

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

FREMONT UNION HIGH SCHOOL  
DISTRICT AND SANTA CLARA  
COUNTY MENTAL HEALTH.

OAH CASE NO. 2009080222

**DECISION**

Administrative Law Judge (ALJ) Bob N. Varma, Office of Administrative Hearings (OAH), heard this matter in Sunnyvale, California, on February 23, 24 and 25, 2010.

Student's Mother represented Student.<sup>1</sup> Student was present for part of the hearing, by telephone, on February 23 and 24, 2010. Lenore A. Silverman and Melanie D. Larzul, Attorneys at Law, appeared on behalf of the Fremont Union High School District (District). Bryan Emmert, Director of Educational Services, was present throughout the hearing on behalf of District. Michael A. Wahlander, Deputy County Counsel, appeared on behalf of Santa Clara County Mental Health (Mental Health). Peter Antons, Manager of Chapter 26.5 Services, was present throughout the hearing on behalf of Mental Health.

On August 6, 2009, Student filed a request for due process hearing. On September 1, 2009, the parties requested and received a continuance of the hearing dates. At the close of the hearing, the matter was continued to March 12, 2010, so the parties could file written closing arguments. The record was closed and the matter was submitted for decision on March 12, 2010.

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<sup>1</sup> Student is 19 years of age. She has assigned her educational rights to Parent for this due process hearing.

## ISSUES<sup>2</sup>

1. Did the April 28, 2009 individualized education program (IEP), as amended on June 18, 2009, and January 27, 2010, fail to offer Student a free appropriate public education (FAPE) for the 2009-2010 school year (SY), including the extended school year (ESY), because:

- a.) The proposed transition of Student from The King's Daughter School (King's Daughter) in Tennessee to a local post-secondary program, Wings, with transition support, vocational and community training, life skills and social skills training, and mental health support services was not appropriate to meet Student's unique needs?
- b.) The proposed placement was not in the least restrictive environment (LRE)?

2. If Student was not offered a FAPE, does Student's placement at King's Daughter constitute a FAPE in the LRE?

## PROPOSED REMEDY

Student requests that District and Mental Health be ordered to fund her placement at King's Daughter through the remainder of the 2009-2010 SY, including ESY 2010, and through the end of the 2011-2012 SY.

## PRELIMINARY MATTERS

### *Stipulation Regarding San Andreas Regional Center*

In their joint prehearing conference statement, District and Mental Health identified Mindy Nguyen, program manager for the San Andreas Regional Center (SARC), as a potential witness. On February 24, 2010, District, Mental Health and Parent entered into a stipulation regarding the testimony of Ms. Nguyen, which the ALJ has accepted and considered in this decision. The parties stipulated that, if called to testify, Ms. Nguyen would have provided the following testimony:

1. A representative of SARC was present at the April 28 and June 18, 2009, and January 27, 2010 IEP team meetings for Student;
2. Student qualifies for services from SARC;

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<sup>2</sup> These issues are those framed in the February 16, 2010 Order Following Prehearing Conference. The ALJ has revised the issues without changing their substance, for purposes of organizing this decision.

3. SARC services are available to Student, should she or her conservator request, in the form of home support, such as a respite worker, group home placement, and brokered mental health services through which SARC may purchase mental health services for Student from a third-party vendor.

#### *Objection to Parent's Closing Statement*

On March 12, 2010, OAH received the parties' closing statements. On March 15, 2010, District and Mental Health filed a joint objection to Student's closing statement, asserting that the majority of Student's closing statement is comprised of testimony by Parent. OAH did not receive a response to the objection from Parent.

A party to a due process hearing has the right to confront, cross-examine and compel the attendance of a witness. (Ed. Code, § 56505, subds. (e)(3).) Prior to the hearing, Parent identified herself as a potential witness in her prehearing conference statement. However, Parent chose not to call herself as a witness during the hearing. To consider Parent's testimony, contained in the closing statement, would deny District and Mental Health the right to cross-examine Parent. Therefore, the objection is sustained and the testimony has not been considered in this decision. However, to the extent that Student's closing statement puts forth arguments on behalf of Student's position, those arguments have been considered.

#### CONTENTIONS OF THE PARTIES

Student contends that the IEP offer of April 28, 2009, as amended by the June 18, 2009 and January 27, 2010 addenda, fails to offer her a FAPE because it is not designed to meet her unique needs in the LRE. Specifically, Student asserts that her emotional and behavioral needs require continued residential placement. Therefore, the District and Mental Health's offer to transition her to her local community and place her in a post-secondary program with support services does not address her emotional and behavioral needs. Student also contends that during the 2007-2008 SY, prior to her placement at King's Daughter in April 2008, she was unsuccessful at her placement at the Fremont High School (Fremont High), and therefore, a return to a local public school placement will also be unsuccessful. Finally, Student contends that the severity of her emotional and behavioral needs requires placement at King's Daughter through the 2011-2012 SY.

District contends that Student was ready to transition to a lesser restrictive environment by the beginning of the 2009-2010 SY. District asserts that Student has not demonstrated any serious behavior or emotional problems for a substantial period of time; and, that King's Daughter has neither identified these as areas of need, nor developed or implemented a plan to address any identified emotional or behavioral needs. District asserts that the placement offer at Wings is different than Student's prior placement at Fremont High. The offered placement is in a small-group environment, addresses her functional academic needs, and offers community-based vocational training and independent living skills training. The placement would also provide Student with interaction with other

agencies such as SARC and Mental Health, allowing for a transition to independent living when Student becomes ineligible for special education at age 22. Therefore, District asserts that its offer meets Student's academic, emotional, behavioral and post-secondary transition needs in the LRE.

Mental Health joins in District's contentions. Additionally, Mental Health contends that OAH cannot order prospective placement at King's Daughter because the facility has not been certified as a non-public school by the California Department of Education (CDE). Mental Health asserts that, because OAH cannot grant Student's requested remedy, it need not conduct an analysis of whether District and Mental Health offered Student a FAPE in the LRE.<sup>3</sup> In the alternative, Mental Health asserts that its offer of bi-weekly individual therapy, weekly family counseling and monthly medication monitoring, in conjunction with the educational placement offer by District, meets Student's emotional and behavioral needs.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is eligible for, and receives special education services, under the disability category of a serious emotional disturbance. She has a secondary eligibility category of a specific learning disability. According to District, she is eligible to receive a certificate of attendance, but remains eligible for special education until she reaches the age of 22.

2. Student qualified for special education at a young age due to global developmental delays. In February 2006, her father passed away, which was a catalyst to Student's increasing emotional difficulties. Student began the 2007-2008 SY at Fremont High. Due to her increasing emotional difficulties, in September 2007 Student was referred to Mental Health for an eligibility assessment. In late September or early October 2007, Student was hospitalized at John Muir Adolescent Behavioral Health Unit (John Muir) in Concord, California. In January 2008, Student was again hospitalized at John Muir. Upon her release she was transferred to the Aspen Institute for Behavioral Assessment (Aspen), in Syracuse, Utah. Student was discharged from Aspen on March 25, 2008.

3. According to the reports from Aspen, Student's course of treatment included individual therapy three times per week, group therapy five times per week, family intervention and consultation on a weekly basis, and medication management. Upon discharge, Aspen recommended placement in a residential treatment program, with a

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<sup>3</sup> Mental Health provides no legal authority for its position that if a remedy cannot be granted, OAH need not conduct an analysis of whether an IEP offer provides a student with a FAPE in the LRE. A party filing a due process hearing complaint is required to identify a proposed resolution to the extent known and available to the party at the time. (20 U.S.C. § 1415(b)(7)(A)(ii)(III) & (IV).) The proposed resolution does not control whether the party's identified issues in a complaint may be litigated and determined, nor does it limit the relief an ALJ may order. Whether a proposed resolution may be barred by law is determined once an analysis of the issues is conducted.

“strong” behavioral program, made a “strong” recommendation for family therapy, and cautioned against placing Student with peers who were lower functioning academically. On April 8, 2008, Student was placed at King’s Daughter by Parent.

4. King’s Daughter is a residential facility in Columbia, Tennessee. Dr. David Craig is an educational psychologist and the Executive Director of King’s Daughter. King’s Daughter accepts children with the primary disability of specific learning disorder (SLD). The typical academic functioning of students at King’s Daughter falls between pre-kindergarten to fifth grade. Dr. Craig stated that Student was accepted at King’s Daughter because she fit the SLD profile based upon her delayed academic skills. While she had emotional and behavior problems when she came to King’s Daughter, Dr. Craig stated that she was accepted due to her SLD profile.

5. Subsequent to the unilateral private placement at King’s Daughter, Parent filed for a due process hearing in 2008. The parties entered into a settlement in that action and King’s Daughter became Student’s publicly funded educational placement. During this hearing, all three parties presented evidence regarding Student’s placement at Fremont High prior to King’s Daughter, and her academic, emotional and behavioral functioning prior to placement at King’s Daughter. The parties have argued whether Student required placement at King’s Daughter prior to the 2009-2010 SY in order to receive a FAPE. That issue was not raised in this hearing, and the evidence of why Student was initially placed at King’s Daughter has been considered for background purposes only. Student currently remains at King’s Daughter as her stay put placement.

*The April 28, 2009 IEP*

6. On April 28, 2009, District and Mental Health held Student’s annual IEP meeting. Parent was present and King’s Daughter staff participated by telephone. King’s Daughter staff presented an update on Student’s progress based upon goals that King’s Daughter developed for Student on May 2, 2008. The meeting was continued to June 2, 2009, to allow for an exchange of proposed goals from King’s Daughter and to allow Parent to visit potential post-secondary programs within the District.

7. On June 2, 2009, the parties reconvened to continue the April 28, 2009 IEP meeting. The IEP team based Student’s present levels of performance (PLOP) in academic functioning on Woodcock-Johnson III Test of Achievement (Woodcock) scores obtained by King’s Daughter on March 30, 2009. Her adaptive and daily living skills PLOPs were determined to be at an age equivalency of 11.7. Student’s social, emotional and behavioral PLOPs do not identify these skills as areas of concern. The IEP notes reflect that, according to King’s Daughter staff, Student was displaying positive behaviors. Based upon these PLOPs, District and Mental Health identified Student’s areas of need as functional reading, life and vocational skills. Parental concern is noted on the IEP in the areas of reading and daily living skills. However, Parent did not present any evidence to dispute either the PLOPs or the identified areas of need.

8. Based upon the PLOPs, District developed measurable annual goals in the identified areas of need of life skills, vocational skills and functional reading. Mental Health proposed goals in the area of hygiene and social interaction, to be reviewed within six months. The Mental Health goals were to be implemented at King's Daughter. Post-secondary goals for Student's transition plan were for her to continue to work on functional math and reading skills, develop positive working relationships with adults and peers, and learn budgeting skills. Parent and Student did not challenge the appropriateness of these goals or the transition plan during the IEP meeting or at hearing.

9. During the June 2, 2009 IEP team meeting, Mental Health offered to continue funding Student's placement at King's Daughter through July 31, 2009, as the ESY placement. District joined in the offer for ESY 2009. Upon conclusion of ESY 2009, District offered Student placement in the local Santa Clara County area at Wings, a post-secondary program, to implement Student's goals, and to provide vocational training, social skills training, daily living skills training and training in utilizing public transit. It further offered participation in the Independent Academic Success (IAS) program so Student could continue to work towards high school credits and the high school exit exam. Following the IEP team meeting, Parent visited the Wings program.

*The June 18, 2009 IEP Addendum*

10. On June 18, 2009, an IEP team meeting was held to address parental concerns and develop an addendum to the April 28, 2009 IEP. The IEP states that Parent told the team that Student was making progress and was comfortable in her placement at King's Daughter. Therefore, Parent wanted Student to remain at King's Daughter.

11. At the June 18, 2009 meeting, District reiterated its offer of placement and services as set out in Factual Finding 9. Additionally, District offered direct adult supervision for the first 30 days of Student's placement at Wings. It offered to reconvene the IEP team upon Student's return to the local area. At that meeting, District would plan Student's transition to Wings, including discussing the length of Student's educational day, transitional activities and appropriate work sites with Parent and King's Daughter staff. Mental Health reiterated its offer of services as set out in Factual Finding 9 and offered to reconvene the IEP team meeting upon Student's return from King's Daughter to a local placement. Parent did not consent to the IEP.

*The January 27, 2010 IEP Addendum*

12. District and Mental Health conducted assessments of Student in November 2009. They held an IEP team meeting on January 27, 2010 to develop an addendum to the April 28, 2009 IEP. King's Daughter staff expressed concerns that they did not believe Student was ready to transition out of their program. They believed that Student had not mastered skills to be a candidate for competitive employment, had some socialization difficulties and needed to work on identifying appropriate conversational topics. King's

Daughter staff stated that Student had not had any behavior problems and was on level four, out of five levels, indicating progress in their program.

13. At the January 27, 2010 IEP team meeting, District offered 25 hours per week of placement at Wings, with 45 minutes per week of behavior consultation to the school and job site, and one-to-one staff supervision for six hours per day at school and the job site. District presented Parent and Student with detailed written information regarding how Wings would address Student's needs in functional academic, social, independent living, and vocational skills, and behavioral support. District offered four hours per week of regular education in the IAS program, with accommodations, at the "Ed Ops Center." District also offered speech and language therapy one time per week for 45 minutes. Finally, for ESY 2010, District offered eight weeks of the Wings program and one 45-minute speech and language therapy session per week.

14. Mental Health offered Student individual counseling two times per week for 60 minutes per session, and family counseling one time per week for 60 minutes. Additionally, Mental Health offered medication monitoring one time per month for 60 minutes.

#### *Appropriateness of the IEP Offer*

15. The evidence established that Student has unique needs in the areas of functional academics, vocational skills, independent and daily living skills, social skills, and emotional and behavioral functioning. As discussed below, the April 28, 2009 IEP, with its addenda, offers Student a FAPE in the LRE in her local community. The evidence does not support Student's assertions that she requires residential placement in order to receive a FAPE.

16. Joseph Weber is a school psychologist, as well an administrator for District. He estimates that he has participated in over 1,000 IEP team meetings. Mr. Weber has been involved in Student's case since October 2008. He is also the primary designated program administrator for all District children placed at Wings. Elinor Yamauchi is a speech and language specialist for District. She is the speech therapist assigned to the Wings program.<sup>4</sup> At hearing, Mr. Weber and Ms. Yamauchi provided a detailed description of the Wings program and how it would meet Student's needs.

17. Wings is a program for disabled students between the ages of 18 and 22 years old. The program has between 15 to 20 students, two teachers and four aides. It works on students' vocational, community, social, independent living and functional academic skills. The students go out into the community to job sites on a daily basis from one to three hours per day. In the classroom at Wings, students work on reading, filling out job applications, meal planning, budgeting and accounting. Wings provides students with opportunities to

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<sup>4</sup> Ms. Yamauchi is familiar with Student because she worked with Student at Fremont High and assessed Student in March of 2008, between her release from Aspen and her placement at King's Daughter.

practice doing laundry, going to restaurants in the community, shopping for meals, engaging in an exercise program, and assisting with self-care and hygiene. Wings provides coordination and collaboration with other agencies such as SARC, Mental Health and the Department of Rehabilitation, and allows for planning and coordination of students' lives after they are no longer eligible for special education.

18. Theresa Wilson, school psychologist for District, has visited Wings once. Ms. Wilson opined that Wings provided students with the opportunities to develop independent living skills, job skills, self-help skills and provided behavioral and social support. Based upon her assessment of Student in November 2009 and her opinion that the Wings program addressed all of Student's identified educational needs, Ms. Wilson concluded that Wings was appropriate for Student.

19. In addition to the Wings program, District offered Student the IAS program. While the evidence established that the Wings program meets Student's functional academic needs, IAS would allow Student to continue working on core academic skills and build credits towards District's graduation standards. IAS would provide Student with additional academic support, beyond what was necessary to address Student's IEP goals.

20. Hayley Giniger is a licensed therapist for Mental Health. Ms. Giniger has substantial training as a therapist. She has handled over 100 cases, with over 90 percent being individuals who are seriously emotionally disturbed. Ms. Giniger stated that of those cases, a large majority of the cases are individuals in residential placement. Ms. Giniger was a credible witness. Ms. Giniger assessed Student in November 2009, as discussed below. She also observed Student at King's Daughter and interviewed staff. She opined that Student's emotional needs could be met in her local community with counseling and medication management.

21. The most current assessments of Student support District and Mental Health's position that the April 28, 2009 IEP, including its addenda, appropriately addresses Student's identified areas of need. In November 2009, Ms. Wilson assessed Student's cognitive functioning, academic functioning, social-emotional and adaptive functioning. Based upon test scores, she stated that Student's cognitive functioning was moderately delayed. Ms. Wilson also used the Woodcock to assess Student's academic functioning. She reported that Student's scores were consistent with the testing in 2008 from Aspen, wherein her reading scores were comparatively higher than her math scores. The scores Ms. Wilson obtained were also consistent with the Woodcock scores obtained by King's Daughter in March 2009.

22. The evidence did not support Student's assertion that she has behavioral and emotional needs that require a residential placement such as King's Daughter. At hearing, Dr. Craig and Ms. Ballard stated that Student did not display serious behavior problems. The evidence established that Student has had only three incident reports since May 2008. These incidents, on May 26 and June 12, 2008, and May 21, 2009, were all identified by King's Daughter as minor incidents. King's Daughter staff reported to District and Mental Health,

during interviews and at the relevant IEP meetings, that Student did not have serious behavior problems.

23. Dr. Craig stated that the incident reports do not account for daily behavior issues that arise and are addressed in the moment by King's Daughter's staff. However, Student did not present any evidence that she displayed such behaviors. Student participates in the same behavioral system as all students at King's Daughter. Students at King's Daughter have four behavioral goals, which are to follow directions, have appropriate peer interactions, have appropriate staff interactions, and stay on task. A point system is implemented based upon these goals, allowing students to earn points that can be used for privileges.

24. Mr. Weber observed the program at King's Daughter and interviewed eight staff members on February 9, 2010. In his testimony and the report of his visit, he described the point system for Student at King's Daughter. Students at King's Daughter are able to earn up to 640 points per week. Student had earned 635 points or higher for approximately 25 weeks. Mr. Weber was informed that Student's behavioral compliance is at such a high level that for Student to lose more than five points in a week would be considered having a "bad week." Student's success under this system established that she does not display behavior problems that require a specific behavior plan, and that she is capable of performing at a high level when included in a general behavior program applied to all students.

25. Ms. Wilson opined that she did not feel Student displayed behavioral needs that required residential placement. In her conversations with King's Daughter staff, she was informed that Student was on level 14 out of 15 levels, was doing well and did not display serious behavior or emotional problems. King's Daughter staff told her that Student was not ready to transition because she needed to be at level 15. However, even at that level, King's Daughter could not say if Student would be ready to transition out of their program. The evidence established that, regardless of whether a weekly point system or a level system is used, Student has maintained a very high level of behavior compliance at King's Daughter for a substantial period of time.

26. Dr. Craig and Ms. Ballard could not articulate when any individual, and specifically Student, would be ready to transition from King's Daughter. They acknowledged Student's excellent performance on their points-based and levels-based behavior programs. However, they believed that even performing at the highest level did not mean an individual was ready to transition out of the program. Neither of them could provide any objective criteria by which to determine when Student may be ready to transition to a lesser restrictive environment. Dr. Craig and Ms. Ballard opined that Student was not ready to transition from King's Daughter to a lesser restrictive placement because she was doing well at King's Daughter. They both believed that Student would regress if removed from King's Daughter. However, they could not identify any specific area in which District and Mental Health's April 28, 2009 IEP, with its addenda, would not meet Student's educational needs.

27. While Dr. Craig and Ms. Ballard were credible witnesses as to Student's performance and functioning at King's Daughter, their opinions on whether District and Mental Health offered Student a FAPE in the LRE is given little weight. They could not articulate any objective criteria by which to measure when a student may be able to transition to a lesser restrictive placement than King's Daughter. Additionally, they both admitted that they were unfamiliar with the placement and services that had been offered by District and Mental Health. Ms. Ballard was under the mistaken impression that Student would be returned to a placement on a campus such as Fremont High, with hundreds of other students.<sup>5</sup>

28. Dr. Craig stated that Student had a history of delusional thinking, sometimes based upon religious themes, and continues to have some visual and auditory hallucinations. The evidence established that when Student came to King's Daughter she continued to have some delusional thinking related to the belief that she was impregnated with the "Christ child," which was thinking that had carried over from Aspen. Student related her continued auditory hallucinations to Ms. Giniger. However, the evidence established that Student's emotional issues of auditory hallucinations are managed with medication and are not interfering with her ability to access her educational environment.

29. King's Daughter did not conduct a behavioral assessment of Student, did not identify behavior problems as an area of need on her IEPs, and did not develop an individualized behavior support plan for Student. Student's typical day at King's Daughter does not include a therapeutic component designed to address emotional issues. Student receives weekly counseling from a contracted vendor for King's Daughter.

30. Student and two of her teachers from King's Daughter completed the Behavioral Assessment System for Children, Second Edition, (BASC-2), as part of Ms. Wilson's assessment. Ms. Wilson stated that Parent was also given a BASC-2 as part of Student's assessment, but Parent did not return the rating scale. Student's self-report on the BASC-2 did not reveal any areas of clinical significance. The response by Student's science and social studies teacher revealed a clinically significant score in anxiety. The response by the accelerated reading teacher revealed clinically significant scores in anxiety, depression and somatization. Both teachers rated Student as having strong adaptive skills, which was consistent with Student's self-report.

31. As part of Ms. Wilson's assessment, Student's reading teacher and house parent at King's Daughter completed the Adaptive Behavior Evaluation Scale (ABES). The ABES measures an individual's functioning in communication, self-care, social, home living, community use, self-direction, health and safety, functional academics, leisure and work-related adaptive skills. Student's scores showed overall deficits measuring one or more

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<sup>5</sup> Similarly, Parent presented evidence of Student's prior program at Fremont High and asserted that returning Student to a placement with a large population would be detrimental to Student. However, the evidence established that both the Wings program and the IAS program are not located on a campus with a large student population.

standard deviation. Ms. Wilson reported that this indicated that Student required special education services and on-site adjustments to regular education classes in order to succeed. She concluded that, while Student displayed behavioral and emotional needs, they could be addressed through counseling on a consultative model. She did not believe that the severity of Student's behavioral and emotional needs required a residential placement in order for Student to receive educational benefit. Ms. Wilson has substantial experience as a school psychologist and in administering testing to students. Her testing and subsequent report supported her testimony, and she was a credible witness.

32. On November 20, 2009, Student was assessed by Ms. Giniger. She interviewed Student, as well as Jill Fields, Student's therapist at King's Daughter; Bonnie Hall, Student's residential counselor at King's Daughter; and David Neff, the Director of Residential Services at King's Daughter. The assessment revealed that Student's therapy at King's Daughter primarily focused on appropriate interactions with peers and authority figures, and social skills. Student displayed idiosyncratic thinking and possible continued psychotic processes because she continued to have auditory hallucinations wherein she hears a "God voice" and a "Devil voice." However, Student is on medication, is aware of her medications and dosages, and is able to manage her mental health functioning through medication and counseling. Student sees Ms. Fields one time per week for therapy.

33. In her residential setting, Student's goals focus on her hygiene and peer interactions. Ms. Hall informed the assessor that Student has difficulty engaging peers in reciprocal interactions, can become "intrusive or bossy" with peers, and does not always understand that a peer may wish to converse about subjects of interest to the peer rather than subjects that interest Student. Student is well liked by staff and peers.

34. Ms. Giniger followed up her assessment of November 2009, with another visit on February 19, 2010. She observed Student throughout her day. Student was engaged in her class, interacted well with peers during free time and appeared to be well liked. Student was in the highest functioning language arts group in her class. Ms. Giniger observed Student in a sheltered workshop environment where she was putting together water heaters and filling out time cards. Student also volunteered at a soup kitchen. She did not see Student's mental health needs interfering with her ability to function at school and in the community.

35. Mr. Weber, Ms. Wilson, Ms. Yamauchi and Ms. Giniger were persuasive in establishing that the IEP offer of April 28, 2009, as amended by the June 18, 2009 and January 27, 2010 addenda, was designed to meet Student's unique needs and is reasonably calculated to allow her to receive some educational benefit.

#### *Least Restrictive Environment*

36. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular

classes with the use of supplementary aids and services cannot be achieved satisfactorily. Placement must foster maximum interaction between students with disabilities and their nondisabled peers. The law favors mainstreaming, although it recognizes that a less restrictive setting may not always meet a child's unique needs. For some students, a more restrictive setting may be necessary to provide a student with a FAPE.

37. The test 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 the less restrictive placement; (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 less restrictive placement; and (4) the costs of educating the child in the less restrictive placement with appropriate services, as compared to the cost of educating the child in the more restrictive setting.

38. The parties agree that Student cannot be satisfactorily educated in the general education environment. Because the Wings and IAS placement is a non-residential placement in California, in this case, it is by definition the less restrictive placement. The IEP offer of April 28, 2009, including its addenda discussed herein, would place Student in special education for 100 percent of the educational day. This is similar to the King's Daughter program, which provides a campus with no access to typically developing peers. However, the evidence established that the placement offered by District and Mental Health provided for daily access to the community through either the vocational portion of the program or through the daily and independent living skills portion of the program. At King's Daughter, on the other hand, Student does not have a job in the community, and practices her vocational skills in an on-site sheltered program. Student accesses the community at King's Daughter approximately two to four times per month. According to Ms. Ballard, jobs in the community are very limited. Student is not learning how to use the community public transportation, as King's Daughter drives Student to any off-campus activities.

39. Under the IEP of April 28, 2009, including its addenda, Student would be returned to her home environment. Student has expressed a desire to return to and reside in her home community for after-school and social activities. By contrast, King's Daughter is isolated and Student only accesses the community two to four times per month. The stipulation by the parties established that Student and Parent could access SARC if they desired to explore a group home facility for Student. Student would reside either with her family or near her family. Therefore, the evidence established that Student would receive non-educational benefits of being in her home and local community under the April 28, 2009 IEP, including its addenda, which are not available to Student at King's Daughter.

40. The IEP of April 28, 2009, including its addenda, is designed to address Student's identified areas of need and provide her with some educational benefit. Student's current behavioral and emotional needs can be met through the services offered by Mental Health in her local community. Therefore, Student can receive educational benefit in a full-time placement in a lesser restrictive placement than King's Daughter. The parties did not present any evidence regarding the effect Student may have on her peers or teachers in either

placement. The parties did not present any evidence regarding the costs of either placement. Accordingly, the evidence established that a non-residential placement in California pursuant to the April 28, 2009 IEP, and its addenda, offers Student a FAPE in the LRE.

41. Student did not meet her legal burden to show that the April 28, 2009 IEP, as amended by the June 18, 2009 and January 27, 2010 addenda, failed to offer Student a FAPE in the LRE. Accordingly, whether the program at King's Daughter offers Student a FAPE in the LRE need not be addressed.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for a due process hearing has the burden of persuasion. The Student filed the complaint in this matter, and, therefore, has the burden of persuasion. Even if District and Mental Health had the burden of persuasion, they would have met that burden.

*Did the April 28, 2009 IEP, as amended, fail to offer Student a FAPE for the 2009-2010 SY and ESY because the proposed transition of Student from King's Daughter to Wings, with transition support, vocational and community training, life skills and social skills training, and mental health support services was not appropriate to meet Student's unique needs?*

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The right to special education is extended to pupils from the ages of 18 through 21 years, who have preexisting IEPs, and who have not yet completed their prescribed courses of study, have not met proficiency standards, or have not graduated from high school with a regular high school diploma. (Ed. Code, § 56026, subds. (c)(3) & (4).)

3. A FAPE is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) The term "related services" (also known as designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

4. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that

maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) In *J.L. v. Mercer Island School District*, the Ninth Circuit found that the *Rowley* FAPE standard still applies and that the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard. (*Id.* at p. 951.) The Ninth Circuit has previously also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

5. In this case, both District and Mental Health are responsible for the provision of a FAPE to Student. California Government Code Chapter 26.5 provides for the coordination of services provided by state and local governmental agencies to children who qualify for special education services. (Gov. Code, § 7570 et seq.) Government Code section 7576, subdivision (a) provides:

The State Department of Mental Health, or any community mental health service, as defined in Section 5602 of the Welfare and Institutions Code, designated by the State Department of Mental Health, is responsible for the provision of mental health services ... developed in consultation with the State Department of Education, if required in the individualized education program of a pupil.

6. There are two parts to the legal analysis of District and Mental Health's compliance with the IDEA. First, the tribunal must determine whether they have complied with the procedures set forth in the IDEA.<sup>6</sup> (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

7. To determine whether the District and Mental Health offered Student a FAPE, the tribunal must focus on the appropriateness of the placement offered by District and Mental Health and not on the alternative preferred by Parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) "In striving for 'appropriateness', an IEP must take into account what was, and was not, objectively reasonable ... at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at p. 1149, quoting *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

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<sup>6</sup> Student did not allege a procedural violation of the IDEA.

8. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

9. As discussed in Factual Findings 22 through 34, the evidence did not support Student's contentions that her emotional and behavioral needs require continued residential placement. Based upon Factual Findings 8, 9, 11 through 15, 17 through 20, and Legal Conclusions 1, 3, 4 and 6 through 8, the evidence established that the Wings program, with IAS, was designed to meet Student's unique needs in functional academics, daily or independent living skills, vocational skills, social skills, and behavioral and emotional needs. The placement would have appropriately implemented Student's goals. The evidence established that the April 28, 2009 IEP, including its addenda, is designed to provide Student with some educational benefit and offers her a FAPE.

*Did the April 28, 2009 IEP, as amended, fail to offer Student a FAPE for the 2009-2010 SY and ESY because the proposed placement was not in the LRE?*

10. A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).) 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." (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834; *Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045.)

11. In *Sacramento City Unified Sch. Dist. 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 the less restrictive placement; (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 less restrictive placement; and (4) the costs of educating the child in the less restrictive classroom with appropriate services, as compared to the cost of educating the child in the more restrictive setting.

12. Based upon Factual Findings 38 through 41, the offer by District and Mental Health would place Student in the LRE. It is undisputed that Student requires a more restrictive placement than the general education classroom. The placement under the April 28, 2009 IEP, with its addenda, is designed to address Student's identified needs and provide

her with some educational benefit in a non-residential placement in California. It provides Student with the non-academic benefits available to her in her home and local community. Student did not challenge, and parties did not present evidence on, the impact of Student's placement upon her peers and teacher and the costs of educating Student at either King's Daughter or in the Wings program. Accordingly, District and Mental Health offered Student a FAPE in the LRE.

#### ORDER

The offer by District and Mental Health to place Student in the Wings program, with IAS, behavioral consultation, adult supervision, speech and language therapy, individual counseling, family counseling and medication management, as set out in the April 28, 2009 IEP and the June 18, 2009 and January 27, 2010 addenda, offers Student a FAPE in the LRE. Student's request for relief is denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District and Mental Health prevailed on all issues heard and decided.

#### NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this decision. The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505 subd. (k).)

Dated: April 22, 2010

/s/

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BOB VARMA  
Administrative Law Judge  
Office of Administrative Hearings