

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT, ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008020155

DECISION

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter in Los Angeles, California on May 6 and May 7, 2008.

Student's mother (Mother) represented Student.

My T. Huynh represented Los Angeles Unified School District (District). Victoria McKendall, Due Process Representative for the District, attended on behalf of the District.

Student filed a request for due process hearing on February 4, 2008. Oral and documentary evidence were received during the hearing. Oral closing arguments were heard May 9, 2008, and the record was closed.

ISSUES¹

1. Does the District's January 2008 offer to place Student at Leichman Special Day Center (Leichman) in a special day class (SDC) for students with autism, with related services, offer Student a free appropriate public education (FAPE) through the 2008-2009 school year?
2. Will the duration of the trips to and from school interfere with Student receiving FAPE?
3. If the District's offer of placement at Leichman is not appropriate, would placement of Student at Grant High School (Grant) in a SDC for multiply disabled pupils, with related services, be appropriate and provide him with FAPE through the 2008-2009 school year?
4. Does Student require the following related services for him to benefit educationally and be provided with FAPE through the 2008-2009 school year:
 - a. Direct speech and language services;
 - b. Communication software to aid vocalization;
 - c. A classroom FM system;
 - d. A different itinerant teacher of the deaf and hard-of-hearing (DHH) than currently assigned; and
 - e. Occupational therapy (OT) for sensory integration.
5. Does Student require a functional behavioral assessment (FBA) at this time.²

¹ For clarity of decision writing, the issues have been reorganized, but are the same issues that were discussed and agreed upon at the hearing as the only issues for hearing.

CONTENTIONS

Student contends that Leichman is an inappropriate placement due to the length of time Student will spend on the bus traveling to and from Leichman. The District has proposed a bus trip with several other special needs pupils that will result in Student being on a school bus for 70 minutes for the one-way trip from his home to Leichman, and a trip of similar duration from Leichman to home. Student contends that he cannot ride the bus for 70 minutes due to toileting issues. Leichman is a special day center that serves only pupils with disabilities. Student wants to be placed at Grant High School in a SDC for multiply disabled pupils where he will be surrounded by nondisabled peers. Student also believes the academic program offered at Leichman is inadequate, as other pupils at Leichman appear to be more cognitively delayed than he. Student also contends that he requires direct speech and language services, the assistive technology of communication software and a classroom FM system so he can communicate with others vocally. In addition, Student argues that he requires a different itinerant teacher of the DHH, occupational therapy for sensory integration, and a FBA.

The District contends the placement at Leichman will provide Student with FAPE and Student's toileting issues will be accommodated on the 70-minute bus ride. Because Leichman has personnel who are very experienced in dealing with extreme behaviors such as Student's, the program will help decrease these behaviors which impede his ability to access the curriculum in his current placement. The District further claims that placement at Grant High School will be inappropriate as Student will be in a classroom without its own private restroom, Student will be unable to go outdoors when necessitated by his behavior, and Student and his two aides may be unsafe when

² Student originally requested the services of a behaviorist, but it was determined during the course of the hearing that Student was actually asking for a FBA.

outside of the classroom due to some of Student's behaviors. In addition, none of the pupils with disabilities at Grant have behavioral issues as extreme as Student's so personnel at Grant are not experienced in dealing with extreme behaviors. The District argues that Student has not benefited from the direct speech and language services offered to him for the past four years, so these services should be discontinued. Further, since Student does not wear his hearing aids, appears to be unable to hear spoken words, and does not communicate vocally, the FM system and software for vocalization is unnecessary. The District contends that Student does not require sensory integration occupational therapy (OT). Also, an itinerant teacher for the DHH is no longer required as Student is now accompanied by a signing instructional aide. Finally, a FBA is unnecessary as Student already has the full-time services of a behaviorist as a one-to-one aide.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is 15 years of age, and qualifies for special education and related services due to multiple disabilities, some of which are due to congenital rubella syndrome. Student is both hearing and vision impaired, cognitively delayed, displays autistic-like behaviors and has attention deficit hyperactivity disorder (ADHD).

2. Student currently attends his neighborhood school, Walter Reed Middle School (Reed), where he is placed in a SDC for mild to moderately disabled pupils. He is accompanied by two full-time aides, one a signing instructional aide and the other a behaviorist. Student's current teacher, Karen Hacker (Hacker), testified that students in her class are functioning academically at levels ranging from pre-kindergarten to third or fourth grade, depending on the subject matter and the individual student's abilities.

STUDENT'S UNIQUE NEEDS AND PRESENT LEVELS OF PERFORMANCE

3. Student is currently repeating the eighth grade. He is not taught the standard curriculum for eighth grade pupils. Rather, the daily lessons he receives are modified so that he can access them in spite of his cognitive delays. He has attended Reed for four years. According to Ms. Hacker and behaviorist, Brian Oey (Oey), Student can add and subtract numbers up to 20. He can write a simple sentence when shown a picture and given a prompt to write about the picture, but he cannot write a paragraph. He cannot spontaneously write a sentence.

4. Student has had the same sign language interpreter, Mario Cristales (Cristales), for more than two years. During this time Student's sign vocabulary has increased by at least 100 signs, and the signing skills and vocabularies of both his teacher and his behaviorist have also increased significantly. Ms. Hacker, Mr. Oey, Mr. Cristales, and the speech and language therapist Debra Thomas (Thomas) each testified that Student's primary mode of communication is sign language. He does not vocalize with the intention of communicating. Mr. Oey, who has been with Student for eight years, heard Student use words to communicate only three times when he was in elementary school. Student has not attended elementary school for four years.

5. Shortly after birth, Student had cataracts removed from both eyes. Because of his age, he did not receive lens implants until 2005, and until then wore glasses. While he still requires large print materials when reading, he does not wear glasses. Mother testified that there has been a "big change" in Student's vision since the lens implant, implying that his vision is much less impaired than before he received the lens implants.

6. Student has a profound hearing loss in one ear and severe hearing loss in the other. Student wore hearing aids when younger, but has not done so in class for at least three years. Testimony from Ms. Hacker and Mr. Oey established that Student does

not like wearing his hearing aids, and several years ago a decision was made to not force him to wear them at school. Mother testified that in the past two to three weeks, Student had worn his aids on only two occasions, and only after she promised him a reward if he did so. Student wore the aids no longer than 20 minutes on each of these occasions. Student did not wear his hearing aids at any other time during 2008. Ms. Hacker, Mr. Oey, Mr. Cristales, and Ms. Thomas testified credibly that Student does not appear to have any ability to hear without hearing aids, and there is serious doubt that he can hear anything when wearing his hearing aids. Mother insists that Student still has some hearing without wearing hearing aids and described him waking up at night because she had a visitor or he could hear the television in her room. However, because he cannot hear without his hearing aids, Student must have awakened for other reasons. Student cannot hear anything other than extremely loud noises without hearing aids, and cannot hear or understand spoken language with hearing aids.

7. Student has toileting issues. Ms. Hacker, Mr. Oey and Mr. Cristales all testified that Student asks to use the restroom several times a day, although not on a consistent basis. On some occasions Student uses the restroom several times over the course of an hour. When he goes into the restroom, he will sometimes stay in there for as long as 45 minutes. There is no predictability as to when he needs to use the restroom. A handful of times each school year, Student has urinated on himself at school. On at least one occasion this occurred when he was waiting to use the restroom in his classroom and it was unavailable. However, on other occasions he will go as long as two periods without needing to use the restroom. Mother testified that Student engages in the same behavior at home, using the bathroom frequently. He has been prescribed medication for an overactive bladder. Approximately three times per week Student will urinate on bedding at home. In addition, Student has had toileting accidents in both his parents' and grandparents' vehicles, although he is toilet-trained in

large part. He has not worn diapers for years, and Mother is opposed to having him return to wearing diapers. Mother transports Student to and from school. Mother and the interpreter testified that Student had ridden a school bus three times on field trips during the past two years, with each bus ride lasting 45 minutes, and did so without asking to use the restroom during the bus ride, or having a toileting accident.

8. Student has had the same full-time behaviorist, Mr. Oey, as a one-to-one aide for eight years. Mr. Oey is employed by a nonpublic agency named Focus. Student initially required a behaviorist for self-injurious behavior. He still requires a behaviorist due to other extreme behaviors that pose a risk to himself and others. Student's current behaviors include spitting into his hands and wiping them on his face; spitting on the floor, his desk, and at others; blowing his nose into his hand or arm, and then wiping it on his face; touching himself inappropriately; ripping his shirts off and occasionally ripping his pants off; ripping up his papers; throwing his food or tray in the cafeteria, gagging himself; yelling; throwing objects; shoving his desk and other objects; hitting his aides and pushing them away; and biting his hands. Mr. Oey testified that Student requires a program that is highly structured with lots of hands-on activities and no "down time." Ms. Hacker testified credibly that the behaviors described above, and Mr. Oey's efforts to modify these behaviors (allowing him to leave the classroom to sit in an adjacent grassy area or to lie on a mat), result in Student being "off task" at least 60 to 70 percent of his time in her classroom. On some days he will work diligently with little difficulty, completing all the work that is given to him. On other days he will be resistant to work, wanting to lie on his mat or spend time in the grass adjacent to the classroom, and therefore off-task most of the day. Whenever Student travels from one location to another on the Reed campus, he is accompanied by both Mr. Oey and Mr. Cristales on either side because there is fear that some of his behaviors may be directed towards other pupils, resulting in angry reactions from those pupils. Ms. Hacker testified credibly

that she, Mr. Oey and Mr. Cristales have worked with Student to resolve his behavioral issues so that he can stay on task and access the curriculum. However, they have been unsuccessful in doing so.

9. The evidence established Student has unique needs in the areas of vision, hearing, hearing, cognitive delays, behavior and self help. Student's proposed IEP contains goals and objectives addressing his unique needs in the following areas: Reading Comprehension, Language Arts, Math, Vocational Education, Behavior, Gross Motor, Speech and Language, and Occupational Therapy.

LEICHMAN PROGRAM OFFERED TO STUDENT

10. Leichman is approximately 13 miles from Student's residence. It is a special day center with approximately 200 pupils, all of whom are disabled, many with extreme behaviors. The staff/pupil ratio is approximately one-to-one. School personnel, both teachers and classroom aides, have vast experience in dealing with serious behavioral problems exhibited by pupils with disabilities. For example, Ms. Hacker described a solution implemented by Leichman personnel for a pupil who often ripped off his shirt, much like Student: The pupil is now dressed in a jumpsuit made of fabric that is extremely difficult to tear. Ms. Hacker credibly testified that the entire staff at Leichman had "more tools in their tool bag" than staff at other schools to work with pupils who have severe behavioral issues. The classroom in which Student would be placed is an SDC for pupils with autistic-like behaviors. The program is highly structured with lots of visual stimulation. The pupils are kept very busy. The classroom has its own restroom. There are no halls, and there is a grassy area right outside the classroom. The pupils work in a garden at Leichman. Ms. Hacker observed several staff using sign language.

11. The Leichman program offered by the District, with the exception of the travel plan discussed below, is appropriate for Student. It is reasonably calculated to address Student's unique needs described above. Student requires a program that is

highly structured, with minimal down-time. Leichman will provide this to Student. Moreover, the staff at Leichman are especially adept at dealing with the types of behaviors that Student displays, the academic curriculum is better suited for Student, and Student will still be accompanied at all times by a signing instructional aide and a behaviorist. In addition, the proximity of the restroom will assist Student in regards to his toileting issues, and an outdoor area next to the classroom is important when Student needs a break from the classroom.

12. Mother testified that she believed the pupils at Leichman were more disabled than Student, and as such, it is an inappropriate placement for him. Both Ms. Hacker and Mr. Oey visited Leichman and observed the class where it is proposed that Student be placed. They established that Student is at a similar level, academically and behaviorally, as the other students at Leichman.

TRANSPORTATION TO LEICHMAN

13. The District is offering to transport Student to Leichman using a District school bus. Student will be the second pupil to be picked up by the bus in the morning, and six other pupils will be picked up after Student. Student will be the second to last pupil delivered home in the afternoon. The bus will arrive at Student's home at 6:30 a.m., with Student arriving home between 4:00 to 4:15 p.m., depending on traffic, weather, etc. The total duration of each one-way bus ride for Student is approximately 70 minutes.

14. There are two aides on this bus who are picked up before any pupils. They ride with the pupils on the bus to Leichman where they employed, and also ride the bus when pupils are returned home from school. The aides have received training to assist pupils with special needs while on the bus, as well training to assist in the classrooms at Leichman.

15. If Student indicates he needs to use the restroom during the ride, the bus will stop at a school near the bus route when the request is made. However, the plan does not take into consideration that Student requires two full-time one-to-one aides to be with him at all times he is navigating the school grounds, and the bus only has two aides for eight students. If Student is having consistent toileting problems on the bus, he can wear some sort of adult diaper on the bus. The diaper would then be removed upon arrival at Leichman or home. The time required to address Student's toileting needs by stopping at a school along the way, or time to diaper and change him, will cause Student to lose time in the classroom.

16. The District's offer of transportation does not meet Student's unique needs and is inappropriate. Based on the testimony of Ms. Hacker, Mr. Oey, Mr. Cristales and Mother, Student frequently will have a day where he is going to the restroom several times an hour, therefore, it is likely that Student will have some days when he will need to use the restroom during the 70-minute bus rides. Student is, in large part, toilet-trained and has not worn diapers for years. Therefore, requiring Student to wear a diaper on the bus is inappropriate. There is no evidence that the District cannot provide door-to-door transportation for Student. In the alternative, if she is willing, Mother can drive Student to Leichman and be reimbursed mileage by the District.

GRANT PROGRAM

17. The Grant campus is large and Grant has approximately 3,400 pupils. While Grant does have a few special needs pupils, Ms. Hacker testified credibly that none of these pupils has extreme behavioral issues like Student, nor does the staff at Grant have experience in dealing with such behaviors. There is no outdoor area readily accessible from the SDC as there is at Reed and Leichman, and there is no private restroom adjacent to the SDC at Grant. Student requires two escorts wherever he goes on campus at Reed to prevent him from spitting on other pupils or otherwise behaving in an

offensive manner. These behaviors potentially create safety risks for both Student and his aides in an environment such as Grant. Although Mother testified that Grant has a program for students with vision impairments, there is no evidence that Student requires such a program. Grant is not an appropriate placement for Student due to the size of its student body and campus, the inexperience of staff in handling behaviors such as Student's, and the lack of ready access to a restroom and outdoor areas from the SDC classroom.

SPEECH AND LANGUAGE SERVICES

18. Ms. Thomas is a speech and language therapist who has worked with Student for three of the past four years. She has a bachelor's degree in communicative disorders, and a master's degree in speech therapy. She is licensed and certified, and has 21 years of experience as a speech and language therapist. Prior to working with Student, she spent 14 years at a District school with an aural program³ for DHH pupils.

19. Ms. Thomas has used many different techniques routinely utilized by speech and language therapists to encourage vocalization with Student, including assistive technology, but she has never heard him say a word with the intent to communicate. He has never produced any recognizable speech when she has worked with him. There was no change in Student's response to speech therapy on those few occasions when he wore his hearing aids during the therapy session. Among the methods she tried to encourage vocal communication by Student was having him feel

³ An aural (or oral) program for DHH pupils is one that encourages the pupils to read lips and express themselves orally as their primary mode of communication. In such a program, services of a speech and language therapist are necessary to help the pupils learn how to speak clearly.

her lips and throat while she spoke, and using a vibro-tactile device.⁴ She designed a unique computer program for Student using a power-point presentation to encourage his vocalization, with images of objects that interested him. However, none of her efforts produced spoken words from Student. Ms. Thomas testified that a pupil's use of hearing aids, or a pupil's hearing impairment, does not automatically mean the pupil can benefit from speech and language therapy. She believes he does not require speech and language therapy.

20. Mother provided a letter dated April 7, 2007, from Student's physician, Dr. William Luxford, from the House Clinic (specializing in hearing, facial nerve and balance disorders) that recommends speech therapy as well as an evaluation dated May 23, 2007, from a speech-language pathologist, Kathleen M. Lehnert, that also recommends speech therapy.

21. Ms. Thomas testified credibly that the April 7, 2007 letter from Dr. Luxford contains no information that supports his recommendation for speech and language therapy. The recommendation for speech and language therapy contained in the May 23, 2007 evaluation is not reliable because no observation was done of Student in his school, and school personnel were not interviewed. Also, the May 23, 2007 evaluation, due to Student's behaviors, does not include any standardized testing. As a result, the assessor relied on Mother's reports of Student's ability to hear and communicate, both with and without hearing aids. These reports do not coincide with what Ms. Thomas and others have observed in the school setting.

22. Based on Ms. Thomas' testimony, Student cannot benefit from direct speech and language therapy at this time. Under the proposed IEP, a speech and

⁴ This device creates a vibration when words are spoken to assist the DHH person to read lips, or use hearing aids more effectively.

language therapist will observe Student in his new placement at Leichman to assist in his transition to the new classroom, and to see if this classroom affects his need for speech and language therapy.

23. As previously noted in Factual Finding 19, Ms. Thomas used assistive technology with Student such as a vibro-tactile device and computer software to encourage vocalization without success. Therefore, there is no current need for this assistive technology.

24. Some students who use hearing aids in the classroom can benefit from having a classroom FM system to amplify the speech of others. Student does not use his hearing aids and does not demonstrate any ability to hear with or without them. He is not engaged in an aural program, nor is there evidence that such a program is appropriate for him. His primary language is sign language. There is no evidence that Student will gain any benefit from a classroom FM system. Therefore, it is not necessary assistive technology.

ITINERANT DHH TEACHER

25. An itinerant DHH teacher is a school employee who consults with teachers and aides in a classroom setting when one or more DHH students are in attendance in that class. The itinerant DHH teacher assists the classroom teacher and aides in developing strategies to enhance educational opportunities for the DHH student. At the IEP meeting, Mother requested the services of an itinerant DHH teacher three times per week. At the hearing Mother indicated she is dissatisfied with the services of the current itinerant DHH teacher, who was recently assigned to Student, although she could not articulate why she was dissatisfied with these services. There was no evidence presented at the hearing to support the contention that Student continues to need the services of the itinerant DHH teacher. Student is provided with the full-time assistance of a signing one-to-one personal aide, Mr. Cristales. Mr. Cristales and Ms. Hacker work together to

design lessons that will benefit Student, taking into account Student's hearing impairment. Mr. Cristales will similarly work with Student's new teacher at Leichman. Therefore, services of an itinerant DHH teacher are no longer needed.

OT FOR SENSORY INTEGRATION.

26. Indira McLeod (McLeod) has worked for the District as an occupational therapist for nine years and has been licensed and working as an occupational therapist for a total of 14 years. She has a master's degree in OT from New York University, a California license to practice OT, and she is also registered with the National Board for OT. Both certifications are necessary to practice OT in California. In addition, she is certified to conduct the Sensory Integration and Praxis Test (SIPT) which requires four weeks of training. She has taken continuing education courses in sensory integration therapy, and is familiar with therapy rooms in which there are many devices for use by pupils who need sensory integration therapy. She has been Student's OT since October 2007, and was previously his OT for the 2003-2004 school year.

27. When Student was four years of age he was assessed as needing OT services, including sensory integration OT in a therapy room. He was provided sensory integration OT for several years and it was very successful. Mother believes that Student still requires sensory integration OT to manage his extreme behaviors. However, the evidence did not support this conclusion. In the past two years Student has been assessed by four different occupational therapists, each of whom prepared a written report. Two of the assessments were conducted by District personnel, and the third was an independent educational evaluation. All three of these evaluations concluded that

Student's behaviors were not due to sensory issues requiring sensory integration OT, and none of the evaluations recommended any further OT for sensory integration.⁵

28. Mother introduced into evidence an OT evaluation performed in April 2007 at UCLA Healthcare, recommending sensory integration OT to modify Student's extreme behaviors. However, Ms. McLeod explained that the UCLA assessment was done from a global perspective, not from an educational perspective. The evaluator relied only on Mother's reports of Student's functioning. The UCLA evaluator never observed Student in the school setting, nor did she interview school personnel familiar with Student.

29. Ms. McLeod described how she conducted her own observation of Student in the classroom setting, and explained in detail exactly what she saw when she observed Student. She then described how her observations supported her conclusion that Student does not have a need for sensory integration OT.

30. Although the UCLA evaluator concludes that sensory integration therapy will help improve Student's behavior both at school and at home, the other three evaluators and Ms. McLeod considered Student in the context of the educational setting. All four concluded that Student's behavioral issues were not the result of sensory deficits, and would not be improved by sensory integration OT.

FBA

31. If a pupil's behavior impedes his or her learning, or the learning of other pupils, an FBA may be conducted to determine the cause/s of the behavior, and to determine appropriate responses to the behavior so it can be modified. These resulting

⁵ However, the proposed IEP for Student does recommend 30 minutes per week of OT, to address penmanship.

behavioral interventions, strategies, and supports become a behavioral support plan (BSP), which may be incorporated into an IEP. When the parent of a special education student requests a reassessment such as an FBA, Education Code section 56381(a) requires the District to reassess the student if the student has not been similarly assessed within the past year.

32. Student's proposed IEP of December 19, 2007, contains a BSP. Student is accompanied by a behaviorist for the entire school day. The behaviorist not only records Student's behaviors in a log, he also employs strategies designed to contain Student and decrease problem behaviors. However, testimony at the hearing established that the current interventions are not meeting with great success as Student is off-task for more than half of the time.

33. During the hearing, Mother requested a functional behavioral assessment (FBA) of Student.⁶ Because the parent has requested an FBA, the District is obligated to conduct one, particularly since it appears that the strategies being used with the Student are not as effective as they might be as he is off-task in the classroom 60 to 70 percent of the time.

⁶ Student originally requested the services of a behaviorist, but he already is accompanied by a behaviorist the entire school day, and it is the recommendation of the December 19, 2007 IEP that this continue. It was agreed by the parties when mother testified that the request was for an FBA, and this was one of the issues to be determined.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed the request for due process, and therefore has the burden of persuasion in this matter.

DOES THE DISTRICT'S JANUARY 2008 OFFER TO PLACE STUDENT AT LEICHMAN SPECIAL DAY CENTER (LEICHMAN) IN A SPECIAL DAY CLASS (SDC) FOR STUDENTS WITH AUTISM, WITH RELATED SERVICES, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) THROUGH THE 2008-2009 SCHOOL YEAR?

2. The District contends that Leichman is the appropriate placement for Student. Mother disagrees with this proposed placement.

3. A child with a disability is entitled to a FAPE. A FAPE is defined, in pertinent part, as special education and related services, provided at public expense and under public supervision and direction, that meet the state's educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

4. A school district is required to provide a "'basic floor of opportunity' . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 3048] [hereafter *Rowley*].) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307,

1314 [hereafter *Gregory K.*].) However, the public educational benefit must be more than de minimis or trivial. (*Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.* (3d Cir. 2000) 205 F.3d 572, 577.) If a parent disagrees with the IEP and proposed placement, he or she may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

5. To determine whether a school district's offer constitutes a FAPE, the analysis must focus primarily on the adequacy of the proposed program. (*Gregory K., supra*, at p. 1314.) If the school district's program is reasonably calculated to provide the student some educational benefit, the school district's offer will constitute a FAPE, even if the student's parents prefer another program, and even if the parents' preferred program will result in greater educational benefits for the student. (*Ibid.*)

6. A special education student must be educated with non-disabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56364.2, subd. (a).)

7. Student requires a program with a modified curriculum that is highly structured with lots of hands-on activities and no "down time." The program at Leichman, as described by Ms. Hacker, meets these requirements. In addition, because personnel at Leichman are so experienced in handling a wide variety of extreme and acting out behaviors, there is a strong likelihood that Student's behaviors can be modified in that environment. It is also beneficial that the classroom has its own bathroom which lessens the necessity of Student having to leave the classroom with two escorts to find a restroom. Also, the classroom is accessible to the outdoors, which will

allow Student to leave the classroom and go to a safe outdoor environment easily, should he require a break. (Factual Findings 2-4, and 7-11. Legal Conclusions 3-5.)

8. The evidence demonstrates that in Student's current placement in the SDC at Reed, accompanied by a full-time behaviorist and a full-time signing instructional aide, he is still off-task and unable to access his modified curriculum 60 to 70 percent of the time. It is not the appropriate placement for Student. Placement at Leichman will meet his unique needs, particularly his extreme acting out behaviors. (Factual Findings 2-4, and 7-12. Legal Conclusions 3-6.) Therefore, Leichman is the most appropriate placement for Student if one does not consider the transportation issue, discussed immediately below.

WILL THE DURATION OF THE TRIPS TO AND FROM SCHOOL INTERFERE WITH STUDENT RECEIVING FAPE?

9. Federal law requires that "In determining the educational placement of a child with a disability . . . each public agency shall ensure that . . . [t]he child's placement . . . [i]s as close as possible to the child's home." (34 C.F.R. § 300.116 (b)(3).) Federal law further requires that each public agency ensure that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." (34 C.F.R. § 300.116(c).) The court stated in *Murray by & Through Murray v. Montrose County Sch. Dist. RE-II* (10th Cir. 1995) 51 F.3d 921, 929:

A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), unless the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the

appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible. [Citations omitted.]

The proximity preference is merely one of many factors for a district to take into consideration in determining a student's proper placement and does not amount to a presumption that a student with a disability should attend his or her neighborhood school. (*Flour Bluff Indep. Sch. Dist. v. Lesa T.* (5th Cir. 1996) 91F.3d 689, 693-694.)

10. The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

11. Leichman is the most appropriate placement for Student, but for the transportation plan proposed by the District. Student clearly has toileting issues. If Student rides the school bus as proposed by the District, the duration of a one-way trip to or from school will be 70 minutes. Based upon the evidence, Student will need to use the restroom during the 70-minute trips. The District's plan to stop at a nearby school to let him use the restroom is inadequate, especially since there are not enough aides on the bus to escort Student to the restroom at the school, and Student currently requires two adult escorts everywhere. The other option of Student riding the bus wearing an adult diaper which would be changed once he arrived at school is inappropriate as he is toilet trained in large part, and has not worn a diaper for years. In both instances, Student would miss part of the school day. (Factual Findings 10 and 13-16. Legal Conclusions 9 and 10.)

12. The District's offer of transportation is not FAPE. The IEP shall be revised to reflect that the District shall provide Student with direct door-to-door transportation to

and from Leichman. In the alternative, if Mother wishes to transport Student, she shall be reimbursed for mileage. (Factual Finding 16, Legal Conclusions 9 and 10.)

IF THE DISTRICT'S OFFER OF PLACEMENT AT LEICHMAN IS NOT APPROPRIATE, WOULD PLACEMENT OF STUDENT AT GRANT HIGH SCHOOL (GRANT) IN A SDC FOR MULTIPLY DISABLED PUPILS, WITH RELATED SERVICES, BE APPROPRIATE AND PROVIDE HIM WITH FAPE THROUGH THE 2008-2009 SCHOOL YEAR?

13. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.) Because the proposed placement at Leichman has been found to be a FAPE for Student, Mother's requested placement at Grant does not need to be addressed. However, even if Leichman was not an appropriate placement for Student, neither is Grant because of the size of the school and number of students, the severity of Student's behavior issues and the lack of ready access from the SDC classroom to a restroom and grassy area. (Factual Findings 7, 8, 11 and 17. Legal Conclusion 3, 5, 6, 9 and 13.)

DOES STUDENT REQUIRE THE FOLLOWING RELATED SERVICES FOR HIM TO BENEFIT A EDUCATIONALLY AND BE PROVIDED WITH FAPE THROUGH THE 2008-2009A SCHOOL YEAR:

a. Direct speech and language services;

- b. Communication software to aid vocalization;*
- c. A classroom FM system;*
- d. A different itinerant teacher of the deaf and hard-of-hearing (DHH) than currently assigned; and*
- e. Occupational therapy (OT) for sensory integration.*

14. "Related services" is defined, in pertinent part, as developmental, corrective, and other supportive services, including physical and occupational therapy, as may be required to assist a child with a disability to benefit from special education." (20 U.S.C. § 1401(29).) In California these services are referred to as designated instructional services (DIS). (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

Direct speech and language services, communication software and a classroom FM system

15. Student does not communicate vocally or use his hearing aids. Therefore direct speech and language services, assistive technology to improve oral communication, and a classroom FM system are not necessary related services. After several years of speech and language therapy with assistive technology, including a computer program specifically designed to encourage Student to vocalize, Student has not evidenced any intentional vocalization. He refuses to wear his hearing aids, so he gains no benefit from a classroom FM system. It is clear that Student has no need of these services to receive educational benefit, other than the consultative services of a speech and language therapist to assist in his transition to a new class. (Factual Findings 4, 6 and 18-24. Legal Conclusions 3-5, 13 and 14.) Therefore Mother's request for these services and assistive technology is denied.

Different itinerant DHH teacher

19. Since Mr. Cristales became Student's sign interpreter two and one-half years ago, there no longer is a need for an itinerant DHH teacher in Student's classroom. Mr. Cristales can aid Student's new teacher as he assisted Ms. Hacker to meet the unique needs of this deaf pupil. There was no evidence presented that Student requires a DHH teacher in the classroom. Therefore, Mother's request for a different itinerant DHH teacher is denied. (Factual Findings 6 and 25. Legal Conclusions 3-5, 13 and 14.)

OT for sensory integration

20. The evidence and testimony demonstrate that Student's behaviors are not sensory seeking. If they were, sensory integration OT might be appropriate. However, the testimony of Ms. McLeod, combined with two District OT assessments and an IEE for OT establish that Student does not require sensory integration OT in the educational setting. (Factual Findings 26-30.) Therefore, the ALJ finds that Student does not need OT for sensory integration.

Does Student require a functional behavioral assessment (FBA) at this time.⁷

21. After a child has been found 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) (2006); 34 C.F.R § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b)(1); Ed. Code, § 56381, subd. (a)(2).) Reassessment

⁷ Student originally requested the services of a behaviorist, but it was determined during the course of the hearing that Student was actually asking for a FBA.

of a pupil shall occur if the local educational agency determines that the educational or related services needs of the pupil warrant a reassessment, or if the pupil's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).)

22. Student has been accompanied at school full-time by a behaviorist for the last eight years. A BSP is included as part of Student's December 19, 2007 IEP. There was no evidence that an FBA was conducted less than one year ago. The District has offered placement at Leichman because Student's problematic behaviors are pervasive and continuing, and Leichman is a school with resources for managing pupils with serious behavioral issues. Mother has requested an FBA, and in light of Student's extreme behaviors that have not subsided in spite of behavioral interventions, the FBA will be of use to both the behaviorist, and Leichman staff. (Factual Findings 3, 11, 12 and 33-36.)

ORDERS

1. Placement of Student in a SDC for students with autism at Leichman school is appropriate through the 2008-2009 school year.
2. The District shall provide door-to-door direct transportation for Student to and from Leichman School. In the alternative, if Mother chooses to transport Student, she shall be reimbursed by the District monthly, upon presentation of an accounting, for actual mileage to and from Leichman at the rate permitted by the Internal Revenue Service.
3. The District shall conduct an FBA of Student no later than September 30, 2008.
4. All other requests are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided.

Student prevailed on the second issue, and the fifth issue. The District prevailed on all other 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, subdivision (k).)

Dated: June 20, 2008

A handwritten signature in black ink, reading "Rebecca P. Freie", written over a horizontal line.

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings