

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Parent(s), on behalf of STUDENT,

v.

SWEETWATER UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2008100721

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 13-15, 2009, in Chula Vista, California.

Student, in pro se, was represented at the hearing by her parent (Mother). Student was present on the first day of hearing for most of the day. A family friend was present on the first and third day of hearing and Student's father was present on the second and third day of the hearing.

Sweetwater Union High School District (District) was represented at the hearing by Justin Shinnefield, Esq. Ron Lopez, Director of Student Services for District attended the hearing all day on January 13 and 14 and part of the day on January 15, 2009. Rienzi Haytasingh, Ph.D., District School Psychologist, attended the hearing for part of the day on January 15, 2009.

Student filed a Due Process Hearing request (Complaint) on October 22, 2008. Continuances were granted for good cause on December 1, 2008, January 6, 2009, and January 12, 2009. The parties provided written closing arguments on January 23, 2009, at which time the record was closed and the matter was submitted.

ISSUE¹

Did District deny Student a free appropriate public education (FAPE) in the 2008-2009 school year, by failing to offer and to provide an appropriate classroom placement that meets Student's unique educational needs?

REQUESTED RESOLUTION

Student requests an order requiring District to place Student in an appropriate classroom, similar to the classroom in which she was placed in the ninth grade, designed to meet her unique educational needs for the 2008-2009 school year.

FACTUAL FINDINGS

Background

1. Student was 16 years of age at the time of the due process hearing. She lives with her parents in the jurisdictional boundaries of the District. She is eligible for special education services as a student with an orthopedic impairment (OI) due to Rett syndrome.² Student is in the eleventh grade at Eastlake High School (Eastlake) and is enrolled in the moderate to severe special day class where she is one of approximately seven students.

2. Student was diagnosed with Rett syndrome (Rett) in approximately 2001. She has a significant cognitive impairment. She requires the assistance of a licensed vocational nurse (LVN) and a healthcare assistant for her hygiene and feeding needs. She uses a specially outfitted wheelchair. She has difficulty swallowing and is fed through a

¹ On November 6, 2008, District filed a Notice of Insufficiency and Motion to Dismiss Student's Complaint. On November 13, 2008 OAH issued an Order Denying the Motion to Dismiss and an Order of Partial Insufficiency, which granted Student leave to amend the complaint. Student failed to timely amend the Complaint, and the case went forward on the remaining issue set forth below.

² Rett syndrome is a severe genetic disorder that affects the way the brain develops. Occurring almost exclusively in girls, Rett Syndrome produces symptoms similar to those of autism. Most babies with Rett syndrome develop normally at first, but their progress often slows by the time they reach 18 months of age. Over time, children with Rett syndrome have increasing problems with motor function that may affect their ability to use their hands, speak, walk, chew, and breathe. No cure exists for Rett syndrome. Rett syndrome is commonly divided into four stages. Stages one and two occur in young children between the ages of six months to four years of age. Stage three is a plateau that usually begins between the ages of two and 10 years of age and some remain at this stage for the rest of their lives. It is marked by improvement in alertness, attention span and nonverbal communication skills. Stage four is marked by reduced mobility, muscle weakness, and scoliosis.

Most cases of Rett syndrome are caused by mutations in the MECP2 gene, which is involved in the production of a protein that is essential for normal brain development. The MECP2 gene is situated on the X chromosome- one of two chromosomes that determines a person's sex. Excerpts from the *Mayo Foundation for Medical Education and Research (MFMER)*, © 1998-2008, <http://www.mayoclinic.com/health/rett-syndrome/DS00716>.

Gastronomy Tube (G-Tube).³ She has a seizure disorder and suffers seizures on a daily basis. The seizures are controlled with a vagal nerve stimulator implant (VNS) and Felbatol, an anti-seizure medication. Student's medications also include Glycolax, Lemectal, Diazepam and Robinal. Student is non-verbal and communicates by using eye gaze and augmentative communication devices, primarily the Vanguard.⁴ She also requires hand-over-hand assistance to write.

3. Student entered Eastlake in July 2006 in the ninth grade. Eastlake is a year-round school, whose school year begins in July. A transitional IEP team meeting was held at which Student's needs were identified. Student was the only known child in the District with a diagnosis of Rett. Parents expressed their concerns about the type of classroom environment that would best meet Student's needs, specifically in the area of communication and sensory integration. Parents emphasized Student's need for use of augmentative communication devices (ACC) and assistive technology (AT).

4. Dr. Angela Hawkins (Dr. Hawkins), Interim Director of Special Services for District, worked with Parents in an exhaustive search for an appropriate placement for Student. Dr. Hawkins has more than 45 years in the field of special education. She has both a B.A. degree and an M.A. degree in education, seven teaching credentials, and a Ph.D. degree in educational administration. She is retired from District and is currently a certified co-adjunct professor at National University. According to Dr. Hawkins, District explored options of placing Student in a NPS, other specialized schools, as well as home instruction. District observed various special classes in a number of District schools. At the time Student transitioned to Eastlake there were two moderate to severe special day classes with two teachers. One of the classes was a transition class for students 18-21 years of age and was inappropriate for a ninth grader. The other class was not equipped, in her opinion, to provide for Student's needs. Dr. Hawkins determined that there was no appropriate classroom environment in the District at the time that could meet Student's educational needs.

The November 1, 2006 IEP

5. District convened an IEP team meeting on November 1, 2006. The purpose of the IEP was to conduct an annual review of Student's program. The meeting was attended by Parent and Student; Ms. Santos; Ms. Amalfitano; Dr. Rienzi Haytasingh (Dr. Haytasingh), school psychologist; RoseAnne Stevens (Ms. Stevens), speech-language pathologist; Jodie Hulden (Ms. Hulden), assistive technology specialist; Roxanne Husson, physical therapist; as

³ Gastronomy is a surgical opening into the stomach through the surface of the abdomen. A plastic device (gastronomy button) is inserted into the opening and remains in place at all times, and is capped by a safety plug between feedings. Gastronomy tube feeding is used for persons who cannot be fed by mouth.

⁴ The Vanguard is a picture communication device contained within a computer frame with picture icons from which to select. The user has a tracker which enables the user to point to an icon to communicate the user's needs.

well as a general education teacher, APE teacher, music therapist, and occupational therapist. The IEP team discussed Student's needs and present levels of performance in the areas of self-help, gross-motor, fine-motor, and oral motor skills, recreation and leisure, expressive language, sensory processing, weight bearing, mainstreaming, sitting balance, and computer access. The IEP noted that Student could ride a specialized bike, and used a gait trainer with assistance. She used a prone stander, could bear weight when in a standing position, and could ring sit and ambulate with moderate to full assistance three-to-five feet at a time. Student was also able to grasp finger foods, grasp a spoon, and hold onto a cup with moderate to full assistance. The IEP team discussed progress on some of Student's goals, but no specific information was provided in the IEP document. The IEP team discussed progress on some of Student's goals. Mother was particularly concerned about Student's development in the use of the Vanguard as it required use of Student's motor skills for head tracking, hand control to touch the screen, and picture icons. Mother expressed the desire to the IEP team to see Student initiate communication without hand-over-hand prompting by an aide. The IEP team established annual goals for the then-current school year. The IEP noted that Student required direct one-to-one instruction or a small group setting. The IEP team agreed that because of Student's multiple needs it would be appropriate to establish a classroom to accommodate her and three to five other children with similar needs as they enrolled in the District.

6. The November 1, 2006 IEP offer included: (1) placement in a special education class for specialized academic instruction 57 percent of the day, and mainstreaming in the general education environment 43 percent of the day, which included art and music classes; (2) OT direct services three times per month, 30 minutes per session; (3) APE five times per week, 60 minutes per session; (4) Language and Speech (LAS) three times per month, 30 minutes per session in classroom and once per month in office; (4) Physical therapy (PT) one or more times weekly, 30 minutes per session; (5) AT devices including the Vanguard communication device, once per month direct instruction with Student, once per month parent consult, and once per month collaboration with Parent, OT and LAS, 30 minutes per session; (6) Transportation; and (7) other unspecified services, one or more times per month. Mother consented to the IEP.

7. Dr. Hawkins recruited Ms. Rosanna Santos (Ms. Santos) to teach the specially designed class. Ms. Santos was employed by District since 1995 as a health care assistant with nursing credentials and worked as a one-to-one licensed vocational nurse (LVN). She became a credentialed special education teacher with District in 2004. Ms. Santos had credentials that qualified her to teach moderate to severely disabled students, including those requiring the use of ACC and AT devices. Once she accepted the position, Santos attended transition IEP team meetings concerning Student. She learned that Student required visual cues and sensory input as part of her program. She also prepared by reviewing literature on Rett and attended a conference on Rett. She used strategies from the conference to develop teaching methods to teach Student. Ms. Santos has been Student's teacher since the ninth grade.

8. District assigned Barbara Amalfitano, LVN (Ms. Amalfitano) to provide for Student's hygiene and feeding needs. Ms. Amalfitano has 16 years experience as an LVN providing nursing, hygiene and feeding assistance to moderate to severely disabled special education students. She also attended the conference on Rett to gain an understanding of the disorder and to better provide for Student's health and medical needs in the classroom. Ms. Amalfitano provided one-to-one assistance to Student along with Ms. Santos. She has been Student's primary health aide since the ninth grade.

Placement in the 2006-2007 and 2007-2008 School Years

9. District created a ninth grade class at Eastlake, specially designed for children with sensory integration and communication needs like Student. Student's classroom was located in a converted storage room on Eastlake's campus.⁵ The room measured fourteen feet, six inches by nine feet, five inches. The room was windowless. The room was in a shared facility with a larger moderate to severe SDC. The student-to-adult ratio was 1:2. Ms. Santos worked with Student on functional math and reading skills. There were no other students in the class with whom Student could communicate or socialize. On occasion Ms. Santos invited other students in class for special projects. Student's time outside the special classroom was spent in general education art, dance and music. Student also went on outings. Student also became involved in the cheerleading squad and a school club called best buddies. Ms. Santos and Ms. Amalfitano observed that, while Student was mainstreamed and involved in activities outside the classroom setting at lunch and break time, she did not form relationships with able-bodied peers. Her contact with other special education students was limited and social interaction in the general education classes was minimal. Ms. Amalfitano estimated that even with mainstreaming as a substantial part of her program, Student spent more than 50 percent of her time on campus isolated from meaningful interaction with other students. Student also received direct related services in LAS, AT, OT and PT in the classroom.

10. RoseAnne Stevens (Ms. Stevens) has seven years of experience as a speech therapist. She has been Student's speech therapist since ninth grade. She believed the one-to-one classroom was too restrictive for Student and did not facilitate her development in communication. Jodie Hulden, District AT, provided AT services to Student since ninth grade. Ms. Hulden also believed that the classroom was too restrictive for Student and did not allow Student's development in the use of her AT communication device through

⁵ On the last day of hearing the ALJ ordered additional evidence of the physical description of the prior and present classroom placement offered by District pursuant to Education Code section 56505.1, subdivision (d), which provides that a hearing officer may call a witness to testify at the hearing if all parties to the hearing consent to the witness giving testimony or the hearing is continued for at least five days after the witness is identified and before the witness testifies. Testimony was offered at the hearing by school psychologist, Dr. Haytasingh regarding the classroom measurements and classroom layout. Student cross-examined Dr. Haytasingh on this issue. The ALJ ordered a diagram prepared by a District custodian and supported by declaration to be entered into evidence. Student subsequently filed her own diagram. District filed a Motion to Strike Student's Diagram. Student was not ordered to file a diagram and did not request leave to file. Accordingly, Student's diagram is stricken.

interaction with, and modeling by, other similarly situated students requiring the use of AT devices.

11. During Student's freshman year, both Ms. Santos and Ms. Amalfitano spoke to Dr. Haytasingh about Student's placement. They expressed their concern that the one-to-one placement was too restrictive for Student. Student needed to be in a more stimulating environment with other peers for purposes of social interaction, her social/emotional development, and for modeling by other peers.

12. Dr. Haytasingh has been employed as District's school psychologist since January 2006. He has a B.A. degree and M.A. degree in psychology and child development. He received his Ph.D. degree in psychology and a post doctoral certificate in neuro psychology. He has worked seven and one-half years as a school psychologist and has been assigned to Eastlake since 2006. Dr. Haytasingh initially observed Student's ninth grade class in the fall of 2006. He saw less of her during that year because of the location of her classroom. In the fall of 2006 he had a discussion with Ms. Santos and Ms. Amalfitano that caused him to be concerned. They described Student's classroom as a "closet" that was not conducive to a stimulating teaching environment. Dr. Haytasingh began to closely observe Student in various settings on campus, and in her mainstreaming opportunities and extra curricular activities. He talked to Ms. Santos about alternative classroom settings in which Student's needs could be met. He also talked to her service providers to gain more detailed knowledge of her unique educational needs.

13. By the spring of the 2006-2007 school year, based upon his observations and input from teachers and service providers, Dr. Haytasingh concluded the one-to-one classroom placement was too restrictive and inappropriate for Student. Dr. Haytasingh viewed Student's ninth grade placement as a limited classroom environment with one student, and one-to-one academic instruction supported by a health aide. The room was separated from the moderate to severe SDC by double doors. Student was isolated from regularly interacting with the special education students. During mainstreaming in the general education classes Student's interaction with able-bodied peers was generally limited. The teacher's lounge was located nearby. There was no opportunity for regular peer interaction or external stimuli in the classroom except on occasion for special projects.

14. An amendment IEP meeting was held on April 18, 2007 to conduct Student's triennial evaluation. The IEP team discussed Student's progress toward goals; evaluated Student's related services and made modifications to Student's general education classes and her services in the areas of PT, OT and AT. The IEP team discussed Student's progress in the use of her Vanguard. Ms. Hulden outlined her efforts in teaching Student how to "head track" which would allow her to benefit from the use of the Vanguard communication device. The team also discussed District's concerns about the restrictiveness of Student's ninth grade placement.

15. District convened an annual review IEP team meeting on November 14, 2007. The meeting was attended by Mother; Ms. Amalfitano; Ms. Santos; Dr. Haytasingh; Ms.

Stevens; Ms. Hulden; Ms. Husson; as well as an APE teacher, music therapist, and occupational therapist. The IEP noted Student made limited progress in her communication goals, partial progress toward goals in the areas of self help, sensory processing, some progress in the areas of sitting balance, and minimal progress toward goals in weight bearing and transferring, and gross motor skills. The prior year's IEP goals in all areas and in particular, OT, were carried over to the 2007-2008 school year.

16. The IEP offer included placement in the tenth grade moderate to severe special day class (SDC), with 43 percent of the time in special academic instruction and 57 percent mainstreaming in general education art and music class. Parent agreed with the IEP goals and services and disagreed with the placement offer. However, Parent did not consent to the implementation of the goals or provision of services until February 14, 2008, which delayed provision of some services to Student by several months.

17. The tenth grade moderate to severe SDC for the 2007-2008 school year was taught by Ms. Santos in a larger classroom setting. The class was expanded to include other moderate to severely disabled children, in addition to Student. There were approximately nine children with various disabilities ranging from autism, mental retardation to learning disabled. The increased numbers of children in the class did not impede the implementation of Student's IEP goals.

18. An undated progress report from the 2007-2008 school year showed that Student's progress toward goals was inconsistent. Student did not achieve the PT goals and she exhibited some deterioration in her motor abilities. Ms. Santos as well as Ms. Amalfitano, Ms. Stevens and Ms. Hulden attributed the inconsistencies in Student's declining performance toward OT, AT, and PT goals to stage four Rett. No expert opinion exists in the record as to the medical causes, if any, of Student's declining performance. However, the evidence did establish that whatever the reason, Student's declining motor movement impeded her ability to perform some of her OT, AT, and PT goals. For example, Ms. Stevens reported that Student's limited motor movement impacted her ability to use the Vanguard by "head tracking."

Placement in the 2008-2009 school year

19. Student entered the eleventh grade moderate to severe SDC in July, 2008. Ms. Santos taught the class. There were seven children in class. Three children, including Student, required the use of communication devices, one used an AT device using picture symbols (Student). Two of the children required one-to-one assistance, one of whom was Student, who also required hygiene care. Each of the non-verbal children required assistance with AT devices, verbal prompts, visual cues, and longer response times. Four of the children were verbal. Three of verbal children had expressive language delays. The class was staffed by Ms. Santos, Ms. Amalfitano, and an additional health aide who assisted Ms. Amalfitano with lifting Student during hygiene breaks, and recording data. Ms. Santos had two additional aides who did no lifting. As with the tenth grade class, the children possessed higher cognitive levels than Student. The classroom curriculum was unique to each child

and based upon their IEP goals. Ms. Santos taught functional skills in mathematics and reading. Ms. Santos taught math money skills to the class including Student. Ms. Santos believed Student would benefit from the ability to identify money. The skills would also enable Student to follow a schedule. There is no evidence that the functional math skills instruction was not appropriate for Student.

20. Except for Student, the children in the class were generally higher functioning, which did not interfere with their desire to interact with Student. Student was the only girl in the class. Ms. Santos and Ms. Amalfitano indicated that Student's presence in the classroom had a strongly positive affect on the teacher, the aides and the children. For example, Ms. Santos and Ms. Amalfitano indicated Student has large expressive eyes. She often used eye gaze to communicate with class staff and the children. Ms. Amalfitano indicated that the verbal children "adored" Student and reached out to help her whenever she appeared to be in distress, was experiencing a seizure, or otherwise needed assistance. The verbal children sometimes made inappropriate comments or outbursts in class. Ms. Santos indicated that kind of classroom chatter was not unusual, nor did the verbalizations impede Student's progress. Ms. Santos, Student's aides, and service providers all agreed that Student was positively stimulated by the classroom environment.

21. Dr. Haytasingh observed Student's classroom and campus activities between the 2006-2007 school year to the current school year at least once weekly. He described the eleventh grade classroom as a large room approximately 29 feet, two inches by 26 feet, ten inches with an attached sensory room. The classroom had windows and the walls were covered with colorful art work, icons and other materials. There were desks and computers arranged around the room. The classroom environment was highly stimulating. Student spent 43 percent of her day in the classroom and 57 percent of her day in general education art, music and dance. Based upon his observations, and input from District staff, Dr. Haytasingh concluded that Student has derived both academic and non-academic benefit from her current placement and she has made substantial progress toward goals. In his opinion the eleventh grade moderate to severe SDC is an appropriate placement for Student.

22. At hearing, Mother expressed disagreement with the current placement on several grounds. Parents believed the ninth grade class was the least restrictive environment because it was based solely upon Student's individualized needs. Mother believed the one-to-one instruction with support services, free from distraction and over stimulation, enabled Student to substantially achieve her goals. Since removing Student from one-to-one instruction Student has failed to meet her goals in a number of areas. Parent believes the current placement is inappropriate because the classroom environment is too stimulating, Student has lost ground on goals she had once achieved in the ninth grade, and she now requires additional aide support in the classroom. Mother attributed these losses to Student's placement in a less restrictive environment. Mother admitted she has visited the current placement approximately four times during this school year.

23 Although Mother's beliefs were sincere, they were not persuasive when compared to the testimony of Student's teacher, aides and service providers who are with

Student on a daily or frequent basis. Contrary to Mother's beliefs, the District's personnel persuasively testified that Student is more alert and responsive in the current classroom environment.

LEGAL CONCLUSIONS

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

2. Student contends that the District denied her a FAPE by failing to offer an appropriate placement for the 2008-2009 school year. Student asserts that District's current offer of placement in the eleventh grade moderate to severe SDC, is inappropriate for Student and is not based on Student's unique individual needs or IEP. In particular, Student contends that: the stimuli within the classroom are too intrusive to Student's learning needs and confusing to Student; the children in the classroom are much higher-functioning than Student; the curriculum does not motivate Student to learn; and Student's health aide support has increased, which deprives her of independence. According to Student, the placement is the reason she has failed to meet a number of her goals and has deprived her of educational benefit. Student further contends that her freshman year placement was appropriate due to the one-to-one specialized instruction based upon her educational needs, which was free of distraction by able-bodied peers and which allowed Student to make substantial progress toward IEP goals. According to Student, she has regressed without placement in a small controlled setting with more structure, routine, appropriate expectations, and consistency. District contends that Student made substantial progress toward IEP goals and any failure to achieve IEP goals was due to deterioration of Student's motor skills, not a change in placement. Finally, District asserts that the offered placement is appropriate and in the least restrictive environment.

3. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*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. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with

meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, at p. 200.) School districts are required to 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. (*Rowley, supra*, at p. 201.)

5. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

7. A special education student must be educated with nondisabled peers “to the maximum extent appropriate,” and may be removed from the general education environment only when the nature or severity of the student’s disabilities is such that education in general education classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) “the educational benefits of placement full-time in a regular class”; 2) “the non-academic benefits of such placement”; 3) the effect [the student] had on the teacher and children in the regular class”; and 4) “the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is

not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. Indeed, the continuum of program options ranges from the least restrictive to the most restrictive, from general education settings to institutional settings. (Ed. Code, § 56361.)

8. In *Rachel H.*, the court considered whether a child with special needs should be fully integrated, or mainstreamed, into a regular education program, with the support of a one-to-one aide. In that case, the intent was to have the student spend all of her time in the regular education program and not to be removed at all for specialized instruction. In contrast to *Rachel H.*, Student in this case has spent almost half of her time in an SDC and half of her time in a non academic regular education program. Unlike *Rachel H.*, the issue in this case does not involve a choice between a placement which fully integrates Student in a regular education and placement in a special education program. This case concerns two special education placements, which offer the same degree of mainstreaming but different degrees of participation with special education students. Based upon this distinction, the factors used to determine whether District's offer of placement in *Rachel H.* constituted the LRE are instructive, but not controlling on the facts in this case. Here, the controversy concerns which special education class in the continuum of program options are less restrictive for Student and provides meaningful educational benefit to Student.

9. In the present case, the evidence establishes that beginning in Student's freshman year at Eastlake, District took action to insure that a continuum of alternative placements was available to meet Student's unique educational needs. In its effort to find the appropriate placement for Student, District observed a variety of alternative placements in the district and thought them to be inappropriate at the time. First, District experimented by placing Student in a classroom that allocated 43 percent of the time to specialized one-to-one academic instruction with supplementary aides and 57 percent general education curriculum in art, dance and music. The special education teacher, Ms. Santos, attempted to develop and implement a functional skills curriculum to meet Student's needs. When Ms. Santos and Ms. Amalfitano, and Dr. Haytasinh properly concluded that Student was too isolated and not thriving in that environment, District offered a new SDC placement for Student with higher functioning peers in a more stimulating environment, with all supplementary aides and services provided in the IEP, and with the same allocation of time to specialized academic instruction and opportunities for mainstreaming in general education. District provided a placement that enabled Student to derive both academic and non academic benefit and to make substantial progress toward many if not all of her goals, which provided Student a FAPE in the LRE.

10. Student failed to meet her burden of demonstrating by a preponderance of the evidence that District's offer of the current classroom placement denied her a FAPE. Mother's testimony attributing Student's declining progress toward IEP goals solely to her removal from the specialized one-to-one instruction she received in the ninth grade was

