

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

In the Matter of:

STUDENT,

Petitioner,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2007110823

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on March 24 – 28, and April 2, 2008, in San Diego, California.

Eric Freedus, Esq., represented the Student (Student) at the hearing. Student's mother and father were present during the hearing. Student was present for part of the hearing and testified at the hearing.

Sarah Sutherland, Esq., of Miller Brown & Dannis, represented the San Diego Unified School District (District) at the hearing. Phyllis Trombi also appeared on behalf of the District.

Student's due process complaint was filed on November 29, 2007. On January 16, 2008, the parties stipulated to a continuance of the hearing. OAH issued an order granting the continuance on January 17, 2008. The matter was taken under submission at the close of the hearing on April 2, 2008.

ISSUES

Did the District's proposed February 2007 IEP deny Student a free appropriate public education (FAPE) in the following respects:

- 1) The District failed to develop and offer an appropriate placement with services in the area of occupational therapy (OT); and
- 2) The District failed to develop appropriate goals to address OT needs.¹

FACTUAL FINDINGS

1. Student is a nine-year-old girl who suffers from a genetic disorder involving partial deletion of chromosome 13q. This disorder causes her to have, among other things, cognitive and motor difficulties. Student has received special education services from the District for many years. Student also has attention issues due to her disability and takes medication to help with those issues.

2. Prior to the proposed February 2007 IEP that is at issue in this case, Student's eligibility category for special education services had been "mental retardation." Although Student's parents had agreed to the IEPs prior to February 2007, they had never been happy with the mentally retarded designation. Based on the results of the District's triennial assessment conducted in November 2006 through February 2007, the District staff in the proposed February 2007 IEP recommended changing Student's eligibility category to "other health impairment" (OHI). The staff felt it better described Student's situation. Student demonstrated the limited strength, vitality or alertness due to a chronic or acute health problem characteristic of an OHI classification.

3. While Student was being educated in the District's program, she made slow but steady progress. Student began the 2006-2007 school year in a general education classroom with a one-to-one aide to provide support. Because of Student's cognitive limitations, it was necessary to modify the curriculum for her, and her aide provided prompts and assistance to Student throughout her school day. During the 2006-2007 school year, the District provided Student with designated instruction and services (DIS services) in speech and language, OT, adaptive physical education (APE), and vision therapy. In November 2006, the District added music therapy DIS services.

4. Student does not contest that she made progress in the District's educational program and does not dispute that the District's February 2007 IEP offer would have enabled Student to gain educational benefit. Instead, Student contends that the District failed to address Student's unique needs in the area of OT, in particular Student's sensory needs. Student does not take issue with the amount of OT offered in the IEP. Student's disagreement with the proposed IEP relates to the focus of those OT goals and services. Student believes the OT goals and services should have focused on foundational sensory motor skills rather than the higher level skills targeted in the IEP. Student also contends that

¹ There were additional issues in Student's initial due process hearing request, but Student withdrew those issues during the hearing. Student also stipulated that the reference to "placement" in issue number one solely relates to OT and is not a challenge to the proposed location for Student's education in the District's IEP offer.

the goals relating to gross motor skills were not appropriate to address Student's sensory motor needs because they were APE goals, not OT goals. Student contends that the IEP should have contained OT goals relating to posture and sensory regulation. In order to offer a FAPE, an IEP must contain goals and services designed to meet the needs of the child that result from the disability to enable the child to be involved in and make progress in the general education curriculum.

5. The concerns of Student's parents regarding Student's sensory needs arose during the summer of 2006. In addition to the DIS services Student received from the District, Student's parents provided after-school services for Student, including but not limited to, private OT services, academic tutoring, and speech language services. Some of these services were paid for by private insurance and some by Student's parents directly.

6. In approximately June 2006, Student's parents hired Ann Bass, an educator with an extensive background in special education of the mentally retarded, to provide after-school tutoring to Student. Bass met with Student either once a week or twice a week between June 2006 and March 2007. As Bass worked with Student, she gradually grew concerned that Student was not making the amount of progress Bass believed Student should have been making, given Student's cognitive level.

7. Bass also provided tutoring services for another special needs child, unrelated to Student. That other child was being tested for sensory disorders. When Bass compared that child to Student, Bass wondered if Student had sensory issues that were affecting her academic progress. Bass mentioned her concerns to Student's parents. Student's parents also learned about sensory disorders from a friend of the family who was an educator.

8. On August 11, 2006, Student's mother sent an email to Susan Kroviac, Student's case manager and resource teacher. The email stated in part:

Third, we completed her ABR hearing test and [Student] has no hearing problems so we can put that question to rest. The test was done with the most up-to-date technology available. Because we now have a definitive answer to the hearing issue, I believe that the reason for other challenges is due to sensory issues. [Student's family and family friends] just recently spent a week together in Mammoth and [the friend of Student's mother] got to see first hand what I was speaking about so I have copied her on this email so that she can give some input on the subject. Dave and Wendy have confirmed they always believed this to be an issue as well. We have never addressed this in her IEP before and I think it needs to be addressed now.

The "Dave and Wendy" mentioned in the email referred to the private occupational therapist and speech language therapist who worked with Student. In the email, Student's mother requested an IEP meeting in September to discuss these issues.

9. On September 27, 2006, Student's IEP team met at the parents' request. Ann Bass attended that meeting and mentioned her concerns about a possible sensory disorder. The District's occupational therapist Glenn Mejia told her that the District did not see any sensory issues which affected Student educationally. The IEP team agreed that the District would fund vision therapy services for Student provided by an NPA provider. The IEP team also discussed the possibility of adding music therapy as a DIS service for Student. On November 15, 2006, another IEP team meeting was held to review the music therapy assessment and add music therapy DIS services to Student's IEP.

10. Student's parents requested that the District conduct an early triennial assessment of Student. The District agreed to do so. Between November 2006 and February 2007, the District conducted a triennial assessment. The assessment was comprehensive, and included cognitive, achievement, speech language, OT and APE assessments. Student has not raised any challenge to the validity of that assessment in this due process case.

11. Glenn Mejia conducted the OT portion of the assessment in January and February 2007. Mejia had been providing occupational therapy services to Student since September 2006 under Student's IEP. As part of his assessment he reviewed Student's records, spoke with District staff, including Student's one-to-one aide and Student's resource teacher, observed Student in the classroom, and assessed Student using the Occupational Therapy Progressive Assessment of Student Skills (OT-PASS). Mejia did not talk to Student's parents as part of his assessment, although he did review and respond to an email from Student's mother regarding Student's sensory issues, as discussed in Factual Findings 14 – 16 below.

12. During his assessment, Mejia found that Student had OT needs related to handwriting and following multi-step directions. He observed behaviors by Student that related to a sensory processing deficit, including but not limited to, problems with taking directions, problems with her handwriting and problems with using classroom tools. Mejia determined that Student had sensory needs that affected her education. The District's assessment report concluded that "Secondary to concerns in written language and sensory processing, Occupational Therapy services continue to provide a necessary benefit to [Student]." The report recommended that the IEP continue occupational therapy services at 16 hours per year.

13. Student's APE teacher conducted an assessment of Student's gross motor skills as part of Student's triennial assessment. She assessed Student using the District's "Primary Motor Evaluation," conducted classroom observations and reviewed Student's records. Her assessment covered the areas of body image, balance, both static and dynamic, locomotor skills, visual motor control, including ball handling skills and bilateral coordination/motor planning, and muscular strength. The assessment concluded that Student displayed gross motor delays in the areas of balance, locomotor skills, visual motor control, and muscular strength and fitness. It was recommended that Student receive APE services "with emphasis on all areas of need including functional game skills."

14. On January 16, 2007, Student's mother sent an email to Student's general education teacher, resource teacher and the school psychologist. Student's mother provided a list of 16 behaviors, some or all of which she believed were sensory issues for Student that her family friend helped her to categorize while they were vacationing in Hawaii. These included: 1) pulling on her sleeves and unraveling the cloth; 2) hoarding items such as pens and pencils; 3) collecting rocks; 4) breaking crayons; 5) refusing to eat meat; 6) refusing to sleep in her bed – sleeping on the floor with covers over her head; 7) humming when she was playing with her dog or stuffed animals; 8) placing her hand on her genitals; 9) dislike of things in her hair; 10) dislike of washing machine; 11) fear of car wash; 12) sensitivity to loud noises (such as loud talking and bells); 13) likes loud music; 14) always running around the house without clothes on; 15) grinding her teeth; and 16) fear of ants.

15. The email from Student's mother went on to state:

[The family friend] tried brushing [Student's] arms with a brush and Student told her that felt good and it seemed to help her. But we didn't do it long term. Since [the family friend] is very well in tune with this stuff and she was able to observe all of this over the break I felt much more validated. These issues are going to have a big impact on [Student's] social ability – especially going into 3rd grade where peer acceptance becomes a whole different level. FYI...[Student] doesn't logically get that you can't do many of these things in public, like hand on private spot in public or taking off clothes. Many of these issues have been going on for a while. Unfortunately, I don't know how to get help for them.

16. Student's resource teacher sent a reply email that she would forward the email to Mejia. She did so, and Mejia responded to Student's mother by email. He explained that some of the issues listed by Student's mother were "sensory" type behaviors. Of the sensory behaviors reported by Student's mother, the only one he observed in a school setting was Student tugging at her sleeves. He made suggestions to Student's mother for techniques she could use to address these behaviors at home. Student's mother did not contact Mejia to discuss his response, and they did not exchange any further emails on these issues.

17. Student's private OT Wendi Wert sent Student's mother a fax on February 12, 2007, the day before the first of the February 2007 IEP meetings, with an assessment and update regarding Student's private OT sessions. Wert's comments regarding Student's abilities were very similar to what Mejia and the District's APE teacher found during the triennial assessment – Student had difficulty with things such as handwriting, bilateral coordination, and jumping jacks.

18. With respect to sensory processing, Wert found that Student's level of arousal affected her learning and development. Depending on her level of arousal, Student's performance on the same task would differ at different times. Student had difficulty tracking with her eyes and "lacks the ability to grade her movements during play." Her biggest

concern was Student's ability to consistently remain focused during activities. Wert noted that "sensory input does not always make any significant changes in her level of arousal."

19. The evidence does not support a finding that Student's mother provided a copy of Wert's fax to the IEP team either before or during the two IEP meetings in February 2007. During the hearing, Student's mother could not recall whether she provided a copy to the IEP team in February 2007. She explained that she wanted the fax for herself, because Wert was ill and could not be at the meeting. Mejia testified that the first time he ever saw Wert's fax was shortly before the due process hearing in 2008.

20. Student's IEP team met on February 13 and February 23, 2007, to review the triennial assessment results and draft a new IEP for Student that incorporated those results. Based on his assessment of Student, Mejia drafted two OT goals for Student in the proposed February 2007 IEP. The first goal related to Student's handwriting and the second involved following two to three step directions. Mejia chose these goals because they focused on educational skills that would impact Student's performance in the classroom. In prior IEPs, Student had an OT goal involving the use of scissors. Mejia did not include a goal relating to use of scissors in the February 2007 proposed IEP because Student had met her scissors goals from the previous IEP and his assessment indicated that she no longer needed an IEP goal to work on that skill.

21. In addition to the OT goals in the proposed IEP, the IEP contained APE goals to help Student work on gross motor skills, bilateral coordination, motor planning and playground skills. These goals were designed to help Student work on skills that she needed to function in a school environment, such as doing jumping jacks and dribbling a ball while walking.

22. The IEP proposed that Student be placed in a non-severe special day class (SDC) with special accommodations and modifications including modified curriculum, modified tests, directions given in a variety of ways, reduced paper/pencil tasks, repeated review/drill, shortened assignments, increased verbal response time, preferential seating, extended time for completing assignments, extended time for completing tests, and the assistance of a peer buddy.² Student's proposed DIS services included speech language therapy, APE of 16 hours per year, OT of 16 hours per year, music therapy and vision therapy. During the meeting, Lyna Dyson, Student's NPA vision therapist, expressed concern that Student was not making the progress in vision therapy that she should have been making and raised the possibility of problems with Student's primitive reflexes. Ann Bass again raised the possibility of sensory issues.

² The suggestion to move Student from her general education setting to an SDC was made, in part, based on the parents' concern that Student was not making sufficient educational progress in the general education setting and their desire to see Student in a setting that had a lower pupil-to-teacher ratio. Student's due process request filed on November 29, 2007, initially alleged that the District's IEP failed to offer an appropriate placement to Student, but Student withdrew that allegation on the first day of the hearing.

23. Student's parents did not agree to the February 2007 proposed IEP. On March 7, 2007, Student's parents gave written notice to the District that they would be unilaterally placing Student in a private school and seeking reimbursement from the District.

24. On March 16, 2007, the District responded by letter explaining that the District believed the February IEP offered Student a FAPE and giving the parents notice of their right to file for a due process hearing.

25. In approximately April 2007, Student began attending Sierra Academy, a non-public school (NPS) certified by the State of California. Student continued to attend Sierra up to and including the time of the hearing. Student's parents pay for her to attend Sierra. The District has never funded Student's Sierra placement.

26. As stated in Legal Conclusion 5 below, an IEP is considered a "snapshot" in time. A district is only required to offer a program which will meet the unique needs of the student which the district knew or should have known at the time of the IEP meeting. As stated above in Factual Findings 5 – 22, as of the February 2007 IEP offer, the District had received concerns from Student's parents and some of Student's private providers that Student had sensory issues. The District addressed those concerns by conducting an early triennial assessment, including an OT assessment. The OT assessment found that Student had sensory needs. The District addressed those needs through OT and APE goals in the IEP, DIS services, accommodations in the classroom, and modifications to the curriculum. Glenn Mejia believed the February 2007 IEP was sufficient to meet Student's sensory needs.

27. Student relies primarily on the testimony of its OT expert Erin Schwier and an assessment conducted by a company called School Options to prove that the District's February 2007 IEP did not address all of Student's OT needs.³ Although the District did not have the benefit of either the School Options assessment or Schwier's opinion during February 2007, Student contends that these two things are relevant to show what Student's needs were in February 2007, and how the District failed to recognize and meet those needs. Student contends that Student's needs did not change between February 2007 and April 2007, so the information from April 2007 is relevant to this case. Even if Student is correct that information from April 2007 could be relevant to the District's IEP in February 2007, Student has still failed to meet her burden of showing that the District's February 2007 IEP failed to meet her needs. As will be explained below, neither the School Options assessment nor Erin Schwier's opinion is persuasive regarding Student's unique needs in February 2007 and the proper way to address those needs.

³ Mark Wilson, the occupational therapy assistant who worked with Student at Sierra, also testified at the hearing. However, Wilson is a certified occupational therapy assistant, not a licensed occupational therapist, and he worked at all times under the supervision of Schwier. While his testimony is relevant to show his observations of Student's conduct, he does not have the expertise of a licensed occupational therapist, and his opinions regarding Student's educational needs carry less weight than those of the licensed occupational therapists.

28. In April 2007, Student's parents hired School Options, a private occupational therapy and educational consulting service, to conduct an occupational therapy assessment of Student. Occupational therapists Laura Davidson and Chris Vinceneux conducted the assessment on behalf of School Options.⁴ Davidson and Vinceneux relied on input from Student's mother, a records review, and their own observations in preparing the report. They also administered the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition (BOT-2) to Student. They did not speak to any of the District personnel in connection with their assessment, nor did they observe Student in a school environment.

29. School Options determined that Student had significant difficulties with sensory processing and sensory motor foundation skills. Student also had problems in the areas of reflex integration, postural reactions, postural stability, organization and endurance, vestibular, proprioceptive, auditory, and multisensory processing, spatial and temporal organization, bilateral integration, motor planning, sequencing, grading and timing of movement, body awareness, auditory motor integration, and visual motor integration. They found that Student showed specific difficulties in several areas of sensory processing, in particular in the categories of sensory registration, modulation, defensiveness, and integration. Their report stated that: "These deficits have and are interfering with proper development and functioning in the school, social, and home environments, with impairments in the areas of arousal modulation, self regulation, attention, motivation, organization, motor skills, and overall learning."

30. The School Options assessment report recommended three weekly OT sessions for Student of one hour each for at least 12 months. The report stated: "Particularly important will be [Student's] participation in activities to address primitive reflex integration and the development of automatic postural reactions."

31. Primitive reflexes refer to reflexes that an infant has or develops very early as a precursor to development of true sensory motor skills. For example, an infant's reflex of extending its arm when its head is turned is a precursor to higher skills such as hand-eye coordination. Normally, as a child develops true sensory motor skills, these primitive reflexes are integrated into the skill and disappear. The theory behind primitive reflex integration therapy is that if a child still exhibits these primitive reflexes, the child must be taught to integrate these primitive skills into higher level skills or the primitive reflexes will interfere with the child's learning. For example, if a child still automatically extends her arm when she turns her head, she could lose her place when copying information from a board in a classroom.

32. Sierra Academy did not conduct a formal OT assessment of Student. Instead, Erin Schwier, the occupational therapist at Sierra, and Mark Wilson, her occupational therapy assistant, relied upon the School Options assessment and their own observations in providing services to Student. Schwier agreed with the findings in the School Options'

⁴ Neither Davidson nor Vinceneux testified at the hearing, but their assessment report was admitted into evidence.

assessment. She explained that the behaviors observed by School Options and Student's mother indicated that Student had significant sensory needs. Those needs could interfere with Student's ability to sit still and attend in class, to organize and perform academic tasks, and to focus on the task at hand. In addition to what they read in the School Options report, Schweir and Wilson observed many behaviors by Student that indicated sensory deficits, such as a tendency to trip and bump into things.

33. Sierra drafted its own IEP for Student, with occupational therapy goals including: 1) Student will complete a five station obstacle course; 2) Student will "demonstrate the ability to hold prone extension extension/supine flexion core stabilization, positions for 30 seconds on 4/5 trials..."; 3) Student "will demonstrate the ability to perform 4 bilateral jump activities using fair reciprocation of upper and lower extremities, 4/5 trials..."; and 4) Student "will demonstrate understanding of how her 'engine' is running in the classroom by matching her verbal response to the observed behavior on 4/5 trials with minimal cues...."

34. According to the Sierra IEP, the first OT goal was designed to address the area of need of "motor planning and registration of proprioceptive input." The second goal was designed to address "posture reactions and body awareness." The third goal addressed bilateral coordination, and the fourth goal addressed "sensory integration/self regulation."

35. Although Schwier and Wilson worked for Sierra Academy, their after-school OT services for Student were not included in the tuition price paid for by Student's parents. Instead, Student's parents paid an extra fee each month for those services.

36. The approach Schwier and Wilson used to address Student's OT needs involved a process of teaching foundational sensory motor skills, rather than concentrating on higher level skills. They believed that the foundational skills would become the building blocks for higher level skills and ultimately for academic skills. Schwier criticized the District's IEP because it contained goals relating to specific tasks, such as dribbling a ball, instead of teaching the underlying skills that are the necessary building blocks of those tasks. For example, before Schwier would teach Student about dribbling a ball, she would have Student sit on a ball and work on hand-eye coordination tasks. Schwier believes that if only the higher level skills are taught, it is difficult for a child to generalize those skills. Generalization refers to the ability of the child to carry over the skills from one task or environment to another.

37. Schwier opined that the District's February 2007 IEP did not meet Student's needs because it contained no goal related to sensory regulation and no goal to address Student's postural needs. She believes that without these goals the District's IEP did not appropriately address Student's sensory needs.

38. The District's expert, Patti La Bouff, took issue with the theory and methodology used by School Options and Schwier. La Bouff is a licensed physical therapist, but she is well versed in matters relating to OT because of her extensive background in the

field. From 1993 to 1996, she was a committee member and co-author of the “Guidelines for Occupational Therapy & Physical Therapy in California Public Schools” published by the California Department of Education. In 2007, she served as a member of the state committee which updated that publication. Since 2002, she has worked as the Therapy Services Supervisor for the District, with duties that include supervision of both occupational therapists and physical therapists. She has an extensive background in physical therapy going back to the 1970’s and was trained regarding primitive reflex integration therapy.

39. La Bouff explained that the OT approach used by School Options and Schwier, in which foundational skills are taught first, has been described as the neurophysiological approach or the “bottom-up” approach. That approach was abandoned by the OT and Physical Therapy professional organizations in the 1990’s because there was no evidence for its efficacy. Students who spent their time trying to master the foundational skills never acquired the actual skills they needed to function in their education and in the community.

40. Instead of the neurophysiological approach, modern practice uses the “dynamic systems theory ecological model approach” (dynamic systems approach). That approach has three components – the child, the tasks demanded of the child, and the environment in which those tasks occur. The approach focuses on the supports and services necessary for a child to be successful in the tasks demanded in an educational setting. For example, the school therapists would teach necessary functional skills, such as handwriting and dribbling a ball, and work on the underlying skills necessary to perform those functional tasks. For preschool children, they often use the neurophysiological approach because those foundational tasks are the tasks a child needs to master at that age. However, once the child reaches elementary school, the focus shifts to the higher level skills the child needs to navigate the school environment.

41. Ms. La Bouff’s testimony is persuasive on this issue. La Bouff has been in practice for over 30 years, long enough to see the efficacy of both the neurophysiological approach and the dynamic systems approach. She was trained at a time when the neurophysiological approach was still widely used in the profession, and she was in practice when it was abandoned. She helped to set the state standards for occupational therapists and physical therapists that are used in the schools today and recently helped to update those standards. Schwier, by contrast, received her Bachelor’s Degree from San Diego State University in 1999 and her Doctorate from the University of Southern California in 2003. All of Schwier’s lecturing and writing in the field has been within the last five years.

42. La Bouff’s opinion was supported by the testimony of Glenn Mejia and Torrie Cababa. Mejia has worked as an occupational therapist since 1999, and had worked with Student on approximately 11 occasions at the time he did his assessment. Mejia opined that the proposed February 2007 IEP was sufficient to meet Student’s sensory needs. His proposed OT goals focused on the skills necessary for Student to function in the classroom. Cababa, the APE teacher who assessed Student in the District’s triennial assessment and worked with Student in school, testified that the APE goals in the February 2007 proposed

IEP addressed bilateral coordination, visual motor control, and motor planning.⁵ She testified that the proposed IEP was sufficient to address Student's gross motor needs. As an APE teacher, Cababa is certified to work with special needs students on gross motor skills. She has worked in that capacity for the District for 14 years.

43. Mejia did not put a goal related to sensory regulation into the proposed February 2007 IEP because he did not believe Student needed it at the time. Student was not mature enough to benefit from such a goal in February 2007, and she had a one-to-one aide to support her in the general education environment. That aide could assist her with organization, staying on task and taking sensory breaks when necessary. With respect to the postural goal in the Sierra IEP, he did not believe it was an appropriate goal for an educational setting because it was not relevant to an educational skill.

44. Perhaps the most telling piece of evidence to support La Bouff's opinion comes from Student's own academic progress (or lack of progress) during her year at Sierra Academy. If Student's experts were correct that the District's failure to meet Student's sensory needs was interfering with her ability to make academic progress, her year at Sierra (with the intensive OT services using the neurophysiological approach) should have enabled Student to make significant academic progress. However, the evidence shows the opposite.⁶

45. Between April 2007 and the dates of this hearing in March 2008, Student participated in the Sierra program, with the additional OT services paid for separately by Student's parents. According to the testimony of Schwier, Wilson and Student's mother, Student made progress in her behaviors at school and at home. For example, Student no longer breaks crayons or tugs at her sleeves as much as she did the year before. She can sit up straight in her chair for a longer period of time and can now perform physical activities that require her to "cross the midline."⁷

46. However, the evidence shows that Student made little or no academic progress during her year at Sierra. In May 2007, Sierra's IEP reported that Student was reading at a kindergarten reading level (0.8 reading level). Teresa Keane, student's current classroom teacher at Sierra, testified that Student is still reading at a 0.8 level. By contrast, when Student was in the District's program, she made slow but steady progress in reading, moving

⁵ Student contends that only an occupational therapist can address sensory integration issues as a matter of law, so the APE goals in the February 2007 IEP could not address Student's sensory needs. As discussed in Legal Conclusions 16 – 20, Student's position on this issue is not well taken.

⁶ Evidence of progress after the date of the IEP in issue in a case is of questionable relevance because of the "snapshot" rule of examining IEPs (see Legal Conclusion 5). It is being used here solely to show the weakness of the opinions of Student's experts, which opinions are themselves based on events and observations that occurred after the IEP meeting.

⁷ "Crossing the midline" refers to a child's ability to cross from one side of her body to the other. For example, a child should be able to follow an object that moves from right to left across her field of vision with her eyes, without moving her head.

from a DRA 3 reading level in November 2006 to a DRA 6 level at the time of the February 2007 IEP.⁸ Student showed a similar lack of progress at Sierra in math. Mejia, who observed Student at Sierra in January 2008, noted that she had actually *regressed* in her ability to use scissors properly, and Mejia placed an OT goal related to scissors back in her proposed February 2008 IEP.

47. The parties dispute whether Student's complaint against the District involves a disagreement with the methodology chosen by the District to address Student's needs or a failure by the District to recognize those needs. As discussed in Legal Conclusion 12, as long as a district is addressing a child's unique needs, special education law does not restrict the methodology that a district may choose.

48. The evidence in this case supports a finding that the dispute between the opinions of the parties' experts is a dispute over methodology, not needs. Because School Options and Schwier relied upon the neurophysiological approach to OT, they found Student had sensory needs related to foundational skills. Mejia also found sensory needs in his assessment for the District, but his recommended goals and services focused on the functional skills required under the dynamic systems approach which the District used. Both Student's experts and the District found that Student had sensory needs which affected her education. However, their chosen methodology influenced their approach to those needs and the goals they felt that the school OT services should address.

49. However, even if Student is correct that the opinions of Schwier and School Options involved unique needs, not methodology, those opinions are still not persuasive to show a failure by the District to meet Student's needs. Their opinions are based on an outmoded approach to OT which was abandoned by the professional associations in the 1990's because it was not effective.

50. There are other problems with the School Options assessment. La Bouff and Cababa took issue with that assessment because the School Options occupational therapists administered the BOT-2 to measure Student's abilities. La Bouff has administered the BOT-2 in her practice and is familiar with the test. She explained that the BOT-2 is not designed to assess a child with Student's disabilities. The BOT-2 is a high level test of motor skills that is usually administered when a child appears to be typically developing but the teacher suspects there are disabilities. It is a standardized test with standardized directions. Because Student's disability makes it difficult for her to follow directions, that test should never have been used with her. Any test scores reported would not be valid. Cababa usually uses the

⁸ The DRA level refers to a reading assessment used by the San Diego Unified School District. The 0.8 reading level refers to the level given in the "Read Naturally" program used at Sierra. Because these are two different methods of measuring progress, comparing them might be like comparing "apples to oranges." However, it is not necessary to compare these two to determine Student's lack of progress at Sierra. Student started Sierra at 0.8 level in the Read Naturally Program used by Sierra and was still there a year later at the time of the hearing.

BOT-2 for children who are in fourth grade or older because it is a long test with many verbal directions. She believes it would not be appropriate for Student.⁹

51. Further, neither the School Options occupational therapists nor Schwier observed Student in her District placement or witnessed the behaviors she exhibited there. Their opinions are not sufficient to meet Student's burden of proving that the District failed to meet Student's sensory needs in the February 2007 proposed IEP.

52. The other evidence relied upon by Student to challenge the District's 2007 IEP is equally unpersuasive. Student claims that the District's conduct in connection with the *February 2008* IEP proves that the District's February 2007 IEP was inadequate. That contention is not well taken.

53. In February 2008, the year after the IEP in question in this case, Student's IEP team met for Student's annual review. Because Student was still attending Sierra Academy, several individuals from Sierra attended the meeting along with Student's parents and the District staff. Student points to four changes in the 2008 IEP that Student contends are significant: 1) the 2008 IEP added a sensory regulation goal calling for Student to choose sensory strategies to use in order to sustain focus in a school environment; 2) the IEP added a goal related to posture: "[Student] will independently orient herself physically to the task in front of her and maintain erect sitting posture 80% of the time during a 30 minute rotation..."; 3) the IEP added the occupational therapist as one of the "person(s) responsible" for the goal related to dribbling a ball; and 4) the IEP added the occupational therapist as one of the "person(s) responsible" to the goal related to jumping jacks. Student claims that the addition of these things to the 2008 IEP shows that they should have been done in 2007, and that the District's failure to include them in February 2007 denied Student a FAPE.

54. During the hearing, Mejia clarified that the sensory regulation goal was added in 2008 based on his observation of Student at Sierra in January 2008. He saw the teachers working with Student and liked the way the goal worked at Sierra. He felt it was important to have Student's IEP goal mirror the Sierra goal in case Student stayed at Sierra. However, he testified that Student did not have the maturity for such a goal in February 2007, and she would not have benefited from it at that time.

55. With respect to the postural goal, Mejia explained that he did not see any postural issues in February 2007 that were affecting Student's academic performance. The IEP team added the postural goal in February 2008 because of the suggestions of Schwier and Student's parents.¹⁰

⁹ Because the School Options' occupational therapists did not testify at the hearing, there was no testimony to explain why they chose the BOT-2 or to dispute La Bouff's and Cababa's opinions as to its propriety for Student.

¹⁰ The postural goal added by the District in the proposed February 2008 IEP was very different from the postural goal Sierra used. Sierra's goal worked on prone extension for Student to address the foundational skills underlying posture, while the District's 2008 goal dealt with the functional skill of Student orienting herself to a task and staying upright in a seat during class.

56. Mejia did not believe it was necessary for the occupational therapist to be added to the APE goals in 2007, because the APE teacher could take care of those goals. In 2008, the team asked if he could provide any information on those goals and he agreed that he could consult with the APE teacher. That was why the occupational therapist was added. He explained that even if a particular staff member is not mentioned in a goal, that staff member may still work on the skills underlying that goal with the child.

57. These four additions in February 2008 do not demonstrate that the February 2007 IEP failed to meet Student's needs. Student had aged a full year between IEPs. The difference in maturity between eight and nine years old is significant. While a self regulation goal may have been appropriate for Student in 2008, Mejia's testimony is persuasive that it was not necessary in 2007 due to Student's age and maturity level.

58. The evidence established that the postural goal in 2008 was added in cooperation with Student's parents and the staff of Sierra in the IEP process. There was nothing wrong with adding a goal because a child's parents and the outside experts believe it is important. Student had sensory needs, and a goal to address her posture would be proper. However, the District's actions do not prove that the lack of a goal the year before denied Student a FAPE. It is true that Mejia, on cross-examination, admitted that the goals were added in 2008 to address Student's needs. However, that does not mean those goals were essential to address educational needs to allow Student to access and benefit from her education in 2007. As stated in Legal Conclusion 22 below, there is nothing to stop a district from going beyond the basic floor of educational opportunity required by law.

59. The same is true for the addition of the occupational therapist to the two APE goals. An important part of the IEP process involves listening to the parents' concerns and addressing those concerns in the IEP. Student's parents disputed that the District's goals were sufficient to address Student's sensory needs. By having the occupational therapist consult on the APE goals, the District attempted to address those concerns. The District's action in doing so was in keeping with the cooperative spirit of the IEP process. It does not prove that the IEP a year before was inadequate. To the contrary, it proves the District's willingness to consider all opinions and modify the IEP to address the concerns of all the team members, including the parents.

60. Student has failed to meet her burden of showing that the District's proposed February 2007 IEP failed to develop appropriate goals to address her OT needs. Student has also failed to meet her burden of showing that the District failed to develop and offer an appropriate placement with services in the area of OT. There was no denial of FAPE.

LEGAL CONCLUSIONS

1. The Student has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. California defines “special education” to mean “specially designed instruction, at no cost to the parent, to meet the unique needs of the individual with exceptional needs....” (Ed. Code, § 56031, subd. (a).)

4. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child’s IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.) In the instant case, Student has not challenged any of the procedural components of the District’s February 2007 IEP. Instead, the focus is solely on the substantive goals and services.

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

6. As stated in Factual Findings 3 – 4 above, Student does not dispute that the District’s proposed February 2007 IEP was reasonably calculated to provide Student with educational benefit. The only element of FAPE at issue in this case is whether the proposed IEP addressed Student’s unique needs through goals and proper DIS services.

7. The California Legislature has clarified that a child’s “unique needs” relate to the ability of the child to access and benefit from education. For example, Education Code section 56345, subdivision (a)(2), states that an IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to: “Meet the needs of the individual that result from the disability of the individual to enable the pupil to be involved in

and make progress in the general education curriculum” and “[m]eet each of the other educational needs of the pupil that result from the disability of the individual.”

8. An IEP must also contain a statement of the special education and related services and supplementary aids and services that will be provided to enable the child: “To advance appropriately toward attaining the annual goals...to be involved in and make progress in the general education curriculum...to participate in extracurricular and other nonacademic activities” and “to be educated and participate with other individuals with exceptional needs and nondisabled pupils....” (Ed. Code, § 56345, subd. (a)(4).)

9. Education Code section 56363, subdivision (a) follows this educational focus:

The term “related services” means transportation and such developmental, corrective, and other supportive services (including...physical and occupational therapy...) as may be required to assist an individual with exceptional needs to benefit from special education....

10. As set forth in Factual Findings 10 – 22, there is no dispute the Student had sensory needs that affected her education. The District’s triennial assessment found sensory needs, and the District offered goals and services to address those needs in the February 2007 IEP. The parties dispute whether the goals and services offered by the District were appropriate to meet those needs.

11. As set forth in Factual Findings 10 – 22 and 38 – 43, the District addressed Student’s sensory needs through a combination of OT goals and services, APE goals and services, vision therapy, music therapy, and accommodations in the classroom. Student raises several challenges to the District’s offer of goals and services.

12. First, Student contends that the February 2007 IEP did not address the proper foundational skills that Student needed for her education. According to Student’s OT assessment from School Options and Student’s OT expert Erin Schwier, the District’s proposal was inadequate because it addressed higher functioning skills rather than the underlying skills that Student needed. As set forth in Factual Findings 27 – 48, the Student’s experts are disagreeing with the District on the methodology used. The District relies upon the dynamic systems approach to meet a child’s needs, while the Student’s experts rely on the neurophysiological approach. It is well settled that IDEA does not control a District’s discretion to choose an appropriate methodology to use to meet a Student’s needs. (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at pp. 207 – 208.)

13. Student, however, argues that the difference between the neurophysiological approach and the dynamic systems approach is not a dispute regarding methodology. Instead, Student claims that the foundational skills School Options found Student lacked are sensory integration needs that must be addressed in Student’s IEP. Student contends that

before one can look at methodology, one must first determine whether the offered program meets the Student's needs.

14. Even assuming that Student is correct that the issue involves needs and not methodology, Student has still not met her burden. As set forth in Factual Findings 49 – 60 above, Student's experts were not persuasive in their testimony that the sensory integration "needs" they described had to be remedied to allow Student to access her special education and gain academic benefit. Those experts' findings regarding Student's "needs" were based on their neurophysiological approach. Their testimony was persuasively refuted by the District's experts. Their testimony was also refuted by the evidence of how little academic progress Student made during her year at Sierra. If addressing the "needs" claimed by Student's experts would truly allow her to access and gain benefit from her education, she should have made academic progress during her year of receiving these services at Sierra. Instead, she made little or no academic progress at Sierra. The evidence does not support a finding that Student had sensory integration "needs" that were not recognized and addressed by the District.¹¹

15. Student's next challenge to the District's offer involves the manner in which the services were to be provided. Student contends that only an occupational therapist or occupational therapy assistant can address sensory needs, so the District erred by not having the occupational therapist involved with Student's APE goals in the IEP. Student's contention is not well taken.

16. Student relies on statutory and regulatory definitions to argue that only an occupational therapist can perform services to remedy sensory motor needs. In particular, Student relies upon the definition of occupational therapy set forth in California Code of Regulations, title 5, section 3065, subdivision (k)(1). That section defines occupational therapy to mean "the use of various treatment modalities including self-help skills, language and educational techniques as well as sensory motor integration, physical restoration methods, and prevocation exploration to facilitate physical and psychosocial growth and development." Student contrasts this with the definition of APE in subdivision (a) of that regulation which does not make reference to "sensory motor integration." Based on this language, Student contends that only an occupational therapist or occupational therapy assistant may assist a child with goals that relate to sensory motor integration.

17. Student is incorrect for several reasons. First of all, the regulation in question deals with certification requirements for nonpublic schools and agencies, not public school programs. The regulation begins: "To be eligible for certification to provide designated instruction and services for individuals with exceptional needs, nonpublic schools and agencies shall meet the following requirements...." (Cal. Code Regs., tit. 5, § 3065.) The

¹¹ Even if Student did exhibit additional sensory integration "needs" at home, that did not automatically require those needs to be addressed in an IEP. As one court recently recognized, "not every need of a particular child is the legal responsibility of the District." (*San Rafael Elementary School District v. California Special Education Hearing Office* (N.D.Cal. 2007) 482 F.Supp.2d 1152, 1161.) Instead, the child's school program "revolves around an individual's performance within the academic setting." (*Id.* at p. 1160.)

general definition of the practice of occupational therapy in the Business and Professions Code makes no specific mention of sensory motor integration. (Bus. & Prof. Code, § 2570.2, subd. (k).)

18. However, even if the regulation applied to public schools as well as nonpublic schools and agencies, Student has still not proven that only occupational therapists may deal with sensory motor needs for pupils in a public school. Although Student is correct that the law restricts the practice of OT only to licensed occupational therapists (Bus. & Prof. Code, §§ 2570.2, subd. (g); 2570.3), there is a broad exception for other individuals practicing within the scope of their licenses or credentials: “Nothing in this chapter [the Occupational Therapy Practice Act] shall be construed as preventing or restricting the practice, services, or activities of any of the following persons: (a) Any person licensed, certified, or otherwise recognized in this state by any other law or regulation when that person is engaged in the profession or occupation for which he or she is licensed, certified, or otherwise recognized.” (Bus. & Prof. Code, § 2570.4.)

19. The evidence at hearing showed an overlap in the training and practice of the various professions. For example, as set forth in Factual Finding 38, Patti La Bouff, a physical therapist, was trained regarding primitive reflexes and reflex integration. As set forth in Factual Finding 50, both APE teacher Cababa and the School Options occupational therapists were familiar with and administered the BOT-2 to children. As set forth in Factual Finding 42, an APE teacher is qualified to address a child’s gross motor needs.

20. Student has not met her burden of showing that the DIS services and goals offered in the February 2007 IEP failed to meet Student’s sensory needs. The IEP fully addressed Student’s problems with bilateral coordination, motor planning, gross motor skills, fine motor skills, and attention/comprehension to the extent necessary to enable Student to access the general curriculum and benefit from her special education.

21. Student’s final challenge involves the failure of the District to include certain goals in the proposed IEP and the failure to include the occupational therapist as a “person responsible” on the APE goals. With respect to the failure to include goals, Student contends that the District should have included goals relating to posture and sensory regulation in the February 2007 IEP. As stated in Factual Findings 27 – 60, Student presented no persuasive evidence to support the need for such goals in February 2007. Student relied upon two types of evidence to support Student’s claim that such goals were necessary – the testimony of Student’s expert Erin Schwier and the fact that the District added goals related to posture and sensory regulation in the 2008 IEP. Schwier based her opinion on the neurophysiological method of addressing OT needs, so her opinion is not persuasive. The District’s occupational therapist Glenn Mejia, who had worked with Student for approximately six months prior to the February 2007 IEP meetings, was persuasive in his testimony that Student did not have the maturity level in February 2007 to gain benefit from a sensory regulation goal. A year later, she did.

22. Mejia was also persuasive in his testimony that a posture goal was not necessary in February 2007 and was placed in the IEP in February 2008 in the spirit of compromise with the parents and the educators from Sierra. Mejia was added as a consultant on the APE goals in February 2008 for the same reason. There was nothing improper about the District's actions in changing its February 2008 IEP to address parental concerns. Parents are part of the IEP team, and a District is supposed to consider their input and the input of their experts. (See, e.g., Ed. Code, §§ 56341.1, subd. (a)(2); 56329, subd. (c).) The District's conduct in doing so in 2008 does not prove that the District's actions in 2007 were improper. It is true that Mejia, on cross-examination, admitted that the goals were added in 2008 to address Student's needs. However, that does not mean those goals were essential to address educational needs to allow Student to access and benefit from her education. A District is only required to offer the basic floor of educational opportunity (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at pp. 200 – 201), but there is nothing to stop a District from going beyond that floor. If a District does so, it certainly does not prove that a prior IEP which did not do so over a year before was inadequate. There was no denial of FAPE.

23. Because the District offered Student a FAPE in the February 2007 IEP at issue in this case, there is no basis for an award of compensatory education or reimbursement of expenses. (See Ed. Code, § 56175.) Therefore, there is also no need to address the District's contention that Sierra Academy was not an appropriate placement for Student.

ORDER

Student's request for relief against the District is denied.

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. In accordance with that section the following finding is made: The District prevailed on all issues in this case.

RIGHT TO APPEAL THIS DECISION

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

Dated: April 21, 2008



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