

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

In the Matter of:

LODI UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. N 2005100303

DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on December 8, 9, and 13, 2005, in Lodi, California.

Diane Marshall-Freeman and Anne M. Sherlock, Attorneys, Kronick, Moskovitz, Tiedemann & Girard, represented Petitioner Lodi Unified School District (District). Dr. Catherine Conrado, the District's Administrative Director, Special Services/Special Education Local Plan Area (SELPA) and Karen Honkala, Program Specialist for the District, were also present.

Father (Father), represented his son, Respondent Student (Student).

Testimony concluded, the record closed, and the matter was submitted on December 13, 2005.

ISSUE

Was the District's offer to Student in the August 26, 2005, Individualized Education Program of placement in a special day class for students with Autism at Victor Elementary School a free appropriate public education in the least restrictive environment for the 2005-2006 School Year and 2006 Extended School Year?

FACTUAL FINDINGS

1. Student, who turns seven-years-old in January 2006, is eligible for special education and related services as a child with autism. As a result of an interim agreement between the parties, he currently attends a general education kindergarten class at the District's Reese Elementary School (Reese), his neighborhood school. The only element of the District's offer that is at issue is the proposed placement in the special day class (SDC) at Victor Elementary School (Victor SDC).

2. The parties participated in seven Individualized Education Program (IEP) team meetings between May 6, 2004, and August 26, 2005, to attempt to resolve Student's classroom placement. Student's parents consistently consented to the related services, including speech and language, occupational therapy, and behavior consultation, and disagreed with placement in the Victor SDC. Student's parents initially requested that Student have more time in the general education setting, and eventually requested that he be fully included in a general education classroom. Father believes that Student should be fully included in a general education classroom to develop socialization skills by mimicking the behavior of his typical peers.

3. In May 2004, at the conclusion of the 2003-2004 School Year, Student's parents kept him out of school. Student did not return to school until February 2005, when the District agreed to an interim placement for Student in order to get him back into school. The District placed Student into a general education kindergarten class with an instructional assistant at Vinewood School from February through April 2004, and then at Reese for the 2005-2006 School Year. The previously-offered IEPs of May 6 and October 22, 2004, were in effect, except for the classroom placement. The parties agreed that Student would initially attend the general education kindergarten class for 90 minutes, and the time would be increased as he progressed. Student's progress was evaluated every two weeks, but his time in the class was never increased.

4. The IEP team met on August 26, 2005, to discuss Student's placement. The team recommended that Student be placed in the Victor SDC, five hours a day; participate in the general education environment five hours per week; have a one-on-one assistant, five hours a day; and receive the related services of speech therapy, occupational therapy, and behavior consultation. Student has unique needs in the areas of communication, school adjustment, socialization, fine motor skills, articulation and language development. The

team determined that Student required an SDC program with a small staff-to-student ratio, a visually-clear physical environment, a visual schedule, and a visual work system; daily adult-facilitated play sessions; direct one-on-one teaching sessions; use of a visually-mediated communication system, such as the Picture Exchange Communication system (PECS)¹; and a structured after-school program with a trained assistant to facilitate structured social activities with typically-developing peers. Student will participate in daily socialization opportunities, beginning in the SDC in structured one-on-one situations with a trained adult to learn play skills, then with reverse mainstreaming², and progressing to a larger group setting as appropriate. Father consented to the IEP except for the placement at the Victor SDC.

5. Colleen Smith is Student's teacher at Reese. Ms. Smith has been a teacher for over 30 years and has had an average of two to four students in her classroom each year who have IEPs. She shares the classroom with another teacher. They have 20 students, including Student, and the assistance of two to four parent volunteers. The kindergarten class is academically oriented. Students are expected to work independently on academic assignments. There is a great deal of activity and noise as students receive instructions on their assignments, work on their own or in groups, seek assistance from parent-volunteers, and talk with their teachers. Ms. Smith modified her classroom for Student. She removed some of the decorations and students' work that were displayed to lessen visual distractions. She covered distracting items, such as the computer. Student has a work table in the corner of the room that is arranged to be less distracting for him. He has a spot on the rug for "circle time," and has an assigned place at a group work table. Mrs. Smith has tried to include Student in the classroom activities.

6. Student's attention span is very limited. He requires direct, physical prompts to get him to engage in most activities. Ms. Smith has seen no evidence that Student is mimicking the behavior of the other students in the class. Student does not seem to understand his routine or class schedule. He has shown a limited ability to socialize with other children. Student is able to match colors and solve simple puzzles. He is able to trace the letter "M" on sand paper. Student can make marks with a crayon when it is placed in his hand, but he is unable to pick up a crayon on his own. The other students in the classroom gain some benefit from Student's participation in the classroom.

7. Student's presence in the class adversely impacts Ms. Smith's ability to teach the other students. She needs to spend time with Student's aide and the itinerant special education teacher to develop activities for him. He disrupts the class when he runs away from his activity to do something that interests him more, such as playing with the computer or television. On at least one occasion, he scratched a student who was trying to play with him. Ms. Smith appeared genuinely concerned about Student as she expressed frustration that his academic and non-academic needs are not being met in her classroom.

¹ PECS is a program designed to develop early nonverbal symbolic communication.

² The District proposes reverse mainstreaming by having a general education peer come into the Victor SDC to participate in activities with Student, and gradually increasing the number of general education peers as appropriate.

8. Bryna Siegel, Ph.D., Director, Autism Clinic, Children's Center, Langley Porter Psychiatric Institute, Department of Psychiatry, University of California - San Francisco, evaluated Student in May 2005 pursuant to an agreement of the parties. Dr. Siegel has researched and worked in the area of autism for 20 years. She has assessed about 3,500 children for autism spectrum disorders and has published several books and numerous articles in peer-reviewed professional journals in the field. Dr. Siegel evaluated Student to provide recommendations concerning an appropriate educational program. She diagnosed him with autistic disorder and moderate mental retardation.³ She determined that Student was functioning comparable to a typical 12 to 18-month-old child.

9. Dr. Siegel's testimony is highly credible and is deserving of significant weight. She is an expert in the field of autism spectrum disorders, including their evaluation, diagnosis, and treatment. She has qualified as an expert witness in over 60 administrative hearings and court proceedings and has testified equally on behalf of parents and school districts.

10. Dr. Siegel recommended that Student be in a small SDC with a structured learning environment that emphasizes visual learning skills. The curriculum must be strongly visually-based, using visual schedules, visual recipes, and visual incentives. His education should be geared towards developing functional skills so that he will be able to engage with and function in the world. She recommended that Student have a one-on-one aide to keep him focused on his activities and address other behavioral issues. Dr. Siegel also recommended that Student participate in a structured after-school program with a normal peer group of diverse ages so that he can learn to interact with peers who are not family members. She specifically recommended that Student not be in an inclusive setting because he is unable to comprehend it or learn from it.

11. Dr. Siegel observed the Victor SDC after she prepared her recommendations and determined that it was consistent with them. She also observed Student's general education kindergarten at Reese. Dr. Siegel believes that the Reese class is inappropriate for Student because he does not have the basic skills to benefit from it. Student is unable, due to his autism, to learn by imitating those around him. According to Dr. Siegel, a full inclusion setting would be detrimental to Student.

12. Father relied upon advice he received from Dr. Goldberg, one of Student's treating physicians, who recommended Student be placed in a regular kindergarten, with an aide if necessary. Dr. Goldberg opined that a special education placement was not appropriate for Student because research showed that if a child remains too long in a special education classroom, it becomes very difficult to revert the process and learn in a typical way. Dr. Goldberg's opinion is not deserving of much weight. Dr. Goldberg did not testify.

³ Dr. Siegel determined that Student was functionally in the moderate to severe range of mental retardation. However, she conservatively diagnosed him with moderate mental retardation because it did not make a difference in the educational recommendations she made. Father does not believe that Student has mental retardation.

There is no evidence indicating that Dr. Goldberg legally qualifies as an expert in the treatment of autism or autism spectrum disorders.

LEGAL CONCLUSIONS

1. A child with a disability has the right to a free appropriate public education (FAPE). (20 U.S.C. §1412(a)((1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State’s educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(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.)

2. A school district must 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 Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201.) The intent of the Individuals with Disabilities Education Act (IDEA) is to “open the door of public education” to children with disabilities; it does not “guarantee any particular level of education once inside.” (*Id.* at p. 192.) 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. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is required to provide an education that confers some educational benefit upon the child. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra*, 458 U.S. at p. 200.) In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. However, there were no allegations that the District failed to comply with any procedural requirements.

3. 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.)⁴ “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred

⁴ Although *Adams* involved an Individual Family Service 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. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), *supra*, 811 F.2d at p. 1314.)

4. The District, as the petitioner, has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (Nov. 14, 2005, No. 04-698) ___ U.S. ___ [2005 U.S. Lexis 8554].)

5. Based on Factual Findings paragraphs 4, 10, and 11, the Victor SDC meets Student's unique needs, is reasonably calculated to provide him with meaningful educational benefit, and constitutes a FAPE.

6. Having found that the Victor SDC constitutes a FAPE, it is not necessary to evaluate the alternative requested by Student's parents. However, based on Factual Findings paragraphs 5, 6, 10, and 11, it is clear that full inclusion in a general education classroom does not meet Student's unique needs and is not reasonably calculated to provide him with meaningful educational benefit.

7. A child with a disability must be, to the maximum extent appropriate, educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b).) In addition, a child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Ibid.*) Unless the IEP requires otherwise, a child with a disability must be educated in the school that he or she would attend if he or she were not disabled. (34 C.F.R. § 300.552(c).) Each child with a disability must participate with children who are not disabled in nonacademic and extracurricular services and activities, such as meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F.R. § 300.553.) The child's placement must be in the least restrictive environment (LRE), based on the child's IEP, and as close as possible to the child's home. (34 C.F.R. § 300.552(a)(2), (b)(2), (3).) When determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. (34 C.F.R. § 300.552(d).) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

9. When determining whether a placement is the LRE, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

10. Since the Victor SDC constitutes a FAPE and full inclusion in a general education does not, it is not necessary to determine whether the Victor SDC is the LRE for Student. However, based on Factual Findings paragraphs 4, 6, 7, 10 and 11, it meets this requirement as well. An analysis of the required factors clearly show that the Victor SDC is

the LRE for Student: the educational benefits of full time placement in a regular classroom are negligible at best; there is some non-academic benefit for both Student and the children in the regular classroom; Student's behavior has been disruptive to the classroom; and there is no evidence that cost is a factor.

ORDER

The District's offer to Student in the August 26, 2005, IEP of placement in the Victor SDC is a FAPE in the LRE for the 2005-2006 School Year and 2006 Extended School Year.

PREVAILING PARTY

Education Code section 56507, subdivision (d) requires s decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: December 27, 2005

JUDITH A. KOPEC
Administrative Law Judge
Special Education Division
Office of Administrative Hearings