

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2008120492

v.

Parent(s), on behalf of STUDENT.

**DECISION**

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 10-13, 2009, in Fresno, California.

Fresno Unified School District (District) was represented at the hearing by Tracy Tibbals, Esq. Nancy Miser, Manager of Special Education Programs for District was present for the entire hearing. Sarah Daniel, Esq. was present in the afternoon of March 12, 2009 as an observer.

Student was represented at the hearing by Arthur Lipscomb, Esq. Agnes Williams, Esq., was present for the entire hearing as an observer. Student's mother (Mother) was present for the entire hearing.

District filed a Due Process Hearing request (Complaint) on December 15, 2008. Continuances were granted for good cause on December 23, 2008 and January 9, 2009.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing the parties requested leave to file written closing argument. The matter was continued to March 27, 2009, to permit the filing of written closing arguments. The parties timely filed written closing arguments on March 27, 2009, at which time the record was closed and the matter was submitted.

## ISSUE

Did District offer Student a free appropriate public education (FAPE), in the least restrictive environment, in the individualized educational program (IEP), dated September 25, 2008?

## FACTUAL FINDINGS

### *Background*

1. Student was 17 years of age at the time of the due process hearing. She lives with her parents in the jurisdictional boundaries of the District. She is eligible for special education services as a student with mild mental retardation. Student has received special education services in the District since May 1, 1996.
2. Student is in the eleventh grade at Erma Duncan Polytechnic High School (Duncan), a District magnet school, where she is fully included in the general education curriculum. Student has received special education support in the general education classroom with a one-to-one instructional assistant and assignments provided in the core classes by a resource specialist teacher (RSP). At the time of her enrollment at Duncan in the ninth grade, Student was academically at a first to second grade level for reading and mathematics, and Student's IQ fell in the range of 50-60.
3. Prior to her enrollment at Duncan, Student attended Kings Canyon Middle School (Kings Canyon) in a self-contained special day class program (SDC). Student completed the eighth grade at Kings Canyon in the June 2006.
4. District convened an IEP team meeting on May 11, 2006, for the purpose of conducting Student's annual review and to discuss Student's transition from Kings Canyon to high school. The IEP established Student's present levels of performance and goals and objectives in the areas of reading/decoding, oral and written language, mathematics, adaptive physical education (APE) and motor activities. The IEP offered continued placement in a self-contained SDC program with designated instruction and services (DIS) and supports, including a one-to-one aide. The IEP team discussed Student's proposed placement in the mild/moderate SDC program at Roosevelt High School (Roosevelt) Student's home high school. Mother consented to the IEP services, but informed the IEP team that she did not accept the proposed placement at Roosevelt. She further informed the IEP team she preferred placement at Duncan. District personnel informed Mother that Duncan was not an appropriate placement for Student. No further action was taken by District.

*Placement in the 2006-2007 school year*

5. Mother did not enroll Student at Roosevelt for the 2006-2007 school year. District became aware of the situation and assigned a regional instructional specialist (RIS) to work with Mother to find a placement for Student in a District comprehensive high school other than Duncan. On September 21, 2006, Mother submitted an application, in which she disclosed Student was eligible for special education services, to District's magnet office for admission to Duncan. Admission to Duncan was based upon a lottery system. On December 21, 2006, District selected Student for admission to Duncan. Student enrolled in Duncan on January 8, 2007, immediately following the winter break.

6. District convened an IEP team meeting on January 11, 2007, for the purpose of finalizing Student's placement and program at Duncan. Mother attended the IEP. The District IEP team members in attendance included Monica Vane (Ms. Vane), special education teacher/ resource specialist (RSP); Jeannie Santos (Ms. Santos), general education teacher; Joanie Di Filippo (Ms. Di Filippo), assistant principal; Robyn Scroggins (Ms. Scroggins), RIS; Donna Flannigan (Ms. Flannigan), adaptive physical education teacher (APE); and the school psychologist, school nurse, and an SDC teacher. The IEP team agreed to continue the goals and objectives, and services of the one-to-one aide offered in the May 11, 2006, IEP. The IEP team also offered placement in general education math, language arts, and history, with the support of a RSP case manager to work with the core teachers to modify class assignments to Student's functional level and abilities. The offer included general education electives in floral design, home economics and physical education (PE). The offer of a general education program was in effect until the annual review IEP was convened in May 2007. Mother consented to the IEP.

7. An IEP team meeting was convened on May 25, 2007, for the purpose of reviewing Student's performance against annual goals. The IEP team included Mother, Ms. Vane, Ms. Di Fillipo, Ms. Scroggins, Ms. Flannigan, and Diane Adams (Ms. Adams), general education mathematics teacher. The IEP team reviewed Student's present levels of academic achievement and functional performance.

8. The present levels of performance in reading established that Student was reading at the second grade level. In mathematics she understood the addition of single digit numbers and was learning about addition and subtraction of double digit numbers, counting, and working with numbers and learning to tell time. In the area of oral and written language Student expressed herself in complete intelligible sentences, when comfortable with the listener, she understood most verbal conversation and could write a paragraph with four simple sentences, and she was working on her general education class assignments as modified to her abilities and functional level. Student's attendance was excellent; she willingly completed her assignments and came to class prepared. Student was described as a logical thinker and a good predictor, who used visual cues appropriately and well. Student had good self-help skills, and motor skills. In the area of social emotional skills the IEP noted that Student was friendly and polite, had a good sense of humor, and got along with students she saw daily. The IEP noted that Student was overwhelmed by large tasks, needed

frequent direction to get to class on time, needed prompting to get started with some assignments, needed help with organization, and that Student interacted primarily with her aide while in class.

9. Ms. Adams and Ms. Flannigan reported to the IEP team on Student's progress. Student was performing in mathematics and PE at her functional ability level. Ms. Flannigan recommended a goal for Student's further inclusion in the general education PE class. The consensus of Student's general education teachers was that Student had a positive and cooperative attitude in class. None of the teachers reported that Student was not making progress in the modified general education curriculum.

10. Mother was pleased that Student made a good transition from middle school to high school. Unlike Student's home school, Duncan had a smaller campus with multiple opportunities for Student's full inclusion. Mother expressed her desire to have Student fully included in the general education classes with opportunities for social interaction and modeling from her non-disabled peers.

11. The IEP team established goals and objectives in reading/decoding, reading comprehension, oral and written language, mathematics, and APE. Despite the reports of the general education teachers, the IEP team proposed to remove Student from Duncan and offered placement in a self-contained mild/moderate SDC program at a District comprehensive high school for the 2007-2008 school year. Mother declined the offer and the IEP team offered continued placement at Duncan. Thereafter, the IEP offered the following for the remainder of the 2006-2007 school year: (1) continuation of special education services, with resource support in the general education curriculum in core academics and elective classes; and (2) a one-to-one aide for the school day. The IEP offered the following for the 2007-2008 school year: (1) one period in an SDC functional skills, class daily; (2) five periods in general education classes, with modified curriculum and resource support; (3) DIS/APE consultation up to twice per month for 15 minutes; (4) a one-to-one aide for six and one-half hours per day; and (5) extended school year (ESY) for summer 2007. Mother expressed reservations about the offer of ESY, but consented to the offer in all other respects.

12. At this IEP team meeting District also provided Mother with written notice that due to her disability Student was on a "non-diploma track." This meant Student was not required to take the California High School Exit Exam (CAHSEE) or to accumulate the credits required to graduate with a diploma. Instead, Student would be eligible for a letter of recommendation upon completion of four years of high school. Mother signed the notice at the IEP team meeting acknowledging that she understood that Student was not likely to complete the required District coursework, including Algebra I and Geometry in order to receive a high school diploma.

13. California state standards provide three methods of completing high school. Students may complete high school by either receipt of a High School Diploma, a Letter of Recommendation/Certificate of Completion, or a Letter of Recommendation. High school diploma requirements include completion of 230 credits or District-required approved

coursework including Algebra I and Geometry and School Employment Pathways (STEPS) credits. Letter of recommendation/certificate of completion requirements include completion of 230 credits; regular attendance; parental request and signed approval on Student's IEP. The third option for a Letter of Recommendation applies to severely disabled students who complete four years of high school and are 18 years of age, regardless of the amount of credits accumulated. Successful students in all categories may participate in commencement exercises.

14. Ms. DiFilippo is the vice principal at Duncan. She had administrative responsibilities pertaining to Student's program. In Student's first year at Duncan she was fully included in the general education classrooms with a one-to-one aide for safety in transition between classrooms. Student's program in the first year included English, Mathematics, Earth Science, Physical Education, Floral Design, and Home Economics. The program changed in the May 25, 2007, IEP when one period of Functional Skills class was added. According to Ms. DiFilippo Student was not on diploma track because of her disability. She was not expected to earn credits toward graduation. Accordingly, her progress in the general education classes could not be measured by her inability to perform at grade level.

15. Ms. Santos was Student's ninth grade English teacher in the second semester of the 2006-2007 school year. She testified that Student did not have work assignments based on the California state standard curriculum for ninth grade English. However, Student was successful in her class with modified first and second grade level accelerated readings that Ms. Santos prepared for her, in addition to modified work assignments prepared by her RSP. Student was able to re-tell stories with prompting by her one-to-one aide. She was able to pass simple tests constructed by Ms. Santos. Though Student was reluctant to work in noisy environments she was able to stay on task and complete assignments with prompting from her one-to-one aide. Student interacted with other students in the class. For example, Student participated in literature exercises with the general education students. One such exercise involved an adaptation of Homers "Odyssey" in which Student participated with the other students. Ms. Santos opined that Student felt a part of the class. Ms. Santos believed Student had friends at Duncan and she could not say that Student did not socialize with other students at Duncan. According to Ms. Santos Student made some progress in her class.

#### *Placement in the 2007-2008 school year*

16. Student advanced to the tenth grade for the 2007-2008 school year as a "non-diploma track" student with a full class schedule consisting of Algebra I, Language Arts, Art, Floral Design, PE, and Functional Skills (one period per day). Student's assignments in the core classes were provided by the RSP case manager. Student was provided assistance by her one-to-one aide with occasional assistance from the general education teacher and the completed assignments were returned to the RSP case manager. Student also became involved in school clubs and other extra-curricular activities.

17. Ms. Adams is Student's Algebra I teacher. Student has attended this class since the ninth grade. When Student entered the class in the ninth grade Ms. Adams knew from her IEP that she could not perform at grade level in Algebra I. Ms. Adams took the initiative to prepare work at Student's functional level. Ms. Adams also seated Student with a group of students at the same table. Ms. Adams observed that in the first year Student interacted with other students in the class on a regular basis. After the first year, Ms. Adams changed the table arrangements and Student was given seating in the back of the class, purportedly at her request. Ms. Adams no longer prepared Student's classroom assignments. The RSP prepared Student's assignments at her functional level and provided her work in a folder daily. Ms. Adams does not believe Student belongs in her class because she is not able to do grade level work. Ms. Adams does not track Student's progress. She believes Student receives no academic benefit because she does not perform at grade level. Ms. Adams believes Student has not received non-academic benefits because Student does not interact with the students who are doing grade level work. Ms. Adams has not encouraged social interaction in the classroom. She has not considered making changes in the classroom to foster social interaction or enhance academic benefit to Student. Ms. Adams attended several of Student's IEP team meetings and did not tell the IEP team that Student was not making progress or that she was a problem student.

18. Suzanne Sweet (Ms. Sweet) is Student's English teacher. Student has attended her class for the past three semesters. She teaches ninth grade English. Ms. Sweet does not consider Student to be "her student" because Student was not on her attendance roll, Student sits in the back of her classroom with her "tutor," she does not provide student's work assignments, and did not grade her work. She was not sure who was responsible for Student being in her class but she believed it was the RSP case manager. Student did not do the ninth grade state standard assignments. From "what she could tell," Ms. Sweet believed Student was doing first grade level work as she sat in the back of the class. Unlike Ms. Santos, Ms. Sweet did not get involved in the development of Student's curriculum or her work assignments. She never discussed Student's progress or lack thereof in her class with Mother. She attended the most recent IEP team meeting last semester as a formality. She reported to the IEP team that Student was in her classroom, had a nice personality and was not a problem. She has never complained about Student or told District that Student should not be in her classroom. Ms. Sweet did not know whether Student had friends or socialized with the students in her class.

19. Dana Harris (Ms. Harris) is Student's teacher in Floral Design and Introduction to Agricultural Science classes. These are electives. Student is taking Floral Design for the second year for lack of other electives available at Duncan. Student was able to access the curriculum in Floral Design on a modified basis. Student is seated in front of Ms. Harris in the classroom. She participates in class with the support of her one-to-one aide. Modifications and accommodations to her assignments were made by giving Student extended time to complete a project or task. According to Ms. Harris, Student has shown artistic talent and is making progress in this class. She is getting educational benefit from the Floral Design class because Student has continued to pick up skills and is showing improvement since her first year in the class. Student is in the Introduction to Agricultural

Science class because Student took the initiative and asked Ms. Harris if she could enroll in the class. Ms. Banister authorized her enrollment at Ms. Harris' request. Student is able to perform class projects without modifications except when textbooks are involved, which Student accomplishes with the assistance of her one-to-one aide. Student was able to create a class project working with some of the functional skills students who are in the class. Student interacts with other students in the class, though not always initiated by Student. She also participates in the Future Farmers of America (FFA), an extracurricular club managed by Ms. Harris. Ms. Harris believes that Student has performed even better in the Agricultural Science class than in Floral Design and that she is getting both non academic as well as academic benefit in both of these classes based on her functional level and her IEP. According to Ms. Harris, Student is an asset to her classes and has not been a behavior problem.

20. Ms. Lencioni is Student's Art teacher. Student has been in her class for the last two school years. Student repeated the course because she needed an available elective to complete her class schedule. According to Ms. Lencioni Student is artistically talented. Student sits near the front of the classroom. Ms. Lencioni provides modifications and other accommodations to Student's assignments and class work by extending the time to complete them, with the support of the one-to-one aide. On occasion, both Ms. Lencioni and the one-to-one aide leave Student to work independently when Student demonstrates she has control of the projects or assignments. Student interacts with other students in the class and has at least one friend in the class. Student has shown improvement in the performance of her classroom assignments. Ms. Lencioni also notices that Student will address her directly when speaking and has shown more self-confidence this year. Ms. Lencioni concluded that Student has gotten educational benefit from her class and has met her social goals. She gets along with her fellow students and is not a problem in her class.

21. Mr. Kawakami was Student's functional skills class teacher in the 2007-2008 school year. He reported that Student was engaging, had a good sense of humor, was polite to others, and worked well with others in the classroom. The functional skills class is an SDC class with special education students in full time attendance. The class teaches students independent living skills. At the time Student attended the class she was learning how to count money and tell time. Student attended for one period a day. Student was removed from the class at the start of the 2008-2009 school year at Mother's request. Mr. Kawakami did not know the reason for her removal from his class.

22. Ms. Flannigan had been Student's APE teacher since ninth grade. She too saw some improvement in Student's PE activities. Student was shy and had been self conscious of her appearance and often resisted participating in certain PE exercises. Her participation increased over the school years. She believed Student had made some progress at her functional level.

23. Selena Bravo is Student's one-to-one aide. She has provided instructional assistance to Student since the ninth grade at Duncan. She accompanied Student to all of her classes except for the fourth period when Ms. Bravo took lunch. She is a trained

instructional assistant and a District employee. She has experience in special education and is attending college to earn her degree in education. She provided instructional materials for Student in the ninth grade and was instrumental in the development of her RSP work assignments at that time. Student first presented as a shy teenage girl, and has developed into a creative, outgoing and social person. She has numerous friends at school. She has joined and belongs to multiple clubs including the human relations club, food and nutrition club, and recently joined the animae (Japanese Animation) club. She is actively involved in the school clubs along with non-disabled peers and has social contact with some of her peers outside of school.

24. Pamela Banister (Ms. Banister) became Student's RSP case manager in February 2008. Ms. Banister prepared Student's assignments, primarily in the core classes, modified to her functional level, graded the assignments, and monitored Student's attendance. Ms. Banister reviewed Student's records and consulted with Students teachers. Ms. Banister found Student was not working at grade level in her core classes. Student was seated in the back of the classroom behind her non-disabled peers in English and Mathematics. Echoing the beliefs of Ms. Adams and Ms. Sweet, Ms. Banister believed Student had made no progress in the core academic classes because she could not perform grade level work in either Mathematics or English. However, Student continued to make some progress toward her IEP goals at her functional level. Ms. Banister also believed that Student's educational needs could be met at Duncan if she were placed full time in the functional skills class. However, District never offered Student placement full time in the functional skills class at Duncan.

25. During the 2007-2008 school year, Ms. Scroggins, notified District that Student was not making grade level progress in the general education classes at Duncan and that Mother refused to consent to District's offers of placement at one of several comprehensive high schools in the District, which Ms. Scroggins believed to be more appropriate for Student. Ms. Scroggins also believed that Duncan was not an appropriate placement for Student because Duncan was a magnet school. Student was not the only special needs Student attending Duncan.

26. District convened an IEP team meeting on April 8, 2008, to initiate Student's triennial review and to discuss a post secondary transition plan for Student. Mother attended the meeting. Also present from District was Ms. Di Filippo, Ms. Scroggins, Ms. Banister, Student's new RSP case manager, Ms. Lencioni, Ms. Flannigan, a school psychologist, and Doug Jones (Mr. Jones), District Assistant Superintendent. District informed the IEP team members that there was no current assessment data available to the IEP team to determine Student's present levels of performance and to provide the most appropriate special education program for Student. District informed Mother of the need for an assessment plan to obtain more current information on Student.

27. The IEP team meeting was continued to May 23, 2008, for the triennial review and to obtain Mother's agreement to the assessment plan. Mother attended the meeting. District personnel in attendance included Ms. Banister; Ms. Scroggins; Ms. Adams; Ms.

Flannigan; and a guidance counselor. Nancy Miser (Ms. Miser), manager of special education programs also attended the meeting. She first became aware of Student through Ms. Scroggins. Ms. Scroggins spoke to her about Student and Ms. Scroggins' belief that Student's current placement at Duncan was inappropriate. Ms. Scroggins further informed her that District had previously offered Student placement in a self-contained mild/moderate SDC at a comprehensive high school in the district because she was not making grade level progress at Duncan.

28. Ms. Miser discussed the assessment plan with the IEP team members. She informed the team members that Student had not had a comprehensive psychoeducational evaluation since 2002. The assessment plan proposed to assess Student in the areas of academics, health, APE, and intellectual development, including cognitive ability. The plan also included a vocational assessment. Mother signed the assessment plan. The IEP team meeting proceeded as scheduled and the IEP noted that another IEP would be scheduled within the statutory time frame to review the assessment results. The IEP team discussed Student's then present levels of performance and her performance against goals and objectives, which remained the same as the prior year. No one at the IEP team meeting stated that Student was not making progress at her functional level. The team reviewed Student's post-secondary transition plan and Mother requested removal of the functional skills class from Student's class schedule beginning in the 2008-2009 school year. District renewed the previous offer to place Student in a self-contained mild/moderate SDC at a comprehensive high school. Mother once again stated Student should remain in the current placement at Duncan. The IEP team then offered "alternatively" to continue Student's current placement and services. Mother consented to the IEP.

29. On June 12, 2008, Mother rescinded her consent to the cognitive assessment. Ms. Miser believed that District could not develop an appropriate program and placement designed to meet Student's unique needs and to provide Student educational benefit in the least restrictive environment without a current cognitive assessment. District administrators understood that District could file a due process hearing request to compel the assessment. District failed to file a due process hearing request to compel a cognitive assessment of Student.

30. Following the May 23, 2008 IEP, the APE and health assessments were conducted by Ms. Flannigan and the school nurse, respectively. The health assessment results indicated Student's hearing was fine, but Student needed to wear glasses for vision correction.

31. The academic assessment was conducted by Ms. Banister. The assessment results revealed Student remained below grade level in mathematics, writing, and spelling. Student's reading comprehension, written expression, and oral expression or word fluency, fell within the below average to average range. Ms. Banister believed the assessment information, even in the absence of the cognitive assessment, was sufficient to develop an appropriate IEP offer of placement and services for Student.

*Proposed Placement in the September 25, 2008, IEP*

32. District convened an IEP team meeting on September 25, 2008, to review assessment results. Mother and Ms. Bravo attended on behalf of Student. Ms. Miser, Ms. Banister, Ms. DiFilippo, Ms. Flannigan, and Ms. Sweet attended on behalf of District. The academic assessment results revealed nothing new. The IEP noted in Student's present levels of performance that she was in the upper first grade level in both reading and math. The goals remained substantially the same. The areas of need to be addressed for Student to receive educational benefit were the same, i.e., APE, basic reading, reading comprehension, written expression, and math calculation. The IEP contained no progress reports and the team did not discuss with or mention to Mother that Student had not progressed in her program at her functional level and abilities.

33. The IEP offer of placement was a mild/moderate self-contained SDC at another unnamed comprehensive high school in the district. The IEP offer of services included APE; and a one-to-one aide throughout the school day including lunch and PE. The IEP team discussed a recent tour of Hoover high school by Student and her one-to-one aide. Student was not receptive to the SDC classes she toured. District requested Mother schedule a visit to Hoover. The IEP noted that Mother was to decide if she would consent to District's placement offer by December 1, 2008. District informed Mother that failure to accept the IEP offer would result in due process action taken by District to compel Student's placement in a mild/moderate SDC at another District school.

34. Mother did not tour Hoover. She observed that Student made great progress in the three years she attended Duncan. Based upon the reports of her teachers Student made some progress toward her IEP goals. Student also made progress toward her social goals and was more confident in her interactions with her non-disabled peers and many of her teachers. Mother did not agree with the placement offer and did not consent to the IEP.

35. District filed a due process hearing request on December 15, 2008.

### LEGAL CONCLUSIONS

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

2. District contends that the September 25, 2008, IEP constitutes a FAPE because it is reasonably calculated to provide educational benefit to meet Student's unique needs in the least restrictive environment. District specifically asserts that the offer of placement in a mild/moderate self-contained SDC, at another comprehensive high school within the district is appropriate for Student and is based on Student's unique needs. District further contends that Student has remained at a first-to-second grade level in reading and mathematics, and

has shown little or no progress in her academic program since her enrollment in Duncan, District's magnet school. District asserts that Student is behind in acquiring independent living and vocational skills. District further asserts that Student's current program of full inclusion in general education classes with the support of a one-to-one instructional aide, not a certificated teacher, and assignments provided by an RSP teacher is too restrictive and has provided no educational benefit to Student. District contends that a more appropriate placement for Student is in a self-contained structured SDC where she will have the opportunity to interact with other disabled peers, and have the opportunity to develop independent living and vocational skills. Student disputes only the placement offer, and contends that the IEP offer of placement is not in the least restrictive environment. Student asserts that full inclusion in the general education curriculum at Duncan, with supports and accommodations, is appropriate because she has derived academic and non-academic benefit, and has made some progress at her functional level.

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

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, at p. 200.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley, supra*, at p. 201.)

5. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946

F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

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

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

8. In *Rachel H.*, the court considered whether a child with mild to moderate mental retardation should be fully integrated, or mainstreamed, into a regular education program, with the support of a one-to-one aide. In that case, the intent was to have the student spend all of her time in the regular education program and not to be removed at all for specialized instruction. In the present case District asserts that in balancing the *Rachel H.* factors the evidence demonstrates that there is no level of supplemental aids or supports that reasonably can permit Student to receive academic or non-academic benefit from full inclusion in general education classes, leading to a conclusion that a self-contained mild/moderate SDC is a more appropriate placement.

9. General Education teachers Ms. Lencioni, Ms. Harris, and Ms. Santos testified that Student made some progress toward her IEP goals in their classes in her work at her functional level. Ms. Lencioni and Ms. Harris credibly testified that Student improved in her work and gained confidence in her ability to articulate her desires to participate in class

projects. The progress she achieved in both the core and elective classes is persuasive evidence that Student derived academic benefit from her program. Ms. Adams' testimony that Student did not gain academic benefit because she did not make progress at grade level does not support the District's position. Although there was some conflicting testimony that Student was required to earn credits toward graduation, Ms. DiFilippo credibly testified that Student was not on diploma track because of her disability. She was not expected to earn credits toward graduation and her progress in the general education classes could not be measured by her inability to perform at grade level. The *Rowley* court made clear there is no one test for measuring the adequacy of educational benefits conferred under an IEP and a student may derive educational benefit if he makes no progress toward some of the IEP goals, as long as he makes progress toward other goals at his functional level. Mother credibly testified that Student was more confident, outgoing and eager to do her school work. She attributed Student's progress to her full inclusion at Duncan. Moreover, Pamela Banister, Student's RSP case manager's, testimony that Student made some progress toward her goals further supports the conclusion that Student derived academic benefit from the program at Duncan.

10. Each of Student's IEPs at Duncan contained social goals to develop Student's communication and maximize her class participation. Student's non-academic benefit included her classroom and campus activities and creation of friendships that she carried off campus. District's attempt at hearing to minimize the level of Student's involvement in school clubs and campus activities was not successful. The evidence established Student obtained a wealth of non-academic benefit. Ms. Harris, Ms. Santos, Ms. Lencioni, and one-to-one aide Ms. Bravo testified persuasively to Student's extensive extra-curricular involvement at the school as well as her increased self-confidence and improved social interaction with non-disabled peers in most of her classes. Student derived a non academic benefit from her program at Duncan.

11. None of the witnesses testified that Student would have an adverse impact on teachers and/or students in her classes. The consensus is that Student was not a problem in any of her classes. In some, she was considered a pleasure to have there. Student's IEPs consistently described her as polite, with a good sense of humor and willing to talk to those she understood. District concedes that Student's behavior was never the issue. Moreover, there was no evidence presented at hearing that the cost of continued placement at Duncan was an issue. Student's presence in the regular education classrooms was not disruptive or unwelcome.

12. Pamela Banister's unrebutted testimony that Student's unique needs can be met at Duncan overwhelmingly supports the conclusion that the current placement was more appropriate than the offered placement.

13. District failed to produce any persuasive evidence Student could not be educated with non-disabled peers in the general education environment with the use of supplementary aids and services, including the provision of independent living and vocational skills training. District also failed to produce persuasive evidence that a self-

