

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010020222

DECISION

Adrienne L. Krikorian, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 13, 2010, and April 14, 2010, in Los Angeles, California.

Student was represented by her Mother and Father (Parents). Parents were present at the hearing on both days and both testified. Student was not present.

Attorney Susan Winkelman represented Los Angeles Unified School District (District). Sharon Robertson, Due Process Specialist, was present on both days on behalf of District.

On February 3, 2010, Parents on behalf of Student filed a request for due process hearing (complaint). A continuance of the hearing was granted on March 23, 2010. At hearing, oral and documentary evidence were received. At the end of the hearing, a continuance was granted until April 30, 2010, to allow parties time to file closing briefs. Each party submitted closing briefs at which time the record was closed and the matter was submitted timely.

ISSUE

Did District deny Student a free and appropriate public education (FAPE) during the 2008-2009 and 2009-2010 school years by failing to provide Occupational Therapy (OT)?

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. Student is a four-and-a-half-year-old female who resides in the District with Parents. Student attends a special day pre-school aphasia program at an elementary school in the District. Based on concerns observed by Parents and Student's pediatrician, at the age of 20 months Student began receiving OT services with emphasis on sensory integration from her private health insurer and from Harbor Regional Center (Regional Center). When Student was three, the Regional Center stopped providing OT services. Student continues to receive medically-based OT through her private health insurer. She was first found eligible for special education at the beginning of the 2008-2009 school year. At the time of the hearing, Student was eligible as a student with speech and language disabilities.

First District OT Assessment on September 17, 2008

3. On September 17, 2008, Shan-ying Tsai (Tsai), school occupational therapist, conducted an initial OT assessment of Student on behalf of District. Tsai issued a report on her assessment of Student dated October 7, 2008.

4. Tsai has a bachelor of science degree in OT and a master's degree in OT with a specialization in developmental disabilities. Tsai became a registered and certified occupational therapist in 1983. She has been performing OT assessments on students since 1983. She was certified in pediatric neural development in 1988. In 1991, Tsai received a special certificate in sensory integration, which enables her to give a full sensory integration assessment of children. Tsai has been employed by LAUSD as a licensed occupational therapist since 1997. Tsai estimates that, in 2009, she performed approximately 200 OT assessments and reports for District. Her job duties for LAUSD include performing preschool OT assessments, preparing reports, and attending IEP meetings three-and-one-half days a week. She provides OT services to students in kindergarten through middle school one-half day a week.

5. Tsai's assessment of Student was based on a parent interview, YWCA day care program classroom observations, clinical observations, and an interview with Student's private health care occupational therapist. Tsai evaluated Student's skills in the areas of fine motor, neuromuscular, praxis and self-help, sensory modulation and organization of behavior, sensory processing, visual perception and visual motor. Most of Tsai's tests were non-verbal such that Student's speech and language disability did not impact Tsai's findings.

6. Tsai found Student's performance in the evaluated areas to be adequate, appropriate, and sufficient for Student to function in the school setting without the need for OT intervention or services. Tsai's testimony and conclusions were credible and persuasive.

October 8, 2008 IEP and December 18, 2008 IEP Amendment

7. District held Student's first Individualized Education Plan (IEP) meeting on October 8, 2008. The IEP team considered Tsai's report and found that Student had no areas of need in the area of occupational therapy. Parents reported at the meeting that Student still runs on her toes and falls frequently. During the meeting, the discussion of OT services was interrupted by a telephone call from the speech and language assessor, and Parents did not pursue further questions of Tsai regarding her OT report. District found Student eligible for special education under the category of speech and language disorder. Parents agreed with the District's proposed placement and goals, and only requested specific services in the area of speech and language.

8. On December 18, 2008, District convened an IEP team meeting to discuss District's offer of non-public agency/language and speech (NPA/LAS) services for Student. At the meeting, Parents raised their concerns about Student's sensory issues. Tsai's September 2008 OT report was reviewed by the team and discussed in detail. Parents disagreed with Tsai's findings.

Second District OT Assessment of April/May 2009

9. On April 23, May 7, May 14, and May 20, 2009, District occupational therapist April Espinosa (Espinosa) performed a second OT assessment of Student. She issued a report dated May 21, 2009.

10. Espinosa has a bachelor of science degree in OT. She is a State-licensed occupational therapist. Espinosa has worked for District as an OT since November 1999. Espinosa's primary responsibilities at District are to assess and screen students for OT, prepare treatment plans, order equipment, and collaborate with parents and teachers. She conducts OT assessments, prepares reports, and attends IEP meetings. Espinosa's primary caseload is with elementary school children. Espinosa has provided OT services to students at Student's elementary school for three years. She estimated that she had assessed 150 to 200 students for OT. Espinosa has assessed students with speech disorders, including aphasia, and she takes that condition into consideration when performing her assessments by administering tests that are non-language-based.

11. Espinosa based her assessment of Student on a review of Student's OT reports from her private insurance provider, student's school records, teacher interviews, multiple classroom-based and clinical observations, a review of Student's work samples, an analysis of a Sensory Behavior Inventory from Student's teacher, and reference to the Peabody Developmental Motor Scales. Although she attempted to interview Parents by leaving a message for them, she was unable to reach Parents to conduct an interview. Espinosa evaluated Student's skills in the areas of auditory stimulation, fine motor, gustatory-olfactory stimulation, motor planning/praxis, neuromuscular, proprioceptive stimulation, self-help, sensory processing/modulation, social interaction, tactile stimulation, vestibular stimulation, visual motor, visual perception, and visual stimulation. On the days she was routinely

scheduled at Student's elementary school, Espinosa also informally observed Student in the classroom.

12. Student's teacher, Mary Elizabeth Schilling (Schilling), did not report to Espinosa that she felt Student required OT services. Espinosa did not note any particular sensory issues during her assessment. She found that Student's school-based performance did not indicate any areas of need in the area of OT that would significantly impede her educational access and/or participation in the school environment. Espinosa's conclusions and findings were based upon her experience and personal observations and assessment of Student. Her testimony and conclusions were credible and persuasive.

May 21, 2009 IEP Amendment

13. The IEP team discussed Espinosa's report on May 21, 2009. Among those present were Parents, Schilling, and Espinosa. Parents requested OT services for Student to address sensory integration deficits identified by Student's private health care insurer's OT evaluation.

14. In Espinosa's opinion, a distinction exists between medically-based OT and educationally-based OT; the two are evaluated differently. In the case of medically-based OT, such as that received by Student through her private health care insurer, emphasis is often on motor movement and motor quality. However, school-based OT looks at whether or not Student can access and perform in the school environment, notwithstanding medically-based needs. Based on her experience and qualifications, Espinosa's opinion was credible.

15. Espinosa reported at the May 21, 2009 IEP meeting that Student did not demonstrate any sensory or motor deficits that impacted Student's performance in the school setting. Espinosa did not observe behavior from Student in the classroom that was consistent with Student's reported behavior outside of the school environment. Espinosa found that Student was capable of accessing her current educational program with classroom prompting. Parents disagreed with Espinosa's findings and requested an independent OT assessment.

District's Third and Independent OT Assessment of September 2009

16. In September 2009, District funded an independent OT assessment of Student by Pediatric Therapy Network (PTN), a provider selected by Parents. Mother was present during the assessment at PTN.

17. Occupational therapist Kherna Ablack (Ablack) issued a report dated October 2009. Ablack did not testify and no evidence was presented by either party regarding Ablack's qualifications. Ablack's report identifies Ablack as a licensed occupational therapist with a master of science degree.

18. Ablack's report was based on a parent interview, a teacher interview, classroom observations, the standardized test entitled Movement Assessment Battery for

Children – 2nd Edition, structured and unstructured clinical observations, and the standardized test entitled Sensory Processing Measure – Main Classroom & Home Form. Ablack concluded that Student demonstrated age-appropriate fine and gross motor skills that allowed her to successfully access her school environment. Ablack also found that, while Student demonstrated appropriate processing of sensory inputs at school, she also displayed some problems in the home environment that did not appear to impact her at school. She concluded that Student did not qualify for OT as part of her IEP. Ablack's methodology and findings were consistent with those of Tsai and Espinosa and, therefore, credible.

January 14, 2010 IEP Team Meeting

19. District held an amendment IEP team meeting on January 14, 2010. Parents, Schilling, and Espinosa were present. Espinosa reviewed and presented Ablack's report at the IEP meeting. Parents disagreed with Ablack's conclusions, specifically the results relating to balance. Parents expressed concern about Student's balance, and reported that she continued to fall at home, at school, and in the community. Parents communicated at the January IEP meeting that Student's safety in the community is of great concern to them. District declined to offer Student OT services at the January 2010 IEP team meeting.

Parents' March 29, 2010 OT Assessment by Therapy West

20. On March 29, 2010, Parents independently retained Therapy West to perform an OT assessment of Student. Licensed occupational therapist Melissa Tong (Tong) performed the assessments of Student. Tong, who has a master's degree in OT, is credentialed to work as an occupational therapist in school districts. Tong's report, which was prepared after Parents filed the Request for Due Process in this case, was not available to Student's IEP team at Student's January 14, 2010 IEP meeting.

21. At the time of her assessment, Tong was not aware that Student had been previously assessed for OT. Tong's assessment was based upon a sensory profile caregiver assessment prepared by Parents, and clinical observations and tests in a variety of settings. Because her assessment was performed during the school spring break, Tong did not interview Student's classroom teacher, she did not review District's prior OT assessments, and she did not observe Student in the school setting. Tong found that Student's performance on the Movement Battery Assessment for Children – 2 was below average and indicated significant movement difficulty. She found that Student had deficits in the foundational skills of organization of behavior, sensory processing and postural control. She found that Student had difficulty processing vestibular/proprioceptive information and modulating tactile input. She recommended that Student receive OT within a specialized clinic setting for six months, one to two hours per week utilizing sensory integration, developmental and play approaches.

22. Tong concluded based on her observations that, although Student might benefit from OT services in the school setting, she could not state so with certainty because she did not evaluate Student in the school setting or interview her classroom teacher.

Observations of Student by Student's Teachers and Parents

Mary Elizabeth Schilling

23. Schilling has been Student's classroom teacher at Student's elementary school since Student enrolled. Schilling has a bachelor of arts degree in liberal studies and a master of science degree in communication disorders. She is a licensed speech pathologist, has a lifetime Multiple Subjects credential, and is certified in clinical aphasia. Schilling has been employed by LAUSD since 1981.

24. Schilling was provided with copies of Student's initial preschool assessments in October 2008, when Student enrolled in Schilling's class at Student's elementary school. She was present at Student's IEP meetings held on December 18, 2008; May 21, 2009; October 8, 2009; and January 14, 2010.

25. Student's classroom consists of 13 students of mixed eligibility. Schilling observes Student at school on a daily basis, five days a week. The last time Schilling witnessed Student fall at school was in December. Schilling concluded at the time that Student fell because Student was not watching where she was going. Based on Schilling's daily observations of Student since October 2008, Student has no motor skills problems that are not common for her age. Student does not fall excessively, Student does not bump into things in the classroom, she does not have balance issues, and she does not have any fine motor skills issues. Student can stand up straight and walk, she writes her name when she wants to, she can use scissors to cut, she can catch and throw a playground ball and a bean bag, she can jump, and she can access playground equipment. Student allows teacher to brush her hair. Although she occasionally walks on her toes, Student will walk on her feet when prompted. Student cooperates with a harness car seat on the school bus, and has no problem with loud noises in the classroom.

26. In Schilling's opinion, Student has been able to and can function in the classroom without OT services. Schilling's opinion was credible because it was based on her personal observations of Student on a daily basis, and on her experience and qualifications.

Leona Tamayo

27. Leona Tamayo (Tamayo), who testified telephonically, is supervisor of Student's child care center at the YWCA in San Pedro. Tamayo received an associate of arts degree in early childhood development in 2006. She has a California teaching permit, but is not credentialed with any school district. She has been supervisor at the YWCA day care center since 2005. Tamayo's duties include oversight of the center and staff, updating files and records, and providing supplies to staff when needed. Tamayo occasionally assists teachers in the classroom when the need arises. She has no background in OT and does not work with students in the field of OT.

28. Student has been attending the YWCA day care center from the age of two-and-one-half years, where she received speech therapy services through the Regional Center. Tamayo observes Student weekday mornings for approximately 20 minutes, five days a week, before Student takes the bus to Student's elementary school. Student is primarily engaged in social interaction and eating breakfast during those 20 minutes. Tamayo also randomly observes Student after Student returns from elementary school.

29. Tamayo's observations of Student include that Student demonstrates behavioral issues transitioning from one activity to another, including tantrums, yelling, kicking and screaming. Student occasionally resists having help brushing her hair, and has a short attention span. Student falls more than other students. She walks up flights of stairs with the assistance of a railing. Student sits on the floor with legs crossed, gets up from the floor and sits on a chair without assistance. Student climbs outside on play equipment, and uses stairs to access the slide. Student falls more than other children at her level; her gross motor skills are not quite at the same level as other children in her classroom; her attention span is short; she occasionally loses her balance; and she does not like being strapped into a car seat on the school bus. She grips a pencil or crayon with a full fist and uses hard pressure when writing or coloring, until she is corrected. Student will attempt activities but gets frustrated when she cannot perform the same tasks as other students. Student's teachers at YWCA have never recommended to Tamayo that Student should be assessed for OT.

30. Tamayo was not a member of the IEP team, her observations of Student's behavior were not part of the IEP team's evaluation of Student, and Tamayo was not qualified to render a professional opinion as to whether Student was eligible for school-based OT services. Therefore, her conclusions relating to Student's abilities at the day care center were not persuasive as to the issue of whether District should have offered Student OT services during the 2008-2009 and 2009-2010 school years.

Parents

31. Mother is a licensed speech pathologist who works for District. Father is an elementary school teacher for District. Both have worked with children with a variety of disabilities. Mother noticed that Student had difficulties with fine motor skills and sensory perception from the time Student was nine months old. At 20 months of age, Student's pediatrician referred Student for an OT assessment at Student's private health insurer. Student was evaluated for dressing skills and tactile skills. Student received OT one time a month from her health insurer. Student initially received OT one time a week through the Regional Center. The frequency increased to two times a week for approximately one year. The occupational therapist taught Student brushing methods, worked on sensory skills, provided tasks to make bath time more fun, and worked on stretching Student's toes to improve toe walking.

32. Mother's concerns include that Student has difficulty manipulating small objects in her hand, cannot line up a string with a hole in a bead, has difficulty brushing her hair and allowing others to brush her hair, and has difficulty tossing and catching a ball.

Student is fearless, she does not understand the concept of safety, she tries to imitate much older children, and she will try to perform tasks like older children that may be beyond her ability. If Student faces a difficult task, she will try to complete it; but if she is not successful, she refuses to try it again. Student cannot follow a maze or stand within a maze. She tends to walk on her toes but, as of October 2009, she is not falling as frequently. She grips a writing utensil such as a pencil or crayon with a hard grasp and writes with a “hard push.” Student has difficulty writing on the left side of the paper, and uses her stomach to balance herself when writing past the midline. Student has difficulty balancing on one leg. Student’s deficits in hand-eye coordination have become more pronounced as she has grown physically. In Mother’s opinion, Student’s developmental level in motor and fine sensory skills is that of a three-year-old.

33. Parents are concerned that Student continues to toe-walk, occasionally falls down, bumps into other children, has difficulty writing past midline, grasps and applies a pencil/crayon abnormally, cannot always catch a ball, and has issues with spatial relations, hand-eye coordination and balance.

LEGAL CONCLUSIONS

Burden of Proof

1. Parents contend that Student is eligible for school-based OT services because Student has, since age 9-to-15 months, demonstrated deficiencies in motor and sensory skills that raised concerns by Parents for her safety in the community and her ability to benefit from the school setting. Parents further contend that District substantively denied Student a FAPE by not providing her with OT services. District contends that, based upon its three OT assessments of Student in 2008 and 2009, Student was not eligible for OT and District provided a FAPE to Student for the 2008-2009 and 2009-2010 school years.

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

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) A FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term “related services” (in California, “designated instruction and services”), includes transportation and other developmental, corrective, and supportive services, including OT, as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to

specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

6. The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable ...at the time the IEP was drafted.” 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.) “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.)

7. To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student’s educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subd.(e), (f).)

8. Assessments of students’ suspected disabilities must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(b)(2),(3); Ed. Code § 56320, subd. (a),(b).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment

adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

9. Here, based upon Parents' concerns that Student had sensory and motor skill issues requiring OT, District evaluated Student for OT services on three occasions, specifically by occupational therapists Tsai, Espinosa, and Ablack of PTN. Tsai's and Espinosa's assessments were administered with consideration for Student's known deficits in speech and language; no evidence was offered that Ablack's assessment was not appropriate. All three assessments incorporated school-based clinical observations of Student, interviews with Parents and Student's teacher, and testing in multiple modalities in a clinical environment. The three evaluations meet the standards set forth in Ed. Code § 56320, subd. (a),(b). The IEP team met and discussed each assessment, and included Parents' participation. The team found that Student could access the school environment and obtain an educational benefit without the need for OT services.

10. Parents attended and participated in the IEP meetings held on December 19, 2008; May 14, 2009; and January 14, 2010, at which OT was discussed. Each of the three District OT assessors concluded that they observed no concerns with Student's fine motor or sensory skills such that they would impact Student's ability to perform in the school setting without OT therapy. Student's teacher, who observes Student on a daily basis, also concluded that Student does not require OT services to obtain an educational benefit in the school setting. Although Parents expressed their disagreement with the conclusions in the three reports, Parents offered no evidence that credibly refuted or discredited the manner and method of or conclusions reached by any of the three District OT assessments.

11. District's basis for not offering OT services to Student through and including the January 2010 IEP team meeting was made on the information known to the IEP team members at the time. Tong's report was not relevant to District's determination of Student's eligibility for OT because the IEP team did not have possession of the report at the January 2010 IEP meeting. Similarly, the IEP team did not have the benefit of any of Tamayo's observations at the January IEP team meeting. Therefore, Tong's and Tamayo's conclusions are not applicable to the outcome of this case because, under the "snapshot rule" (*Adams, supra*, at p. 1149), the information was not available to the IEP team at the January 14, 2010 IEP meeting.

12. In conclusion, Student has not met her burden of proving by a preponderance of the evidence that, for school years 2008-2009 and 2009-2010, District denied Student a FAPE by failing to offer Student OT services. (Factual Findings 1-33, Legal Conclusions 2-12).

ORDER

Student's claim for relief is denied.

