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

In the Matter of: STUDENT, Petitioner, v. CLOVIS UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2006070834

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings Special Education Division (OAH), State of California, heard this matter on September 20-22, 2006, in Clovis, California.

Dale Mentink, Attorney at Law, represented Petitioner (Student). Student's Mother attended the hearing.

Matt Juhl-Darlington, Attorney at Law, represented Respondent Clovis Unified School District (District). Janet Van Gelder, District Director of Special Education, also attended the hearing.

Student's due process hearing request was filed on July 28, 2006. There have been no continuances. Oral and documentary evidence were received. The record was held open for the filing of closing briefs by 5:00 p.m. on October 6, 2006. The briefs were timely filed; the record was closed and the matter submitted on October 6, 2006.

ISSUES

1. For the 2006-2007 school year at Clovis High School (CHS), does the District's offer of placement in the Special Day Class Functional Skills (SDCFS) class provide Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE)?

2. For the 2006-2007 school year at CHS, does the District's offer of a general education physical education (GEPE) class, with some sports restrictions, provide Student a FAPE in the LRE?[1]

3. For the 2006-2007 school year at CHS, did the District deny Student a FAPE in the LRE by refusing to provide, in Student's individualized education plan (IEP), the supplementary aides, services, and program modifications necessary for Student to participate in the off-campus training runs of the extracurricular cross-country team?

FACTUAL FINDINGS

1. Student was born October 22, 1991, and lives within the District's boundaries. She is eligible for special education services due to mild to moderate mental retardation. She currently attends the SDCFS program at Clovis High School.

Student's Unique Needs

2. A school district must provide a FAPE in the LRE that is designed to meet a student's unique needs, reasonably calculated to provide some educational benefit and, to the maximum extent appropriate, allows a student to be educated with his/her nondisabled peers. The parties do not dispute that Student has unique needs (deficits) in the areas of cognitive/intellectual abilities, adaptive behavior skills (communication, socialization, and daily living), and PE. However, the parties disagree over the severity of those needs, in that they disagree about the proper placement to address Student's unique needs.

Cognitive/Intellectual Needs

3. As to the severity of Student's cognitive/intellectual unique needs, David Webber, who holds two master's degrees, is working on his doctoral degree, and is part of the California panel that norms/updates the Wechsler Intelligence Scale for Children (WISC) test, provided detailed, thorough, highly persuasive testimony. Mr. Webber was the school psychologist at Clark Middle School (CMS), where Student attended seventh and eighth grade. In that position, he was part of the multi-disciplinary team that assessed Student. He also assisted the multi-disciplinary team with interpretation of the most recent assessment, completed by the Fresno Diagnostic Center report and dated June 9, 2005. That report includes Student's scores on the Stanford Binet Intelligence Scales (SBIS) IV, the SBIS V,

[1] The Prehearing Conference Order noted this issue as it related to District's original offer of a combination of GEPE and Adapted PE (APE). However, at the hearing, the parties did not dispute the submission of evidence regarding the update in the District's offer – to 100 percent GEPE, with restrictions as to which sports in which Student can participate. Therefore, the issue to be resolved is that set forth here, which reflects the new evidence adduced at the hearing. The same is true as to Issue No. 3 – as set forth here, the issue statement reflects the new evidenced adduced at the hearing.

the WISC III, and the WISC IV. Student took these tests over the course of the last eleven years, and her scores across the tests were consistent.

4. On the SBIS V, the most recent test, Student's scores were as follows: 43 in non-verbal IQ, 59 in verbal IQ, 49 in full scale, 65 in fluid reasoning, 57 in knowledge, 53 in quantitative, 59 in visual spatial, and 48 in working memory. The mean score is 100, and a standard deviation of 15 points in either direction would be considered average. Webber used a graph entitled, "The Normal Curve and its Relationship to Various Derived Sources" to explain that any score below a 70 placed Student in the bottom 2.15 percent of all test takers, while any score below 50 placed Student in the bottom .13 percent. So Student literally scored lower than 99.9 percent of the people who have taken the test in the non-verbal, full scale, and working memory portions of SBIS V, and lower than 97.85 percent of all test-takers in the remaining portions of the test. The scores indicate that Student will have difficulty with understanding written or oral language, the ability to visually and spatially relate things, working with concrete or abstract numbers, and committing things to memory and responding appropriately. All of these scores indicate that Student was squarely within the mild to moderate range of mental retardation (and in some areas approaching the range of severe mental retardation).

5. Studies indicate that IQ is fluid in individuals below 10 years of age, but it becomes fairly stable after 10 years of age. Student will be 15 years old on October 22, 2006. Therefore, it would be appropriate to rely on these scores to determine Student's placement for the 2006-2007 school year. Looking only at these scores, Mr. Webber reached several conclusions: (1) the SDCFS class might be challenging for Student; (2) he would not rule out a Severely Disabled class for Student (but that would be a more restrictive environment); and (3) Student's typical peers (cognitively) would be those students in the SDCFS class.

6. Paulette Bradford, one of Student's expert witnesses on this issue, had been a school teacher for several years (Lifetime Teaching Credential for kindergarten through ninth grade), had been extensively trained (in Lindamood Bell, Project Read, and a program by the National Institute for Learning Disabilities entitled "Discovery"), and had been a private tutor for about 15 years. However, her testimony was not particularly helpful because, while Student made progress during the several years that Ms. Bradford provided one-to-one tutoring on reading skills, Ms. Bradford's estimates of Student's reading skills indicated that Student still had significant deficits (third grade level for meaningful decoding skills, fourth grade level for instructional reading, and lower levels for listening skills and listening vocabulary).

7. LaQuetta Copeland, Student's other expert witness on this issue, began working in the educational field in 1967, and had spent most of the years between then and now working with children with special needs, including testing, consulting, and training others as to the integration of special needs children. However, Ms. Copeland's opinion that Student should be placed in the Resource Specialist Program Vocational skills class (RSPV) was not persuasive, because it is based on incomplete and inaccurate information. Ms.

Copeland's report of May 25, 2006, does not indicate that she reviewed or considered the Fresno Diagnostic Center report. Ms. Copeland's conclusions and recommendations do not account for the severity of Student's unique needs, as documented in the Fresno Diagnostic Center report. In addition, Ms. Copeland's report is not accurate because she did not understand the Resource Specialist Program (RSP) options at CHS. Furthermore, Ms. Copeland's findings and recommendations are contradictory. For example, the fundamental nature of the academic goals set for Student in Ms. Copeland's report (for example, improving Student's skills at reading/written language and math using second and third grade materials, respectively), belie her recommendation that Student be placed in the Vocational Certificate Program (which, as described by Ms. Copeland, "focuses on academics and matching student abilities and interests" – presumably for future employment).

8. The conclusions of the Fresno Diagnostic Center report corroborated Student's severe cognitive/intellectual deficits. Specifically, the center found that Student's receptive and expressive language skills were in the age range of five to seven years, Student's reading comprehension was in the age range of six years to seven years, four months (depending on the presentation of reading material and assessment style), Student's word recognition skills were in the age range of eight years to eight years, two months, and Student's overall math skills were "within the early kindergarten range and commensurate with nonverbal intellectual functioning."

9. At least three District witnesses, all of whom had extensive education and experience teaching and/or working with special education students, confirmed this picture of the severity of Student's cognitive/intellectual unique needs. Karen Balske, who taught Student's RSP academic classes at CMS, established that Student had a very difficult time with reading comprehension; she estimated Student's ability to be at the first grade level, while Student's word recognition was at the second to third grade level. Student's RSP curriculum was modified, because all of the other RSP students were academically ahead of her (for example, by up to a couple of years in reading comprehension and oral skills). Ms. Balske assisted Student with the modified materials, had Student participate in learning groups, and had Student do some work using the same materials as the other RSP students. However, by the end of Student's eighth grade year, she was "shutting down"; she would look around the room rather than at her paper, and she seemed unhappy when she was pulled aside to work on other things. Ms. Balske also established that Student's "like peers" would be first or second grade students, or students in a Life Skills class.

10. Debbie Trantham, Student's speech and language therapist at CMS, who worked with Student during lunch and break times, corroborated that Student's classmates in the RSP class at CMS were not her "like peers" because they had higher levels of academic functioning, and were able to work independently. Ms. Trantham also corroborated that Student was "shutting down" in the RSP class at CMS; Student had problems accessing the "highly modified" curriculum. Even if Student was able to complete a task in the RSP class at CMS, she did not have the foundation that would allow her to tie that task to anything else. Debbie Takacs, a District program specialist who supervises a number of classes, including the SDCFS class, and who has worked with special education students for all of the 26 years

she has been in the educational field, verified that Student's CMS RSP curriculum was "highly modified."

Adaptive Behavior Needs

11. As to Student's unique needs in the area of adaptive behaviors, Mr. Webber did not believe it would be appropriate to base any decision regarding Student's placement solely on Student's cognitive test scores. As a result, Mr. Webber explained Student's scores on the Adaptive Behavior Assessment System II. These scaled scores have a mean of 10, and a standard deviation of three. Thus, according to the Normal Curve, a score of "1" would be equivalent to a standard score of 55, which is in the .13 percentile. Student received a score of "1" as to all three teacher form scaled scores in the categories of communication, community use, functional academics, school or home living, health and safety, and social. Student received higher scores on the three teacher form scaled scores in the categories of leisure, self-care, and self-direction. Mother gave Student a scaled score of "1" in the categories of community use, school or home living, self-care, and social.

12. Several District employees, all of whom had extensive education and experience teaching and/or working with special education students, provided observations to convincingly illustrate the severity of Student's unique needs in the area of adaptive behaviors. Christine Van Bebber, Student's current teacher in the SDCFS class, established that Student has deficits in the areas of personal and social skills (for example, Student stands too close to others, has difficulty with eye contact with a peer, or sometimes stares at a person) and self-help skills (Student does not clean herself after getting candy or glue on her hands). Janet Ryska, the school psychologist at CMS, who has known Student since Student was in the same kindergarten class as Ms. Ryska's son, and who has worked extensively with Student on social skills (for example, at lunch and during breaks), established that Student had a difficult time establishing relationships at CMS because the other students at lunch and on class breaks were not Student's "like peers." Student was not able to read body language, and did not know what others meant or wanted. Ms. Ryska regularly asked Student to wipe her mouth after lunch and, once Student started wearing makeup, Ms. Ryska had her remove the lipstick that she had applied (which was all around her mouth).

13. Ms. Balske and Ms. Trantham corroborated that Student required repeated prompting to clean her face and/or hands. Ms. Balske estimated that Student's social skills were at the first or second grade level, which she observed in Student's conversations about her dog, while Student's classmates were talking about "high school"-type subjects (like football games or dances). At a student banquet, Student used her hands rather than utensils to serve herself with salad from the buffet-style bowl. Also, Ms. Trantham established that Student did not have a concept of money – either how much she had, or how much items cost. For example, Student would not understand, when ordering her lunch, how much money (in change) should be returned to her. Nor did Student understand how to order items, in that she would put her money on the counter, tell the clerk she wanted a particular item, and then, when the clerk brought her the item and her change, Student would then order an additional item. Ms. Trantham worked on Student's social interactions (personal space,

eye contact, appropriate topics and vocabulary for specific situations, etc.) because, for example, Student would go stand with other girls from the choir, but there would be no interaction. Student would simply look in on the group. If the girls walked away, Student would follow them – she did not understand that that action on their part indicated that they did not want her around. Ms. Trantham explained to Student the meaning of walking away, and sometimes Student's feelings were hurt.

Physical Education Needs

14. As to Student's unique PE needs, several credible District witnesses, as well as a report by the Fresno Diagnostic Center, established that Student has delayed or slow reaction times, visual problems, and difficulties in estimating spatial relationships. For example, Ms. Ryska once watched Student playing volleyball. Student stood with her arms extended for the entire time that Ms. Ryska was observing; she did not seem to have the ability to react quickly enough to hit the ball. Ms. Ryska indicated that Student's difficulties appeared to stem, at least in part, from visual challenges, and the Fresno Diagnostic Center report corroborates Student's vision deficit (at least on her right side).

15. Burt Van Ravenhorst, District's APE Specialist who has known and worked with Student since the fall of 1999, once saw Student playing four-way volleyball (using a beach ball) at CMS with a mixture of general and special education students. The ball was served; Student was not aware of the ball until it landed on her head. In addition, Student would have been hit by a football while running on the high school track, despite Mr. Van Ravenhorst's verbal warnings and cue(s) to stop, had Mr. Van Ravenhorst not physically moved her out of the way. Volleyball spikes are "very forceful" at the high school level, which is different than the middle school level. Student does not have the ability to respond quickly, which would be required for power volleyball; assigning an aide to Student would only single out Student while distracting from the volleyball game.

16. Mother and Student testified that Student was never injured in GEPE. However, the notes of the IEP team meeting, dated January 4, 2006, and attended by Mother, indicate that Student's eighth grade teacher saw Student get hit with balls three times, two of which required a visit to the nurse's office.

17. Student's expert on this issue, Marti Fuquay, a certified APE specialist who had earned a master's degree and taught GEPE for a number of years, was not persuasive. Ms. Fuquay only saw Student once, nearly two years ago – as noted by her report dated December 5, 2004. Ms. Fuquay did not observe Student playing any of the sports that the District seeks to prevent Student from participating in, and Ms. Fuquay acknowledged that the level of play in high-school sports would be higher than that at the middle school level. For example, Ms. Fuquay admitted that she would not find it surprising that a male high school student would "spike" a volleyball with force if the opportunity to do so presented itself during power volleyball.

Cross-Country Running Needs

18. As to Student's unique needs regarding the cross-country team, Rodney Marvin, who coached Student's cross-country team at CMS and testified on Student's behalf, expressed concern for Student's safety if she were allowed to run off-campus. Student ran off-campus three or four times during the middle school cross-country team season. However, the middle school route was through a residential area, most of which did not have busy traffic, while the high school cross-country team's route is on a busy street. Numerous credible District witnesses established that it would not be appropriate for Student to run off-campus, and expressed concern for Student's safety if she were allowed to run off-campus. For example, Ms. Ryska had observed Student's delayed reaction time, and was concerned that Student would not be able to make a quick decision if a car were coming at her. Ms. Balske noted that Student had difficulty finding her way from one class to another for a portion of the semester during both the seventh and eighth grade years. Ms. Balske was concerned that Student might get lost if someone was not with her during the off-campus runs, and that, even if someone ran with Student off-campus, Student might fall behind or go in a different direction. Ms. Trantham had not seen Student react quickly. When Ms. Trantham walked with Student on campus, Student did not stay beside her; instead, Student would sometimes wander, go ahead of her, or fall behind her.

19. Mr. Van Ravenhorst provided convincing, detailed information regarding Student's unique needs as related to the appropriateness of off-campus training runs. Student lacks kinesthetic awareness; she knows how to run, but seems to lack awareness of personal and general space. Student will walk up to other students and stop within inches of them; she also wanders from lane to lane while running on the track. This is a problem because Student would be running about three to six feet from traffic if she were allowed to participate in the off-campus training runs of the cross-country team. The Fresno Diagnostic Center reported Student's "difficulty with body in space awareness," and listed as challenges Student's "visual and motor impairments" as well as "[p]roblems with directionality." In addition, high school cross-country team members run independently, rather than in groups; Student typically lags behind. Mr. Van Ravenhorst's verbal cues to Student have not been effective. Therefore, Student's safety would be jeopardized by running off-campus, even if an aide were assigned to run with her. As Mr. Van Ravenhorst noted, it would be inappropriate for someone else (for example, an aide) to have to move Student for Student's safety. Another safety concern for Student is that, in the last month, there have been three reported incidents where drivers either tried to abduct or wanted to fight GEPE students while those students were running off-campus.

20. Mr. Van Ravenhorst also explained that Student does not have the requisite skills for off-campus training runs. First, she does not have the necessary discipline. Student requires prompting for essentially every phase of the cross-country team workout (to take off her backpack, to begin to warm up, to run, etc.). Second, Student does not have the necessary stamina. When Mr. Van Ravenhorst ran on-campus but off the track with Student, she only ran for about six minutes 28 seconds before saying that she was tired and finished for the day. The next day they again ran off the track, but Student did not run very far.

Instead, she expressed her desire to return to the track, where she ran five laps (the farthest she had run at that time). The longest distance that Student can consistently run is about one mile. However, an off-campus training run for the high school cross-country team would range from three miles to between 10 and 15 miles. Student also lacks the ability to self-pace; she alternates between running for 30 to 45 yards in a burst of speed, followed by walking. Nevertheless, Mr. Ravenhorst indicated that, provided Student increased her discipline and stamina, she would (in the future) have the opportunity to run off-campus.

21. As noted, *supra*, Student's expert witness on this issue, Ms. Fuquay, was not persuasive, in that her observations were quite dated. In addition, Ms. Fuquay conceded that the high school cross-country off-campus training runs were about three miles long.

22. In summary, Student has severe cognitive/intellectual needs that require instruction directed at the foundational level – to produce an educational foundation on which Student can build the educational skills necessary for daily living after high school. Student also has severe adaptive behavior needs that require instruction directed at daily living skills such as would be provided in the SDCFS class, and which would not be provided in the RSPV class. Student has unique needs as to physical education and off-campus running, including visual challenges, slow reaction times, and body/spatial awareness issues, all of which require limitations to ensure her safe participation in GEPE and cross-country team activities.

District's Offer of the SDCFS class

23. Ms. Van Bebber, Student's current teacher in the SDCFS class at CHS, explained the curriculum. The Personal/Social Skills class focuses on problem solving, self-help, personal awareness, and other related skills. The Daily Living Skills class teaches the skills that developmentally delayed students need to go through daily life (including food preparation, survival, kitchen-community-school safety, emergency procedures, etc.). English class focuses on reading and writing in a "station" format; Ms. Van Bebber has divided the class into two or three groups according to the students' ability levels. Keyboarding is a GE elective where students first learn the keyboard and how to type on a computer, and then how to work on projects on the computer. Student walks alone to the classroom, which is about four classrooms from Ms. Van Bebber's classroom. Student has a GE lunch period. Student's math teacher, Mr. Duran, has told Ms. Van Bebber that Student is doing well, and that he sits by Student to help her with word problems and working on the calculator. The IEP dated January 4, 2006, contains accurate present levels of performance, as well as goals and objectives that are appropriate and measurable. The physical education (PE) portion of Student's placement will be discussed, *infra*, as it constitutes a separate issue in this matter.

24. Ms. Van Bebber established that Student is having success in the limited time (about four weeks) that she has been in the SDCFS class, which contains nine students and two aides. Student is benefiting from the classes in the SDCFS curriculum, and that she is about average to a little above average (cognitively) for the classes. Student seems happy,

comes in every day with a smile, participates and seems engaged, and is making progress. Sometimes, Student's classmates re-direct her. Ms. Van Bebber has seen Student making friends both inside and outside class; Student is not isolated; and Student seems to like her classmates and they seem to like her.

25. In summary, Mr. Webber persuasively established that, after consideration of Student's scores on the tests of cognitive function and adaptive behavior, the appropriate placement constituting a FAPE in the LRE for Student was the SDCFS class. Ms. Trantham pointed out that the SDCFS class would provide Student with the foundational skills that she needed on a daily basis, would allow Student to build some relationships and achieve some success, which would lead to additional successes for Student, and would eventually allow Student to become employable (which was not her current situation). Ms. Takacs confirmed that Student's "like peers" were in the SDCFS class, because the SDCFS students were at a similar level as Student. The SDCFS class would best meet Student's unique needs, because there Student would learn the strategies she needs, and later the class would give Student the opportunity to job-shadow and have hands-on job experiences.

26. Mr. Webber also established that the RSPV class would not be an appropriate placement for Student, because of the class's pace, and because the RSPV students are expected to work independently – reading classifieds, doing research on the internet, and working on their interviewing skills. Numerous District witnesses corroborated Mr. Webber's conclusion. Ms. Trantham established that the RSPV class was not appropriate for Student because of its academic focus, and because it would not meet Student's personal/social needs. Ms. Takacs established that the RSPV class curriculum would require such significant modifications to accommodate Student that it would no longer be the RSPV curriculum. Instead, it would essentially be an all-new curriculum, or it would be the equivalent to the SDCFS class curriculum.

27. As noted in Applicable Law 3, any analysis of the least restrictive environment must consider four factors: (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. Student asserts that the LRE is the RSPV class. First, as noted Factual Finding 10, Student was "shutting down" in the "highly modified" RSP class she attended during the 2005-2006 school year. In light of the severity of Student's unique cognitive/intellectual and adaptive behavior needs, Student would receive little educational benefit from the RSPV class. However, Student would receive substantial educational benefits from the SDCFS class, because the SDCFS class will provide the basic, foundational education skills that Student needs to be successful in life. Second, Student would not receive non-academic benefits in the RSPV class, because that class would not meet her unique adaptive behavior needs. On the other hand, in the SDCFS class Student will receive substantial non-academic benefits, because the SDCFS class includes classes on personal, social, and daily living skills, and because Student will be with her "like peers," which will allow her to establish typical school relationships and friendships

that will provide her with opportunities to practice the adaptive behavior skills she will learn in the SDCFS class. Third, Student would have a detrimental effect on the RSPV class, because the severity of her needs would require substantial modification of the RSPV class curriculum (to the point that it would no longer be the RSPV class curriculum), and because Student does not have the knowledge and adaptive behavior skills necessary for her to be successful in that class. However, because Student's cognitive/intellectual functioning is about average for the SDCFS class, she will be able to contribute to the SDCFS class. Finally, the cost of either the RSPV or SDCFS class is not an issue.

28. Accordingly, given the severity of Student's unique cognitive/intellectual and adaptive behavior needs, the District's offer of the SDCFS class was appropriate, and constituted a FAPE in the LRE.

The District's Current Offer of 100 percent GEPE, with some Sport Restrictions

29. The District's original PE offer consisted of 15 minutes per week of APE consultation, 160 minutes per week of APE, and 130 minutes per week of GEPE. The parties do not dispute, and there was no objection to the presentation of evidence regarding, the change in the District's PE class offer (made after the filing of this matter) – to a GEPE class for 100 percent of Student's PE class time. The only restriction is that, based on the District's legitimate concerns for Student's safety, Student will not be allowed to participate in water sports/snorkeling, power volleyball, flag football, soccer, basketball, street hockey, and wrestling. When Student's GEPE class participates in these sports, Student will go to another GEPE class. Therefore, the issue to be resolved is whether the District's current offer of GEPE, with limitations as to certain sports, constitutes a FAPE in the LRE for Student.

30. In light of the severity of Student's unique needs, the District's offer of 100 percent GEPE classes, with a restriction that Student not participate in water sports/snorkeling, power volleyball, flag football, soccer, basketball, street hockey, and wrestling, constituted a FAPE in the LRE for Student.

The District's Current Offer for Student to Participate in the Cross-Country Team, Except for the Off-Campus Training Runs

31. Originally, the District's offer did not include participation in the CHS cross-country team. Instead, the District recommended that Student participate in the swimming or track teams, where the training environments would allow appropriate supervision and structure. The parties do not dispute, and there was no objection to the presentation of evidence regarding, the post-filing change in the District's offer – to allow Student to participate in the cross-country team. The only restriction, based on the District's concerns for Student's safety, is that Student will not be allowed to participate in the team's off-campus training runs. Instead, Student will do supervised runs on the school track. Therefore, the issue to be resolved is whether the District's current offer of cross-country team participation, without off-campus training runs, constitutes a FAPE in the LRE for

Student (assuming, arguendo, that Student requires, in order to benefit from her educational placement, off-campus training runs as part of the cross-country team; see App. Law 7).

32. In light of the severity of Student's unique needs, and the District's legitimate concerns for Student's safety, the District's offer to allow Student to participate in the cross-country team, with the exception of off-campus training runs, was appropriate, and constituted a FAPE in the LRE for Student.

LEGAL CONCLUSIONS

Applicable Law

1. Student has the burden of proving the essential elements of her special education claims. (*Schaffer v. Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed 2d 387].)

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a)(1)(A);[2] Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

3. The Supreme Court's decision in *Board of Education of the Hendrick Hudson School District v. Rowley* (1982) 458 U.S. 176, established a two-prong analysis to determine whether a FAPE was provided to a student. (*Id*. at p. 200 [*Rowley*].) First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. Here, Student has not asserted any procedural violations. The second prong of the *Rowley* test requires the court to assess whether the IEP was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Capistrano Unified Sch. Dist. v. Wartenburg* (9th Cir. 1995) 59 F.4d 884, 893, citing *Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.)

4. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.C. 2002) 238

[2] All statutory references are to the Individuals with Disabilities Education Act (IDEA), Title 20 of the United State Code, unless specifically noted otherwise.

F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id*. at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

5. In addition, federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature 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." (§ 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code § 56031.) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Bd. of Ed*. (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 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.) In *Sacramento City Unified School District v. Rachel H*. (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. However, the Supreme Court has noted that IDEA's use of the word "appropriate" reflects Congressional recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.)

6. Title 34, Code of Federal Regulations, § 300.108(a), "Physical education," requires school districts to make physical education services available to "every child with a disability receiving FAPE." Specifically, subsection (b) of that regulation mandates that each child with a disability be "afforded the opportunity to participate in the regular physical education program available to nondisabled children unless [¶] [t]he child needs specially designed physical education, as prescribed in the child's IEP."

7. Title 34, Code of Federal Regulations, § 300.107(a), "Nonacademic services," requires public agencies to "take steps, including the provision of supplementary aids and

services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." Athletics is included in the list of nonacademic and extracurricular services and activities found in subsection (b) of that regulation. In *Retting v. Kent City Sch. Dist.* (6th Cir. 1986) 788 F.2d 328, the court reversed a district court order that the school district provide one hour per week of extracurricular activities. The *Retting* court held:

> Accordingly, the Act [IDEA] does not absolutely require that a handicapped child be provided each and every special service available to nonhandicapped children. Rather, the applicable test under *Rowley* is whether the handicapped child's IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.

(*Id*. at p. 332; see also *Letter to Anonymous* (1990) 17 LRP 1291, 17 IDELR 180 [school district rule limiting participation in sports to the first eight semesters in high school does not deny FAPE to a student unless the student's IEP specifically includes a sports program, nor does the rule violate 34 C.F.R. § 300.306 (now 34 C.F.R. § 300.107) so long as the school district has acted to provide an equal opportunity to participate in athletics and recreational activities to all disabled students.) Similarly, California law provides that recreation services, as part of designated instruction and services defined in the IEP, shall be available when the instruction and services are necessary for the student to benefit from his or her educational program. (Ed. Code, § 56363, subds. (a) and (b); see also Cal. Code Regs., tit. 5, § 3051.15, subd. (a) & (b) [defining "recreation services" as, inter alia, "those specialized instructional programs designed to assist pupils in becoming as independent as possible in leisure activities" and "emphasize the use of leisure activity in the teaching of academic, social, and daily living skills"].)

Determination of Issues

Issue 1: For the 2006-2007 school year at CHS, does the District's offer of placement in the SDCFS class provide Student with a FAPE in the LRE?

1. Based on Factual Findings 1 through 13 and 22 through 28, as well as Applicable Law 1 through 5, the District's offer of the SDCFS class constituted a FAPE in the LRE, in that it was designed to meet (the severity of) the Student's unique needs, and was reasonably calculated to provide some educational benefit.

Issue 2: For the 2006-2007 school year at CHS, does the District's offer of a GEPE class, with some sport restrictions, provide Student with a FAPE in the LRE?

2. Based on Factual Findings 14 through 17, 22, 29, and 30, as well as Applicable Law 1 through 6, the District's current offer of 100 percent GEPE with restrictions on six sports, constitutes a FAPE in the LRE, in that it is designed to meet (the

severity of) the Student's unique needs, and is reasonably calculated to provide some educational benefit.

Issue 3: For the 2006-2007 school year at CHS, did the District deny Student a FAPE in the LRE by failing to include, in her IEP, the supplementary aides, services and program modifications necessary for Student to participate in the off-campus training runs of the extracurricular cross-country team?

3. Based on Factual Findings 18 through 22, 31, and 32, as well as Applicable Law 1 through 7, the District's current offer to allow Student to participate in the cross-country team, but restricting her from off-campus training runs, constitutes a FAPE in the LRE, in that it is designed to meet (the severity of) the Student's unique needs, and is reasonably calculated to provide some educational benefit. Furthermore, Student's IEP (including the notes regarding the follow-up meetings in March 2006) does not mention Student's need to participate in the cross-country team or, more specifically, off-campus training runs, nor has there been any showing that Student requires participation in the cross-country team, or off-campus training runs, to access her educational program.

ORDER

All of Student's requests for relief are denied.

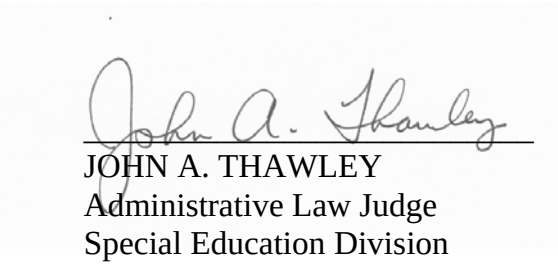
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. District prevailed on all issues in this matter.

RIGHT TO APPEAL THIS DECISION

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. (Ed. Code, § 56505, subd. (k).)

Dated: October 17, 2006



JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings