

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

STUDENT,

Petitioner,

Vs.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH NO. N 2005070516

(Formerly SEHO No. SN05-00601)

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Los Angeles, California on July 29, and August 1, 2, 3, and 4, 2005.

Student (student) was represented by Carol H. Graham, Esq.

Angela Gordon, Esq. represented the Los Angeles Unified School District (district).

Oral and documentary evidence was received and the matter was continued for good cause to allow the parties to submit written closing statements. The closing statements were received, read and considered and the matter was deemed submitted on September 8, 2005.

ISSUE

1. Has the district provided/offered student a free appropriate public education (FAPE), as required under the Individuals with Disabilities Education Act (IDEA) and related California laws, from February 2004 through the present time?

FACTUAL FINDINGS

1. Student, whose date of birth is December 4, 2000, is a 4 ½-year-old male who qualifies for special education and related services under the eligibility category of Other Health Impaired (OHI). The evidence established that student has attention deficit hyperactivity

disorder (ADHD). Student also suffers from a Regulatory Disorder, a sensory processing disorder that adversely affects his attention span and his ability to regulate his behavior.

2. Student is a preschool student and the parties agree that without appropriate early intervention and related services provided through IDEA he will have great difficulty succeeding in kindergarten, which he is due to commence in September of 2006.

3. Student has been identified as having specific needs in the areas of occupational therapy (OT), speech, sensory integration, social/emotional development, and behavior.

4. According to student's December 3, 2003 Individualized Education Program (IEP), student's areas of suspected disability were health, cognitive delay, pre-academic skills, self-help skills, social/emotional, motor skills, and speech and language. The December 3, 2003 IEP notes that when student "becomes especially overstimulated he will cry and holding him may calm him down. However at times when he is extremely upset he may head-butt." (Student's Exhibit E) As a result of the December 3, 2003 IEP meeting student was placed in a district special day class for orthopedically impaired students (OI class). This placement lasted from February 2004 through early November 2004.

5. The OI class was deemed appropriate by the December 3, 2003 IEP team based on the student's need to be placed with a small number of students in a structured setting. The OI class was small, consisting of approximately eight students, and provided appropriate designated instruction.

6. The December 3, 2003 IEP provided, in pertinent part, that student receive behavioral services consisting of a non public 1:1 behavioral aide during the school day (BII) and behavioral supervision (BID) starting in February 2004 at eight hours per month.

7. Toward the end of October 2004 student's behaviors, speech and language and academic skills improved; however, many of the students in the OI class were orthopedically impaired; they lacked mobility and had medical problems that prevented age appropriate physical interactions with student. Consequently, all parties agreed that the OI class was too restrictive an environment for student and that it was time for student to transition to a more academically and physically challenging educational environment.

8. On November 3, 2004 an IEP meeting was held and a new IEP was written for student. The IEP noted, in pertinent part that "[student] has currently met his goals in social/emotional development and language development in the special day class. He has been mainstreamed into a SRLDP preschool for 4 days a week for 45 minutes a day. He requires behavioral support at this time in the regular classroom." (Student's Exhibit C)

9. Just prior to student's transition into the district's general education Speech Readiness Language Development Program (SRLDP) student's behaviors began to deteriorate. During November 2004, student began exhibiting an extreme increase in oppositional behavior. Student began regularly attending the SRLDP program in January 2005. From January 2005

through March 2005, student's behavior at school and at home deteriorated even more. Most notably, student's parents had great difficulties convincing student to attend school. Student refused to get dressed and ready for school in the morning and fought his parents all the way to the school house door (he exhibited extreme oppositional behavior) in his attempts to stay away from the SRLDP class.

10. Although no one can identify the specific reasons for student's increase in oppositional behavior, it appeared from the evidence presented that there were probably several inextricably intertwined factors. The most significant factors were as follows: 1) Student suffers from a regulatory disorder that affects his ability to control his emotions in large groups. The OI class consisted of only about eight students while the SRLDP class consisted of approximately 15 students, with student being the only special education student with an IEP. In an environment consisting of more than 8-10 students student receives too much stimuli, becomes overly stimulated and can not attend to tasks; 2) The parties stipulated to the fact that as of April 7, 2005, student had not been provided with 29 hours of BID, as required in student's IEP dated December 3, 2003, the IEP amendment dated April 22, 2004, the IEP dated November 3, 2004, and the IEP dated February 25, 2005. These supervision hours were extremely important, especially in view of the ALJ's finding, based on the testimony and demeanor of the BII aides who implemented student's behavioral intervention, that the aides did not adequately provide appropriate behavioral interventions to modulate and control student's outbursts; and, student's SRLDP teacher was a general education teacher, not a special education teacher, and had no training regarding regulatory disorders and associated sensory integration problems.

11. Because of their concerns about student's behavioral deterioration student's parents requested an IEP meeting. In response, an IEP team meeting was convened on February 25, 2005. As a result of the IEP meeting, the IEP team found that:

It is the consensus of the IEP Team that [student's] placement in the SRLDP classroom at Burton Elementary School with PKIT services, OT services and NPA Behavior services to be the most appropriate and least restrictive environment for him at this time. (Student Exhibit B)

The February 25, 2005 IEP modified the behavioral intervention techniques used by the BII's in the classroom; however, the class size and composition was not modified. Student's mother disagreed with the IEP recommendations and declined signing the IEP documents.

12. Notwithstanding mother's disagreement with the IEP, student continued participating in all aspects of the district's prescribed program. Student's behaviors did improve slightly; however, it appeared that he was still suffering overstimulation problems due to the number of students in the classroom setting. Mother's observations of student's behavior led her to conclude that student was doing much better when he was in a classroom with fewer students, such as the OI setting. Experts who testified at the hearing agreed. Susan Bacon

appeared at the hearing and expressed her opinion concerning student's special needs and what is necessary for him to receive FAPE. Ms. Bacon holds a Bachelors Degree in Sociology from UCLA, and a Masters Degree in Human Development and in Psychology from Pacific Oaks. She is licensed in the State of California as a Marriage and Family Counselor and she has teaching credentials in regular education, early education, severely handicapped, and administration. Based on her observations and assessment of student she concludes that in order for student to receive FAPE, he requires a small structured classroom of approximately eight students; a class that can attend to student's deficits and not overwhelm student's senses. Student also needs speech and language, OT, and counseling. According to Ms. Bacon, the behavior strategies used in the district's SRLDP class were not appropriate for student; and, since the classroom consisted of approximately 20 students, student was overstimulated.

13. On March 2, 2005, mother requested a "stay put" of all behavioral services pursuant to the last agreed upon IEP (the November 3, 2004 IEP). Then, on March 6, 2005 mother filed for a Due Process Hearing.

14. Student continued participating in the district's program after the February 25, 2005 IEP meeting and after mother's request for a Due Process Hearing; however, student's mother's (mother) remained dissatisfied with, and concerned about, student's placement in SRLDP. Although she related her dissatisfaction and concerns to the district, the district maintained that student's placement in the SRLDP class was appropriate. Mother disagreed. It was apparent that something was terribly wrong. When student attended the OI class he went to school willingly and did not exhibit oppositional behavior; however, since the time he began attending the SRLDP class, student fought going to school; he exhibited tantrums at home, on his way to school and at the door to the classroom. Clearly something was wrong and it was adversely affecting student's desire to attend school. Accordingly, in March 2005, mother began researching other placements. In the course of her research mother investigated the Julia Ann Singer program (JAS) located in West Los Angeles. JAS is a non-profit, non-public school and the program student would participate in consisted of a classroom setting with only about eight to ten students. JAS follows the district's curriculum. JAS is accustomed to working with public schools and has numerous students placed by school districts, including district, in its programs. JAS provides speech and language, OT, and other services pursuant to a student's IEP. JAS provides a 1:1 or 1:2 (depending on student's needs) teacher/student ratio; the type ratio student needs to obtain educational benefits.

15. After interviews and visits to JAS mother and JAS mutually agreed that JAS could provide student with an appropriate program that would meet his special needs, especially relative to his regulatory disorder.

16. On April 8, 2005, student ceased participating in the district's SRLDP class and began attending JAS. Student had no problems transitioning into JAS and from April 8, 2005, to the present, student's behaviors have improved at home and at school as a result of the change in his educational environment. Student's parents were so impressed with student's progress that they moved from where they had been living in the San Fernando Valley to West Los Angeles so the commute to JAS would be more convenient for student and parents.

17. Mother's actions in withdrawing student from the district's program and her decision to place him in the JAS program was in the best interests of student and was justified under the circumstances. Student was not receiving FAPE in the district's program. As previously noted, student was not receiving the BID hours specified in his IEPs, he was in a classroom setting where there were too many students, and the behavioral interventions were inappropriate.

18. Mother and the experts agree that although student did not receive the required amount of BID hours, those hours can not be "made up." More BID now will not, and can not, help; there is no catching up. However, according to Ms. Bacon, if student remains placed in JAS, chances are that he will be able to transition to a regular education kindergarten class in the district during the 2006-2007 school year.

19. On June 8, 2005, the district IEP Team offered student a Preschool Collaborative class at Richland with 20 students. Given the number of students in the proposed class, this offer is unsatisfactory. It is evident that student can not learn in a classroom setting with 20 students. His sensory problems prevent him from attending to scholastic tasks in such a large student population (the addition of teachers and aides increases the number of people in the classroom to well over 20) and he can not, at this time, receive FAPE in such a setting. JAS will slowly and appropriately begin desensitizing student by slowly introducing him to larger class sizes in preparation for transitioning student to a regular education kindergarten class for the 2006-2007 school year.

20. If student remains in the JAS placement he needs no behavioral support, he only requires speech and language one time per week, and OT two times per week, with consultation between the OT and student's JAS teacher.

21. Student was accepted by JAS on a scholarship. JAS has agreed to continue funding student's placement at JAS using scholarship funds pending the outcome of the current Due Process hearing. As previously noted, JAS is a non-profit organization; the scholarship money used for student's placement at JAS comes from the JAS scholarship fund.

LEGAL CONCLUSIONS

1. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).)

As set forth in Findings 10 and 17, student was not provided services in conformity with his IEP. Specifically, he did not receive the required hours of BID. As a

result, the BII student received in the district's SRLDP program was inadequate and ineffective. Consequently, student was denied FAPE from February 2004 through April 8, 2005 (the date student left the district and began attending JAS).

2. "Special education" is defined as specifically designed instruction at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

As set forth in Findings 9, 10, 12, 14, 16, and 19, the district's placement of student in an SRLDP program with 20 students and approximately four adults (teacher and aides) failed to meet student's unique needs. The facts set forth in Findings 5, 9, 10, 12, 14, 16, 19, and 20, establish that student needs a small, structured, classroom setting consisting of only about eight-ten students plus approximately four to six adults (teacher and aides). In the setting provided by the district student could not obtain an appropriate education. Due to student's sensory problems he was acting out in inappropriate ways and was not able to attend to scholastic endeavors. Student's acting out was then addressed using inadequate and inappropriate behavioral interventions, thus exacerbating the situation. By placing student in such a counterproductive environment the district denied student FAPE.

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. V. Rowley* (1982) 458 U.S. 176, 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Ibid.* at 201.) The Court also recognized the importance of adherence to the procedural requirements of the IDEA. (*Ibid.* at 205.) Thus, the analysis of whether a student has been provided a FAPE is twofold. The ALJ must determine whether the procedural safeguards of the IDEA have been satisfied and whether the FAPE provided was substantively appropriate. (*Ibid.* at 206-207.) To constitute a FAPE as required by the IDEA and *Rowley*, the district's offer must meet the following substantive requirements: (1) be designed to meet student's unique needs; (2) be reasonably calculated to provide student with some educational benefit, (3) comport with his IEP; and (4) be provided in the least restrictive environment (LRE). (See also *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314) Under the facts of the instant case, as set forth in Findings 9, 10, 12, 14, 16, 17, 19, and 20, student's current IEP and the district's most recent offer fail to meet the substantive requirements necessary to constitute a FAPE. Student's program at the district failed to meet student's unique needs. While in theory it may have been "calculated" to provide student with some educational benefit, in reality it did not, and the program did not comport with student's IEP.

4. Student's current JAS placement is appropriate. The placement is necessary to meet student's unique needs, it provides educational benefit, it comports with his IEP, and,

given student's sensory integration problems, the JAS setting is the LRE in which student can gain educational benefit. Additionally, student's placement in JAS is the only equitable method by which student can be compensated for the district's failure to provide him a FAPE since he began attending school in the district in 2003. Courts have consistently held that the authority to award compensatory education is derived from 20 United States Code, section 1415, subdivision (i), subsection (12), subparagraph (B), subsection (ii), which authorizes a court to grant such "relief as it determines is appropriate." Compensatory education is an equitable remedy, it represents part of a court's inherent power to craft appropriate relief. (See *Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489) When considering a request for compensatory education, it is first necessary to determine whether a school district failed to provide a FAPE. If so, the next question is what compensatory services are necessary to provide an appropriate education under the law. As previously concluded, in the present instance student was denied a FAPE and the only appropriate way to compensate student is by ordering the district to fund student's current, appropriate, placement at JAS with the other supportive services found necessary in Finding 20 (Speech and Language one time per week and OT two times per week).

5. As set forth in Findings 18 and 19, it is anticipated that student will be ready to transition into a regular kindergarten in the district at the beginning of the 2006-2007 school year. Accordingly, the district must fund student's current placement and all necessary supportive services through the 2006 extended school year (summer school).

6. Since student's current program at JAS has been funded with scholarship money (Finding 21), fairness and equity dictate that the district repay the scholarship fund for the money used to fund student's placement at JAS from April 8, 2005 until it commences funding his program directly pursuant to the order resulting from the instant hearing.

7. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, student prevailed on the sole issue of whether student received a FAPE from February 2004 to the present, and all associated sub-issues.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is granted.
2. The district shall fund student's program at JAS through the 2006 summer school session and shall fund/provide speech and language one time per week, and OT, 30 minute sessions, two times per week, with consultation between the OT and student's JAS teacher.
3. Student or JAS shall provide district evidence of the amounts paid by the JAS scholarship fund for educational costs from April 8, 2005 through receipt of the first direct

payment from the district of student's JAS program costs pursuant to this order. The district shall, immediately upon receipt of the evidence provided by student or JAS, reimburse the JAS scholarship fund for the amounts used to fund student's participation in the JAS program from April 8, 2005 until the district commences funding his program directly pursuant to this order.

4. An IEP team meeting shall be held enough in advance of the commencement of the 2006-2007 school year to determine whether student is ready to transition into a regular kindergarten class or other appropriate district placement and to provide an appropriate transition into a regular kindergarten or other district placement if such transition is deemed appropriate by the IEP team.

Dated: September 26, 2005

ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearing

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.