

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

In the Consolidated Matters of:

POWAY UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006070546

STUDENT,

Petitioner,

v.

POWAY UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006080043

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings (OAH) , Special Education Division, State of California, heard these consolidated matters on November 13, 14, 15, and 16, 2006, and January 4 and 5, 2007, in Poway, California.

Justin R. Shinnfield, of Atkinson, Andelson, Loya, Ruud & Romo, represented Poway Unified School District (District) at the hearing. Emily Shieh, Assistant Director of Special Education, and Theresa Kurtz, Director of Special Education, appeared at various times on behalf of the District.

Student's mother and father appeared on behalf of Student (Student). Student was not present.

On July 19, 2006, the District filed a due process hearing request in case number N2006070546. On August 1, 2006, Student filed her request for a due process hearing in

case number N2006080043 and requested that the two cases be consolidated. On August 11, 2006, the Office of Administrative Hearings granted Student's request to consolidate the two cases and continued the hearing date for the District's due process case. The parties subsequently requested and received another continuance, and the hearing began on November 13, 2006. At the close of the hearing on January 5, 2007, the parties requested the opportunity to file written closing argument. That request was granted. The matter was deemed submitted upon receipt of written closing argument on February 5, 2007.¹

ISSUES²

The District's Issue

Did the District offer Student a free appropriate public education (FAPE) for the 2006-2007 school year?

Student's Issues

1. Did the District deny Student a FAPE during the 2005-2006 school year by failing to provide appropriately trained aides, using too many (five) aides causing a lack of continuity in Student's program, and failing to provide Student with the supplemental aids and services identified in the June 2005 IEP?
2. Did the District fail to offer Student a FAPE for the 2006-2007 school year in the following respects:
 - a. Abraxas High School, the placement offered by the District, is not reasonably calculated to provide Student with some educational benefit in the academic areas of reading and math;
 - b. Abraxas High School is not the least restrictive environment for Student;
 - c. The peers at Abraxas High School are inappropriate models for Student;
 - d. The District changed Student from the diploma-bound track?

¹ The initial due date for the filing of the written closing argument was January 22, 2007, but the time was extended at the request of Student's parents upon a showing of good cause.

² Student originally had one additional issue: Is Student entitled to attorney's fees in the amount of approximately ten thousand dollars incurred in March 2006 because the District would not allow Student to take the California High School Exit Examination (CAHSEE)? On the first day of hearing, the District objected to that issue on the basis that it was outside the jurisdiction of the Office of Administrative Hearings. That request was granted and the issue was dismissed from the action.

FACTUAL FINDINGS

Background

1. Student is a 19-year-old woman who has been eligible for special education for many years under the eligibility category of mental retardation. In November 2005, the court declared Student legally incompetent and appointed her parents as her legal conservators. Because of the conservatorship, Student's parents retain educational rights for Student.

2. In order to provide a child with a FAPE, an educational agency's proposed placement and services must be designed to meet a child's unique needs and provide educational benefit to the child. In addition, the agency must provide those services in accordance with the terms of a child's IEP. To determine whether the District provided Student with a FAPE during the 2005-2006 school year, it is first necessary to examine Student's unique needs and the steps that led to her educational placement and services during the 2005-2006 school year.

Student's Unique Needs

3. Student has a history of seizures dating back to early childhood. Until a few years ago, Student took seizure medication to control her seizures. Student is cognitively impaired and requires special education services. Student's parents contend that Student's cognitive abilities may have improved since she stopped taking her seizure medication, but they presented no expert testimony or medical evidence at hearing to support their belief. All evidence indicated that Student remained cognitively impaired and qualified for special education services on that basis at all times relevant to this action.

4. Student was reassessed in November 2003, at the time of her triennial review. As part of that assessment, the school psychologist administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to Student to measure Student's cognitive ability. Student scored in the lowest percentile in every subpart of that test. The psychologist calculated Student's full scale intelligence quotient (IQ) score to be 40.

5. As part of reassessment, Student also took the Wechsler Individual Achievement Test (WIAT), which measures a child's educational achievement. Student scored in the lowest percentile in every category on the test, supporting the IEP team's conclusion that she qualified for special education services under the category of mental retardation. The other tests administered as part of the assessment also supported the team's conclusion that Student suffered from cognitive impairment.

6. Student's classroom work matches the test results of the WISC-IV and WIAT. Student's mathematical abilities are far below her age and grade level. Without using an electronic calculator, Student can add "one" to another number and get the answer (for example: $3 + 1 = \underline{\quad}$), but she is unable to perform other types of addition, including

addition of single-digit numbers.³ Student has never been capable of performing subtraction without a calculator. Student can recognize pennies, but cannot reliably recognize other coins. She cannot count money or make change. Student also has trouble telling time. She can tell time to the half-hour, and one of her IEP goals calls for her to tell time within 15-minute increments.

7. At the time of her November 2005 IEP meeting, Student's reading was at or below a third grade reading level. When Student's teacher asked Student to choose books for independent reading, Student's parents complained that independent reading for Student "is not constructive."

8. Student's parents dispute the nature of Student's disabilities. Student's mother believes that Student is not mentally retarded, but is instead learning delayed. She explained that Student learns everything more slowly than other people, but given sufficient time and repetition, Student will learn. For example, it took twelve years to teach Student to swim. She feels that, as Student's mother, she understands Student's abilities and needs better than the educators working for the District. Student's father shares her opinions in this regard.

Student's Placement During the 2005-2006 School Year

9. On November 19, 2004, while Student was still in her junior year, Student's IEP team met for her annual IEP meeting. Student was 17 years old at the time. The District's offer of FAPE included a special day class placement in the non-severely handicapped (NSH) class at Rancho Bernardo High with extended school year services. Student's primary disability was listed as "mental retardation." The offer of FAPE included occupational therapy services and consultation, speech-language services, and adaptive physical education. The transition plan attached to the IEP listed Student under the "letter/certificate" category instead of the "diploma" category, and recommended that Student attend the District's transition program after high school.

10. Student's parents did not agree to the IEP at the November 2004 meeting. Additional IEP meetings were held on December 8, 2004, January 21, 2005, February 8, 2005, and May 3, 2005, but Student's parents did not agree to any of the IEP proposals at those meetings. Instead, the parents finally signed their agreement to the proposed IEP on June 22, 2005. The signature line indicated that Student's parents agreed to the placement and services offered, but added the statement: "Yes, except for we requested test format practice." In addition to the terms proposed on November 19, 2004, the June 22, 2005 IEP included a "special factors" page listing the following supplemental aids and services: 1) one-to-one instructional assistance for reading, writing, math, and task completion/organization throughout the school day; 2) use of graphic organizers and standard wide ruled paper throughout the day; 3) curriculum-based vocabulary with simple

³ For example, on one of Student's school worksheets submitted as evidence by Student's parents, Student answered "3" when solving the equation: $2 + 2 = \underline{\quad}$.

definitions: match or fill in blank format; 4) visual cue cards/examples/simple steps for completing homework assignments; 5) extra set of books; 6) tests/work samples sent home; and 7) data collection regarding IEP goals.⁴

11. There were subsequent IEP meetings during the 2005-2006 school year, but Student's parents did not sign their consent to any of the District's proposed IEPs after June 2005. The parent's attorney wrote a letter dated April 17, 2006, consenting to portions of the March 16, 2006 IEP, but not the entire proposal.⁵ The evidence supports a finding that the November 19, 2004 IEP, as amended at subsequent meetings and finally signed on June 22, 2005, is the last agreed-upon and fully implemented IEP for Student. It was the IEP under which Student received services during most of the 2005-2006 school year, except for the period after April 17, 2006, when the IEP was supplemented by the specific things agreed to in the attorney's April 17, 2006 letter. Student's parents removed Student from the District in approximately July or August 2006 and placed her in a private school.

12. As set forth in Factual Finding 9, the June 22, 2005 IEP placed Student in an NSH class at Rancho Bernardo High School during the 2005-2006 school year (Student's senior year). The NSH class was a special day class for higher functioning special education students. Prior to Student's junior year, Student had been placed in a "critical skills class" at Rancho Bernardo High School, but Student's parents had objected to that placement because they did not believe it provided Student with appropriate academic instruction.⁶ At the parents' urging, the IEP team agreed to change Student's placement to the NSH class. Student's cognitive abilities were on the borderline between the critical skills class and the NSH class. She was at the top of her class in ability and achievement in the critical skills class, but at the bottom of the class in the NSH placement.

13. Both parties agree that the NSH class at Rancho Bernardo High School was an appropriate placement for Student's senior year. Student benefited socially and emotionally by exposure to higher functioning peers during her time in the NSH class.

14. Student was not intellectually capable of comprehending the material presented in the NSH class without modification to the course curriculum. Therefore the IEP

⁴ There were other supplemental aids and services contained within that IEP, but only the ones in dispute are listed here.

⁵ The portions of the March 16, 2006 IEP to which Student's attorney consented on behalf of her clients in April 2006, contained basically the same placement, services and supplemental aids and services as agreed to in the June 22, 2005 IEP, so there is no need to list them again.

⁶ The critical skills class is designed for severely disabled pupils, and emphasizes functional skills necessary for everyday living in its teaching.

called for Student to work with a one-to-one aide in her classes. Student's teachers and aides modified the classroom material to a level that Student could understand.⁷

Did the District Deny Student a FAPE During the 2005 – 2006 School Year (Student's Senior Year in High School)?

15. For the 2005-2006 school year, Student does not dispute the placement provided by the District, the goals and objectives in her IEP, or the services offered in her IEP. Student's objections relate to the manner in which the services were provided.⁸ In particular, Student contends that the District failed to provide appropriately trained aides, used too many (five) aides causing a lack of continuity in Student's program, and failed to provide Student with the supplemental aids and services set forth on the "special factors" page of the June 22, 2005 IEP, (and the attorney's April 17, 2006 letter). The law states that a district must provide services in accordance with a child's IEP in order to provide a FAPE.

Were Student's One-to-One Aides Appropriately Trained?

16. As stated above in Factual Findings 11 – 14, during the 2005-2006 school year Student was instructed using a modified curriculum throughout her school day. In order to instruct Student in that modified curriculum, a one-to-one aide worked with Student, under the direction of Student's teachers. Student's teachers worked with her aide to modify the classroom material so that the aide could present that material to Student in a format and at a level Student would understand.

17. Student contends that the aides hired by the District to provide Student's one-to-one instruction during the 2005-2006 school year lacked appropriate training to conduct the SRA method of reading and math instruction.

18. Because of Student's cognitive disabilities, Student was not capable of understanding the normal math and English classes taught in the NSH curriculum. Instead, Student's reading and math instruction was conducted using the SRA method of instruction.

19. The SRA method involves a series of numbered lessons. Each lesson builds on skills and knowledge learned in the previous lessons. A child is supposed to "master" the skills and knowledge from one part of the program before moving on to the next. After a child completes a certain number of lessons, the child is tested to see if mastery has occurred. If there are gaps in the child's knowledge based on the results of the mastery test, the child is supposed to go back to an earlier numbered lesson or lessons where the missing skills and knowledge are taught.

⁷ Student disputes that the curriculum was modified, but as set forth in Factual Findings 70 – 81, the evidence shows that the curriculum was modified and that such modifications were necessary for Student to gain educational benefit from the NSH placement.

⁸ The parties stipulated that the goals and objectives from the IEP and proposed IEP in both school years in question in this case (2005-2006 and 2006-2007) were appropriate for Student.

20. During the 2005-2006 school year, Student's one-to-one aide, working under the direction of Student's special education case manager Marc Lazernik, instructed Student in SRA reading and math. Lazernik is a teacher credentialed to work with non-severely handicapped special education pupils. He was also Student's geoscience teacher for the 2005-2006 school year.

21. Laura Thibault was the primary one-to-one instructional aide working with Student during most of the 2005-2006 school year. She began working with Student in November of 2005. Thibault received a bachelor's degree in linguistics from the University of California in Irvine in 1989, and began working on a teaching credential. She did not complete her work for her credential and is not a credentialed teacher.

22. The day before Thibault began working as Student's one-to-one aide, she met with Lazernik to discuss her work with Student. Lazernik explained to her how to modify the school program to meet Student's needs.

23. When Thibault began working with Student, she made arrangements to receive SRA training from a District instructor who was familiar with the SRA reading program. She met with that instructor, but did not bring the necessary books and materials with her, so no hands-on training was done. Instead, the instructor gave Thibault a half-hour orientation, as well as videotapes and an instruction manual to review regarding how to conduct the SRA program. Thibault watched the videotapes and read the manual. It took her approximately eight-to-10 hours to complete this training. Carrie Otto, a district employee who was trained in using the SRA math program, also provided training to Thibault. When Thibault had questions about either the SRA reading or math program, she would speak with Otto, Lazernik, or the District instructor who was familiar with the reading program.

24. The parties dispute whether review of these videotapes and the instruction manual was sufficient training for Thibault to use the SRA program for reading. Student's mother attended a training session conducted by McGraw-Hill, the company which publishes the SRA program, in August 2006. Student's mother testified that the SRA instructors told her it was necessary to attend their training in order to be properly trained to use SRA. The District's Director of Special Education testified that an SRA representative had told her that most of their training was done through videotapes rather than live sessions.

25. No one who worked for McGraw-Hill testified at the hearing. There was no testimony from anyone connected with the SRA program that watching the videotapes and reading the manual was insufficient training to administer the program. It is doubtful that McGraw-Hill would produce training videotapes unless it expected those tapes to be used for training. The evidence supports a finding that the tapes and manual provided sufficient training for Thibault to conduct the program, particularly in a school environment where a credentialed teacher such as Lazernik was available to assist with the program. Both Lazernik and Thibault testified that the materials provided sufficient instruction in the use of the SRA program.

26. The parents contend that a comment made by Thibault that “prompting logs” were not part of her training shows that she was not properly trained. However, no representative of McGraw-Hill or other expert in the SRA teaching method testified that prompting logs are an essential part of the SRA process or that the failure to use those logs demonstrated improper training.

27. Student’s parents also contend that Thibault’s lack of training was evidenced by how long she spent working with Student on “lesson 65” of Student’s SRA reading program, and the fact that Student ultimately was placed in an earlier lesson after several months of working on lesson 65. However, the evidence does not support the parent’s contention in this respect.

28. When Thibault began working as Student’s one-to-one aide, Student was working on SRA reading lesson 65. Thibault continued to work with Student on that lesson until March 2006. Lesson 65 was the last one in the book, so Student was required to take a mastery test before moving on to the next book. Student’s test results showed that she had not mastered the material and that she should be moved back to a much earlier lesson.

29. During the hearing, Thibault explained that the District was under pressure from Student’s parents to move Student forward in her lessons. In an effort to meet the parents’ demands and still provide appropriate instruction for Student, Thibault continued to teach Student from lesson 65 (rather than moving her back to an earlier lesson), but supplemented each of Student’s SRA reading lessons with material from earlier numbered lessons to help make up for the earlier material that Student had not mastered. Ultimately, in March 2006, when Student had still not mastered the material, Lazernik told Thibault to move Student back to an earlier lesson number despite the parents’ wishes.

30. Thibault’s testimony in this regard was credible and was supported by other evidence at the hearing. The communication log between the parents and the District demonstrates the parents’ insistence that Student continue to progress at a rate the parents felt was appropriate, rather than a rate at which Student actually had the ability to achieve. For example, at one point Student’s mother wrote a note in the communication log insisting that Student move on to lesson 66. At another point, Student’s mother had Student read lesson 65 at home. When Student was able to read it, Student’s mother complained to Thibault about her daughter still working on that lesson. In email to Lazernick in June 2005, Student’s parents insisted that Student’s IEP goal be more advanced than what the District proposed (3.5 level in reading instead of 3.0). Student’s parents demanded that their daughter be on a “diploma-bound” path in high school even though she was not capable of doing simple arithmetic without an electronic calculator.⁹ The parents’ expectations for their daughter, although sincere and well-intended, were not realistic. The parents’ unrealistic expectations

⁹ For example, on August 30, 2005, Student’s parents sent Lazernick a letter in which they wrote: “[Student] is diploma bound, and any thoughts, information, or plans to the contrary are in direct opposition to our requirements for [Student’s] education in the least restrictive environment.”

placed the District in the difficult position of working to comply with the demands of Student's parents while at the same time trying to meet Student's actual educational needs.

31. The fact that Student was unable to master SRA lesson 65 is not proof that Thibault was untrained. The evidence showed that Student was very inconsistent in her retention of information and would often forget things after she had learned them.¹⁰ School psychologist Martha Ingham testified that an individual with Student's full-scale IQ score could be expected to reach about a second grade level academically. Student was reading at a level around second-to-third grade during the 2005-2006 school year. Student presented no expert testimony to show that Student's lack of progress in the SRA program was due to improper teaching methods rather than the limitations of Student's disability.

32. The evidence supports a finding that Thibault was appropriately trained to act as a one-to-one aide for Student during the 2005-2006 school year.

33. Student's parents also contend that the other aides who worked with Student were not properly trained. However, Student presented no evidence regarding the educational background or training received by any of these other aides. Student's mother testified that one of the aides named Lucille told Student's mother that she (Lucille) had never received SRA training. However, Lazernick testified that Lucille and the other aides received training in the SRA program from Lazernick or Thibault. Neither Lucille nor any of the other aides besides Thibault testified at hearing. Student raised this issue in her due process hearing request and has the burden to produce evidence to support her contentions. She failed to do so.

34. In addition, even if there had been evidence to show that the other aides received no formal SRA training, there is no showing that the lack of SRA training deprived Student of educational benefit. These aides were not Student's teachers. They worked at all times under the direction and guidance of a credentialed teacher. The aides had many functions besides assisting with the SRA training. They also helped Student by simplifying the lesson materials in classes, preparing visual cue cards and graphic organizers, keeping track of her homework and daily lessons, and supporting her in class when she did not understand what was happening.¹¹ Even if the aides were not trained in a specific teaching methodology that is not sufficient evidence of lack of training to perform their duties.

¹⁰ A good example of this lack of retention is shown by her curriculum at the private school she currently attends. Student's father testified that Student is currently on lesson eight or nine of the SRA reading program at the private school. However, Thibault testified that when Student was at Rancho Bernardo High School, she was very comfortable with the material around lesson 18.

¹¹ For example, in history class, Student did not understand the concept of past events and would become upset because she thought that historical events were happening at the present time. Her one-to-one aide would help her calm down.

Did the District Use Too Many (Five) Aides, Causing a Lack of Continuity in Student's Program?

35. Student contends that the District used too many aides, causing a lack of continuity in Student's program. The evidence does not support this contention.

36. During the early part of Student's 2005-2006 school year, Jan Chadwick was Student's one-to-one aide, with Lucille, Lazernik's classroom aide, as her back-up. Chadwick ceased working with Student in September, and Lucille took over as Student's primary one-to-one aide until Thibault was hired in November.

37. Thibault worked as Student's primary aide for the remainder of the 2005-2006 school year. During the days or times when she did not work, other aides filled in the one-to-one duties with Student.

38. The evidence does not support a finding that the District used too many aides. To the contrary, the evidence showed that the District had a primary aide assigned to Student at all times during the 2005-2006 school year. First Chadwick worked as Student's aide, then Lucille, and finally Thibault. Just because it was necessary to use other aides on a few occasions when the primary aide was not available does not mean the District used "too many aides."

39. Further, there was no evidence presented of any lack of continuity in Student's program, apart from the parent's contentions regarding the SRA program. Even when aides besides Thibault worked with Student, the aides always worked closely with Student's teachers with respect to Student's modified curriculum and her IEP goals. They received written communications from Thibault regarding Student's lessons and they received input from Student's parents through the communication log. There was no lack of continuity.

Did the District Provide the Supplemental Aids and Services Called for in the June 2005 IEP?

40. Student contends that the District failed to provide several of the supplemental aids and services called for in the June 2005 IEP. In particular Student contends that the District failed to provide: 1) one-to-one instructional assistance; 2) use of graphic organizers; 3) curriculum-based vocabulary with simple definitions; match or fill in blank format; 4) visual cue cards/examples/simple steps for completing homework assignments; 5) an extra set of books; 6) tests/work samples sent home; and 7) data collection regarding IEP goals.

One-to-One Instructional Assistance

41. The evidence supports a finding that the District provided Student with one-to-one instructional assistance for reading, writing, math, task completion and organization throughout the day. Student was constantly under the supervision of a one-to-one aide during the 2005-2006 school year. Student contends that the aide failed to assist Student

with task completion and organization, because the aide failed to assist Student with the IEP goal that called for Student to learn to record her own school assignments. Student contends that the aides, not Student, made all the recordings in Student's communication log. However, Student presented no evidence that Student was supposed to make entries in the communication log. Instead, the IEP goal called for Student to use a "lined template and sectional binder." There was no evidence that this goal was not attempted with Student.

Use of Graphic Organizers

42. The evidence supports a finding that graphic organizers were used with Student as called for in the IEP. A "graphic organizer" is a device used to simplify Student's study materials to make them more understandable. There is no set format for these organizers. They can be anything used to break down an assignment so it is easily understood. Student's aides, working under the direction of her teachers, used many different methods to make the work understandable to Student, including graphic organizers. Lazernik testified that graphic organizers were used in his class throughout the year as needed.

Curriculum Based Vocabulary

43. The evidence supports a finding that the district used curriculum-based vocabulary with simple definitions for Student. Lazernik discussed the need to simplify the work for Student to help her understand it. Student's other teachers also testified regarding the ways the vocabulary in their classes was simplified for Student. Thibault testified that she prepared matching cards to help Student learn vocabulary words.¹²

Use of Visual Cue Cards/Examples/Simple Steps for Completing Homework

44. The evidence supports a finding that the District used visual cue cards, examples, and simple steps for completing homework assignments. Thibault testified that she prepared visual matching cards for Student. She explained how she prepared them and under what circumstances they were used. The other District witnesses explained the ways in which they simplified Student's classes. There was a communication log and constant contact between the school personnel and Student's parents regarding the homework assignments. Any homework assignment that the parents did not understand could be quickly and easily explained.

¹² The special factors page in the proposed March 2006 IEP used slightly different language. Instead of saying "curriculum-based vocab w/simple def.; match or fill in blank format," it clarified: "curriculum-based vocabulary with simple definitions; match or fill-in-blank format for all tests & quizzes." In the letter of April 17, 2006, Student's attorney agreed to this clarified language. However, that slight change in language makes no difference to this Decision. Student presented no evidence that the tests given after April 17, 2006, did not follow the required format.

Second Set of Textbooks

45. The evidence supports a finding that the District did not provide a second set of textbooks for the parents as required by the IEP. The purpose of the second set of textbooks was to allow Student's parents to help Student at home with her homework. Student's father testified that they did not receive the second set of textbooks. His testimony is supported by the communication log which shows that the parents were required to purchase a second textbook for Student when the District thought she had lost hers. When the original was found, the parents kept the second book to work with Student at home. Lazernik testified that a second set of textbooks was provided, but his statement is contradicted by the statement he wrote in the communication log dated "29 Aug" that a second set of books was not required at that point because Student had no homework.

46. However, the evidence does not support a finding that the failure to provide a second set of textbooks deprived Student of educational benefit or prevented her from receiving a FAPE. The second set of textbooks was intended to permit Student's parents to help Student with her homework. On those occasions when Student had homework that needed use of a textbook, she was able to bring those books home in her backpack. There was no evidence that the parents were unable to help Student with her homework because of the lack of this second set of textbooks at any time during the 2005-2006 school year. In fact, the evidence was quite the opposite – Lazernik testified that her homework was too well-done, and indicated that Student's parents might be doing part of her homework for her.

Tests and Work Samples Sent Home

47. The evidence supports a finding that the District sent home tests and work samples on a continual basis. Both the communication log and Thibault's testimony support a finding that work samples and tests were sent home.

Data Collection Regarding IEP Goals

48. The evidence supports a finding that the District personnel failed to perform the type of data collection regarding IEP goals required by the IEP. The parents wanted regular reporting with specific data to show how many trials were taken for each IEP goal and how Student did. Student's father testified that no one provided this data to them. The District did not counter this testimony or introduce any physical evidence to show that this type of data collection occurred.

49. However, the evidence does not support a finding that the failure to perform data collection deprived Student of educational benefit or prevented her from receiving a FAPE.

50. The lack of numerical evidence of how many tries Student took to complete certain IEP tasks did not prevent the IEP team from drafting proper goals and objectives. The parties stipulated that the IEP goals and objectives for both school years in issue were

proper. There was no evidence that the lack of data collection affected any of the instruction provided to Student.

51. The evidence supports a finding that the District provided Student a FAPE during the 2005-2006 school year.

Did the District Offer Student a FAPE for the 2006-2007 school year?

52. The District contends that it offered Student a FAPE for the 2006-2007 school year. In order to provide a child with a FAPE, a District's proposed placement and services must be designed to meet a child's unique needs and provide educational benefit to the child. In addition, the placement must be in the "least restrictive environment" appropriate for the child.

53. The District's offer for the 2006-2007 school year consisted of placement in the District's "transition program" along with services and supplemental aids similar to those provided in her prior IEP. The parties stipulated during the hearing that the goals and objectives set forth in the District's offer were appropriate.

54. The District's FAPE offer was originally made at the annual IEP meeting in November 2005, and included the remainder of the 2005-2006 school year, as discussed above. However, Student's parents did not sign their agreement during that meeting. On April 17, 2006, Student's attorney sent a letter to the District in which she stated that her clients consented to portions of the District's offer made at a subsequent IEP held on March 16, 2006. Student agreed to speech services, the occupational therapy consultation and services, the adaptive physical education consultation, the supplemental aids and services, the placement proposed at Rancho Bernardo High School through the end of the 2005-2006 school year, the goals and objectives, and the accommodations for the high school exit examination. The attorney said the parents were investigating the proposed placement at the transition program for the 2006-2007 school year.

55. The District made its final offer of FAPE for the 2006-2007 school year at the June 2006 IEP meeting. Student's parents rejected the placement in the transition program for the 2006-2007 school year. Both parties thereafter filed due process hearing requests to determine the sufficiency of the District's 2006-2007 offer of FAPE. Because the parties stipulated to the goals and objectives in the District's offer and because the attorney's letter of April 17, 2006, agreed to the services and accommodations, the only issue in dispute is the proposed placement in the transition program.

Was the District's Offer of the Transition Program an Appropriate Placement?

56. The District's transition program is designed to assist adults with special needs between the ages of 18 and 22 with transition from a school environment into the workforce. It focuses on skills that those adults will need in order to function in society, such as monetary and banking skills, homemaking skills, and job skills. A large part of the program

involves the pupils going into the community to work at actual jobsites. The transition program collaborates with community employers to give special needs adults the opportunity to learn employment skills in a safe, supported manner.

57. The District's transition program is housed on the Abraxas High School campus. Abraxas is a continuation school attended by general education students who need to make up high school credits. These general education students include students who are unable to attend regular high school due to disciplinary problems. However, the transition program is located in a self-contained area on the campus, separate from the rest of the school, and there is close supervision of the special needs adults who attend the program.

58. The evidence supports a finding that the District's transition program is the appropriate placement for Student during the 2006-2007 school year. Every educator familiar with the transition program who testified at the hearing stated unequivocally that the transition program will provide educational benefit to Student and help her meet the goals set forth in her IEP.

59. Student submitted a letter from Student's pediatric neurologist dated September 10, 2006, which states in part that student "should continue to be in an educational setting that emphasizes academics as well as more practical daily living skills." However, that doctor did not testify at the hearing and the letter was admitted only as hearsay. Student's parents called no experts to testify, and relied upon their own testimony to dispute the testimony of the District's experts regarding the appropriateness of the transition program placement.

60. Student has only three years left before she passes the maximum age for special education. The District has only three years to prepare Student to take her place in the community. The transition program is designed to do just that – with its emphasis on the practical skills necessary for an adult to function in everyday society and its on-the-job training, it gives Student her best opportunity for the greatest measure of independence possible.

Would the Transition Program Provide Student with Educational Benefit in the Academic Areas of Reading and Math?

61. Student contends that the transition program is not reasonably calculated to provide her with educational benefit in the academic areas of reading and math. The SRA method of teaching reading and math is not normally used in the transition program, and the instructors in the program are not trained to use that method of instruction. As a general rule, reading and math instruction in the transition program involves practical matters, such as how to read the Department of Motor Vehicles driver's manual or how to count coins to make change in a sales transaction. Although the SRA program is mentioned in the IEP meeting notes, it does not appear that the proposed IEP requires the District to use the SRA methodology in Student's education at the transition program.

62. Student provided no expert testimony to support Student's contention that Student requires SRA reading and math instruction to derive educational benefit in the academic areas of reading and math or that SRA instruction is necessary to meet her IEP goals. The instructors from the transition program testified that Student's IEP goals could be met in the transition program instruction. The parties stipulated that Student's IEP goals are appropriate.

63. However, even if Student is correct that SRA reading and math instruction is required under the proposed IEP and/or is necessary for Student to derive educational benefit, the evidence indicates that SRA instruction could take place as part of the transition program placement. Dean Weese, a teacher at the transition program, testified that the transition program staff could receive SRA training and provide SRA instruction to Student if necessary to meet Student's IEP goals.

Is the Transition Program the Least Restrictive Environment Appropriate for Student?

64. Student contends that the transition program is not the least restrictive environment appropriate for Student. Student believes that she should stay on the Rancho Bernardo High School campus and receive her educational instruction in the same manner as she did in her junior and senior years of high school. Alternatively, Student believes that she should go back to the Rancho Bernardo High School campus for part of her educational day. The four factors to be considered in determining whether a placement is the least restrictive environment include the educational benefits of the placement, the non-academic benefits of the placement, the effect the child will have on the teacher and other students in the class, and the cost of mainstreaming the child.

65. The evidence supports a finding that the District's transition program is the least restrictive environment appropriate to meet Student's unique educational needs. Given Student's age and her cognitive limitations, it is imperative that she receive instruction in the skills necessary for her to function in the real world. Every educational expert who testified at the hearing about Student's placement agreed that the transition program is the appropriate placement.

66. The evidence also supports a finding that the transition program placement will provide student with significant non-academic benefits. Student's same-aged peers are no longer at Rancho Bernardo High School. Student is a 19-year-old adult, not a high school student. Although there are occasionally 19-year-old students on the Rancho Bernardo High campus, the vast majority of Student's peers are not there. Student's participation in a job in the community will give her far more exposure to her typically developing adult peers than a special day class placement in a high school where the majority of children are at least two years below her age and all her instruction requires a one-to-one aide and modification of the curriculum.

67. The effect Student would have on her teachers and the classes is not relevant, nor is the cost of mainstreaming. Neither party suggests that Student be placed in a mainstream class. Even the private school which Student currently attends placed Student in a special day class program similar to the District's transition program.

Would the Transition Program Provide Student with Appropriate Peer Role Models?

68. Student contends that that the peers in the transition program are inappropriate models for Student. Student believes that she should be in a class with the non-severely disabled students such as the NSH class at Rancho Bernardo High School, rather than the transition program class which is entirely composed of severely disabled students. The evidence does not support that contention.¹³

69. There are no typically developing students in the transition program. Any typically developing adults of Student's age would either have gone on to college or would be part of the workforce. By enabling special needs adults to participate in jobs in the community, the program provides those special needs adults with education among their typically developing peers. Those working peers are appropriate role models for Student.

Did the District Deny Student a FAPE During the 2006-2007 School Year by Changing Student from a Diploma-Bound Track?

70. Student contends that the District denied Student a FAPE by changing Student from a "diploma-bound" to a "non-diploma bound" track. To the extent that a change of status might constitute a change of Student's placement or services, it could affect the District's offer of FAPE to Student.

71. The evidence establishes that prior to and during the November 2004 IEP meeting, Student was on a "diploma-bound track" in high school. Both Student's parents and the various District representatives at that meeting discussed the fact that Student was working toward a high school diploma, rather than a certificate. However, the parents did not agree to the proposed IEP at that meeting. After the November 2004 meeting, the parties began to disagree about whether a diploma-bound status was educationally appropriate for Student. The notes to the February 8, 2005 meeting state: "district team recommended letter/certificate (non diploma bound) status for [Student] – parents do not agree w/this."

72. The IEP that was finally signed on June 22, 2005, contained an individualized transition plan which showed Student's graduation plan to be "letter/certificate" and stated that she would attend the transition program after graduation. Student contends that her parents' agreement to this IEP did not include agreement with the non diploma-bound status.

¹³ It is unclear whether Student also contends that the continuation school students on the main part of the Abraxas campus provide inappropriate role models for Student because some have had disciplinary problems. However, if so, Student presented no evidence that any students with disciplinary problems at the continuation school would have any interaction with the transition program adults.

Student's written closing argument states, ". . . Parents were told at the time the first page was signed that a non-diploma status was not determined based on Parent's indicated disagreement."

73. Even if Student's contention is correct, it does not show that Student was in a diploma-bound track under the terms of her June 2005 IEP. Instead it shows that the parties disagreed about whether Student was diploma-bound. The evidence also shows that during Student's senior year, the parties disagreed constantly about whether Student was diploma-bound and whether her class curriculum was being modified. Student's parents made demands to change Student's schedule to diploma-bound classes and to let Student take the California High School Exit Examination (CAHSEE). The District acquiesced to some of these demands in an effort to work cooperatively with the parents, but there is no indication that Student's "status" changed as a result.

74. Because there was no agreement in the June 2005 IEP that Student was "diploma-bound" the evidence does not support a finding that the District "changed" that placement in its June 2006 IEP proposal.

75. However, even if Student had been on a diploma-bound track during her senior year, and even if the District proposed to change that status in its June 2006 IEP proposal, there was no denial of FAPE due to this change. The evidence supports a finding that, as of June 2006 when the offer of FAPE was made, Student was not capable of achieving a high school diploma. Student attempted the CAHSEE and failed, despite accommodations and modifications provided by District personnel. Lazernik, who administered the test to her, explained that Student did not even understand the nature of what was required of her and simply filled in the answer bubbles without any attempt to make the bubbles match the answer.¹⁴

76. In addition to her inability to pass the CAHSEE, Student could not meet the other District requirements for a high school diploma. During the 2005-2006 school year, Student was being taught a modified curriculum. Classes using a modified curriculum did not meet the District's requirements for coursework necessary for a high school diploma.

77. The parties dispute whether the NSH curriculum was modified for Student. Student's parents contend that the District provided "accommodations" for Student, not modifications. However, the evidence supports a finding that the curriculum was modified.

78. There is a difference between modifications to curriculum and accommodations to allow a Student to access the regular curriculum despite a disability. For example, a blind Student might be provided the curriculum using braille. That would be an

¹⁴ Student's parents maintained that Student did not need to pass the high school exit exam because of an exception provided by the "Romero Bill." (Sen. Bill No. 267 (2005-2006 Reg. Sess.)) However, that bill did not become law until September 2006, and the exception only applied to students who had met the other requirements for high school graduation. (Ed. Code, § 60852.4, subd. (a)(3).) The evidence established that Student had not met those requirements as of June 2006.

accommodation, because the Student would still be learning the same material as the other pupils. Modification occurs when the material is altered from California standards.¹⁵

79. As set forth in Factual Findings 9 – 10, Student’s IEP called for numerous accommodations to assist with her work, such as the use of graphic organizers to help make the material more understandable. However, despite those accommodations, it was still necessary to modify the curriculum by teaching Student only a few key concepts related to the material the other children studied. For example, in an economics class, when the other pupils were learning concepts such as “supply and demand,” Student’s teacher and aide would help Student to understand terms such as “receipt” and “taxes,” and Student’s IEP goals called for her to learn the value of coins. In geoscience class, when other pupils were learning about the forces underlying volcanic activity, Student learned about what a volcano is, what comes out of it, and why it is dangerous. In each case, the teacher and the aide would try to find Student’s level of understanding in a topic and then pull simplified information from the classroom curriculum to try to increase Student’s understanding. Student was not taught the California curriculum.

80. Student’s parents rely on the notations (and lack thereof) in Student’s school records, as well as comments made during IEP meetings to show that her classes were accommodated, not modified. Student’s parents and the District had an ongoing debate during Student’s senior year about whether her classes were modified or accommodated. However, no matter how the classes were labeled, at least during Student’s senior year (the 2005-2006 school year at issue in this case), the classes were in fact modified from the general curriculum. Those modifications were necessary to help Student gain educational benefit from her NSH placement.¹⁶

81. Without any indication that Student had the capability of attaining a high school diploma, it would not have been educationally appropriate for the District to propose that Student remain at Rancho Bernardo High School during the 2006-2007 school year. Instead, the District’s offer proposed an appropriate placement for Student – the transition program where her needs could be met. As stated in Factual Findings 56 - 69, the transition program located on the Abraxas High School campus would provide Student with educational benefit in the least restrictive environment. Every trained educator who testified at the hearing agreed with the District’s proposal.

¹⁵ Student’s written closing argument describes the difference in this fashion: “Accommodations are instructional differentiation to deliver the state standard content while curriculum modification is the elimination of some amount of content required by state standard.”

¹⁶ It is not clear to what extent Student’s classes were accommodated rather than modified during her junior year, but that school year is not at issue in this case.

LEGAL CONCLUSIONS

Applicable Law

1. Under both state and federal law, students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code, § 56000.) The term “free appropriate public education” means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Under federal law, a “child with as disability” includes a child with “mental retardation ...who, by reason thereof, needs special education and related services.” (20 U.S.C. § 1401(3).) A school district’s obligation to provide special education services to a student ends when the student receives a high school diploma or reaches 22 years of age. (Ed. Code, § 56026, subd. (c).)

2. To the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may 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. (20 U.S.C. § 1412(a)(5).) This is often referred to as the “least restrictive environment” requirement.

3. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, the court established a four-part test that provides guidance on the question of whether a placement is in the least restrictive environment. The four factors are: 1) the educational benefits of placement full time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the child will have on the teacher and other students in the class; and 4) the cost of mainstreaming the child. Although the Ninth Circuit’s decision dealt with an issue of whether a child should be “mainstreamed” in a regular education class, not a difference between one special day class and another, it is still helpful to consider the *Rachel H.* factors in analyzing whether the District offered a placement in the least restrictive environment appropriate for the Student.

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the law. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the law does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*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.)

5. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address a student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the IEP, then the district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. Actions of school districts "cannot ... be judged exclusively in hindsight," but instead on "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, quoting from *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. The law does not require a district to pay for special education or related services if the district offered a FAPE to a child and the parents unilaterally chose to place the child in a private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).) However, the district can be ordered to reimburse the parents for the private placement if the district failed to offer a FAPE to the child prior to that enrollment and if the private placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii).)

7. The burden of proof in this proceeding is on the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In this case, the District has the burden to prove that the District's offer of placement and services for the 2006-2007 school year constituted a FAPE for Student in the least restrictive environment. Student has the burden to prove that District failed to provide Student with a FAPE during the 2005-2006 school year and that the District's offer of placement and services for the 2006-2007 school year did not constitute a FAPE for the four reasons stated by Student at the time of the Prehearing Conference.¹⁷

Determination of Issues

The District Did Not Deny Student a FAPE During the 2005-2006 School Year By Failing to Provide Appropriately Trained Aides, Using too Many (Five) Aides, or Failing to Provide the Supplemental Aids and Services Identified in the June 2005 IEP.

8. Student failed to meet her burden to show that the District failed to provide her with a FAPE during the 2005-2006 school year, as set forth in Factual Findings 1 – 51, and Legal Conclusions 1 – 7. Student failed to prove that aides hired by the District to provide her one-to-one instruction were not adequately trained. Student's primary aide for the 2005-2006 school year, Laura Thibault, was appropriately trained to conduct the SRA reading and math program. Student did not provide evidence of lack of training for the other aides.

¹⁷ The burden of proof for the District and Student overlap for the 2006-2007 school year. However, given the abundance of evidence to support the appropriateness of the District's offer of placement for the 2006-2007 school year, this Decision would be the same regarding the 2006-2007 school year no matter which party has the ultimate burden to show FAPE or denial of FAPE for that year.

Student also failed to prove that the District used too many aides, causing a lack of continuity of her educational program. The District had a primary aide assigned to Student at all times. Just because other aides filled in when the primary aide was absent did not mean the District used “too many aides.”

9. While Student did prove that the District failed to provide a second set of textbooks and data collection as required by the special factors page of her IEP, neither of those minor omissions deprived the Student of educational benefit or prevented her from receiving a FAPE. The District provided the remaining services, accommodations and supplemental aids and services called for in the IEP.

The District Offered Student a FAPE for the 2006-2007 School Year.

10. As set forth in Factual Findings 1 – 14, and 52 – 81, and Legal Conclusions 1 – 7, the District met its burden of proving that the District offered Student a FAPE during the 2006-2007 school year. The transition program placement was the appropriate placement in which Student could receive educational benefit in the least restrictive environment for the 2006-2007 school year. Because the transition program would place Student in the workforce in the community, she would have access to her typically developing adult peers and appropriate role models. Contrary to the claims of Student’s parents, the transition program would provide Student with educational benefit in the areas of reading and math, either through the practical type of reading and math instruction that is usually part of the transition program or, if required by Student’s IEP, through one-to-one SRA instruction just as Student received during high school.

11. As set forth in Factual Findings 70 – 81, and Legal Conclusions 1 – 7, the evidence does not support a finding that the District’s 2006-2007 offer of FAPE “changed” Student from a diploma-bound track. The IEP signed on June 22, 2005, did not place Student on a diploma-bound track, so there was nothing to change. However, even if the District’s June 2006 IEP offer did change Student to a non-diploma track, that change was appropriate given Student’s unique needs and her abilities. The expert testimony of the various educators at the hearing persuasively demonstrated that Student needs the functional skills provided by the transition program at this stage of her adult education.

Reimbursement

12. Student’s parents requested reimbursement for the expenses that they incurred by placing their daughter in a private school program. However, in light of the findings that the District offered or provided Student a FAPE for both school years at issue in this case, no reimbursement order or compensatory education order is appropriate.

ORDER

1. All of Student's requests for relief are denied.
2. The District's proposed IEP of June 2006 offered Student a FAPE for the 2006-2007 school year.

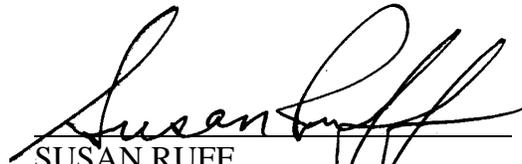
PREVAILING PARTY

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. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: March 15, 2007


SUSAN RUFF
Administrative Law Judge
Special Education Division
Office of Administrative Hearings