

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

In the Matter of :

GATEWAY UNIFIED SCHOOL DISTRICT,

OAH No. N 2005080397

Petitioner,

v.

STUDENT,

Respondent.

DECISION

This matter was heard before Suzanne B. Brown, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, on September 8, 9, 12, and 22, 2005, in Redding, California.

Petitioner Gateway Unified School District was represented by attorneys Marcella Gutierrez and Emily Soares. Present on behalf of the District were the District's director of educational services, Jody Thulin, and the District's director of special education, Susan Dunn. District superintendent John Strohmayer was also present during some portions of the hearing.

Respondent Student was represented at the hearing by attorneys Mara Rosen and Pamela Wool. Student's mother, Mother, and Student's grandmother were also present during the hearing.

On September 30, 2005, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is a special education student who resides within the boundaries of the Gateway Unified School District (District). She is currently eligible for special education due to a specific learning disability (SLD), based upon a severe discrepancy between her ability and achievement in reading, and attention and auditory processing disorders.

2. On May 17, 2005, and again on June 22, 2005, Student's individualized education program (IEP) team convened. At the conclusion of the June 22 meeting, the District offered the Student an educational program for the 2005-2006 school year. The District believed its offer constituted a free appropriate public education (FAPE). The Student's mother did not agree and rejected the offer.

On August 12, 2005, the District filed a request for due process hearing, which was assigned OAH Case No. 2005080397. Sworn testimony and documentary evidence was received at the hearing on September 8, 9, 12, and 22, 2005. On September 30, 2005, the parties submitted written closing arguments by facsimile. Upon receipt of the written closing arguments, the record was closed and the matter was submitted.

Issue

3. The sole issue for hearing is as follows: Did the District offer the Student a free appropriate public education (FAPE) for the 2005-2006 school year?

Contentions of the Parties

4. The District contended that its offer of placement and services at the District's Central Valley High School (CVHS), contained in the IEPs dated May 17 and June 22, 2005, constituted an offer of FAPE in the least restrictive environment (LRE), based upon a careful consideration of Student's unique educational needs.

The Student argued that the offer of placement at CVHS was inappropriate because it did not address her unique needs.¹ In particular, the Student argued that: (1) the offer does not include sufficient one-to-one instruction; (2) Student's history with the District indicates that the District will not provide an appropriate program; (3) attendance in special day classes (SDCs) will have a negative impact on Student's self-esteem; (4) the offer does not include services recommended by Children's Health Council (CHC) in an independent evaluation; (5) the CELL and ExLL instructional programs, as currently implemented by the

¹ In her closing brief, Student also raised a new procedural claim, that the District's failure to invite DRSC employees to the June 22, 2005 IEP meeting constituted a procedural denial of FAPE. Because this contention was raised for the first time in a closing brief, and as a result the District had no opportunity to respond, the Decision will not consider the claim.

District, are not appropriate methods for her at this time; and (6) several of the IEP goals and objectives are inappropriate.²

The Student seeks to continue attending her two elective classes at CVHS. Thus, the dispute essentially concerns Student's attendance for the academic portion of her school day. While Student seeks to continue her placement at the non-public school Dynamic Skills Resource Center (DRSC) for her academics, whether DRSC is an appropriate placement is not at issue in this case.³

Procedural Background

Motion to Continue

5. On August 12, 2005, OAH received the District's request for due process hearing. On September 2, 2005, OAH received from the Student a written motion requesting a continuance of the hearing that was scheduled to begin on September 8, 2005. On September 6, 2005, OAH received the District's opposition to the Student's request for continuance. Thereafter on September 6, a pre-hearing telephone conference convened in this matter and the ALJ heard additional argument regarding the continuance motion.

The Student argued that she required a continuance so that her preferred expert, Dr. Nancy Sullivan, could observe the proposed placement at the District's Central Valley High School and advise the Student's attorneys on whether the placement was appropriate. The Student alleged that her attorneys were not able to adequately prepare for the hearing without Dr. Sullivan's recommendations following observation of the placement. The Student stated that Dr. Sullivan was not available to observe the proposed placement until September 19, 2005, and therefore requested that the hearing begin after that date. The Student argued that pursuant to *Benjamin G. v. Special Education Hearing Office*, (2005) 131 Cal.App.4th 875, 32 Cal.Rptr.3d 366, the Student was entitled to a continuance to allow Dr. Sullivan's to observe the placement prior to the hearing.

In opposition, the District argued that the Student had ample opportunity to schedule an observation prior to the hearing date. The District explained that it had informed the Student of the proposed Central Valley High School (CVHS) placement as early as the May 17 and June 22 IEP meetings, but that neither Student's mother nor her representatives made any request to observe the placement until September 2, 2005.⁴ The District alleged that it

² These contentions are addressed, in their present order, in the Decision's Legal Conclusions 5, 6, 7 and 8.

³ The ALJ denied the District's motion to add this issue two days before the hearing began. However, the ALJ clarified that relevant evidence regarding DRSC was still admissible, to the extent that such evidence was relevant to establish what Student's needs are for the 2005-2006 school year or what type of program Student needs to receive educational benefit.

⁴ The District explained that the observation could have taken place over the summer because the proposed placement was in operation during the extended school year (ESY). The 2005-2006 regular school year began on August 22, 2005.

had encouraged the Student and her parent to observe the proposed placement, that it had offered to schedule Dr. Sullivan's observation immediately upon learning of the Student's request, and that it remained very willing to permit Dr. Sullivan's observation of the placement. The District emphasized that it had already arranged for witnesses, served witness subpoenas and paid witness fees in anticipation of the scheduled hearing dates, and that rescheduling the hearing would be a burden for the witnesses and for the District.

6. California law mandates that continuances may be granted only for good cause, and the 45-day timeline for resolution of due process hearings evidences Congress's intention that these hearings should be resolved in an expeditious manner. (Cal. Educ. Code § 56505(e); 34 C.F.R. § 300.511(a).) In the present case, considering that the Student's attorneys could have secured expert advice earlier had they chosen to do so, that the hearing concerned a time-sensitive issue concerning the current school year, the relatively late filing of the continuance motion, and the expense and inconvenience of rescheduling the District's witnesses, the ALJ found that the Student had not established good cause for a continuance. Securing the advice of an expert is part of preparing a case for hearing, and needing more time for hearing preparation generally does not constitute good cause for a continuance. The holding in *Benjamin G.*, that parents have the right to have their expert observe a proposed placement as part of the parents' preparation for due process hearing, is not at issue and not in dispute in the present case. Nothing in *Benjamin G.* addresses whether a parent's failure to exercise that right prior to hearing constitutes good cause for continuance of the hearing.

Thus, the ALJ denied the motion and confirmed that the hearing would begin on September 8, 2005. However, out of an abundance of caution, the ALJ ruled that the hearing record could be left open to permit Dr. Sullivan to testify on September 20, 2005.⁵

Student's Affirmative Defenses and Witnesses

8. During the pre-hearing telephone conference and for the first three days of the hearing, the Student took no position on the sole issue for hearing and would not identify any specific dispute with the District's proposed placement. Instead, the Student asserted that she did not know whether the placement was appropriate because she required Dr. Sullivan's input to make that determination. The Student also stated on the first day of hearing that she would not be calling Dr. Sullivan or any other witnesses to testify at the hearing because she was unable to prepare her case without the benefit of Dr. Sullivan's input on the proposed placement. After the Student conducted relatively limited cross-examination of some witnesses, the District objected that the Student was intentionally not participating in the hearing.

At the beginning of the third day of the hearing, the Student indicated that she had changed her strategy in light of the District's allegations that the Student was intentionally not participating in the hearing. The Student stated that she sought to call Dr. Sullivan and

⁵ The ALJ also granted the Student's motion to permit Dr. Sullivan to testify at the hearing by telephone from Palo Alto.

other individuals on the parties' proposed witness lists. After hearing the District's objections, the ALJ ruled that the Student would be permitted to call witnesses, and the District would be given latitude to present rebuttal evidence. After hearing specific offers of proof regarding the relevancy of the proposed witnesses' testimony, the ALJ denied the Student's request to present testimony from her former advocate, Mary Somers, but permitted the Student to call the other witnesses she had identified. Given the prior ruling that the hearing schedule would be accommodated to permit Dr. Sullivan's testimony on or about September 20, 2005, the ALJ also granted the Student's request to call Dr. Sullivan and the other witnesses beginning on September 22, 2005.⁶

The District completed presenting its case-in-chief on September 12, 2005. During a telephone conference on September 21, 2005, the Student identified her specific areas of dispute with the District's proposed placement offer.

The Student presented her case-in-chief on September 22, 2005. The District was given the opportunity to present rebuttal evidence, but ultimately it chose not to do so.

Factual Background

9. Student is a fifteen-year-old student currently in the tenth grade. She has attended school in the District beginning in kindergarten. Since first grade, she has been determined eligible for special education due to a specific learning disability (SLD). In elementary school, Student received resource specialist program (RSP) services on a pull-out basis, but otherwise remained in general education. In fourth grade, she received after-school tutoring at Sylvan Learning Center (Sylvan), pursuant to a unilateral placement by her parent.

10. In middle school, Student attended RSP math and English classes, but was in general education for the remainder of her day; her 2002 triennial evaluation noted that she was in special education for 20 percent of her day during sixth grade. In eighth grade, designated instruction and services (DIS) were added to her educational program as follows: speech-language therapy for thirty minutes per week, and one-to-one reading instruction from an instructional aide for thirty minutes per day. Also during her eighth grade year, Student began receiving after-school tutoring at Dynamic Resource Skills Center (DRSC), a non-public school, pursuant to a unilateral placement by her parent.

11. In April 2004, when Student was in eighth grade, the District evaluated her using the Woodcock-Johnson-III Tests of Academic Achievement (WJ-III). Student's scores on that test included the following:

<i>Cluster/Test</i>	<i>Standard Score</i>	<i>Grade Equivalent</i>
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⁶ The Student explained that Dr. Sullivan's observation was now scheduled to occur on September 20th, not September 19th as stated during the pre-hearing conference.

Total Achievement	70	3.3
Broad Reading	61	2.6
Broad Math	77	4.9
Broad Written Lang.	67	3.3
Math Calc Skills	76	4.8
Written Expression	87	5.7
Academic Skills	50	2.8
Academic Fluency	69	3.3
Academic Apps	82	4.7

12. Also in April 2004, Mother took Student for an independent educational evaluation at the Children’s Health Council (CHC) in Palo Alto, California. The CHC assessment was conducted by a speech-language pathologist, an educational specialist, and a licensed psychologist, Dr. Nancy Sullivan. Among the results of CHC’s testing were scores indicating that Student had overall cognitive ability in the low average range, with a full-scale IQ of 86 on the Wechsler Intelligence Scale for Children-III (WISC-III). Regarding academics, the findings included that Student exhibited particular deficits in sight word reading, spelling, and oral reading of passages, where she scored at first grade and beginning second grade levels.

The findings of the CHC evaluation included that Student had dyslexia, had difficulty with sequencing, had significant deficits in expressive and receptive language, and had problems with critical thinking, verbal-problem solving, and higher-order thinking. The evaluation also noted several of Student’s strengths, including her likable personality, her artistic talent, and her creativity. Pursuant to the Diagnostic and Statistical Manual-IV (DSM-IV), the assessors diagnosed Student with both a Reading Disorder and a Mixed Receptive and Expressive Language Disorder on Axis I, and assessed her Global Assessment of Functioning (GAF) at 80, noting some mild difficulties functioning in academics. The report recommended intensive, multimodal instruction in reading, spelling, and written expression, and suggested Slingerland, Orton-Gillingham and Lindamood Bell as appropriate methodologies.

13. On May 24, 2004, Student’s IEP team convened for her annual IEP meeting. A key topic of this meeting was Student’s transition from middle school to high school. The District proposed placement at the District’s Central Valley High School (CVHS) in special day classes (SDCs) for core academics, and general education for social science, driver’s education, physical education, elective classes, lunch, assemblies, and extracurricular activities. The District also offered DIS of “push-in” speech-language therapy for 30 minutes per week. Mother did not sign her consent to the IEP. She informed the other team members that she would be providing a copy of the CHC evaluation, and would like the team to consider the evaluation’s information when designing Student’s educational program.

14. The IEP team convened again on July 6, 2004, and the District members of the team reiterated the placement offer at CVHS. Mother did not sign her consent to the IEP.

District Offer for the 2005-2006 School Year

15. For the 2004-2005 school year, which was her ninth grade year, Student attended DRSC for her academic instruction. Pursuant to a January 2005 settlement agreement between the parties, the District agreed to fund that placement until the end of the regular school year. For the second semester of the 2004-2005 school year, Student attended DRSC in the mornings for academic instruction, then attended two general education elective classes at CVHS in the afternoons.

16. On May 17, 2005, Student's IEP team convened for her annual IEP meeting. The team members discussed Student's present levels of performance and agreed that she continues to have educational needs in reading, writing, and math. More specifically, Student has needs in reading fluency, reading decoding, reading comprehension, receptive and expressive language, spelling, writing, math calculations, and math fluency.

Roberta Taylor, director of DRSC, and Karen Long, Student's math teacher at DRSC, presented information to the IEP team about Student's progress towards her goals and objectives. Ms. Taylor also presented the results of informal assessments administered at DRSC. District literacy specialist Janie Ryness suggested doing a "running record" to track Student's reading levels. The team drafted some new goals and objectives for the 2005-2006 school year, and reviewed what additional data was needed for Student's triennial evaluation. District members of the IEP team requested the parent's consent to an academic assessment of Student using the WJ-III, as part of Student's triennial reevaluation. Mother signed her consent to this assessment. The team also reviewed Student's individual transition plan (ITP) regarding her post-high school interests and plans, and discussed what courses Student needed to receive the necessary credits towards high school graduation.

During this IEP meeting, the District offered a placement at CVHS in SDCs for Student's academic classes of English/language arts, math, and social science, and in general education for two elective classes, lunch, and other school activities such as assemblies. Because CVHS uses a "block" schedule of four 90-minute class periods each day, the proposed schedule offered four classes for the fall semester and four classes for the spring semester. For the fall semester, the District proposed classes in art, weight training for girls, SDC English and SDC social science. For the spring semester, the proposed classes were physical education (co-ed), SDC English, drafting and SDC math.

Regarding DIS, the District offered one-to-one speech-language therapy for 30 minutes per week using a "push-in" model during Student's language arts class, and consultation by the District's literacy specialist with Student's teachers for two hours per week. The offer also included accommodations for test-taking, modified assignments, small group instruction in general education, books on tape, and text books for use at home. Additionally, the District offered extended school year (ESY) at CVHS.

Mother did not consent to the District's proposed placement. She stated that she sought to continue Student's placement at DRSC because Student was making progress there.

17. On May 24, 2005, District RSP teacher Adrienne Cowling administered the WJ-III to Student. Student's scores included the following:

<i>Cluster/Test</i>	<i>Standard Score</i>	<i>Grade Equivalent</i>
Total Achievement	63	3.9
Broad Reading	70	3.2
Broad Math	78	5.1
Broad Written Lang.	72	3.8
Math Calc Skills	74	4.8
Written Expression	79	4.9
Academic Skills	68	3.9
Academic Fluency	64	3.1
Academic Apps	81	5.0

18. The IEP team reconvened on June 22, 2005. Among the team members in attendance were Ms. Long and Kevin McCarty, an administrator at DRSC. The team members discussed the results of the WJ-III testing, and made changes and additions to the IEP goals initially drafted at the IEP meeting on May 17. After those changes and additions, the final proposed IEP goals and objectives were in the following areas: reading fluency, decoding, reading comprehension, writing, spelling skills, math skills improvement (pre-algebra), language arts, receptive/expressive language, math computation, and science/social studies.

The District reiterated its placement offer at CVHS. Student's mother and grandmother explained why they did not agree to this offer, and requested continued placement at DRSC until January 2006. Student's mother did not sign her consent to the IEP, and requested stay put at DRSC.

19. Student continued to attend DRSC for summer school in June and July 2005. On August 12, 2005, OAH received the District's request for due process hearing. Thereafter in August 2005, the parties reached an agreement that the District would continue to fund the placement at DRSC as the stay put placement pending resolution of the due process matter.

20. Beginning on or about August 22, 2005, Student returned to attending DRSC for her academic instruction in the mornings, followed by attendance at CVHS in the afternoons for two elective classes, drama and woodworking.

Student's Unique Educational Needs

21. Student has cognitive ability in the low average range, with full-scale IQ test scores ranging between 82 and 88. Student's reading skills are at a third grade to fourth grade level, her writing skills are at approximately a fourth grade level, and her math skills are at approximately a fifth grade level. Remediation in these areas is a particularly pressing issue because Student has less than three years to pass the California High School Exit Exam (CAHSEE) to receive a high school diploma at the end of her senior year. By all accounts, passing the CAHSEE is a potentially achievable goal for Student, but she will first need to make significant gains in her reading, writing, and math skills.

Student also has several areas of strength. She is artistic and athletic, and excels at rodeo and barrel racing. She has age-appropriate oral language skills, and the content of her written expression is also age-appropriate. She is well-behaved and tries her best at school. She is an outgoing, socially and emotionally well-adjusted student with relatively good self-esteem. She is liked by peers and teachers, has friends, and enjoys socializing. She does not have any particular social or emotional needs, other than the typical needs of any student.

22. Student needs an intensive instructional program focusing on reading, writing, and math. Due to her weaknesses including poor verbal memory, slow visual processing speed, and poor auditory processing, her instruction should include multisensory/multimodal methods of instruction. Student has needs in reading fluency, reading decoding, reading comprehension, receptive and expressive language, spelling, writing, math calculations, and math fluency, and therefore implementing IEP goals in these areas is appropriate to address her unique educational needs. Because the law requires that special education students have access to the general curriculum, because Student is seeking to graduate with a regular high school diploma, and because Student's needs in reading and writing affect her ability to progress in other academic subjects, goal areas in other academic subjects such as science or social science are also appropriate to address her unique educational needs.

District Witnesses' Testimony Regarding Appropriateness of May/June 2005 Offer

23. Several District employees testified regarding why the program offered in the May/June 2005 IEP is designed to meet Student's needs and is reasonably calculated to allow her to receive educational benefit. The District's director of education services, Jody Thulin, explained that Student needs special instruction in reading, writing, and math, and needs to have her progress in her classes monitored to make certain that she meets graduation requirements. Student needs to focus on math and English so that she can pass the California High School Exit Exam. Because Student's IQ scores are in the 80s, and her academic achievement scores are mostly in the 70s and 80s, Student is actually achieving close to her potential. Regarding the parent's contention that the current offer was inappropriate because Student had not made progress during prior years at the District, Ms. Thulin testified that, even if it were true that Student had not made progress in prior years, the current IEP offered a different, more intensive program.

24. The District's literacy specialist, Janie Ryness, will provide literacy services through consultation with Student's teachers. Ms. Ryness is familiar with Student's areas of need from reviewing the IEP goals, the CHC evaluation, and other assessment reports, and from observing Student in classes at DRSC on three separate occasions. Ms. Ryness has significant experience teaching students, from elementary to high school grades, who are struggling with reading. In addition to literacy training, Ms. Ryness's educational background includes a Master's degree in Education, a teaching credential and an administrative credential.

Currently Ms. Ryness provides staff development to District teachers employing various instructional strategies, particularly strategies from the Comprehensive Early Learning Literacy (CELL) and the Extended Learning Literacy (ExLL) programs in which she has received extensive training. The CELL and ExLL frameworks and methods include guided reading, shared reading, directed reading, interactive editing, and reciprocal teaching. These methods would be implemented in Student's classes and would address Student's needs and lead to progress on her IEP goals. Student does not need to be in a one-to-one environment to make progress on her goals, and Student's teachers and instructional aides will provide her with one-to-one instruction when needed.

Ms. Ryness discussed each of Student's ten IEP goals and explained how she would assist Student's teachers and speech-language therapist in implementing the goals, including by use of the CELL and ExLL methods. District staff would take a "running record" of Student's reading progress, to inform the teacher of Student's progress, and that information will guide Student's ongoing instruction. Moreover, it is important for Student to have access to high-interest reading materials at her reading level, and the District has ordered appropriate "leveled readers" which serve that purpose.

25. Special education English teacher Adrienne Cowling teaches the SDC English class in which the District proposes to place Student.⁷ With the assistance of one instructional aide, Ms. Cowling teaches the class comprised of 13 to 14 students. The reading levels of the students in the class range approximately from fourth grade to sixth grade. Ms. Cowling believes that all of the students currently in her SDC English class have SLD classifications for their special education eligibility, and none are classified as eligible due to emotional disturbance (ED).⁸ Severely disabled students do not attend the SDC English class proposed for Student.

Ms. Cowling is familiar with Student's needs because she reviewed Student's assessment reports and other educational records, attended the May 17, 2005 IEP meeting, spoke with District and DRSC about Student, and administered the WJ-III to her on May 24, 2005. Ms. Cowling has experience and expertise in teaching reading to dyslexic and other

⁷ The difference between RSP and SDC is that RSP students are in special education for less than 50% of their school day, while SDC students are in special education for at least 50% of their school day. However, RSP students sometimes are placed in SDCs, and SDC students are sometimes placed in RSP classes.

⁸ Ms. Cowling noted that she had not completed reading all of the IEP documents yet, because it was only the third week of the new school year.

learning disabled students. In addition to her training in Slingerland, Orton-Gillingham/Language!, CELL, ExLL, the California Writing Project and the California Reading and Literature Project, Ms. Cowling has a lifetime teaching credential, a learning handicapped teaching credential, and a resource specialist certificate.

Because of her low skill levels, Student needs to be placed in an SDC English class instead of a less intensive English class such as RSP or general education English. Ms. Cowling described the strategies she would use to implement Student's IEP goals in reading, writing, spelling, and receptive/expressive language. Ms. Cowling uses strategies from various programs, including Slingerland, Orton-Gillingham, Language!, CELL and ExLL, Writing Road to Reading, and the Jane Schafer writing program. She often teaches using a multisensory approach wherein the students "hear it, see it, say it, and feel it." While it is useful to incorporate strategies from programs such as Slingerland, Orton-Gillingham, or Lindamood Bell, there are many ways to teach dyslexic students how to read. Ms. Cowling testified that it would not be appropriate for Student to be in a one-to-one setting for her reading and writing instruction for the 2005-2006 school year, because Student will benefit from hearing ideas from her peers and expressively communicating with her peers.

26. Special education math teacher Daniel Mahan teaches the SDC math class the District has proposed for Student. The SDC has approximately 13 students, and Mr. Mahan is assisted by one instructional aide. The range of functioning among the students is from third grade to sixth grade math skills. Students are assigned to particular math classes based upon their ability levels. Hence, two students may be in the same math class and at the same level of math skills, but one is classified as an RSP student and the other as an SDC student because of the overall percentage of time each spends in special education.

Mr. Mahan is familiar with Student's needs because he reviewed Student's assessment reports and other educational records, observed her in class at DRSC, spoke with the DRSC math teacher about Student, and consulted with Ms. Ryness about how to help Student in the SDC math class. Student's recent achievement test scores indicate that she is at a fourth-grade to fifth-grade level in math. Student's lack of prior exposure to math concepts has a greater effect on her math skills than her low reading skills do, because the SDC math does not involve reading paragraphs.

Mr. Mahan discussed both of Student's math goals and testified regarding how he would implement those goals. The activities and teaching strategies he employs in his SDC math class include changing activities and environments every 15 minutes to keep the students engaged, presenting information both auditory and visually, using different colored pens and other varied presentation methods to draw the students' attention, and doing activities in small groups.

27. District speech-language pathologist Sally Ephland would provide one-to-one speech-language services to Student for thirty minutes per week. Ms. Ephland would provide those services to Student in the SDC classroom, and would implement Student's receptive/expressive language goals during that time.

Student's Witnesses' Testimony Regarding Inappropriateness of District's Offer

Testimony of Dr. Nancy Sullivan

28. On September 20, 2005, Dr. Nancy Sullivan observed the proposed CVHS placement to evaluate whether it was an appropriate placement for Student. Dr. Sullivan observed the SDC English, SDC social science, and SDC math classes, and general education elective classes. She also spoke with the literacy specialist, Janie Ryness. Dr. Sullivan is familiar with Student's needs due to the evaluation she participated in conducting in April 2004, and a review of Student's more recent educational records. Dr. Sullivan is a staff neuropsychologist at CHC, has a Ph.D. in clinical psychology, and has extensive training, experience, and expertise in that field.

29. At the hearing, Dr. Sullivan testified that the SDC math class would be appropriate for Student, but the SDC English and SDC social studies classes would not be. Dr. Sullivan stated that in both reading and writing, Student needs more one-to-one instruction and more intensive multisensory instruction than the District is offering. Referring to a chart within the CHC evaluation which summarized Student's scores on the Woodcock Johnson achievement tests from 1997 to 2004, Dr. Sullivan testified that Student had made little progress in the District's special education programs during those years and that the current proposed program does not appear to be markedly different from Student's previous programs in the District.

Despite this testimony, as well as the testimony of Student's mother, overall the evidence did not establish that Student needed a greater amount of one-to-one instruction than was offered in the May/June 2005 IEP. The SDCs offer an intensive program with a 1:7 ratio, and Ms. Cowling and Mr. Mahan testified that they and/or their instructional aides will provide Student with one-to-one instruction when she needs it, in addition to the weekly one-to-one instruction from the speech-language therapist. Thus, while Student would likely benefit from greater one-to-one instruction, her needs can be addressed in a larger setting.⁹

Regarding the testimony that Student previously failed to make progress when she attended school in the District, the District established that the educational program offered for the 2005-2006 school year is different and more intensive than the educational programs Student had previously received from the District. Previously Student was an RSP student who spent approximately 20 percent of her time in special education, while the current offer is for 51 percent of her time in special education. Moreover, in addition to offering placement in a different school, the proposed placement in SDCs would provide more intensive instruction than Student would have received in RSP. Thus, while informative, Dr. Sullivan's explanation that Student failed to make gains during her previous years in the

⁹ Given that the District must offer placement in the least restrictive environment that will address Student's unique needs, offering a placement with more one-to-one instruction than she needed to receive educational benefit would have denied Student the right to FAPE in the LRE.

District does not indicate that Student is unlikely to make progress in the current proposed placement. The evidence of Student's past performance in a less restrictive placement is less persuasive than the other evidence, discussed above, that the proposed placement included intensive multisensory instruction in Student's areas of academic need.

30. Dr. Sullivan testified that placement in SDCs would be damaging to Student's self-esteem, and that a minority of the students in the SDCs "looked different" and would not be appropriate peers for Student. However, Dr. Sullivan also agreed that Student currently is socially well-adjusted and has relatively good self-esteem. As discussed further in the Legal Conclusions, given Student's relatively strong social and emotional functioning, a general concern about the stigma of the SDCs is not persuasive regarding whether the District's offer addresses Student's unique needs.

31. Dr. Sullivan further raised the concern that the "Second Chance" program of the CELL and ExLL frameworks was new and therefore that the teachers were not fully versed in teaching that particular program. Testimony from Ms. Ryness and Ms. Cowling established that the CELL and ExLL programs addressed Student's areas of need in reading and writing, and were reasonably calculated to provide her with educational benefit. Dr. Sullivan agreed that CELL and ExLL were excellent programs, but expressed concerns that they are currently too advanced for Student, and that the District staff are still learning how to implement some aspects of the program.

However, Dr. Sullivan acknowledged that she is not particularly familiar with the CELL and ExLL programs; her familiarity with the programs was due to reading the programs' website, not due to implementing the programs or receiving any training. In contrast, Ms. Ryness and Ms. Cowling are both very familiar with CELL and ExLL due to extensive training and experience with implementing the programs. Given Ms. Ryness's and Ms. Cowling's greater familiarity with the programs and their implementation within the District, the testimony of Ms. Ryness and Ms. Cowling established that the CELL and ExLL programs would be appropriate for Student's levels and that the District staff members are trained and experienced in implementing those programs.

32. Dr. Sullivan reviewed the May/June 2005 IEP goals and stated that some of them are inappropriate.¹⁰ Other than math fluency, Dr. Sullivan did not dispute the goal areas, but instead disagreed with the way that some of the goals were written. Regarding the proposed goals in reading fluency and decoding, Dr. Sullivan stated that the specifics of how the goals would be implemented are too vague. Similarly, Dr. Sullivan testified that the reading comprehension goal was inappropriate because it was unclear how the District would provide core literature at Student's functional level, given that Student functions at a tenth-grade level but reads at a third-grade level. Regarding the science/social studies goal, Dr. Sullivan testified that it was unclear how Student would access the tenth-grade coursework

¹⁰ Dr. Sullivan testified that the IEP's spelling and receptive/expressive language goals were appropriate for Student.

when she reads at only a third-to-fourth grade level. Regarding the spelling goal, Dr. Sullivan testified that it was unclear how the goal would be met, given Student's basic problems in phonemic awareness and grapheme/phoneme processing.

Additionally, Dr. Sullivan testified that the writing goal was appropriate but the baseline of an 89 standard score was too high; this was because the Writing Sample subtest of the WJ-III tends to produce an inaccurately high score. Regarding the math computation goal, Dr. Sullivan testified that while it was not a bad goal, it was irrelevant because Student needs to focus on improving her skill set before working on calculating at a rapid pace.

While Dr. Sullivan raised reasonable questions about how some of the goals would be implemented, she was not present for the testimony of Ms. Cowling and Ms. Ryness, who explained how they would implement the goals. For example, regarding the reading fluency goal, Ms. Ryness and Ms. Cowling described how they would work on this goal using strategies such as interactive editing, choral reading, shared reading, and having Student listen to a book on tape while reading along. Likewise regarding the reading decoding goal, Ms. Cowling described techniques she would use to implement this goal, such as providing a packet with vowel sounds that Student has trouble with, using kinesthetic activities from the Language program, and doing activities such as word sorts from the Writing Road to Reading program. In another example, while Dr. Sullivan questioned how the District would provide core literature at Student's functional level pursuant to the reading comprehension goal, Ms. Ryness explained that the District had ordered high-interest "leveled" readers at Student's reading level, and also noted how the goal would be implemented using other strategies such as guided reading. Similarly, regarding the science/social science goal, Ms. Ryness described some strategies to facilitate Student's reading and understanding of the science and/or social science materials. Regarding the spelling goal, the testimony of Ms. Ryness and Ms. Cowling, along with the documentary evidence concerning the CELL and ExLL frameworks, established that the District's proposed program addresses phonemic awareness. Overall, the testimony from Ms. Cowling and Ms. Ryness established that the District staff could appropriately implement Student's IEP goals.

Regarding the writing goal, other evidence about Student's writing skills, such as test scores and Student's work samples, supports Dr. Sullivan's opinion that the baseline for this goal is too high, and the District did not offer any persuasive evidence to the contrary. Thus, Student's writing level is at approximately a fourth grade, not far above her reading level. Regarding the math computation goal, while Dr. Sullivan recommended focusing on other goals, there is no question that math computation and math fluency are among Student's needs. Therefore, inclusion of this goal addresses Student's areas of need in math, and a preference for focusing on other areas does not render this goal inappropriate.

Testimony of Student's Mother and Grandmother

33. Student's mother, Mother, testified regarding why the District's offer from the May and June 2005 IEP meetings did not constitute a FAPE. Mother expressed concern that SDCs were not appropriate classes for Student, both because of the stigma of special

education classes and because the other students in the SDCs would be more disabled than Student. However, as discussed in Factual Finding 31, given Student's social-emotional functioning, the concern about the stigma of the SDCs was ultimately less persuasive than other evidence about the appropriateness of the proposed placement.

34. Mother also recounted past difficulties with Student's teachers, such as when Student's fourth grade teacher still had not read Student's IEP by the middle of that school year, and when Student's current woodshop teacher had not read her IEP and did not know that Student has difficulty with reading. Mother also expressed her concern that Ms. Cowling had testified that she had not completed reviewing all of the IEPs of the students in her class, even though she testified during the third week of the school year.

While Mother's concerns are reasonable, upon consideration none of the instances cited indicate that the District's offer would not provide Student with a FAPE. Given the different schools, the different staff members involved, and the length of time that has passed, the incident regarding Student's fourth grade teacher has very little relevance when evaluating whether the current proposed teachers would implement Student's program in conformity with her IEP. Regarding Student's current woodshop teacher, while all of Student's teachers should be familiar with her IEP, the teacher's unfamiliarity with it is not particularly indicative given the lack of a current IEP, the nature of the class, and the very early stage of the school year when the incident occurred. Given also that Ms. Ryness will consult with the teachers of Student's elective classes to coordinate implementation of Student's IEP goals, the woodshop teacher's unfamiliarity with the IEP is not indicative of how Student's teachers would implement the proposed IEP for the 2005-2006 school year. Finally, regarding Ms. Cowling's testimony on September 8 that she had yet not completed reviewing the IEPs of all of her students, neither party asked Ms. Cowling to elaborate on her comment or explain what constitutes appropriate practice in reviewing her students' IEPs. Given the very early stage of the school year, Ms. Cowling's statement alone does not indicate that she or the other proposed teachers would fail to appropriately implement Student's IEP.

35. Additionally, Mother testified that the RSP services Student had previously received from the District were not successful, and Student's reading ability had not improved from the time she entered special education in first grade through the end of her eighth grade year. In contrast, Mother stated that Student has made a lot of progress since she began attending DRSC. Similarly, Student's grandmother, testified that Student did not make any progress when she attended school in the District from first grade through eighth grade, except for the progress she made due to attendance at Sylvan Learning Center and DRSC. However, as discussed in Factual Finding 30, the evidence about Student's past progress was less persuasive because the current offer for the 2005-2006 school year is for a different, more intensive program.

Credibility of Witnesses

36. Both Student's mother and grandmother both gave testimony was honest and sincere. However, for the most part their testimony was not ultimately persuasive because of the distinction between their preferences for Student's education and what the law requires for provision of FAPE.

Student's expert witness, Dr. Nancy Sullivan, was both knowledgeable and credible, and her credibility was enhanced by her willingness to offer some opinions that were contrary to the parent's position. However, while Dr. Sullivan has extensive expertise in psychology, she noted that she is not an educational expert; instead, for educational issues, she relies on the educational specialist who participates in CHC's multidisciplinary assessments. Hence, while Dr. Sullivan's testimony was informative, on some points her testimony, when taken as true, nevertheless did not establish that the District's offer was inappropriate pursuant to the legal standards of FAPE.

Alternatively, the key District witnesses, Ms. Cowling, Ms. Ryness, and Mr. Mahan, were knowledgeable regarding both educational requirements and Student's needs. Those witnesses also offered credible testimony. In light of all circumstances, when all relevant evidence was weighed and evaluated, on several points those District witnesses were more credible due to their particular knowledge of relevant educational matters.

LEGAL CONCLUSIONS

Applicable Law

1. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Cal. Ed. Code § 56000.) The term "free appropriate public education" 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 individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. 20 U.S.C. § 1401(29).

Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Cal. Educ. Code § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034 (1982), 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 198-200.) The Court stated that 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. (*Id.* at 201.) At the administrative hearing, the school district has the burden of proving that it has complied with the IDEA, including that it has offered an appropriate educational placement for the student.¹¹ (*Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994).)

3. To determine whether the District offered Student a FAPE for the 2005-2006 school year, the focus is on the adequacy of the placement the District actually offered to her at CVHS, rather than on the placement at DRSC preferred by the parent. (*Gregory K. v. Longview School District*, 811 F.2d 1314 (9th Cir. 1987).)

4. To constitute a FAPE as required by the IDEA and *Rowley*, the District's offer must be designed to meet Student's unique needs and be reasonably calculated to provide Student with some educational benefit. Although not the focus of the dispute here, additional requirements are that the District's offer must conform to the IEP, must be in the least restrictive environment (LRE), and provide the student with access to the general education curriculum.¹² (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.347(a), 300.550(b); Education Code § 56031.)

Determination of Issue

5. The proposed SDCs, in combination with the proposed DIS and accommodations, offered the type of intensive, multisensory instructional program that Student needs to receive educational benefit, and therefore offered Student a FAPE. As determined in Factual Finding 22, Student needs an intensive, multisensory instructional program to address her deficits in reading, writing, and math. As determined in Factual Findings 24, 25 and 26, Student's proposed instructors utilize multisensory strategies and techniques in teaching the SDCs. As determined in Factual Finding 30, the evidence did not establish that Student needed a greater amount of one-to-one instruction than was offered in

¹¹ IDEA is silent about which side bears the burden of proof in a state administrative proceeding brought by parents to challenge the adequacy of an IEP. There is a split of opinion on this issue among federal appellate courts. This issue is now before the United States Supreme Court in *Schaffer et al. v. Weast et al.*, Docket No. 04-0698.

¹² While the Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA, it is unnecessary to address that portion of the FAPE analysis because the Student did not timely raise any alleged procedural violations.

the May/June 2005 IEP. Given that the District must offer placement in the LRE that will address Student's unique needs, the evidence does not support the Student's argument that a greater amount of one-to-one attention is necessary for Student to receive a FAPE.

6. As determined in Factual Finding 21, Student is a socially and emotionally well-adjusted student who has relatively good self-esteem. As determined in Factual Findings 25 and 26, the SDCs were comprised of students with disabilities similar to Student's, and the SDCs would address Student's areas of academic need. Given those findings, the testimony from Dr. Sullivan and Mother regarding the social stigma of SDCs has little relevance to whether the proposed placement would address Student's needs.¹³ Whether an offer is appropriate is based upon the student's unique needs, and Student does not have any particular social or emotional needs that would render an SDC placement inappropriate for her.

Hence, given that Student does not have particular social/emotional needs greater than any other student her age, the Student's position that SDC placement would negatively impact Student's self-esteem essentially constitute a generalized argument that SDC placement is inappropriate for any student with an SLD, even if the student is socially and emotionally well-developed. There is no support in the law for the Student's contention on this point, particularly given that the California Education Code specifically provides for the existence of SDCs. (See Cal. Code Regs., tit. 5, § 3053.)

7. Because the District has offered an appropriate methodology that is reasonably calculated to provide Student with educational benefit, the Student's preference for a different methodology is not grounds for finding a denial of FAPE. The law is well-established that so long as the school district's choice of educational methodology is reasonably calculated to provide the student with educational benefit, that choice is entitled to deference. (*Rowley*, 458 U.S. at 207-208.) As determined in Factual Finding 25, Ms. Cowling uses instructional strategies from both Slingerland and Orton-Gillingham. Moreover, as determined in Factual Finding 13, Dr. Sullivan and the other CHC assessors had only suggested those programs as among the types of methodologies that would be appropriate for Student, and there was no evidence that Student required these particular methodologies. As determined in Factual Findings 24 and 31, the CELL and ExLL programs utilized by the District are appropriate to address Student's academic needs.

8. As determined in Factual Finding 32, the District has offered appropriate IEP goals, except that the baseline for the writing goal was based upon a misleading test score, which led to creation of a baseline that is too high. While this baseline should be corrected to accurately reflect Student's writing skills at the fourth grade to fifth grade level, overall this error is relatively minor and does not render the entire offer inappropriate.

¹³ Notably, the Student is not contending that the SDCs are too restrictive a placement for her, and she does not seek to be placed in less restrictive academic classes. Instead, the Student seeks to receive her academic instruction in a more restrictive placement, specifically a non-public school (NPS) comprised of only five other special education students, at least some of whom are more disabled than she is.

9. In light of the above factual findings and legal conclusions, the ALJ concludes that the District's May/June 2005 IEP offered Student a FAPE for the 2005-2006 school year.

ORDER

1. If Student returns to attending school full-time within the District, the District may implement the offer of FAPE arising out of the May/June 2005 IEP.
2. If Student returns to attending school full-time within the District, the District shall convene an IEP meeting to modify Student's writing goal to accurately reflect her writing ability.

PREVAILING PARTY

Pursuant to California Education Code § 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The District prevailed on the sole hearing issue.

RIGHT TO APPEAL THIS DECISION

23. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Cal. Educ. Code § 56505(k).)

Dated: October 17, 2005

SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings