

Docket No. 10-56320

Docket No. 10-56373

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SOLANA BEACH SCHOOL DISTRICT and MARY ELLEN NEST,
Appellants/Appellees,

-v.-

Ka.D., a minor, by her mother, Ky.D. as her next friend; Ky.D. and B.D.,
Appellees/Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
No. 08-CV-0622W (WVG)

**BRIEF IN SUPPORT OF APPELLEE/APPELLANTS AND REVERSAL ON BEHALF
OF
AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES**

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INTERESTS OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. 20 U.S.C. §1400(c)(1) (2006). Children with severe disabilities are among the most vulnerable in our society and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act (IDEA or Act) requires.¹ All parties to this litigation have consented to COPAA filing this Amicus Brief. COPAA submits this brief to address the particular importance of providing education to all children—including children with disabilities—in the least restrictive environment, so as to promote independence and self-sufficiency

¹ Pursuant to Fed. R. App. P. 29(5), counsel for COPAA, Selene Almazan-Altobelli, Maryland Coalition for Inclusive Education, Inc. states: (1) Selene Almazan-Altobelli authored the brief in whole with comments from COPAA; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief. FRAP 29(5).

for all children. In this Brief, COPAA places before the Court some of the extensive empirical research, which demonstrates the efficacy of providing education to children with disabilities in the least restrictive environment, namely, the general education classroom.

SUMMARY OF ARGUMENT

As set forth in detail in the Brief for Appellees/Appellants: the Administrative Law Judge (ALJ) found that the school district had denied Ka.D. s right to receive education in the least restrictive environment (LRE), and awarded relief for that violation which included reimbursement for tuition paid to Hanna Fenichel Preschool for the school year 2007-08; the services of a one to one aide at school who is trained in Applied Behavior Analysis (ABA)² principles and specifically trained to work with students with autism; and 10 hours per week of intensive ABA services supplied by the Solana Beach School District (Solana Beach). The district court s decision is consistent with and appropriately applies this Court s decisions interpreting the least restrictive environment provisions of the Individuals with Disabilities Education Act.

² This Court has recognized that children with autism need specialized teaching that incorporates repetition, routine, and behavioral reinforcement. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1094 (9th Cir. 2010) Behavior analysis - a scientific approach to understanding behavior and how it is affected by the environment provides such specialized teaching. ABA is the use of those techniques and principles to address socially important problems, and to bring about meaningful behavior change.

ARGUMENT

I. With the Act's 1997 Amendments and Continuing With the 2004 Reauthorization, Congress Made Involvement and Progress in the "General Education" Curriculum an Overall Priority and Goal for Students with Disabilities.

The 2004 Reauthorization of the Act incorporated the following findings, thus renewing and strengthening the obligations attendant to the least restrictive environment (LRE) requirements:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible;

(C) coordinating this title with other local, educational service agency State, Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate.

20 U.S.C. §1400(c)(5).

In 2004, therefore, Congress expressly reaffirmed that a student has the right of access to the general curriculum and classroom and opportunities to be

educated alongside appropriate peers to the maximum extent possible. Congress recognized that special education can become a service for such children rather than a place where such children are sent. *Id.*³

With the 1997 amendments and the 2004 reauthorization, Congress adopted a number of measures that further the goal of educating students with disabilities in general education classes to the maximum extent appropriate. For example, the IEP must include supplementary aids and services in order to facilitate in the general education classroom. In addition, a student cannot be removed from general education classes based solely on a need for curriculum modification. 34 C.F.R. §300.116(e). A student's general education teacher is a member of the student's IEP team and participates in developing the IEP. 34 C.F.R. §300.324(b)(ii)(E)(3). If a student will not be participating in general education classes, an explanation for that exclusion must be provided in the IEP. All these measures serve to not only reinforce the strong presumption of placement in general education classes, but also to highlight the Congressional intent that educating students with disabilities in general education classes allows school districts to set and maintain high expectations for the educational achievements of those students with disabilities.

³ This notion that special education is not a place but services is important to understanding how a student with disabilities can be successfully included in general education classes and receive special education services in that same setting. *See* 20 U.S.C. §1400(c)(5).

II. Thirty Years of Educational Research Supports the Inclusion of Students with Disabilities in General Education Classes.

The Congressional commitment to placement of students with disabilities in general education classrooms reflected in these measures is a direct outgrowth of the 30 years research and experience relied upon by the Congress in 2004.

Abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from placement in general education classes with supplementary aids and services. Time spent with non-disabled peers enhances academic achievement for students with disabilities, that is, inclusion and achievement are positively correlated. A 2002 study compared results on measures of child development and social competence, for children in inclusive programs versus children in segregated or self-contained programs over a 2-year study period. The children enrolled in inclusive⁴ programs achieved statistically significant better results than the children in the segregated programs.

Fisher & Meyer, *Development and Social Competence After Two Years for*

Students Enrolled in Inclusive and Self-Contained Educational Programs, 27

⁴ Inclusion is the provision of services to students with disabilities, including those with severe impairments, in the neighborhood school, in age-appropriate general education classes, with the necessary support services and supplementary aids (for the child and the teacher) both to assure the child's success-academic, behavioral and social-and to prepare the child to participate as a full and contributing member of the society. McGregor, G. and Vogelsberg, R., *Inclusive Schooling Practices: Pedagogical and Research Foundations* 9 (1998) (citing Lipsky, D. & Gartner, A., *Inclusion and School Reform* 763 (1996)).

Research & Practice for Persons with Severe Disabilities 165, 166, 169-73 (2002).

The authors concluded:

The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities seems to be beneficial for individual child learning outcomes. . . .

Id. at 172-73.

Research also shows that students with disabilities who are educated in general education classes do better academically and socially than comparable students in noninclusive settings, regardless of the type of disability or grade level.

R. Turnbull, A. Turnbull, M. Shank & S. Smith, *Exceptional Lives: Special Education in Today's Schools* 238 (2004).

In 50 research studies since the 1980s comparing the academic performance of mainstreamed and segregated students with mild disabilities, the mean academic growth of the integrated group was in the 80th percentile, while the segregated students was in the 50th percentile. R. Weiner, *Impact on Schools* (1985).

It is important to remember that all children—not only those with disabilities but also typical students—learn differently. Including students with disabilities in regular education classrooms, as the law requires, makes it possible for educators to develop new methods of instruction that lead to improved outcomes for all

students. *See, e.g., Gilberts, et al., The Effects of Peer Delivered Self-Monitoring Strategies on the Participation of Students With Severe Disabilities in General Education Classrooms*, 26 *Journal of the Association for Persons with Severe Handicaps* 25 (2001) (study of using peer tutors and self-monitoring by students with disabilities).

Identifying the conditions that enable peers to have a positive influence on the learning of children with developmental needs and disabilities presents a significant challenge for researchers. *See Odom, McConnell, McEvoy, Peterson, Ostrosky, Chandler, Spicuzza, Skellenger, Creighton, & Favazza, Relative effects of interventions supporting the social competence of young children with disabilities*, 19 *Topics in Early Childhood Special Education* 75-91 (1999) and Wolery, *Inclusion in early childhood special education: seeing through a glass darkly, knowing in part*. 58 *Exceptional Children*, 127-135 (1991). Significantly, the record in this case confirms what the research has found: Students with disabilities make greater progress in an inclusive class than in a segregated class.⁵ There has also been research that supports the position of Ka.D., namely, that the two part program offered by Solana School District in which Ka.D. would receive

⁵ One study found that the cost of educating students in segregated programs was double that for educating them in integrated programs. Piuma, Mary F., *Benefits and Costs of Integrating Students with Severe Disabilities into Public School Programs: A Study Summary of Money Well Spent*. San Francisco: San Francisco State University, 1989.

instruction in a segregated special education classroom and then move to a general education setting, is ill advised and inappropriate for students like Ka.D. *See*, Vaughn, Moody, & Schumm, *Broken promises: Instruction in the resource room*, 64 *Exceptional Children* 211-255 (1998) (resource rooms provide primarily whole group reading instruction with little differentiated materials); Algozzine, Morsink & Algozzine, *What's Happening in Special Education Classrooms?*, 55 *Exceptional Children* 259-65 (1988) (few differences in instructional methods across self-contained classes for students with various disabilities); McDonnell, Thorson, McQuivey & Kiefer-O'Donnell *Academic Engaged Time of Students With Low-Incidence Disabilities in General Education Classes*, 35(1) *Mental Retardation* 18-26 (1997) (results showed no significant differences in academic responding and task management behaviors of students with and without disabilities enrolled in general education classes).

Research on preschool inclusive opportunities for students with severe disabilities has found that children with severe disabilities who participate in inclusive settings appear to score higher on standardized measures of development than comparable children enrolled in traditional special education settings. Odom, S. *Preschool Inclusion: What We Know and Where We Go From Here*, 20(1) *Topics in Early Childhood Special Education*, 20-27 (2000). Another study examined the impact of peer-mediated intervention on pre-school children s

participation within routine childcare activities. Results indicated that a peer-mediated intervention consisting of songs and finger plays, attention to photographs of children displaying desired behaviors, and peer verbal cues was effective in increasing each of these skills. Alper, Green, Koler, Robertson, Schloss, *Using a Peer-Mediated Intervention to Facilitate Children's Participation In Inclusive Childcare Activities*, 26(2) *Education and Treatment of Children* 182-197 (2003). Another study by Kohler and Strain describes four types of effective peer-mediated interventions recognized in the early childhood literature. Peers:

1. provide suggestions, encouragement, and related forms of support for one another's behaviors
2. model appropriate responses for a child with special needs to imitate
3. act as tutors and provide instructions and feedback to teach specific academic or developmental skills
4. participate in cooperative activities and group-oriented reinforcement contingencies with other children

Kohler & Strain, *Promoting positive and supportive interactions between preschoolers: An analysis of group-oriented contingencies*, 14(4) *Journal of Early Intervention* 327-341 (1990).

In short, inclusive education is not only effective, but its effectiveness is growing with greater experience.⁶ This makes it even more important that courts

⁶ Waldron, N., Cole, C., & Majd, M., *The academic progress of students across inclusive and traditional settings: A two year study Indiana inclusion study* (2001). This study investigated the effects of inclusive programs for students without disabilities and students identified with mild disabilities in Indiana schools.

enforce the law's mandate education in the least restrictive environment and do so without hesitation or compromise.

III. A Free Appropriate Public Education

The IDEA requires that states receiving federal funds provide to all children with disabilities a free appropriate public education (FAPE) or special education and related services that have been provided at public expense. 20 U.S.C. §1401(8). Pursuant to the IDEA, those educational services must be provided in the LRE. *Hendrick Hudson Dist. Board v. Rowley*, 458 U.S. 176 (1982) established a two-part test for determining whether a placement of a child with a disability in an education program complies with the requirements of the IDEA.

First, has the State complied with the **procedures** set forth in the Act? And second, is the individualized education program developed through the Act's procedures calculated to enable the child to receive educational benefits?

458 U.S. at 206-207 (emphasis added). The Ninth Circuit has held that procedural compliance is essential to ensuring that every eligible child receives FAPE, and

Students' academic progress in reading and mathematics were compared using a curriculum-based measure, the Basic Academic Skills Sample (BASS). The results of this two-year study reveal that inclusive settings have benefit for the achievement of students without disabilities and assert that inclusive settings do not adversely affect students with disabilities. In fact, students without disabilities showed significantly greater progress in math (as measured by the BASS) than students who were not educated in inclusive settings.

those procedures which provide for meaningful parent participation are particularly important. *Amanda J. v. Clark Cty. Sch.l Dis.*, 267 F.3d 877, 891 (9th Cir. 2001). The reason is that (t)he Act s procedural guarantees are not mere procedural hoops Rather, the formality of the Act s procedures is itself a safeguard against arbitrary and erroneous decision making. *Ms. S. v. Vashon Island Sch.l Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003) (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)), *cert. denied*, 544 U.S. 928 (2005). Thus, a school district s non-compliance with the IDEA s procedural requirements can be a basis for holding that it failed to provide a student with FAPE.

The procedures outlined in the IDEA are more than a formality. The procedures constitute the framework upon which the educational program is developed, ensuring the provision of FAPE to students with disabilities.

Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA s most important substantive requirements. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). For this student, Ka.D. , with her unique IEP, procedure is substance, for the procedures Soldana violated would have afforded Ka.D. access to educational opportunity. In this instance, the procedural violations amount to a denial of FAPE and a loss of educational opportunity.

IV. Solana Beach Failed to Make a Placement Recommendation in the Least Restrictive Environment

In addition to requiring the provision of a FAPE, the IDEA declares that children with disabilities shall be educated in the LRE. The federal regulations explicate the LRE requirement mandating that school systems ensure that

[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.552(c). School districts may not unnecessarily restrict a child if that child's IEP can be implemented using supplementary aids and services in a regular education classroom in the student's neighborhood school. *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir.), cert. denied sub nom., *Sacramento City Unified Sch. Dist. v. Holland by and through Holland*, 512 U.S. 1207 (1994).

In adopting the IDEA, Congress created a strong preference for educating students with disabilities in regular education classrooms. Basic to the IDEA and its precursor, the Education for All Handicapped Children Act, is the student's Fourteenth Amendment right to avoid seclusion and re-segregation.

The Court in *Rowley* acknowledged that the interpretation and requirements of the IDEA fall squarely within Fourteenth Amendment jurisprudence. See *Rowley*, 458 U.S. at 200 (federal special education legislation designed to provide access to education consistent with equal protection). The IDEA was enacted

pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment. *Dellmuth v. Muth*, 491 U.S. 223, 228, n.1 (1989). It is more than a simple funding statute; rather, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States. *Honig v. Doe*, 484 U.S. 305, 310, (1988); *A.W. v. Jersey City Public Schools*, 341 F.3d 234, 248 (3d Cir. 2003). Thus, because it is founded on equal protection principles, the IDEA fundamentally is meant to provide equal access to the entire protected class of children with disabilities, not just the wealthy and the few.

Two landmark cases, *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) (*PARC*), set forth the foundational understanding of the Fourteenth Amendment principles on which the IDEA ultimately rests.⁷ They were specifically referenced in the legislative history of, and played a significant role in the passage of the Education for All Handicapped Children Act of 1975. *Honig*, 484 U.S. at 309, (citing S. REP. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425,

⁷ The *Mills* and *PARC* cases influenced the understanding of this area of law which led to the reform of the EHA into the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773, 775, which was then reinforced by the passage of the newly titled Individuals with Disabilities Education Act, P.L.101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142.

1430).⁸ These principles are so embedded in present case law that many courts fail to make specific reference to them in reaching decisions over more recent controversies. These principles bear restating as they provide the necessary context and foundation on which this case must be decided.

First, the right to an education, once given, is a fundamental right;⁹ therefore the defendants must show a compelling state interest in order to lawfully exclude [disabled] children. *PARC*, 343 F.Supp. at 283, n.8. Second, [s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. *Mills*, 348 F.Supp. at 874 (*quoting Brown v. Board of Education*, 347 U.S. 483, 686, 691, (1954)).

When Congress amended the IDEA in 1997, it continued to link its authority and intent to the Fourteenth Amendment noting its desire to restate that the right to equal educational opportunities is inherent in the equal protection clause of the

⁸ Congress stated its intent unambiguously:

It is clear today that this 'right to education' is no longer in question. In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: 'In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity . . . is a right which must be made available to all on equal terms.*' (*Brown v. Board of Education*).

⁹ This is not to say that there is fundamental Constitutional right to education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973). However, once a child enters the school system, the equal access obligations of the IDEA apply.

14th Amendment of the U.S. Constitution, and that the IDEA is founded in and secured by the 14th Amendment. S. Rep. No. 104-275, at 31 (1996). Clearly, the IDEA is a civil rights act, implementing the equal protection clause of the Fourteenth Amendment and it places an affirmative obligation upon the States to provide children with disabilities a free and appropriate education.¹⁰

Professor Mark Weber posits:

Least restrictive environment obligations would appear to be a form of negative rights: A person is entitled to be free from intrusion or control to the greatest extent possible. In many contexts, courts have given the right that construction. For example, in *Olmstead v. L.C.*, 527 U.S. 581 (1999) the Supreme Court ruled that under the Americans with Disabilities Act, a person involuntarily confined on account of mental retardation has the right to placement in the least restrictive setting that would serve her needs, consistent with professional judgment concerning treatment and the legitimate cost concerns of the government. Similarly, in *Youngberg v. Romeo*, 457 U.S. 307 (1982) the Court construed due process to require that any confinement of persons with mental disabilities be in "reasonably nonrestrictive" conditions. *Id.* at 324. The right is consistent with other constitutional rights, which are typically rights to be free from some form of intrusion, rather than rights to a specified good or service. (citation omitted)

In special education law, the situation is different. The Individuals with Disabilities Education Act (IDEA) recites the general obligation, "To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled . . ." 20 U.S.C. §1412(a)(5) The statute goes on to provide:

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [must] occur? only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.*

¹⁰ See 143 Cong.Rec. 7925 (1997) (Sen. Harkin) and *id.* at 8187 (Sen. Lott).

When a court asks if a school district has provided all the services that could make special classes or separate schooling unnecessary, it effectively creates a positive entitlement to services. This positive entitlement has two dimensions, one heightening the level of services to which a child is entitled under the special education law, the other lessening the degree of deference to local decision making that the law requires.

Weber, Mark, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. Davis J. Juv. L. & Pol y 147, 148 (2001).

These protections emerged as statutory and regulatory obligations:

With this directive, which is often referred to as mainstreaming or placement in the least restrictive environment, Congress created a statutory preference for educating handicapped children with nonhandicapped children. (Footnote omitted citing to *Rowley, supra* at 181 n.4)

Greer v. Rome City School District, 950 F.2d 688, 695 (11th Cir. 1991). This right is independent of FAPE. *Id.* at 695-696. Thus, the *Rowley* test assumes the Act's mainstreaming¹¹ requirement has been met. *Id.* at 696 (*quoting and adopting Daniel R.R.*, 874 F.2d at 1048). The *Rowley* test presumes that such inclusion services with the use of supplementary aids and services are considered and rejected only when they cannot satisfactorily achieve the benefits of the

¹¹ Mainstreaming means educating a handicapped child with non-handicapped peers. *Briggs v. Board of Educ.*, 882 F.2d 688, 691 (2d Cir. 1989).

program. *Greer*, 950 F.2d at 696. Thus, even if a child could learn at a higher rate if segregated, this alone does not defeat inclusion. *Id.* at 697.

V. This Court Has Firmly and Directly Addressed the LRE Requirements Contained in the IDEA Beginning with *Rachel H.*

Since *Rachel H.*, this Court has consistently reiterated the importance of the least restrictive environment provisions in the IDEA. *See J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448-449 (9th Cir. 2010); *cf. Ms. S.*, 337 F.3d at 1128 (given the flexible and temporary nature of the plan, non-inclusive placement was appropriate). More restrictive placements are appropriate only if necessary for the student to receive benefit from the program. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996); *Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995)(citing *Rowley*, 458 U.S. at 188-89). These cases repeatedly hold that removal from the general education setting can occur only within the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The IDEA defines supplementary aids and services as aids, services and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . 34 C.F.R. §300.42. The regulations recognize the critical role that supplementary aids and services play in

a disabled child's ability to participate in the regular classroom. IEP requirements dictate that every IEP must contain a written statement of special education and related services and supplementary aids and services, *based upon peer reviewed research to the extent practicable*, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to participate in regular education. 34 C.F.R. §300.320(a)(4) (emphasis added.)

Additionally, in considering the continuum of alternative placements, the IEP team must [m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. §300.115

VI. The District Court's Conclusion that Ka.D. Could be Educated in Regular Education Classes Is Consistent with *Rachel H.* and its Progeny.

In *J.W.*, *supra*, this Court noted that the question whether to educate a handicapped child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry. In each case, the apparent tension between the IDEA'S clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child must be balanced. 626 F.3d at 448 (citing 20 U.S.C. §§ 1401, 1414(a)(5)); *see Oberti*, 995 F.2d at 1214; *Daniel R.R.*, 874 F.2d

at 1044-45.¹² In considering whether the District proposed an appropriate placement for Student, a court balances four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Student had on the teacher and children in the regular class; and (4) the costs of mainstreaming Student. *Rachel H.*, 14 F.3d at 1404.

This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. § 1412(5)(B) .

The Act provides both procedural safeguards and substantive requirements to be followed in the development of an IEP. *Rowley*, 458 U.S. 193-94, 206. The *Rowley* Court confirmed that Congress empowered federal courts to determine whether States have complied with the Act s procedural safeguards and substantive requirements, including whether the child s individualized educational program developed through the [Act s] procedures [was] reasonably calculated to enable the child to receive educational benefits. 458 U.S. at 206-07. If, and only if, a court determines that the school district has complied with the procedural safeguards and substantive requirements of the Act, *see supra*, determinations as to educational methodology are left to the school officials. *Id.*, at 208.

¹² However, mainstreaming is the starting point and presumption. A placement in other than a regular class is a fall-back choice made only after it is determined that placement in regular classes will be unsuccessful. *Board of Educ. v. Holland*, 786 F. Supp. 874, 882 (E.D. Cal. 1992), *aff'd by Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*.

However, contrary to the district's arguments, LRE is not a methodology about which school districts have a choice. Congress expressed a strong preference in favor of educating children with disabilities in an inclusive setting and requires States accepting IDEA funds to educate children in the LRE to the maximum extent appropriate.¹³ Simply put, States that accept IDEA funding do not face the question of *whether* a student should be educated in the least restrictive environment. Rather, Congress has tasked States and school districts to determine *how* a child can be educated in the LRE. Thus, school districts must, as a preliminary matter in every case, determine whether the child can be provided with an appropriate education in the regular education classroom with supplementary aids and services. See *Department of Educ. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985). Appellants' attempts to characterize this dispute as anything other than compliance with an IDEA mandate created to ensure substantively appropriate programming must fail.

CONCLUSION

The district court's decision is consistent with and appropriately applies this Court's decisions interpreting the least restrictive environment provisions of the Individuals with Disabilities Education Act. For the reasons set forth above,

¹³ Appropriate in this context means the least restrictive setting available that will provide the student with FAPE.

COPAA respectfully requests that the Court should reject the District s appeal, grant Ka.D s cross appeal and affirm Ka.D. s placement at Hanna Fenichel Preschool.

Dated: February 25, 2011

Respectfully submitted,

/s/

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 25, 2011.

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