

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

HACIENDA LA PUENTE UNIFIED SCHOOL
DISTRICT,

v.

PARENTS, on Behalf of Student.

OAH CASE NO. 2009040154

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in La Puente, California on May 12-15, 2009, May 18, 2009 and June 9, 2009.¹

Student was represented by advocate Maria Calzada (Advocate). Advocate, Student, Mother and Father attended the first day of hearing on May 12, 2009. No one appeared on Student's behalf on May 13, 14, 15 or 18. Mother and Advocate attended the hearing on June 9, 2009. The Hacienda La Puente Unified School District (District), was represented by Ricardo Silva, Attorney at Law. Also in attendance for District were Beth Nishida, Director of Special Education, and Deanna Scott, Program Administrator for District. A Spanish language interpreter was also present each day of the hearing.

¹ On June 1, 2009, the ALJ reopened the record for the specific and limited purpose of retaking the testimony and evidence given on May 15, 2009. The testimony was retaken on June 9, 2009 due to the ALJ's inadvertent failure to record the May 15, 2009 proceedings. No new evidence was taken or accepted on June 9, 2009. The date for filing of closing briefs was extended from June 1, 2009 to June 23, 2009.

District filed a request for Due Process hearing naming Student as respondent on April 2, 2009.² Student's request for continuance was granted on April 27, 2009 for good cause. At the close of hearing on June 9, 2009, the record remained open until June 23, 2009 for the submission of closing briefs. District's closing brief was timely filed. Student's closing brief was not timely filed. Although Student's brief was filed after hours on June 23, 2009, it was accepted and considered by the ALJ.

ISSUES

1. Did the District properly assess Student in the areas of occupational therapy (OT), speech and language, psycho-educational, and transition, such that Student is not entitled to independent educational evaluations (IEEs) at public expense in these areas?

2. Did the District offer Student a free appropriate public education (FAPE) in the March of 2009 Individualized Education Program (IEP)?

FACTUAL FINDINGS

1. Student is a 19 year old young man born September 25, 1989. He has a medical diagnosis of Down's syndrome. At all relevant times, Student was eligible for special education under the categories of Mental Retardation and Speech and Language Impairment. Student's primary language is Spanish.

² Student filed a request for due process hearing on November 29, 2008 denominated OAH case number 2008120092. At the request of District, the matter was consolidated with the instant case on April 10, 2009. On May 14, 2009, the cases were bifurcated. On May 15, 2009, pursuant to an order to show cause re: dismissal, Student's case number 2008120092 was dismissed for failure of Parents and the Advocate to participate in the proceedings.

2009 TRIENNIAL ASSESSMENT

2. District conducted a triennial assessment of Student in January of 2009. Student's triennial assessment should have been completed by September 27, 2008. District made multiple unsuccessful attempts to schedule the triennial assessments. However, after consenting to the assessment plan, Parents refused to make Student available for assessment until January 7, 2009.

3. District school psychologist Amy Kuo (Kuo) performed a psychoeducational assessment of Student. Kuo received her Bachelor of Arts and Master of Arts degrees in psychology. She has a multiple subject teaching credential and is a credentialed school psychologist. Kuo has served as a school psychologist for eight years. She assesses approximately sixty students per year and is familiar with Down's syndrome. She has assessed six students with Down's syndrome in the last eight years. Kuo was familiar with Student because she was the school psychologist for Wilson High School where Student had been a special day class (SDC) student. She also conducted the psychoeducational portion of Student's previous triennial assessment.

4. Kuo observed Student in the in the Wilson High School SDC on January 15, 2009 and January 26, 2009. She obtained information from Student's SDC teachers John Paik (Paik) and Ed Dial (Dial) about Student's history of academic performance, classroom functioning, communication skills, and adaptive behavior. When Kuo assessed Student with standardized tests, an experienced Spanish interpreter assisted her. Student appeared to understand the test instructions better in Spanish, but seemed to answer in English. Student was difficult to understand due to articulation problems.

5. Kuo administered the Leiter International Performance Scale Revised (Leiter) to Student to evaluate his cognitive ability. The Leiter is a nonverbal test of intelligence used to evaluate children who may have sensory or motor deficits and who have difficulty speaking or reading. The assessment does not require any verbal skills.

6. Student received a full scale intelligence quotient (FSIQ) score of 33, within the range of moderate to severe mental retardation on the Leiter. The Leiter consists of subtests in figure ground, design analogies, form completion, sequential order, repeated patterns and paper folding. The subtests include tests of finding objects hidden within a picture, finding similarities between like items, visualizing a whole from parts, finding the next picture in order, patterns, and the ability to visualize a folded shape. Kuo administered the Leiter according to the instruction manual.

7. Kuo administered the Woodcock-Johnson III Test of Achievement (WJ-III) on January 15, 2009. The WJ-III was administered consistent with the instructions of the test manual. Student scored below Kindergarten level in all areas. In reading, Student was able to identify a few letters of the alphabet, including P, E, C, and A. He was able to correctly point to the word "cat" when requested. Student was able to identify a few icons such as a chair and tree. He accurately pointed to the "big house." In written language, Student was able to copy a vertical line and a scribble. Student was able to connect two dots with a line. He was able to draw a circular line within a circle. Student was able to trace dotted letters. Student was able to write the letter "O" correctly, but he was not able to write any other letters or words correctly when dictated to him. In Mathematics, Student was not able to add or subtract. Student was able to hold up one and two fingers when requested. Student was also able to count one object.

8. Kuo also administered the Brigance Inventory of Early Development (Brigance) to Student on January 26, 2009 to assess Student's skills in general knowledge, comprehension, readiness, basic reading skills, manuscript writings, and basic math. The Brigance is a criterion-referenced test and was administered in accordance with the test manual. In the area of general knowledge, Student showed an interest in looking at books, turned pages and pointed at simple pictures when requested. He could name a few items, point out most body parts and name many

coins. He was able to match shapes and understood some directional and positional concepts. Student was not able to verbalize what to do in different situations (i.e. What do you do when you are sleepy?) and the roles of community helpers (i.e. Why do we have doctors?). He attempted to respond, but had little understandable verbal language. In the area of readiness/basic reading scales, Student could not recite the alphabet and could not consistently match letters and was not able to read. In the area of manuscript writing, Student was able to correctly write his first name. He was unable to correctly write his last name or the letters of the alphabet. In the area of basic math, Student was not able to consistently identify numbers and could not count verbally. He did recognize a dollar bill, but not any denominations of coins. He was not able to tell time, but did know what a clock was.

9. Overall, Student's academic skills performance was consistent with his prior triennial assessment from 2005. From this, Kuo concluded that Student may have peaked in his academic achievement based upon the limits of his cognitive ability.

10. Bilingual school psychologist Frank Tobias (Tobias) assisted with the adaptive behavior portion of the psychoeducational assessment. Tobias was fluent in both English and Spanish. Tobias received a bachelor's degree in Psychology in 2004 and a master's degree in Counseling in 2007. Tobias has a Pupil services credential, a Child Welfare and Attendance credential and School Psychologist credential. Tobias has assessed ten children with Down's syndrome. As a school psychologist, he conducts psychoeducational evaluations, interviews, reassessments, attends IEP meetings, consults with teachers, counsels students and conducts crisis intervention. Tobias had worked with Student for two years as the bilingual school psychologist assigned to Wilson High School. He spoke to Student's Mother and Student often and observed Student on the campus and in the SDC.

11. Tobias interviewed Parents in Spanish, distributed the Vineland Adaptive Behavior Scales (VABSIII) to teachers and distributed the Behavior Assessment System for Children II (BASCII) scales to Parents and teachers and evaluated the results. Tobias conducted a semi-structured interview with Parents as part of the VABSIII. All measures were administered in accordance with the test manual instructions. SDC teachers Paik, Dial and Tina Carpenter completed the teacher rating scales for the VABSIII. On the VABSIII, Student scored at an age equivalent of 4.3 in daily living skills and at an age equivalent of less than three years old in all other measured areas. These ratings were consistent with those obtained from Parents on the VABSIII. The BASCII teacher rating scale was completed by SDC teacher Paik. Paik's responses indicated that Student was at risk in the areas of attention, learning, social skills, leadership, study skills, functional communication, adaptive skills composite, and school. Paik rated Student as clinically significant in withdrawal and adaptability. In contrast, the BASCII scales completed by Parents showed Student ratings of average to high in all areas except attention where Student was rated low.

12. According to the BASCII and VABSIII results as well as interviews and observations, Student's adaptive skills were overall very low. The scores were consistent with prior evaluation results conducted over the years. Tobias selected the VABSIII because it was a well normed and valid measure. The test was normed across a varied student population. It permitted the use of scales or a structured interview. The BASCII teacher rating scales were consistent with the VABSIII rating scales. The Parent rating scales of the BASCII were inconsistent with the VABSIII parent interview and both sets of teacher rating scales. Tobias concluded that the Parents' responses on the VABSIII were not consistent with their responses on the BASCII, nor were they consistent with the responses of the teachers or Tobias' own observations of Student. Tobias discounted the BASCII parental responses. He explained that parents sometimes misinterpret the

questions asked on the BASCII and underestimate or overestimate the frequency of behaviors. Tobias opined that the parental responses on the VABSIII were more reliable than the parental responses on the BASCII because the responses were obtained orally, in Spanish, with an opportunity for the examiner to probe for clarity and understanding.

13. Tobias opined that Student would benefit from a vocational self-help program such as the Puente Hills Adult transition program (transition program). Tobias opined that Student's cognitive ability limited his achievement and at this juncture, after spending more than 4 years in high school, Student would benefit from a program with same age peers and the development of independence and daily living skills.

14. Judy Nyguen (Ngyuen) received a bachelors' degree in Biology and a master's degree in Communicative Disorders from California Polytechnic University at Pomona, California. Ngyuen is also a state licensed and credentialed speech and language pathologist. She has assessed over 600 students including 20 with Down's syndrome. She used a Spanish language interpreter during the evaluation. Student seemed to understand more Spanish than English, but attempted to respond in English, with a mix of hand signals.³

15. Ngyuen administered the Preschool Language Scale fourth edition Spanish edition and English edition (PLS-4) the Clinical Evaluation of Language Fundamentals Spanish Fourth Edition (CELF-4), Test of Language Development Primary (TOLD-P) in

³ Ngyuen's observation was consistent with the observation of the ALJ when Student attempted to testify during the hearing. His verbal utterances were unintelligible in either English or Spanish. Student demonstrated an ability to respond to "yes" and "no" questions asked by the Advocate, but was unable to answer questions from the ALJ and made a series of identical hand gestures resembling the walking of his fingers across the palm of his other hand in response to questions.

Spanish, and conducted informal observation. Ngyuen followed the instructions in the testing manuals for administration of all assessment tools.

16. Student performed in the 3 to 4 year old range in auditory comprehension. His receptive language was rated as functional based upon his low cognitive ability. Student's expressive language skills were at the two year old level. He used single words or short word utterances and hand gestures. Student performed at the two year old level in articulation and phonological processes. An oral motor evaluation revealed that Student's tongue was large for the size of his mouth and made it difficult for him to articulate words. Nguyen opined that Student's overall speech abilities were consistent with his cognitive ability and oral motor limitations typically associated with Down's syndrome. Nguyen opined that Student was not likely to improve his speech and should be taught alternative and augmentative methods of communication. Ngyuen recommended that Student practice communicating in varied environments, use alternative means to communicate including sign language and a picture book to improve his functional communication skills. Ngyuen recommended that Student received consultative speech therapy in the transition program. Ngyuen opined that Student would have opportunities to practice his functional communication skills in the transition program. Nguyen opined that Student would not benefit from further direct speech therapy as he had reached the limits of his verbal abilities.

17. Lillian Onyegbaduo (Onyegbaduo), the transition program SDC teacher conducted the transition assessment. Onyegbaduo has a Bachelor of Arts degree from the University of Nigeria. She received her master's degree in special education from the California Polytechnic University at Pomona. Onyegbaduo has a multi-subject teaching credential and a special education teaching credential. She has been an SDC teacher in the District for four years. Prior to that, she had 11 years experience teaching special education for the Los Angeles County Office of Education and the San Bernardino County

Office of Education. Onyegbaduo is familiar with Down's syndrome and has assessed students with Down's syndrome.

18. Onyegbaduo administered the Adolescent and Adult Psycho Education Profile (AAPEP) to Student in accordance with the test manual instructions. The APPEP is an assessment tool used to evaluate current and potential skills for semi-independent function in the home and community. It also evaluates readiness for placement in sheltered employment settings and community-based activities. The AAPEP is used with moderate to severely retarded persons with and without autism. The AAPEP combines evaluations of performance at home and in day placement with direct assessment of skills. The home scale was completed by interviewing Student's parents. The school/work scale is based on a similar interview with a work supervisor or teacher. In this case, Student's SDC teacher completed the scales. The direct observation scale is a direct assessment of a student's skills. Here, Onyegbaduo conducted the direct observation. The scales were administered in Spanish to both Parents and Student. The results of three scales are integrated to formulate an appropriate educational and habilitation plan for each individual. Each scale measures six function areas: vocational skills, independent functioning, leisure skills, vocational behavior, functional communication, and interpersonal behavior. The measure is intended to evaluate strengths and weaknesses across different environments. Student passed 64 of 144 items and received a score of 44 percent on the measure. The AAPEP provides scores of "passing," "emerging" or "failing." The emerging skills are the most useful in planning an appropriate program for student. According to Onyegbaduo's analysis, Student had emerging skills in vocational behavior, functional skills, leisure skills, independent functioning and interpersonal behavior. Based upon the assessment results, Onyegbaduo recommended that Student be placed in a program that would emphasize functional skills, independence and vocational skills.

19. Student was assessed for OT by Sandra Pinedo (Pinedo), of Gallagher Pediatric Therapy. District contracts with Gallagher Pediatric Therapy for OT assessments and therapy. Pinedo received a Bachelors degree in Occupational Science in 2002. She has a California occupational therapy license and has national board certification. She has 6 years of experience in OT. Pinedo has assessed more than 100 students and has familiarity with Down's syndrome. Pinedo is bilingual in English and Spanish. She conducted an OT assessment of Student in Spanish on February 13, 2009. Her assessment consisted of an interview with Parents in Spanish, a review of Student's September 27, 2007 IEP and triennial psychoeducational evaluation dated September 27, 2005, clinical observations and administration of selected subtests of the Bruininks Oseretsky Test of Motor Proficiency, Second Edition (BOT-2). Assessment results indicated that Student performed in the functional and developmentally appropriate fine motor, visual motor, self-care and behavioral organization skills. Based upon the results of the assessment, Pinedo opined that Student did not require OT services to benefit from his educational program.

20. District also assessed Student in the areas of adaptive physical education (APE) and physical therapy. The appropriateness of those assessments is not at issue in this case. The physical therapy assessment did not result in a recommendation for physical therapy services. The APE assessment revealed needs in the areas of object control and strength building. The assessor recommended goals in each area and APE twice a week for fifty-five minutes each session.

MARCH 2009 IEP

21. Student's IEP was developed over two meetings on March 13, 2009 and March 17, 2009. At that time, Student attended an SDC for the entire school day at Wilson High School and received related services including adaptive physical education, transportation, and speech and language therapy. The IEP team consisted of Parents,

Student, an administrative designee, program coordinator, a special education teacher from Wilson High School, a SDC teacher from the transition program, a general education teacher, an occupational therapist, a speech pathologist, a school psychologist, an APE teacher, a Spanish language interpreter, a bilingual school psychologist and the Student's advocate.

22. The team determined that Student had needs in the areas of preacademic/functional skills, communication development, fine/gross motor development, social emotional/behavior, vocational/prevocational/self-help and health.

23. Based upon the assessment reports and IEP team member input, the team determined Student's educational needs, then-present levels of performance (PLOPs) and devised goals for Student based upon his PLOPS.

24. In the reading area of Language Arts, Student was not able to recognize and name all uppercase and lower case letters of the alphabet. The team developed a goal that Student would "identify letters with 85 percent accuracy in five consecutive trials as measured by teacher-made tests/teacher-character observation."

25. In the writing area of Language Arts , Student was unable to print legibly and space letters, words and sentences appropriately. Student also had a difficult time writing his full name. The team developed a goal that Student would write and recite his first and last name with correct letter formation and spacing with 80 percent accuracy in five of five trials as measured by student work samples and/or teacher records. The goal was to be implemented and monitored by the special education teacher.

26. In the English language development area of language arts, Student was not able to recognize functional words in the community. The team developed a goal that Student would recognize and use five functional picture vocabulary (i.e. safety signs, danger/warning signs, and traffic signs) within the community with 80 percent

accuracy in 3 of 4 trials with minimal verbal prompting from school staff. The goal was to be implemented and monitored by the special education teacher.

27. In the area of daily schedule, Student arrived late to school and had a difficult time managing time with his lunch break, and struggled with the end of the day with dismissal. The team developed a goal that by March 13, 2010, Student would be able to demonstrate his ability to follow a daily schedule including arrival time, restroom breaks, lunch, and departure time on three of five occasions. The goal was to be implemented and monitored by the special education teacher.

28. In the area of Mathematics, Student was unable to count, recognize, represent, name, and order a number of objects up to 30. He was able to count up to 10. The team developed a goal that by March 13, 2010, Student would, when given 30 objects, count, recognize, name, order and sort the number of objects with 80 percent accuracy in five of five trials as measured by teacher-made tests/teacher-charted data. The goal was to be implemented and monitored by the special education teacher.

29. In the area of Mathematics, Student knew what a dollar bill was, but did not know the value of coins and was not able to show different combinations of coins that equal the same value. The IEP team developed a goal that by March 13, 2010, Student, when given four different coins of different denominations, will identify and state the value of each coin with 85 percent accuracy in the five consecutive trials as measured by teacher-charted observations. The goal was to be implemented and monitored by special education teacher.

30. In the area of object control, Student could bounce and catch an eight and a half inch ball in place and while moving forward two times before losing control of it. The IEP team developed a goal that by March 13, 2010, Student will bounce and catch an eight and a half inch ball in place with both hands five times on four of five trials as

measured by recorded teacher observation. The goal was to be implemented and monitored by the APE teacher.

31. In the area of physical fitness, Student was able to perform 22 cross-arm sit-ups in a minute. The IEP team developed a goal that by March 13, 2010, Student would perform 30 cross-arm sit-ups in a minute 80 percent of the time as measured by recorded teacher observation. The goal was to be implemented and monitored by the APE teacher.

32. In the area of language, Student was not able to independently make requests in the classroom setting using a communication board. The IEP team developed a goal that by March 13, 2010, Student will independently request by pointing to pictures on a communication board of four choices his preference of an activity, subject, or object 60 percent of the time when asked by his teacher during each classroom activity. The goal was to be implemented and monitored by the speech and language pathologist.

33. Also in the area of language, Student was not able to consistently make communicative exchanges with peers. The IEP team developed a goal that by March 13, 2010, Student will independently make three communicative exchanges with a peer a using total communication during various activities (class work, lunch, recess) in 2 out of 3 occasions.

34. The IEP team also adopted a behavior support plan (BSP) to address Student's reluctance to transition between activities, reluctance to participate in APE and Student's behavior of going under tables when asked to transition or participate in APE. The BSP indicated that Student's behaviors occurred when he was upset or had not been given positive praise. The BSP provided that Student needed social skills for communicating when he was upset, use of social stories, sufficient praise and reinforcement from a peer buddy, and extended time and prepping before transitions.

35. The March IEP included an individual transition plan which provided for a continuation of Student's education at the transition program, continuation and coordination of services with the Regional Center, and once-per-week community outings to assist Student in learning to utilize public transportation, cross the street safely, purchase items, use a public restroom, and obtain a California identification card. The transition plan also provided for Student to work at a job through District's Innovative Rehabilitation Services (IRS). According to the transition plan, Student planned to remain living with his family, but would explore supportive options through the Regional Center. The transition plan also provided for acquisition of daily living skills and functional vocational skills.

36. The District members of the March IEP team offered Student a placement at the transition program. The transition program is designed to assist students that have reached chronological maturity and require continued academic instruction and a functional living skills and vocational skills program. The transition program is designed to increase a student's ability to be independent and to obtain basic skills needed to function in the community. Typically, a student in the program would receive academic instruction working on specific IEP goals and functional skills in a classroom of less than 18 students several days a week. Depending on the level of the student's cognitive ability and adaptive skills, students in the program are employed in the community and on the transition program campus working in the kitchen, gardening and at local stores such as Dollar Tree in a variety of capacities. In these roles, students learn to take public transportation, work with a job supervisor, follow a schedule and obtain vocational skills all focused on increasing student independence. Most students work two to three days per week.

37. The March IEP provided for related services in APE twice a week for 55 minutes each session, speech and language consultation twice a month for twenty minutes and transportation to and from school.

38. All of the proposed goals contained in the March IEP could be implemented in the transition program.

39. Parents did not consent to the March IEP. Parents expressed disagreement with assessments and the proposed placement and services in the March 13, 2009 and March 17, 2009 IEP meetings. Parents requested IEEs in the areas of OT, psychoeducation, speech and language and physical therapy.⁴ Parents wanted Student placed on home instruction or returned to the Wilson High School SDC.

LEGAL CONCLUSIONS

1. As the petitioning party, District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUE ONE: ASSESSMENTS

2. District contends that the January 2009 multidisciplinary assessment of Student was appropriate, such that Student is not entitled to IEEs in the areas of OT, speech and language, psycho-educational or transition at public expense. Student contends that the assessments were not appropriate.

3. When a parent disagrees with an assessment by the educational agency, the parent has the right to an IEE from independent qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329, subds. (b) & (c), 56506 subd. (c); 34 C.F.R. § 300.502.)

⁴ District agreed to fund an IEE in the area of physical therapy.

4. For purposes of evaluating a child for special education eligibility, the District must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child’s educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); 34 C.F.R § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

5. Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see also 20 U.S.C. § 1414 (b) (3).) Any psychological assessment, including individually administered tests of intellectual or emotional functioning and must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320(b)(3), (g), 56324.)

6. The assessors must use a variety of assessment tools and strategies to gather relevant functional and developmental information about the child including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum, that may assist in determining whether the child is a child with a disability and what the content of the child’s IEP should be. (34 C.F.R. § 300.532(b).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student’s primary language or other mode of communication

unless this is clearly not feasible. Tests must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.532, subs. (a) & (c); Ed. Code, § 56320, subs. (a) & (b).) The assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532, subd. (d); Ed. Code, § 56320, subd. (c).) All tests administered must be reported in writing. (Ed. Code, § 56327.)

7. Here, the District's assessments in the areas of OT, speech and language , psychoeducation and transition were each conducted by trained, qualified individuals holding the appropriate licenses and credentials for the assessments. Each of the assessors was knowledgeable about Student's disability and competent to perform the assessment. An experienced licensed speech and language pathologist conducted the speech and language portion of the assessment, two experienced licensed school psychologists completed the psychoeducational and adaptive behavioral measures, an experienced licensed occupational therapist performed the OT assessment and an experienced SDC teacher performed the transition assessment.

8. Each of the assessors used a variety of assessment tools, tests and assessment materials validated for the specific purposes for which they were used. The measures were selected and strategies were used to gather relevant functional and developmental information about Student, to determine his unique educational needs and to assist the IEP team in developing an appropriate placement and related services for Student.

9. The assessors utilized alternative measures when necessary to gain as much information as possible about Student's level of functioning and cognitive ability. A Spanish/English bilingual school psychologist interviewed Parents, a Spanish/English bilingual OT conducted the OT assessment and a Spanish language interpreter was used

to assist all other assessors. The measures were selected and administered in a non-discriminatory manner and were administered according to the instruction manuals.

10. Accordingly, District's assessments in the areas of OT, psychoeducation, speech and language, and transition were appropriate. Because the ALJ determines that the referenced assessments are appropriate, the Student is not entitled to IEEs at public expense in those areas. (Factual Findings 1-20 and Legal Conclusions 1-10.)

ISSUE TWO: OFFER OF FAPE

11. District contends that the March 2009 IEP offered Student a FAPE. Student contends that the March 2009 IEP did not offer Student a FAPE and that Student should remain in the Wilson High School SDC or on home instruction.

12. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction 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).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

13. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207, [73 L.Ed. 2d 690] (*Rowley*)). Second, the tribunal must decide whether the IEP

developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

14. Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

15. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) An IEP must include a post-secondary transition plan during the school year in which the child turns 16 years old. (Ed. Code, § 56043, subd. (g)(1).) "Transition services" means "a coordinated set of activities for an individual with exceptional needs" that: 1) "Is designed within an results-oriented process, that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil 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”; 2) “Is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil”; and 3) “Includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.” (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

16. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

17. Regarding substantive aspects of a FAPE, in *Rowley*, the Supreme Court held that the basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Rowley, supra*, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an

education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

18. Federal and state law requires school districts to provide a program in the least restrictive environment (LRE) to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) 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 use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child

has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

19. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁵ An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

⁵ Although *Adams* involved an Individual Family Services Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212) and district courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salelm-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

20. As discussed in Issue One, District properly conducted a triennial assessment to determine Student's PLOPS prior to the IEP team meeting. After analyzing the assessment data and PLOPS at the March 13, 2009 and March 17, 2009 IEP meetings, the IEP team developed goals in the areas of need identified in the assessment data and by the IEP team. The team created goals for Student in the areas of preacademic/functional skills, communication development, fine/gross motor development, social emotional/behavior, vocational/prevocational/self-help and health. Each of the goals was measurable and designed to address Student's unique educational needs. District assembled the necessary IEP members including the Parents and Student. The IEP team discussed the triennial assessments, the unique needs of the Student, devised measurable goals and made an offer of FAPE to Student including a placement and related services, developed a BSP and a transition Plan. Parents and Student were provided an opportunity to participate in the IEP meetings and did express their disagreement with the assessment reports, goals, services and offer of placement.

21. The IEP team evaluated Student's needs for related services and an appropriate educational placement for him. Given that Student had already spent four years in the Wilson High School SDC, had low cognitive ability, low adaptive skills, and was not on a diploma track, the District members of the IEP team recommended that Student be placed in the transition program. The transition program offered an academic program in an SDC with like-aged peers that would address Student's academic goals. In addition, to assist Student with transitioning to adult life, the program included a sheltered employment program that would allow Student an opportunity to develop vocational goals, generalize functional communication, develop social relationships and be exposed to similar-aged Students. All of Student's goals could be implemented in the transition program with the added benefit of Student gaining vocational skills, independent living skills and an opportunity to generalize

knowledge and skills to other settings while remaining in a sheltered environment. The unrefuted evidence from Ngyuen was that Student's structural oral motor disability coupled with his low cognition prevented him from making further progress with speech. Based upon Ngyuen's assessment results, District members of the IEP team all believed that Student needed consultative speech and language therapy rather than direct speech therapy. Based upon the APE assessment results, the District team members offered Student APE twice a week for 55 minutes. The IEP team also offered transportation to and from the transition program.

22. Finally, the District's offer of placement was in the LRE. While the March IEP does not offer Student an opportunity to return to Wilson High School or home instruction, as Parents desired, it offers him an opportunity to receive a meaningful educational benefit tailored to his unique needs in an environment where his emerging skills may be further developed and where his IEP can be implemented. No member of the IEP team, including Parents, contemplated placement in a general education classroom. Student required a functional curriculum which was not available in the general education classroom. Accordingly, the IEP team need not consider the educational benefits of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student would have on the teacher and children in the regular class or the costs of mainstreaming the student. Instead, the continuum of special education classroom placements were considered for Student. In evaluating those options including home instruction, the Wilson SDC classroom and the transition program, the team considered the restrictiveness of the placements and the suitability of each placement to implement Student's IEP and the non-academic benefits of the placement. The transition program offered Student the opportunity to have social interactions with similar aged peers and to generalize his skills to the community and sheltered employment situations. These aspects of the proposed placement are not

available to Student in a more restrictive home instruction program nor are these aspects available at Wilson High School SDC. Student is an adult that needs both academic and functional skills. The placement offered, unlike those favored by Parents, will foster the independence, development and generalization of skills contemplated by the goals developed for the March IEP and is in the least restrictive environment.

23. In sum, the District's offer of placement and services contained in the March 2009 IEP constitutes a FAPE and provides Student with a meaningful educational benefit in the least restrictive environment. (Factual Findings 1-39 and Legal Conclusions 1, 11-23.)

ORDER

1. The January of 2009 occupational therapy, psychoeducational, speech and language, and transition assessments were appropriate, such that Student is not entitled to independent educational evaluations in these areas at public expense.

2. The IEP developed on March 13, 2009 and March 17, 2009 offered Student a free appropriate public education in the least restrictive environment.

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

