

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

In the Matter of:

STUDENT,

Petitioner

OAH CASE NO. N 2005120247

v.

HAYWARD UNIFIED SCHOOL DISTRICT,

Respondent.

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on March 21, 2006, in Hayward, California.

Student's mother (Mother), represented her daughter, Petitioner (Student).

Laurie Reynolds, Attorney at Law, represented Respondent Hayward Unified School (District). Valarie Baugh, the District's Special Education Director, and Kris Vasser, the District's Compliance Officer, were also present.

The following witnesses were called: Mother, Kris Vasser, Valarie Baugh, Carrie Otsuka-Kirahara (Student's first-grade teacher, during the 2004-2005 school year), Pat Northam (Student's second-grade teacher), and Michelle Pierre (the District's speech and language pathologist (SLP)).

Oral and documentary evidence were received, the record was closed, and the matter was submitted on March 21, 2006.

ISSUE

Did the District's August 9, 2005, individualized education plan (IEP) offer of twice weekly 30-minute "pull-out" sessions of speech and language therapy (SLT) (to work on auditory comprehension and pragmatics), provided by the District's SLP in a small group of no more than 3 students, constitute a free appropriate public education (FAPE) for the 2005-2006 school year?

SUBISSUES:

1. Whether Student's removal from her general education class for the pull-out sessions would distract her to the detriment of her overall educational program?
2. Whether group sessions with the District's SLP are appropriate?
3. Whether Student is reticent to attend pull-out sessions with the District's SLP and/or has poor rapport with the District's SLP, which would render the IEP impractical?

FACTUAL FINDINGS

1. Student, who turned eight years old on March 26, 2006, is entitled to special education and related services as a child with a speech and language disability. She resides in the District and attended a general education class in the District. It appears that she was first determined to be eligible for special education and related services in May 2001.

2. The manifestations of Student's disability include difficulties in processing auditory information, reading comprehension, and writing. The parties did not disagree that Student's unique needs include remedial help in these areas, provided by a SLP.

3. In school year 2004-2005, Student's educational program consisted of a first-grade general education class with similar pull-out SLT sessions as those now proposed by the District. SLP Michelle Pierre provided the SLT. Ms. Pierre had worked with Student from March until June 2004 in the previous school year (presumably Student's kindergarten year). In October 2004, Mother removed Student from SLT, asserting that Student failed to "connect" with Ms. Pierre.

4. During the 2004-2005 school year, Ms. Pierre worked with Patricia Northam, Student's first-grade teacher, as Ms. Pierre did with all classroom teachers, to ensure that Student would not be removed when the teacher felt Student should be in the classroom. Ms. Northam adjusted her class schedule so Student was pulled out for SLT during the class's language time, when the other students would be working on writing and oral language. Student never appeared reluctant to work with Ms. Pierre. She appeared happy and went to the pull-out sessions on her own without the necessity of Ms. Pierre's having to go retrieve

her. Ms. Northam observed that Student liked going to the SLT sessions, that she would “light up” when she went and return with a smile on her face. Ms. Northam felt that the SLT was very supportive for Student, because Student required help with her language skills, and the help was also beneficial in her reading and social skills.

5. Ms. Pierre holds a bachelor’s degree in speech pathology and audiology from California State University, San Jose, a Clinical Rehabilitative Services (Speech Therapy) credential, and a master’s degree in speech pathology and audiology. She has worked as a SLP for about 22 years, four years with the District, and 18 years with the East Side Unified School District. Her general duties included scheduling and providing SLT, conducting assessments, and making recommendations in consultation with teachers and parents. The children in Pierre’s group sessions are grouped by IEP goals. During her group sessions, she works with the whole group, to ensure every student is involved, knows when it is their turn, and stays on-topic. Ms. Pierre had worked with students on auditory composition “many times over the years.” During her work, she usually added vision and tactile experiences. She had also worked with students on pragmatics “many times,” and her students had made good progress when they worked step-by-step with her through the process. This involves her modeling things to the students, and then decreasing her role as the students are able to do what she has modeled. She uses visual cues with verbal questions, and eventually the students have been able to respond with complete sentences. As to the Student’s goal to work on “s” and “z” sounds, Pierre noted that it required a lot of drill, using items such as games and cards. The group dynamic is important – the activities may seem like playing, but substantial learning occurs. Overall, a student’s progress depends on the student’s efforts; progress involves collaboration between the SL therapist, the student, and the student’s parents.

6. The parties reached a settlement agreement on May 2, 2005, part of which called for an independent speech and language evaluation of Student. In June and July 2005, Kris Vasser, the District’s Compliance Officer,¹ facilitated an independent speech and language evaluation by Bonnie Groth of East Bay Therapy. Ms. Groth recommended SLT and an audiological evaluation of Student. Ms. Groth specifically recommended twice weekly SLT in 30-minute, small group (no more than three students), pull-out sessions during nonacademic periods. Vasser had no concerns about the evaluation; she believed it was very thorough, and done with expertise and experience.²

¹ Vasser received a bachelor’s degree in Recreational Administration from California State University, San Jose, in 1966, and earned another bachelor’s degree in Landscape Architecture from the University of California, Santa Cruz. She earned a master’s degree in English as a Second Language from the University of Southern California in 1969. She holds multiple credentials, including reading, English as a Second Language, and as a Resource Administrator. She worked for 18 years in the Pajaro Valley Unified School District as an elementary and high school-level Resource Administrator, and as assistant director of the SELPA – where she reviewed over 100 SLT evaluations, arranged private assessments, and worked on IEPs.

² The ALJ notes that the quality of the evaluation is not at issue.

7. An IEP team meeting was scheduled for August 9, 2005. Mother did not attend. IEP team members who did attend included Ms. Vasser, Ms. Groth, the District's Special Education Director Valarie Baugh, and Carrie Otsuka-Kirahara, Student's second-grade teacher. The team reviewed the Groth evaluation, and developed a program including goals and objectives for Student. The IEP developed essentially offered Student what Groth had recommended – twice weekly SLT in 30-minute, small group (no more than three students) sessions (to work on auditory comprehension and pragmatics), as well as an audiological consult. Ms. Baugh, who has been working on this matter for about three years and was familiar with Student's previous IEP, believed the IEP team recommendation was appropriate, particularly since it was based on the independent evaluations. If a student was not reaching his or her goals and objectives, the District would hold an IEP team meeting to determine the reason, and to re-write the goals and objectives. Ms. Otsuka-Kirahara testified at the due process hearing, and established that she had "no concerns" with Student being pulled out of her class for SLT, that she believed the SLT would have helped Student, and that she had no reservations about Ms. Pierre providing the SLT.

8. Ms. Vasser sent a copy of the IEP to Mother, and called Mother to tell her to expect the documents in the mail. The Mother twice left voicemails for Vasser stating that she did not want District services for the Student's potential audiological needs, that she wanted or would obtain a private evaluation, and that she would not sign any District documents. Mother asked the District not to pull the Student out of class during academic sessions, so the District agreed to adjust the schedule so that the pull-out sessions would occur during nonacademic sessions such as music or art, and the District planned to rotate the pull-out sessions so that the Student would only miss one non-academic subject per week. Mother asked the District not to pull the Student out of class at any time during the school day. This was impossible, because Ms. Pierre only worked during the school day.

9. Mother never consented to the District's offer. As a result, the SLT offered by the District was not provided to Student. Mother talked to Student's teacher, the school principal, and to Ms. Baugh. Mother removed the Student from the District's school on February 14, 2006. At the due process hearing, Mother explained that she removed her daughter because she believed Student had "no future in the District." She would like District to provide Student with SLT, using another SLP, after school and in a setting other than a group session (presumably individual therapy).

10. There was no evidence presented that the use of pull-out SLT sessions would be distracting or otherwise detrimental to Student's educational program. There was no evidence from which to infer that the small group environment offered by the District was inappropriate for Student. There was no evidence that Student would be reluctant to attend the SLT sessions or that there is a lack of rapport between Student and Ms. Pierre. In fact, during the time that Student dealt with Ms. Pierre in previous pull-out sessions, Student demonstrated by her demeanor that she enjoyed the sessions with Ms. Pierre. Student's first-grade teacher observed the benefits that Student derived from the pull-out sessions and Student's second-grade teacher approved reinstating the sessions in the manner offered in the contested IEP.

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 and related services, 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.) Speech and language pathology, as well as audiology services, are among the “supportive services” included in “related services” that “may be required to assist a child with a disability to benefit from special education.” (20 U.S.C. § 1401(26)(A).)

2. 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.” (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 192 (*Rowley*).) 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].” (*Id.* at p. 201.) Hence, 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. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; see also *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d. 877, 890.) Rather, a school district is simply required to provide an education that confers some educational benefit upon the child. (*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.)³ “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 by the parents. (*Gregory K., supra*, 811 F.2d at p. 1314.)

³ 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).

4. Based on Factual Findings 1 through 10, the District's offer of small-group SLT was designed to confer some educational benefit to Student.

5. Pull-out SLT sessions may be appropriate, and constitute a FAPE, for a particular student. (See *Zasslow v. Menlo Park City School Dist.* (N.D. Cal. 2001) 101 LRP 1354, 35 IDELR 244, *aff'd*, *Zasslow v. Menlo Park City School Dist.* (9th Cir. 2003) 103 LRP 8100, 38 IDELR 187.) Based on Factual Findings 1 through 10, pull-out SLT sessions were appropriate for Student.

6. Business and Professions Code section 2530.2, subdivision (i)(2), provides, in pertinent part:

The supervising speech-language pathologist employed or contracted for by a public school may hold . . . a valid, current, and professional clear clinical or rehabilitative services credential in language, speech, and hearing issued by the Commission on Teacher Credentialing For purposes of this paragraph, a "clear" credential is a credential that is not issued pursuant to a waiver or emergency permit and is as otherwise defined by the Commission on Teacher Credentialing.

Based on Factual Finding 5, Pierre was a properly qualified SLP.

7. Based on Factual Findings 1 through 10, and Legal Conclusions 4 through 6, the District's offer of twice weekly SLT in 30-minute, small group (no more than three students), pull-out sessions (to work on auditory comprehension and pragmatics), as well as an audiological consult, was designed to meet the Student's unique needs, was reasonably calculated to provide the Student with meaningful educational benefit, and constituted a FAPE.

8. The Student, as the petitioner, has the burden of proving her contentions at the hearing. (*Schaffer v. Weast* (2005) ___ U.S. ___, 126 S.Ct. 528, 537, 163 L.Ed.2d 387.)⁴ The Student did not meet her burden in this matter.

ORDER

The District's offer to the Student in the IEP dated August 9, 2005, of twice weekly SLT in 30-minute, small group (no more than three students), pull-out sessions (to work on

⁴ Justice Stevens stated in his concurring opinion in *Schaffer*, *supra*, 126 S.Ct. at page 537:

I have, however, decided to join the Court's disposition of this case, not only for the reasons set forth in Justice O'Connor's opinion, but also because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute.

auditory comprehension and pragmatics), as well as an audiological consult, was a FAPE for the 2005-2006 School Year.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on the sole issue in this matter.

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: April 21, 2006

JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings