

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

In the Matter of:

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE No. N 2007090576

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on February 5, 6, and 8, 2008, in San Diego, California.

Amy Bozone, Assistant General Counsel, appeared on behalf of petitioner and respondent San Diego Unified School District (District). Phyllis Trombi, District's Coordinator attended the entire hearing. Harlan Zaback, a law student and legal intern from General Counsel's office, attended to observe parts of the hearing.

Patricia Lewis, attorney with the Lewis Law Firm, appeared on behalf of respondent and petitioner Student. Student's mother (Mother) and co-conservator, attended the entire hearing. Rodolfo Pacheco, an interpreter with Sally Low Interpreters, attended the entire hearing and translated for Mother both the proceedings and the testimony of Mother, from English to Spanish and from Spanish to English. Student's sister (Sister) and co-conservator, and Student also attended a portion of the hearing on February 8, 2008.

PROCEDURAL BACKGROUND

District filed the request for due process in this case on September 18, 2007. On September 21, 2007, OAH gave written notice setting October 15, 2007, as the date for the due process hearing in this matter. On September 27, 2007, Student filed a response to District's request in this case. On September 27, 2007, Student also filed his own request for

due process hearing in OAH Case No. N2007090745 and filed a motion to consolidate Student's newly filed case with the above is matter. On October 4, 2007, OAH issued an order consolidating the two cases for hearing and setting November 26, 2007, as the date for the due process hearing.

On November 2, 2007, the parties notified OAH of their partial agreement relating to issues in the consolidated cases and jointly requested the November 26, 2007, hearing date be placed off calendar. At a trial setting conference on January 10, 2008, OAH reset February 5, 2008, as the date for the due process hearing. On January 25, 2008, the parties filed their stipulation for the dismissal of Student's complaint in OAH Case No. N2007090745.

On February 5, 2008, the ALJ opened the record. The ALJ received testimony and documentary evidence during three days of hearing. After the introduction of evidence, the parties made their closing arguments and the matter was submitted on February 8, 2008.

On February 28, 2008, Student filed Student's Objection to Petitioner's Closing Reference to Prior OAH Decisions in which Student objected to District's closing argument request that the ALJ read and rely upon prior decisions issued by California's OAH. This ALJ notes the two OAH decisions cited by District in its closing argument were the decisions in the consolidated cases of *Poway Unified School District v. Student*, OAH Case No. N2006070546, consolidated with *Student v. Poway Unified School District*, OAH Case No. N200608043 (the *Poway Cases*); and *San Diego Unified School District v. Student*, Case No. SN-05-01660, consolidated with *Student v. San Diego Unified School District*, OAH Case No. N2005070047 (the *San Diego Cases*). The Administrative Procedure Act provides that OAH decisions, like other non-binding decisions, may be cited as persuasive authority. Counsel's objection is overruled.¹

ISSUE FOR DECISION

District has raised the following issue for decision at this due process hearing:

Whether the individualized education program dated May 24, 2007, offered a free appropriate public education to Student in the least restrictive environment so that District should be permitted to implement it without parental consent?

¹ Implied in counsel's objection is an assertion that the individual ALJs who authored the decisions in the *Poway Cases* and the *San Diego Cases* were biased and lacked sufficient knowledge of special education matters to make those decisions. If this is part of counsel's objection, counsel's objection is overruled on the specific alternate ground that there is absolutely no evidence to support such allegations and that the ALJs who authored these decisions were unbiased and knowledgeable in special education matters.

CONTENTIONS OF THE PARTIES

District contends the individualized education program (IEP) dated May 24, 2007, provides a free appropriate public education (FAPE) to Student in all respects. District asserts the IEP was designed to meet Student's unique needs and was calculated to provide him with educational benefit. District contends that the off campus interaction provided by the IEP placement was designed to assist Student to transition from high school to adulthood, and that District's obligation to provide for such a transition is required by law.

Student contends the IEP dated May 24, 2007, does not offer him a FAPE for the 2007-2008 school year because it does not meet his exceptional needs in the least restrictive environment. Student contends the written IEP document dated May 24, 2007, is ambiguous in a number of respects and does not clearly identify placement. Student also contends he is entitled to remain on a high school campus until he turns 22 years of age. In spite of this, Student alleges District simply wants Student off campus because he is mentally retarded and because he has reached 19 years of age.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is currently 19 years old and qualifies for special education because his general intellectual functioning is significantly below average. He has been eligible since he was five years old, and was first placed in special education in June 1994. During the time of these proceedings, Student attended District's Patrick Henry High School (PHHS). During the period of time at issue in this case, Student resided with his Mother and two adult sisters in San Diego, California, within the geographical boundaries of District.

2. Pursuant to letters of conservatorship filed with the San Diego Superior Court, both Mother and Sister of Student were appointed as the limited conservators of the person of Student. The powers of these conservators include making decisions concerning the education of Student.

Background

3. This case arises from the disagreement between Student and District over whether District's IEP dated May 24, 2007, offered a FAPE to Student in the least restrictive environment for the 2007-2008 school year. To resolve this issue, District must show there were no procedural or substantive violations of the Individuals with Disabilities Education Act (IDEA).

4. PHHS is a comprehensive high school campus for students in grades nine through 12. In September 2003, Student began attending PHHS as a 10th grade student for the 2003-2004 school year. He has attended PHHS each year since September 2003. Student attended PHHS for the 11th grade during the 2004-2005 school year. He attended PHHS for the 12th grade during the 2005-2006 school year. He attended PHHS for the 12th grade again during the 2006-2007 school year and attended the graduation ceremony in June 2007. The current 2007-2008 school year is the third year that Student is registered as a senior at PHHS.

5. Student's eligibility for special education flows from the physical manifestations of his fragile X condition. Fragile X syndrome is one of a number of syndromes that are based on a recognized genetic mutation. In the case of fragile X, the mutation is found on the X chromosome inherited from the mother. And like other genetic syndromes, it can manifest itself in a variety of ways, from mildly to severely disabling. Individuals with fragile X syndrome often have problems ranging from mild learning difficulties to more significant cognitive and behavioral impairments, including mental retardation and/or autism.

6. In Student's case, he has significant cognitive deficits as measured by current intellectual functioning instruments. For example, the results of cognitive measures of Student over the years showed that he had intelligence quotient (IQ) scores of 55, 58, and 64. When compared to the average range of scores of 90-110 for the general population, Student's cognitive ability is significantly below average.

Student's Unique Needs as Identified by the IEP Team

7. A triennial reassessment of Student was due near the end of the 2006-2007 school year. On May 2, 2007, District gave notice of an IEP Team meeting scheduled for May 24, 2007. District also undertook its assessment of Student's needs for the meeting. The assessments are not at issue in this case. The assessments were designed and conducted to gather information that would be needed to develop an IEP for Student.

8. District's assessments included a brief health assessment dated May 15, 2007. There was also a speech/language assessment, a health assessment, an academics assessment, and a psycho-educational assessment, all of which were dated May 21, 2007. The written report of the information gathered, and the recommendations made for Student, consisted of nine pages of Assessment Report that were a part of the May 24, 2007 IEP for Student for the 2007-2008 school year.

A. Speech and Language Assessment

9. Ellen Goren (Goren) is a licensed speech and language pathologist (SLP) employed by District. She conducted the speech/language (SL) assessment of Student that appears as page two of the eight pages of the Assessment Report. Goren has a B.A. and M.A. in communicative disorders and an additional M.A. in vocational rehabilitation

counseling. She has worked for District as a SLP since 1993. She worked for 10 years at the elementary school level and for five years at the junior high and high school level. For the past five years she has worked at PHHS. Goren knew Student because she provided services to him since he first arrived at PHHS in 2003. She was qualified to conduct this assessment.

10. To conduct her assessment, Goren reviewed records and observed Student. She did not conduct any formal assessments of Student's speech and language needs. She explained there was no reason for any formal assessments due to the fact that there is generally not much change in speech needs during the high school years.² She explained that it was also difficult to test Student because of his low level of cognitive functioning. She plainly stated she could get more information about his speech language needs by observing and working with Student in natural environments for her assessment.

11. Goren's report noted that Student has received speech and language services for many years. The report stated he "is a second language student who has been acquiring and expanding his use of English." Although Spanish was spoken at home, Goren noted Student had become more comfortable with English and was able to use language to express himself in the classroom, socially, and in a work setting. Goren's observations about Student's ability to communicate in English were supported by his appearance at the hearing. Student testified at the hearing and responded in English to questions asked in English by counsel and he responded in Spanish to the questions asked in Spanish by the interpreter. After a few minutes of testimony, use of the interpreter was stopped when it became clear Student understood and responded in English. Student appeared to have conversational ability in both languages.

12. Goren addressed the fluency needs of Student. She described his fluency as inconsistent and situational. He may stutter slightly when nervous or unsure of himself, but was generally fluent. She noted he was able to express himself and be understood. Student could use his language effectively in the classroom and in his job on the PHHS campus. He got along very well with his peers. Goren concluded that Student's functional language was at a level that Student did not require direct SL services and that his inconsistent fluency problem did not interfere with his ability to communicate.

13. Goren also noted that Student may not ask questions if he does not understand something. With his below average cognitive abilities, Student did not always ask for clarifying instructions, although he sometimes did so. Student needed coaching to help him ask a question when he did not know what to do or did not know what was expected of him. Goren was concerned that a work setting supervisor might misunderstand that if Student did something incorrectly, it was not due to Student not trying, it might be due to Student not asking for clarifying instructions. And the supervisor needed to be aware of that with Student.

² It is not possible to conclude whether this generalization was inaccurate in Student's case. However, there was no qualified testimony to rebut that Student's speech language needs remained unchanged as stated by Goren.

14. When Student first arrived at PHHS, his IEP had a goal for fluency, related to stuttering. Goren worked on this goal and others over the years. One of his goals from the previous 2006-2007 IEP was to use two fluency-enhancing strategies but that goal was not met. Still, Student was able to communicate and be understood. Goren believed that trying to repeat this goal for 2007-2008 was not appropriate for Student.

15. Goren's assessment concluded Student no longer needed SL services during the 2007-2008 school year, but recommended, "If parent or team disagrees, continuing services with consultation for three hours/year may be considered." No other speech language pathologist testified at the hearing. No other opinion as to Student's speech language needs was offered by any other witness qualified to discuss speech language issues in young adults.

B. Health Assessment

16. A registered nurse, with a B.S. in nursing, conducted the Health Assessment of Student. This assessment noted Student was in general good health with normal visual acuity and no hearing problems. There were no unusual health problems identified in the assessment.

C. Academics Assessment

17. Janice Bailey (Bailey), Student's special day class (SDC) teacher and case manager, prepared the Academics Assessment. Bailey had been Student's teacher for two full years and for part of the previous year. She was familiar with his academic abilities.

18. In the area of mathematics, Student had participated in functional mathematics and was at the kindergarten to first grade level. He was able to physically use a calculator to find sums, differences, products, and quotients. He was also able to physically use a device known as a coin-ulator to add coins and dollars. However, Student does not recognize whether the answer he gets from a calculator or coin-ulator is accurate or not. Student also struggles with the following concepts: greater than and less than; before and after; telling time (with analog clocks); identifying coins and making change; and reading bus schedules.

19. In the area of reading, Student had participated in functional reading at the pre-kindergarten level. Bailey noted there was some concern about English being a second language for Student, but she noted Student struggled in any written word. He was able to use memory skills to recognize some symbols and some directions. However, Student needed someone to coach him through all written word activities.

20. In the area of writing, Student had participated in functional writing and relied on others to help him. He did not fill out answer sheets independently. If left alone, Student would become confused and copy answers to questions in the wrong spaces. He also needed an adult help him fill out forms.

D. Psychoeducational Assessment

21. Audrey Pitts (Pitts), a school psychologist employed by District, prepared the psychoeducational assessment of Student. Pitts has a B.A. in education and a M.A. in counselor education. She became credentialed as a school psychologist in 1993. For the past ten years she has been employed by District as a school psychologist. Pitts is a member of the National Association of School Psychologists, the California Association of School Psychologists, the Learning Disability Association, and the International Dyslexia Association. She keeps up with the literature and attends various meetings provided by these associations. She has been a school psychologist at PHHS for the past four years. During the past four years, Pitts estimated she has assessed upwards of 30 students with cognitive disabilities.

22. Pitts reviewed previous records to help determine what assessments to conduct. She noted Student's adaptive behavior had been assessed some four times previously, beginning in 1994, and his cognitive levels had been assessed three times previously. She selected several formal assessments for an update on Student's adaptive behavior and his level of cognitive functioning after her record review and observations of Student.

23. Student was attentive and cooperative during his two meetings with Pitts. He seemed to be at ease with Pitts, was willing to engage, and appeared to put forth his best efforts during the meetings. He responded to most direct questions with brief answers, but at times made no response. Pitts interpreted the lack of an answer to be the result of Student either not knowing the answer or not understanding the question.

24. To investigate Student's adaptive behavior, Pitts administered the Street Survival Skills Questionnaire (SSSQ) to Student. Student's scaled scores on the nine sections administered to him included the following: a scaled score of 8 in Public Service and Monetary; a scaled score of 9 in Basic Concepts, Tools, Domestic, Time, and Measurement; and a scaled score of 11 in Functional Signs and health and Safety.

25. Student's scaled scores on the SSSQ were calculated using a table of norms for neuropsychologically disabled adults in the age range from 15 to 55 years old. Thus, scaled scores in the range from 7 to 13 indicate typical performance of neuropsychologically disabled adults. Based on Student's scaled scores from 8 to 11, his results were in the typical range for disabled adults.

26. Student's overall raw score on the SSSQ was 114. This translated to a standardized score of 44, according to norms for average adults. Similar to a consideration of IQ scores, the standardized score of 44 placed Student in the range described as moderately disabled when considering the ranges described as Normal, Borderline, Mild, Moderate, Severe, and Profound. Thus, his adaptive behavioral skills tested as below average, but that was in line with his overall cognitive functioning, which was below average as well.

27. Previous measures of Student's cognitive functioning over the years included IQ scores of 55, 58, and 64. Although the SSSQ score of 44 was lower than the previous cognitive testing, the SSSQ test itself explains this result. Some of the subtests require functional reading by the student. If a student is not able to readily read the questions, there will be a lower test result, even though the ability for learning functional skills can still be substantial. Pitts believed the standardized score of 44 was consistent with Student's earlier standardized scores because of the amount of reading that was required in the SSSQ, as specifically referenced in the instruction materials provided.

28. On the Developmental Test of Visual-Motor Integration (VMI-5), Student obtained a standard score of less than 45, which was described as well below average. This score indicates a severe delay in the visual-motor domain. This result was consistent with earlier testing of Student.

29. To evaluate Student's visual memory, Pitts administered the Picture Memory subtest of the Wide Range Assessment of Memory and Learning (WRAML). Student obtained a scaled score of 6 on the Picture Memory subtest, a result which is below average. Pitts explained that although this result was below average it was not very much below average, such that Student would be able to recall what he sees, and he would be able to use that ability in future schooling and training.

30. To assess more abstract reasoning, Pitts attempted to administer portions of the Detroit Tests of Learning Aptitude (DTLA-3). Student made an effort and tried to give responses. However, Pitts had to abort the DTLA-3 testing because it became apparent to her after working with the subtests for a brief time that the testing was beyond Student's understanding. He was not getting any score but was trying to give answers to go along with the testing.

31. Based on her record review and her observations and testing of Student, Pitts concluded Student had significantly below average general intellectual functioning with adaptive behavior deficits. Even with direct instruction in reading, she did not believe Student would make great gains in reading due to his level of intellectual functioning that was identified consistently during his years in school. Her recommendation did not preclude any placement but rather noted that the IEP Team needed to review the data in her report and make recommendations for Student's program.

32. No other psychologist testified at the hearing. No other opinion as to Student's cognitive strengths or weaknesses was offered by any other witness qualified to discuss psychoeducational issues in young adults.

The IEP Team Meeting and IEP dated May24, 2008

33. A student with a disability has a right to receive a free and appropriate public education which meets his or her unique needs and is designed to provide the student with some educational benefit. If the student's needs cannot be met in the regular education

program, the school district must provide special education and related services designed to assist the student in obtaining access to, and receiving a benefit from, his or her education. Under state and federal law, the district is only required to provide a basic floor of opportunity to the student. The school district is not required to maximize the student's potential and is not required to guarantee that the student will succeed in the program. There is also no requirement that parental preferences be implemented, as long as the student's IEP is reasonably calculated to provide some educational benefits

34. When a child with a disability turns 16 years of age, the requirements for an IEP change, in part, and there is a shift in focus. On a date no later than the child's 16th birthday, the law requires that the IEP include postsecondary goals based upon age, including appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. The law also requires the provision of transition services, which can include courses of study, which are needed to assist the child in reaching those goals.

35. The IEP Team for Student convened on May 24, 2007, to formulate a program to meet Student's needs for the following year. At the time of the meeting, Student was nearing completion of his second year as a senior at PHHS. Student was 18 years old, and would turn 19 within a few months after the school year began.

36. From all accounts, the IEP Team meeting of May 24, 2007, was a long meeting. Georgina Barajas Aguirre (Aguirre), administrator for the meeting, recalled Mother participated fully during the meeting and asked many questions which were answered during the meeting. Aguirre, who was fluent in Spanish, was one of two people who translated for Mother during the meeting. The other person who attended the meeting and was fluent in Spanish was Marianne Pita, Student's social worker from San Diego Regional Center.

The Goals Formulated to Meet Student's Needs

37. There was no dispute that Student made partial progress on reading and math goals during his years at PHHS, but his progress was very slow. Mother provided some samples of Student's work at hearing to support his ability to learn. For example, some reports on Student's work during the 11th grade showed increases in his lists of sight words mastered and increases in his ability to use the "dollar more" strategy³ for money calculations.

³ The "dollar more" or "dollar up" strategy provides a way for students to calculate how much money is needed to purchase an item without having to calculate the exact amount of change needed. For example, if something costs \$1.49, students can calculate up to \$2.00 as the next whole dollar amount needed to purchase the item, without having to count out exact change amounts.

38. To address Student's educational needs, the IEP Team formulated a number of goals. In the area of functional math, Goal 1 provided that Student would learn to make a purchase using the dollar more strategy. This goal was designed to address Student's needs in understanding the concepts of more and less in a functional way that incorporated money concepts as well.

39. In the area of functional reading, Goal 2 provided that Student would learn to independently complete a simple form, such as providing personal information on a job application. This goal was to address Student's need to develop independence when filling out answer sheets and forms and to help him with reading comprehension.

40. Goal 4 also addressed functional reading and comprehension. This goal provided that Student would be able to read and demonstrate single action words by performing the action shown on cards presented to him. This goal addressed his limited reading ability at the pre-kindergarten level and helped him develop reading comprehension skills.

41. In the area of self advocacy, Goal 3 provided that Student would participate in the development of a person-centered plan. This was designed to address his needs in the area of vocational and recreational planning for his future.

42. Goal 7 also addressed self advocacy and provided that Student would ask for help and clarification from staff enabling him to follow directions given to him. Another self advocacy goal, also numbered 7 in the IEP, provided that Student would learn three self advocacy strategies by attending at least one self advocacy meeting per month. These goals addressed Student's needs in the area of failing to ask for clarifying questions if he did not fully understand what was being requested of him.

43. In the area of vocational needs, Goal 6 provided that Student would identify directions, transportation methods, contact personnel, and accessibility needs for three locations in the community. This would provide him with community awareness and mobility options to access programs in the community.

44. In the area of vocational and career/employment exploration, the Goal numbered 8 provided that Student would participate in paid employment through workability for at least 16 hours per week for a minimum of six months. This goal addressed the need for developing job skills and prospects for long term employment in adult life. It also addressed the mandatory requirement that Student's transition services include the services provided by project workability.

Special Education and Related Services as Reasonably Calculated to Provide Educational Benefit

45. For an IEP to be appropriate under the IDEA, the proposed program must be reasonably calculated to provide a student with some educational benefit. The educational benefit must be identifiable at the time the IEP is designed. To implement Student's goals, the IEP Team discussed a program known as Transition Resources for Adult Community Education (TRACE). District's TRACE program was designed for students in the age range from 18 to 22 who remain entitled to special education and services because they were unable to graduate from high school with a diploma. It is designed to be community based, rather than campus based, to support transition from the school environment to adult life in the community.

46. Dayle Taresh, a program diagnostic resource teacher for District, explained the TRACE program during the meeting. The team talked about making Student more independent and having opportunities to transition to adulthood, being able to take the bus and reading bus schedules, and work opportunities. Taresh also addressed Student's needs to begin the transition from Student receiving educational services from District to Regional Center funded services later in life. The TRACE program was designed to prepare students for that transition.

47. Anthony Sidotti, a career and transition specialist for District, also explained the importance of transitioning students into the work force and preparing them for life after high school. He described the TRACE program as providing work experiences for students to help find something they have an interest in for a career. By way of example, Sidotti noted that students could work off campus in a variety of jobs. Some of the jobs where students were recently employed included grocery stores, restaurants, beauty salons, and the San Diego Port District. The goal was to get students to try these job opportunities to see if students could be successful in the jobs they have chosen. If not, the program provides opportunities to try another job setting until they find a good fit for the student.

48. During the meeting, Mother raised questions about Student's reading ability. The IEP Team discussed the fact that Student could continue to work on his reading ability in the TRACE program. Aguirre confirmed that if the team decided Student needed to remain on PHHS' campus, then such a placement would be made. However, in this case, Student's abilities resulted in the recommendation and offer of the TRACE program to transition Student to adult life.

49. Mother told the IEP Team that Student's favorite class was the ROTC class he attended at PHHS for several years. He enjoyed the class and was proud to wear a uniform. There was also discussion by Pita of a possible job opportunity at the Marine Corps Recruit Depot (MCRD). Mother testified she told the IEP Team that she wanted Student to continue to learn basic skills in reading, writing, and math. However, she also testified she did not want him to increase his ability to function in the community. When the subject of the TRACE program was discussed, Mother told the team she understood that Student would be

able to stay at the PHHS campus until he became 22 years old. She recalled that Aguirre explained that he would not remain at the campus until age 22, but needed to attend the TRACE program. Mother explained that District representatives did not give an option of attending either PHHS or TRACE. Rather, they only offered the TRACE program, to which Mother objected. She wanted him to continue in the Progressive Alternative Education Environment (PACE) program that he was currently enrolled in at PHHS. This was an integrated life skills program on the PHHS campus which was designed to help students live in and be a part of their school community.

50. Aguirre also told Mother that Student would be graduating in June 2007, and that at the graduation ceremony, Student would receive a certificate, not a diploma. After receiving his certificate, Student would be able to participate in the TRACE program to help transition him from the school community to the adult community.

51. In the area of speech and language, SLP Goren explained that generally, when students transition to TRACE, there are times when District keeps a small amount of services on the IEP so a speech and language pathologist is available for consultation. Goren testified that at first, she thought Student really did well with communication. She thought she would suggest dismissing him from SL services, but would listen to Student's Mother at the IEP Team meeting. If anyone disagreed with her recommendation at the meeting, Goren would be agreeable to a few hours of SL for consultation.

52. In spite of the fact that Goren believed Student did not require direct services, she agreed with the IEP Team that four hours of consultation were appropriate for Student, and that amount was included in the IEP. Goren recalled that Mother agreed with this offer of SL service.

53. Goren said the decision to place Student in the TRACE program was not predetermined. However, she believed the TRACE program would meet Student's needs. At hearing, she explained there was a very low ratio of just a few students to one teacher. The teacher is made aware of the speech needs of each student through collaboration with the District's SLP, and the teacher is present with the students to coach them in all elements of the program when the need arises. Student's fluency needs could be met, and his need for coaching to ask questions when he was not certain about what to do, could be met by the close ratio coaching available in the TRACE program.

54. Goren believed the offer of TRACE was appropriate because Student would benefit from the transition services provided in that program. It would get Student a little bit more into working environments, and provide the opportunity to practice and improve his communication skills in a work setting. The program was very flexible, so if Student wanted or needed academics, the program could work on academics as well. She believed Student had the language abilities to benefit from the TRACE program.

55. School psychologist Pitts shared her observations and report during the meeting. She was in agreement with the TRACE placement as discussed at the meeting. TRACE appeared appropriate to Pitts considering Student's age. She also stated that TRACE appeared to be the natural progression to continue to improve upon, and add to, Student's skills in the settings outside the school campus. Since Student had already attended the PHHS campus for two years as a senior, it was time to add to his skills in his young adult life progression. The TRACE program provides the next step after the high school campus to help students become functioning young adults. Pitts also noted there was no discussion of placing Student in any general education environment with aide support because such a placement would not serve his needs.

56. At the conclusion of the IEP Team meeting, Mother signed the IEP dated May 24, 2007. She also initialed a statement on the IEP that she received a copy of the procedural safeguards. No document describing the procedural safeguards provided to Mother was produced at the hearing.

Least Restrictive Environment

57. A school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum includes regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. In determining where to place a student along this continuum, a school district is required to provide special education to a student in the least restrictive environment. The purpose of this requirement is to enable a disabled student's education to occur with non-disabled peers to the maximum extent possible. To determine whether a placement is in the least restrictive environment for a particular student, there must be a balancing of several factors. These factors include the educational benefits to the student of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student has on the teacher and other children in the regular class; and the costs of mainstreaming the student.

Least Restrictive Environment to Implement Goals for the 2007-2008 School Year

58. For the 2006-2007 school year, Student takes the position that the least restrictive environment was the SDC located at the comprehensive high school campus at PHHS. The benefits, effects, and costs of placement must be balanced to determine the least restrictive environment.

Academic benefits

59. The academic benefits of the on-campus program at PHHS and the off-campus program at TRACE are essentially identical. Both can provide the reading and writing and math skills that Student needs to learn to function in adult society.

60. The academic benefits of the on-campus program have been available to Student for over four years. He has benefited from his program as he moved through his high school years. There would be little difference in the academic benefits to Student whether he attended the on-campus SDC or the off-campus TRACE programs: functional reading, writing, and math would be equally available to him in either setting. The balance of academic factors would not make an appreciable difference in the benefits for Student.

Non-academic benefits

61. In the TRACE program, great emphasis is placed on the importance of a smooth transition to adult services, where the last day of services provided by District is intended to look exactly like the first day of adult life without District services. In the TRACE program, there is also ability to sample different adult school settings, different work environments, and a variety of different jobs. While in the TRACE program, students are able to sample these different settings with the support of teachers and aides, to be shadowed at work places, and during transition services.

62. The on-campus PACE program fails to meet this mandated need for transition services since its focus is only to prepare students to live in their school community.

63. Both the PHHS campus and the TRACE program could provide non-disabled peers as models for Student. However, the non-disabled students at the high school campus would provide role models of how to act on a high school campus. The role models in the community are the people with whom Student will be interacting for his adult life beyond high school. It would be appropriate to provide adult role models in the community rather than high school students, since Student's need for transition into the adult world is now required to be a part of his IEP. An important part of District's obligation imposed by law is to transition Student to life after high school.

64. Based on these differences in the on-campus PACE program and the off-campus community involvement in the TRACE program, the non-academic benefits of the TRACE program greatly outweigh the narrow focus of the PACE program.

Effect on the regular education teacher and other students

65. There was no testimony from any witness on the issue of Student's effect on a regular education teacher and any other students in any environment, whether on the PHHS campus or in the TRACE program. This part of the balancing test is therefore neither a plus nor a minus in determining the least restrictive environment for Student.

Costs of Placement

66. There was no testimony from any witness on the issue of the costs of the placement options for Student. As a result, this part of the balancing test does not impact the findings on the least restrictive environment for Student.

Balance of Factors for Least Restrictive Environment

67. In balancing the factors above, the evidence showed that Student would derive equivalent academic benefit in either the SDC or TRACE settings. However, in light of the mandate that Student's IEP include transition services to meet transition goals, the non-academic benefits of the TRACE program outweigh the non-academic benefits of the SDC. The weight of the evidence in support of off campus activities to implement transition goals tips the balance in favor of the TRACE program because TRACE is based on providing a student with real-life work and social experiences, in order to prepare the student for adult life.

68. At this point in Student's educational career, the focus must be directed to transition. Student argues that he has the right to continue to be educated until he turns 22 years old. For that reason, Student argues he should remain in PHHS' SDC and not be thrown out into the TRACE program. Student is mostly correct. He has the right to continue to be educated until he turns 22 years old, but he is not being thrown out of the SDC. Rather, he is taking the skills he has learned during his high school years and is being guided into the postsecondary world with as much support from District as Student may need.

69. Student's typically developing peers are no longer found on a high school campus. They are beginning to test their wings as adults: some have moved on to the college settings, some have moved on to the military, and some have moved on to the work force. But the point is all his typically developing peers have moved on from the high school campus. And that is the reason the law requires that an IEP for every student 16 years and older must include planning and services for postsecondary goals.

70. Based on the foregoing, the May 24, 2007, IEP was reasonably calculated to provide educational benefit to Student and would have provided him with a FAPE for the 2006-2007 school year in the least restrictive environment.

Mother's Revocation of Consent to Implement the May 24, IEP

71. Within one to two weeks after the IEP meeting, Mother asked to visit the TRACE program. Mother and Student visited the program on two separate days, once during the summer of 2007 and once during the winter of 2007. Mother did not like what she observed and did not think it was appropriate for Student. The two locations she visited were a community college learning center and the YMCA.

72. During the first visit to the TRACE program, Mother and Student went to the Educational Cultural Complex (ECC) of San Diego Community College, which is an adult learning center in the City of San Diego. Mother did not explain anything about the community college setting or the TRACE program to Student. She only asked Student if he wanted to go to the program and he told her he did not because he did not like it. Mother did not like it because she described Student as being sad and upset when visiting the ECC.

They did not stay for the entire day, but left the program early. Mother said Student was not able to sleep, thinking he was going to a different school from PHHS.

73. Mother explained that Student would prefer to be at PHHS because he had friends at school, he was very familiar with the campus, and he liked it there. Mother wanted Student to remain at PHHS because he always needs someone at his side to help him, and he still needs to learn basic academics to read, to write, and to count money. Mother wanted Student to remain on the PHHS campus until he was 22 years old.

74. Mother also believed there was a lot of wasted time waiting for the bus. She explained sometimes Student could wait one hour 40 minutes for a bus to go to a location. She also believed that academically, students in the TRACE program do not learn anything.

75. On September 3, 2007, Mother sent written notice to District that Student would not be attending the TRACE program. She advised that under the May 24, 2007 IEP, Student's placement in September should be the same as his then current IEP placement in the integrated life skills program at the PHHS campus.

76. Mother again visited the TRACE program in January 2008. The first location she visited was the World Beat Center in San Diego's Balboa Park for a drum class. This was based on Student's interest in playing drums. Mother explained Student did not like the class because it was too noisy. She said he was bored and did not participate in the class with the other students.

77. Mother also visited the YMCA program where Student was to participate with weight lifting machines. Mother was surprised to find Student cleaning the machines with a towel. When Mother asked at the front desk of the YMCA why her son was cleaning the machines, she was told that the people from the TRACE program put Student there to clean the equipment. While visiting the YMCA, Mother also saw Student using a cardiovascular machine while wearing his street clothes rather than the workout clothes he had brought with him. She explained that a person from the TRACE program did not allow him to change because his backpack did not fit in the lockers. Mother did not stay for an entire day at the TRACE program, but left early with Student.

78. The TRACE teacher familiar with the YMCA program explained that in order to receive free memberships at the YMCA, TRACE students often worked at cleaning the machines. The TRACE teacher also explained that they would find a locker for Student to use so he could change out of his street clothes when using the machines.

79. Shortly before the hearing, Student attended another day in the TRACE program. In view of his dislike of the drum class, the program day was changed and Student attended at the community college ECC. During the time Student attended the TRACE program, Student recognized some of his friends who were now in the TRACE program.

Medical Evaluation and Report by Lynne Bird, M.D., dated December 13, 2007

80. Student provided the medical report and testimony of Lynne Bird, M.D., concerning Student's fragile X condition. Dr. Bird is pediatrician who specializes in genetics and birth defects. She obtained a B.S. in biology in 1983, followed by an M.D. at Duke University in 1987. From 1987 to 1991, she completed her internship and residency programs at U.C.S.D. She became board certified in pediatrics in 1990 and was most recently recertified in 2003. Dr. Bird completed a fellowship in genetics at U.C.S.D. in 1994. During her fellowship, she also became board certified in clinical genetics in 1993, and was most recently recertified in 2002. Dr. Bird has been in practice since 1994, and is presently employed as a clinical geneticist at Rady Children's Hospital in San Diego. She was well-qualified to report on Student's fragile X condition.

81. Dr. Bird explained that fragile X syndrome is a genetic condition that involves a mistake in a gene. It is inherited from the mother on one of her copies of the X chromosome. It is a condition that involves mental retardation and distinctive behaviors. For boys, fragile X syndrome typically manifests itself in a number of ways. For boys, they are typically tall, slow to develop language, have behavioral manifestations such as hand wringing and gaze aversion, where they have trouble making strong eye contact.

82. Dr. Bird saw Student on December 13, 2007, and provided a written report of that clinical genetics visit titled Genetic/Morphology Outpatient Service. She found Student to be a delightful and cooperative young man. He did well in making eye contact and did not exhibit a lot of adverse behavioral mannerisms during the visit. He was not hyperactive, was not anxious, and was not disruptive in any manner. The office visit lasted about one hour.

83. From a record review, Dr. Bird's report noted that Student was diagnosed with fragile X syndrome in 1994. He has had very little anxiety and his behavior is not a problem at all. In July 2007, Student was evaluated at the Mind Institute affiliated with the University of California, Davis. The evaluation was conducted by Randi Hagerman, who has done much work in fragile X syndrome and who was described by Dr. Bird as one of the world's experts in fragile X syndrome. The evaluation from the Mind Institute report found Student to have a full scale IQ of 55. That would put him at the border line between mild and moderate mental retardation.

84. With an IQ of 55, Dr. Bird opined that Student should be able to learn to read street signs and other material at about the first grade level. In the area of math, Dr. Bird believed Student should be able to do simple money addition and subtraction. Her opinion was based on her experience with children who are found to be in this range of abilities based on this IQ and what they are typically able to do.

85. In the area of education, Dr. Bird believed Student would be able to learn to read at the first grade primer level. She did not have any of his education records and only had the input of Mother who told her Student would be out in the community in the TRACE program. For this reason, Dr. Bird recommended he be in a classroom setting, not in the

community, to learn basic academics. She also opined that Student should have speech therapy for at least two individual sessions per week to address stuttering. Dr. Bird did not contact Goren or any other speech language pathologist to discuss her recommendations or the basis for them. At hearing, Dr. Bird admitted she was not qualified to make a determination about speech language pathology.

86. SLP Goren did not agree with Dr. Bird's recommendation that Student's speech therapy needed to be increased to at least two sessions per week with individual therapy. Goren explained that Student did not have the cognitive ability to understand situations that trigger stuttering and then be able to recall this information or to recall some strategies to address his fluency. Goren also sees Student in a variety of environments such as in the classroom and when he participates in a club that she runs for socialization. She stated there is very little stuttering that is happening in those situations. She therefore stated that when he is comfortable Student has much less of a stuttering problem than when he is feeling some type of pressure.

87. The medical portions of Dr. Bird's report are entirely credible. However, the educational recommendations in the report are entitled to little weight. Dr. Bird met with Student for only one hour. She did not review any of Student's prior educational records. She did not review any IEP for any school year. She did not have any information from any assessment conducted for educational purposes. In fact, the only educational information Dr. Bird had was based on Mother's report. In the area of speech language, Dr. Bird did not contact Goren or any other speech language pathologist to discuss her recommendations or the basis for them. In the areas of reading and writing, she did not talk to any teacher or person familiar with Student at the PHHS school site. Dr. Bird did not observe Student in any educational setting and did not observe Student attempt to read or attempt to write anything. With such limited educational information available to her, the recommendations of Dr. Bird for reading, writing, and language are not entitled to any significant weight in this proceeding.

Ambiguities Alleged in the IEP Dated May 24, 2007

88. Student pointed out provisions contained in the IEP that Student believes were ambiguous. In particular with respect to placement, the first page of the May 24, 2007 IEP describes the placement from May 24, 2007, to September 1, 2007, as a continuation of the PACE program where Student was then currently placed. For the remainder of the school year from September 2, 2007, to May 23, 2008, the first page describes the placement as "Integrated Life Skills SDC," but the fourth page bearing the heading Team Action had a box to specify "additional item(s)" which plainly stated: "The offer of FAPE is TRACE to begin in the fall (2007)."

89. Student's teacher Bailey explained the computer program that District used to prepare the IEP did not allow for an entry of the TRACE program in the service box shown on page one. If the placement was TRACE, she would enter the Integrated Life Skills option on page one. The TRACE program would then have to be identified on a later page of the

IEP. Independent of this explanation, the claim of ambiguity in this case is not credible. As discussed above, within one to two weeks after the IEP Team meeting, Mother asked to visit the TRACE program, and later actually did visit the program. Based on these unequivocal actions in the weeks and months after the May 24, 2007 IEP Team meeting, it is clear that Mother understood TRACE was the program to begin in the fall of 2007 as provided in the IEP.

90. Student also pointed to a claimed ambiguity in the second and third pages of the IEP regarding whether Student was diploma bound. The second and third pages of the IEP were clearly different. The third page of the IEP had a box checked that indicated Student was diploma bound while the second page of the IEP had a box checked that indicated Student was not diploma bound.

91. Teacher Bailey explained the second and third pages were actually two versions of the signature page: the third page was a draft prepared by District which included the typed names of the participants invited to the meeting, while the second page was the actual signature page signed at the meeting. The computer program places an X by default in the “Yes” box for whether a student is in a course of study which is designed to lead to a high school diploma. Since the third page was a draft page, the “Yes” box was marked. The actual signature page on page two correctly placed an X in the “No” box when the IEP Team signed the document.

92. For another claimed ambiguity, Student pointed to check boxes on the first page of the IEP that indicate a Spanish interpreter was not required but that a Spanish translation of the IEP was required. Based on the testimony at hearing, the check box indicating no interpreter required was in error. However, there was ample testimony that Mother did receive Spanish interpretation from Aguirre and Pita during the IEP Team meeting and there was no claim that any of their interpretation was false.

LEGAL CONCLUSIONS

Applicable Law

1. District, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student’s individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term “related services” (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive

services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. There are two parts to the legal analysis of whether a school district has complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-07 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*)). The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *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 substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Id.* at p. 208.)

Substantive Violations

4. A district satisfies the substantive standard for providing a FAPE if the offer to the student meets a four-part test: (1) the offer is designed to meet the student's unique needs, (2) the offer is reasonably calculated to provide the student with (some) educational benefit, (3) the program provided comports with the student's IEP, and (4) the offer is provided in the least restrictive environment. (*Rowley, supra*, 458 U.S. at pp. 206-207; *Clyde K. v. Puyallup School District, No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400-1401 [LRE is a substantive requirement of IDEA]; *Capistrano Unified School District v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 893; *Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 894 [FAPE must be tailored to the unique needs of each individual child]; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1033; *Katherine G. v. Kentfield School District* (N.D. Cal. 2003) 261 F.Supp.2d 1159, 1172.)

5. Federal and state laws also require a school district to provide special education in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114-300.117; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834 (*Poolaw*)). A special education student must be educated with non-disabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56364.2, subd. (a).)

6. The IDEA establishes a strong preference in favor of the placement of a special education student in the LRE. (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at 181 n.4; *Poolaw, supra*, 67 F.3d at p. 834.) In light of this preference, and in order to measure whether a placement is in the LRE, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of 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 [the student] had on the teacher and children in the regular class, and
- (4) the costs of mainstreaming the [student].

Transition Services for Teens and Young Adults

7. Beginning not later than the first IEP to be in effect when a child with a disability turns 16,⁴ and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) The postsecondary goals must be based upon age appropriate transition assessments and must be updated annually. (*Ibid.*) In addition to identifying such postsecondary goals, every IEP after age 16 must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

8. The transition services to assist in reaching those postsecondary goals means a coordinated set of activities that are designed to be within a results-oriented process, that is, focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. Such transition services must also be based on the individual child's needs, taking into account the child's strengths, preferences, and interests. "Transition services" includes: (i) instruction; (ii) related services; (iii) community experiences; (iv) the development of employment and other post-school adult living objectives; and, (v) if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43 (2006); Ed. Code, § 56345.1, subd. (a).) "Transition services" for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. (20 U.S.C. 1401(34); 34 C.F.R. § 300.43 (2006).) Project workability is an essential component of transition services. (Ed. Code, § 56470, subd. (a).)

⁴ Transition services may be included in the IEP for a child who is younger than 16 years of age if the IEP Team determines such services are appropriate at the younger age. However, there is no claim in this case that transition services would have been appropriate for Student at any age younger than 16.

Precedent Decisions

9. Decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority in subsequent proceedings. (Ed. Code, § 56505, subd. (a); Cal. Code Regs., tit. 5 § 3085.)

Determination of Issue

Whether the individualized education program dated May 24, 2007, offered a free appropriate public education to Student so that District should be permitted to implement it without parental consent?

1. Pursuant to the factual findings 7-32 46-55, 59-70, and 80-87, and Legal Conclusions 1-8, the IEP dated May 24, 2007, provided the appropriate support and services in the least restrictive environment to meet Student's unique needs for the 2007-2008 school year.

2. District had the burden to show its program was appropriate for Student and District carried this burden. The evidence presented at hearing showed that District was obligated to provide transition services to Student. It would not be possible to provide transition services into the adult community in an SDC program that kept Student exclusively on the PHHS campus. Because of the need for transition to the adult world outside the campus, the TRACE program was an appropriate program for Student.

3. There was no limitation on Student's ability to continue to work on his basic academic skills in the TRACE program. To the contrary, Student now has the adult world beyond high school to continue his academics, including attending community college. He has the opportunity to try different academic, work, and recreation options in the community while being supported by TRACE personnel. This is true even though the reading and writing learning would be occurring in the adult world of the community college and work place settings. This, however, is truly where Student's typically developing peers are now learning and working.

4. The short periods of time that Mother visited the TRACE program with Student do not provide any basis to find the program was inappropriate. Pursuant to Factual Findings 71-79, the visits to the ECC, the World Beat Center, and the YMCA actually support the appropriateness of the TRACE program for Student. For example, during the first visit to the community college ECC, Mother reported that Student became sad and upset when he was not in the familiar surroundings of the high school campus among his friends. However, when they visited the ECC months later, Student saw some of his friends who had moved on to the TRACE program. The visit to the World Beat Center for a drum class appeared to be something Student wanted to engage in. However, after attending the class for a brief time, it became apparent Student did not want to participate in the class. The program allowed for an immediate change.

5. When Mother visited the YMCA, it appeared Student was being required to clean the weight lifting machines without reason. However, this was just an option for some students who wanted to pay for their membership at the YMCA by working there. Working at the YMCA was not required, but it provided another possible work experience if Student wanted to take advantage of it.

6. The PACE program requested by Mother, which prepares students to live in their school communities without any provision for postsecondary goals related to training, education, and employment, is legally insufficient for Student. In view of Student's unique needs, coupled with the mandatory requirement for transition services in his IEP to facilitate his move from school to post-school activities, the May 24, 2007 IEP provided Student with a free appropriate public education in the least restrictive environment.

ORDER

1. The individualized education program dated May 24, 2007, offered a free appropriate public education to Student. District shall be permitted to implement it without parental consent.

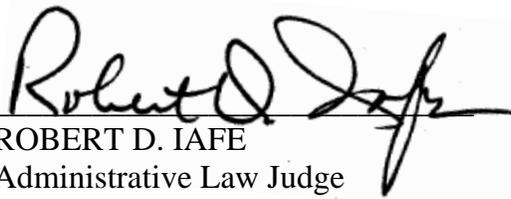
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on the sole issue heard and decided in this case.

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 ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: March 19, 2008


ROBERT D. IAFE
Administrative Law Judge
Special Education Division
Office of Administrative Hearings