii).); (See also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).) "Central among the safeguards is the process of developing an 'individualized education program.'" (*Target Range, supra*, 960 F.2d at 1481); (See also *Rowley, supra*, 458 U.S. at 181.)

7. Based on Factual Findings 1, 6, 7, 12, 13, 14, 15, 20 and 21 and Legal Conclusions 1, 2, 4, 5 and 6, there was a denial of a FAPE because the decision of which program to place Student was not made as part of the IEP process since FCOE unilaterally determined Student's placement at Ramacher. Thus, Student's parents' opportunity to participate in the decision making process of the IEP was significantly impeded since placement is as important to a FAPE as is the setting of goals and determining services.

Substantive FAPE

8. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program and not on the family's preferred alternative. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). The *Rowley* court determined that a student's IEP must be designed (1) to meet the unique needs of the student, (2) be reasonably calculated to provide the student with some educational benefit, and (3) comport with the student's IEP. (*Rowley, supra*, 458 U.S. at p. 198-200.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if the child's parents preferred another program and even if her parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

9 The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot be "judged exclusively in hindsight...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." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

10. Based on Factual Findings 1, 2, 3, 4, 6, 9, 10, 12, 14, 15, 16, 17, 18, and 19, and Legal Conclusions 1, 2, 3, 4, 5, 8, and 9, the District denied Student a FAPE because the District's offer of placement at Ramacher does not comport with his IEP and fails to meet his unique needs as the offered placement fails to provide opportunity for Student to have regular contact with his non-disabled peers.

Least Restrictive Environment

11. In addition, federal and state law requires school districts to provide a program in the "least restrictive environment" (LRE) to each special education student. (See 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 and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) A placement must foster maximum interaction between disabled students and their nondisabled

peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates a “strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also 20 U.S.C. § 1412 (a)(5)(A); *Rowley*, *supra*, 458 U.S. at p. 181, fn. 4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)

12. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the LRE for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley*, *supra*, 458 U.S. at p. 197.)

13. Based on Factual Findings 1 through 19 and 22 through 29, and Legal Conclusions 1, 2, 3, 4, 5, 11 and 12, the District denied Student a FAPE as Ramacher is not the LRE as Student would have no contact with non-disabled peers, be unable to complete his social integration goal of his IEP, and the long bus ride poses a threat to his health.

ORDER

1. The District’s request for relief is denied.
2. Within 30 days of this Decision, the District shall convene an IEP meeting to make an appropriate offer of placement consistent with this Decision.

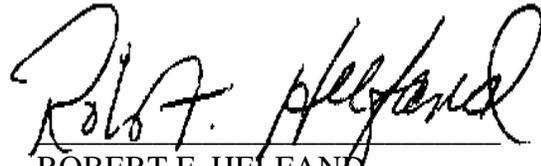
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student was the prevailing party.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: December 14, 2007

A handwritten signature in black ink, appearing to read "Robt. F. Helfand", written over a horizontal line.

ROBERT F. HELFAND
Administrative Law Judge
Office of Administrative Hearings
Special Education Division