

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

In the Matter of:

LANCASTER ELEMENTARY SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007100553

DECISION

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Lancaster, California on November 29, 2007.

Lancaster Elementary School District (District) was represented by Kathleen Lamay (Ms. Lamay) and also present was Benay Loftus (Ms. Loftus), Coordinator of Student Services for District.

No one made an appearance on behalf of Student (Student) at the hearing.

The District's Due Process Complaint (Complaint) was filed on October 18, 2007. On November 19, 2007, a continuance was granted. Testimony and documentary evidence were received on November 29, 2007. At District's request, its closing brief was to be filed on December 19, 2007. District waived the 45-day period for issuance of a final decision and stipulated that the decision would be issued on January 7, 2008.¹ On December 19, 2007, District filed its closing brief. The record was closed on December 19, 2007, and the matter submitted for decision.

¹ Parents were not given notice of the closing brief deadline and District's time waiver.

PROCEDURAL MATTERS

On October 18, 2007, District served its Petition by mail on Parents and on Student's advocate, Victoria Baca (Ms. Baca).² On October 18, 2007, OAH served a Scheduling Order and Notice of a Due Process Hearing, Pre-hearing Conference and Mediation on Parents (Scheduling Order).

A telephonic pre-hearing conference (PHC) was held on November 19, 2007. Ms. Lamay participated on behalf of the District. The ALJ telephoned Parents but they did not answer the telephone and after ten rings an automatic message produced by the telephone company informed the ALJ that the Parents were not answering and the call would be disconnected. The ALJ could not leave a message. Following the ALJ's unsuccessful attempts to contact Parents, the PHC proceeded and Parents did not participate on behalf of Student. Student did not file a PHC statement, a witness list, or an exhibit list prior to the PHC as ordered by OAH in the Scheduling Order dated October 18, 2007.

By the beginning of the hearing on November 29, 2007, Student had not provided the District with any witness list, exhibit list, or exhibits.³ On the date of the hearing, District presented a copy of a Return Receipt for the Complaint, a report containing Student's current address and a Special Education Management Information System sheet. District's counsel asserted that the above documents demonstrated that Parents' address was correct, giving them sufficient notice of the dates for the PHC and Due Process Hearing. In addition, District's counsel stated that Ms. Baca was also served. Prior to commencing the hearing, the ALJ directed District's counsel to contact Parents and Ms. Baca to ask them if they intended to appear at the hearing. District staff telephoned Parents and Ms. Baca, but did not reach them. The hearing proceeded without Student's participation.

ISSUE

Whether District offered Student a free and appropriate public education (FAPE) in its June 6, 2007 Individualized Education Program (IEP) for the 2007-2008 school year with its proposal to eliminate occupational therapy (OT) services?

CONTENTIONS OF THE PARTIES

District contends that it offered Student a FAPE for the 2007-2008 school year. District also contends that based on Courtney Von Tersch's (Ms. Von Tersch) occupational

² District served a courtesy copy of the Complaint on Ms. Baca because she appeared as Student's advocate at the IEP. However, Ms. Baca did not file a notice of representation.

³ Education Code sections 56043(v) and 56505, subdivision (e)(7) require the parties to disclose their witnesses and exhibits to the other party not less than five business days prior to the hearing.

therapy assessment and the June 6, 2007 IEP team recommendation, OT services were no longer necessary to assist Student to benefit from his special education. District requests an Order allowing it to proceed with the proposed June 6, 2007 IEP, and the elimination of OT services.

FACTUAL FINDINGS

Jurisdiction

1. Student is a ten-year old boy, born on June 10, 1997, residing within the boundaries of the District. At the time of the IEP, he was nine-years old and in the fourth grade at Sierra Elementary School (Sierra).

Background

2. Student is eligible for special education and related services as a student with a specific learning disability (SLD). Student began receiving services in January 2001 based on speech and language delays. In January 2002, his disability was changed to SLD.

3. In September 2006, Student transferred into the District from the Los Angeles Unified School District (LAUSD) where he attended Liberty Elementary School in South Gate.

4. On October 20, 2006, District convened a 30-day review IEP meeting. The IEP team recommended that Student continue in a Special Day Class (SDC). LAUSD provided Student with adapted physical education (APE), speech and language (S/L) and occupational therapy (OT) services. The IEP team agreed to continue these services until Student could be assessed in these areas. The services Student received included: APE twice a week for 30 minutes; S/L once a week for 30 minutes; and OT once a week for 30 minutes. At the meeting, the special education teacher proposed that Student participate in "focus time," one hour of leveled grouping of all fourth grade students at Sierra. The IEP team agreed that this would give Student an opportunity to work with his general education peer group.

5. The October 20, 2006 IEP team also agreed to schedule Student's triennial IEP, and that he should have an extensive psychoeducational evaluation that included assessments in APE, S/L, and OT. Mother agreed with the team's recommendation. Mother signed an assessment plan, giving District permission to evaluate Student.

6. On January 18, 2007, the IEP team met for Student's triennial, to review his assessments and IEP. The team included: Student's Mother, advocate Baca, advocate Raul Wilson (Mr. Wilson), interpreter Carmen Escobar, administrator Ms. Loftus, occupational therapist Ms. Von Tersch, a SDC teacher, a S/L teacher, an APE teacher and a school

psychologist. The team reviewed Student's psychoeducational evaluation, including his APE and S/L assessments.

7. Student's academic assessments indicated that Student performed at a second grade level in reading, written language and math. Although he showed a relative weakness on the Passage Comprehension Subtest of the Woodcock-Johnson III (a formal assessment), Student demonstrated much better reading comprehension on informal class assessments and classroom work samples. As a result, the psychoeducational report concluded, Student did not demonstrate a significant discrepancy between ability and achievement. However, Student had deficits in visual processing speed, visual-motor integration, and visual perception. These visual perceptual deficits impact Student's reading, written language and math skills. Therefore, the IEP team agreed that even though Student did not currently have a discrepancy between ability and achievement, he should continue to receive special education support under the category of SLD to help him transition from the SDC into a less restrictive environment.

8. The team also discussed Student's APE and S/L assessments. Student's APE assessment report concluded that Student did not demonstrate a need in the area of motor skills development that required APE. Student's S/L assessment report concluded that, based on observations, formal/informal assessment and input from the classroom teacher, Student did not have verbal or nonverbal deficits that would negatively impact his social and academic communication. Therefore, the IEP team agreed that APE and S/L services should be discontinued.

9. The January 18, 2007 IEP team also discussed and recommended short-term instructional goals and benchmarks to address Student's unique needs in reading comprehension, word analysis, vocabulary development, math (number sense, measurement and geometry), language and communication (writing). The team also agreed that Student should work on his reading goals during ESY.

10. However, it was reported that an OT assessment was not completed on January 17, 2007 by Ms. Von Tersch,⁴ because Student's Mother entered the testing room, interrupted the evaluation and stated that she had not agreed to this assessment. The IEP team discussed Mother's terminating Student's OT evaluation. Mother explained that she wanted an OT evaluation conducted by a Spanish speaking OT evaluator. The IEP team agreed to continue OT as stay-put services until the District and Mother could come to an agreement regarding the OT evaluator. Thus, Mother approved his IEP for the remainder of the 2006-2007 school year.

⁴ Von Tersch received her bachelors of science from James Madison University. She is a board certified occupational therapist and licensed to practice in California and Virginia. Von Tersch taught for 12 years and has been an occupational therapist for the last 15 years. She was employed by the Virginia Beach public school system for three and a half years and has been employed for the past year and a half by Community Therapies. District contracts with Community Therapies for its OT services and assessments.

FAPE for the 2007-2008 school year

11. To provide a FAPE, school districts are required to provide access to specialized instruction and related services which are individually designed to provide educational benefit. Additionally, the IEP team determines whether services are required, and the nature and amount of such services must be included in the IEP. If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE.

12. If the school district's program meets these requirements, then the district has provided a FAPE even if the student's parents preferred another program, and even if parents' preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight.

13. An IEP team must consider whether the student requires services including OT and, if so, the nature and amount of such services must be set forth in the IEP. If OT is required to meet the student's unique needs, and to provide the student with an educational benefit, then the district's failure to provide it is a denial of a FAPE.

OT Assessment

14. As indicated in Factual Finding 10, Mother terminated the January 17, 2007 OT evaluation commenced by Ms. Von Tersch. However, Ms. Von Tersch included her earlier observations of Student in her May 16, 2007 report. In January 2007, she observed Student's performance during a silent reading as well as a read aloud session with his teacher. She reported that Student maintained appropriate posture, opened his book bag and pencil case independently. During read aloud he was able to scan the page appropriately from left to right using his finger as needed to read along. Ms. Von Tersch reviewed Student's work with his teacher and noted that his handwriting was neat, legible with no reversals. His teacher reported to her that Student was working on his cursive writing and was doing well. Ms. Von Tersch noted that during recess Student was able to independently climb equipment, run and jump over obstacles and tie his shoelaces.

15. On January 17, 2007, Ms. Von Tersch began to administer the Bruininks-Oseretsky Test of Motor Proficiency Second Edition (BOTMP-2). The BOTMP-2 measures a sample of gross and fine motor functioning. During the beginning of the test Ms. Von Tersch noted that Student had an appropriate tripod grasp and was able to cut a circle within one-eighth of an inch of the lines. About a third of the way into the evaluation, Student's Mother entered the testing room and indicated that she had not agreed to the testing. She requested that the testing be terminated until she was able to discuss her concerns with the IEP team. Von Tersch terminated Student's assessment. Von Tersch presented a short written report at the January 18, 2007 IEP meeting, recommending that a full OT evaluation be completed.

16. On May 16, 2007, Ms. Von Tersch commenced another OT evaluation of Student. A Spanish interpreter was present throughout Student's evaluation to translate test instructions. Ms. Von Tersch's assessment was based on her review of Student's records, school observation, consultation with his teacher, an informal handwriting assessment, sensory profile school companion, and the BOTMP-2. The BOTMP-2 measures a sample of gross and fine motor functioning from the following subtests: fine motor precision, fine motor integration, manual dexterity, upper-limb coordination, bilateral coordination, balance, running speed and agility and strength.

17. Student completed the short form for the gross motor subtest and the long form for the fine motor subtest. Student demonstrated average skills within the overall gross motor section. He did not receive a separate score in the gross motor area due to his completing only the short form test. However, he placed in the 21st percentile for the combined fine and gross motor scores. The gross motor sections included bilateral coordination, balance, running speed and agility and strength. In the area of strength, Ms. Von Tersch believed that Student did not perform to the best of his ability.

18. The fine motor sections of the BOTMP-2 are broken down into two areas (fine motor control and manual coordination) and four subsections (fine motor precision, fine motor integration, manual dexterity, and upper-limb coordination).

19. Fine motor precision consists of activities that require precise control of finger and hand movement. This subtest has five drawing items, one paper-folding item, and one cutting item. The object of each item is to draw, cut or fold within a specified boundary and performance is evaluated based on how well the examinee remained within the boundary. Ms. Von Tersch reported that Student had some errors but he was able to cut out a circle without any deviations from the line, with a correct grasp on his scissors and appropriate rotation of the paper. The fine motor integration subtest requires the examinee to reproduce drawings of various geometric shapes that range in complexity and the drawing tasks require precise control of finger and hand movement. Since the examinee must reproduce a drawing without additional visual aids or guidelines, this subtest also measures the ability to integrate visual stimuli with motor control. Ms. Von Tersch reported that Student did very well in this section and was able to reproduce shapes, demonstrating good closure, orientation, and overall size. The manual dexterity subtest uses goal-directed activities that involve reaching, grasping, and bimanual coordination with small objects. Ms. Von Tersch indicated that Student did very well on this section and was able to transfer 14 pennies across midline, place seven pegs in a pegboard, sort 15 cards and sting six blocks in 15 seconds. Ms. Von Tersch concluded that Student was in the average range in fine manual control and manual coordination, having scored respectively, in the 21st percentile and the 46th percentile.

20. Ms. Von Tersch observed Student's handwriting skills. She found that Student wrote with an appropriate dynamic tripod grasp and he stabilized his paper appropriately with his left hand. He was able to write letters and numbers with no reversals or incorrect formations. Ms. Von Tersch reported that Student copied four sentences from the board, and his writing was neat and legible with appropriate attention to the lines.

21. As a part of this OT assessment, Ms. Von Tersch administered the sensory profile school companion, a standardized questionnaire that measures a student's sensory processing abilities and provides a profile of sensory processing. The four areas assessed are: registration, seeking, sensitivity and avoiding. The assessment is used to determine a student's response to various sensory experiences. Student scored within the typical performance range for all sections including auditory, visual, movement, touch and behavior. In the area of sensitivity, Ms. Von Tersch reported that he scored in the "probable difference" range, meaning Student is less sensitive to sensory input than others, but as reported by his teacher this was not a significant problem in the classroom. Student's teacher also reported that he was typically able to remain on task for classroom activities with occasional cues for distractibility (when there is a lot of noise in the classroom).

22. Ms. Von Tersch found in observing Student that his muscle tone appeared to fall within normal limits. Student demonstrated functional strength and endurance for school related tasks. She also observed that Student was not demonstrating any difficulty in visual perceptual tasks in the classroom. Student was able to find objects within his desk, copy from the board, and access a computer independently. Ms. Von Tersch found that Student demonstrated adequate postural stability for participation in school related tasks. She also observed that Student had mastered all upper-level hand skills. Thus, Ms. Von Tersch concluded that Student was independent with all of his self-help skills within his school environment.

23. Ms. Von Tersch concluded in her evaluation report that Student had: average fine motor and gross motor skills; appropriate sensory processing skills; and had no difficulties participating in his daily school schedule. Although Ms. Von Tersch found Student to be in the "probable difference" range in sensitivity, correlating to hypo-activity, she concluded that this did not interfere with Student's classroom progress.

24. Ms. Von Tersch testified that Student was able to perform the tasks that previously concerned the IEP team and no longer needed services to address these needs. Student was able to: tie his shoes; sustain focus and attention; and improve his cutting, drawing and hand writing skills. Student's sensory needs and fine motor skills did not interfere with his ability to participate in his educational environment. Ms. Von Tersch also testified that Student had mastered his OT goals in 2002, prior to entering the Lancaster School District and did not need new goals. Ms. Von Tersch was a knowledgeable, credible witness and her findings and recommendations that Student did not need occupational therapy services at this time were persuasive.

Student's Teacher's Classroom Observations

25. Lori Klee, Student's Special Day Class teacher (Ms. Klee), testified that Student was able to perform all of the skills necessary to function well in his classroom environment. Student performed well by: sustaining his focus and attention for extended periods of time; writing legibly; holding his body posture erect; and executing motor tasks

required in the classroom environment. Ms. Klee also testified that Student passed all his courses and, in fact, was one of her top students.

26. Ms. Klee also confirmed that Student demonstrated good balancing skills by his ability to: walk on a curb for approximately 100 feet; play kick ball and tag; use a computer keypad; carry his own lunch tray; and open his milk carton independently. Ms. Klee testified that Student's fine motor skills were adept as demonstrated by his: ability to play with small Legos, complete 100 piece puzzles and accurately copy sentences from the black board. Finally, Ms. Klee testified that it was her opinion that Student did not require continuing OT services to do well in class and benefit from his education. Ms. Klee was a knowledgeable, credible witness and her recommendations regarding Student's abilities and needs were persuasive. Her testimony established that Student functioned well in the classroom and he was meeting the goals and objectives set at the January 18, 2007 IEP meeting.

June 6, 2007 IEP Meeting

27. District contends that it offered Student FAPE for 2007-2008 school year at its June 6, 2007 IEP meeting and was entitled to discontinue OT services based on Ms. Von Tersch's OT evaluation of Student and the IEP team's recommendation to discontinue Student's OT services. District asserts that Student did not need OT services to benefit from his education. Therefore, District concluded that it offered Student FAPE.

28. On June 6, 2007, the IEP team met to review Student's OT assessment. Among those present at the IEP meeting: Mother; advocate Ms. Baca; advocate Mr. Wilson; general education teacher Maria Esquivel; SDC teacher Lori Klee; Stacey Inman, District's attorney (Ms. Inman); occupational therapist Ms. Von Tersch; administrator Ms. Loftus; and a bilingual educator. Mother and Student's advocates initially indicated that they would attend this IEP meeting but after voicing a concern about District's attorney's presence at the IEP meeting, Ms. Baca and Mr. Wilson left the meeting. Mother knew that Von Tersch's report recommended that OT services were not needed by Student to access his education. However, Mother was unhappy about this recommendation and voluntarily left the IEP meeting, before voicing her specific concerns.

29. The IEP team discussed Student's progress in the goals established at the January 18, 2007 IEP meeting. The team agreed that Student was making good progress towards his goals in reading comprehension, word analysis, vocabulary development, math (number sense, measurement and geometry), language and communication (writing). Thus, Student was on target in meeting his educational goals.

30. Ms. Von Tersch presented the results of her May 16, 2007 OT evaluation of Student to the IEP team. The results of the assessment are found in Factual Findings 14 through 23. Ms. Von Tersch reported to the team that Student demonstrated average fine and gross motor skills. Student's only low score was in strength. The team found that this was

not indicative of his ability but due to Student's resistance to the tasks on this portion of the assessment.

31. Ms. Klee reported to the team that she completed the sensory profile on Student and that he had average skills in this area. In the area of sensitivity, Student scored somewhat lower but the team agreed with Ms. Von Tersch that this score was not clinically significant. Ms. Von Tersch also reported that Student had adequate skills in handwriting, copying and letter formation. Ms. Von Tersch indicated that Student had adequate postural stability, strength/endurance, visual perceptual skills, hand skills and self-help skills. Ms. Von Tersch recommended that Student's OT services be discontinued, and the IEP team agreed.

32. Mother has not agreed to the June 6, 2007 IEP offer and has not agreed to the District's recommendation that OT services should be terminated.

33. The IEP team reviewed and discussed Ms. Von Tersch's assessment, Ms. Klee's observations and carefully considered whether Student continued to need OT services. The team also discussed the fact that Student met all of his OT goals prior to his entering District and continued to receive OT services at both LAUSD and District as a stay-put service. The evidence supports District's finding that OT services were not required to meet Student's unique needs, and to provide Student with an educational benefit. Thus, District's offer to Student at the June 6, 2007 IEP meeting provided him a FAPE.

34. The ALJ finds that Student did not need occupational therapy services to address fine motor skills and to communicate and meet his sensory needs. Therefore, Student was able to fully participate and benefit from his current school placement without OT services. District appropriately assessed Student with respect to OT.

LEGAL CONCLUSIONS

Applicable Law

1. District, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

3. The educational agency may be required to provide "related services, denominated as "designated instruction and services" (DIS) in California. This includes developmental, corrective, and supportive services, such as occupational therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(26); Ed. Code, § 56363; *Taylor By and Through Taylor v. Honig* (9th Cir. 1990) 91 F.2d 627, 629.) As defined by the Code of Federal Regulations, Occupational Therapy is designed to enhance a student's ability to *function* in an educational program, not just to access it. OT services are defined to include "improving, developing, or restoring functions impaired or lost through illness, or deprivation" and "improving ability to perform tasks for independent functioning if functions are impaired or lost" as well as, "preventing, through early intervention, initial or further impairment or loss of function." (34 C.F.R. § 300.24(b)(5).)

4. If a parent in the past consented in writing to the child's receipt of special education and related services, but then refuses to consent to those services in a subsequent IEP, the LEA shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

5. School districts receiving federal funds under IDEA 2004 are required pursuant to 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability. that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and district wide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

6. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

7. There are two parts to the legal analysis of whether an LEA such as a school district offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

8. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, reasonably

calculated to provide the student with some educational benefit, and must comport with the student's IEP. (20 U.S.C. § 1401(9).) According to the United States Supreme Court, a FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Rowley*, 458 U.S. at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (*Id.* at pp. 198-200.)

9. As set forth in Factual Findings 2 through 34, District's elimination of OT services in the June 6, 2007 IEP was reasonably designed to provide Student some educational benefit, addressed his unique needs and provided him a FAPE for both the 2007-2008 school year.

ORDER

District's June 6, 2007 IEP offered Student FAPE for the 2007-2008 school year.

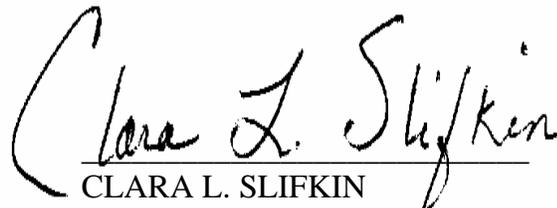
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on the issues for hearing in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: January 7, 2008


CLARA L. SLIFKIN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings