

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010080545

DECISION

Administrative Law Judge Rebecca P. Freie (ALJ), Office of Administrative Hearings, State of California (OAH), heard this matter in Los Angeles, California on November 15, 17, and 18, 2010, and February 16, 2011.

Student's parents (Parents) appeared on behalf of the Student. Both were present for the hearing on November 15, 17, and 18, 2010. Parents did not appear for the hearing on February 16, 2011.¹

Donald Erwin, Attorney at Law, appeared on behalf of the Los Angeles Unified School District (District). Joyce Kantor, a District Due Process Specialist attended most of the hearing as the District representative. In her absence, Sue Talesnick, another Due Process Specialist, attended the hearing as the District representative. There was no District representative present for the District's oral closing argument on February 16, 2011.

¹ The hearing was continued to February 16, 2011, to permit Parents to review a translated copy of a psychoeducational assessment of Student prepared by the District. A Spanish language interpreter was present for all hearing dates. When Parents did not appear for the hearing on February 16, 2011, the interpreter telephoned all of the telephone numbers the District had on file for them. There was either no answer or the numbers had been disconnected. The interpreter was able to contact Student's grandfather, and the grandfather informed the interpreter that Parents were at work. The grandfather refused to provide the interpreter with a work telephone number for Parents. Spanish-speaking support staff at OAH were also unsuccessful in attempting to contact Parents at telephone numbers they had previously provided OAH.

On August 13, 2010, Student filed a Request for Due Process Hearing. On September 22, 2010, the hearing was continued. Testimony concluded on November 18, 2010. The hearing ended on February 16, 2011, following oral closing argument by the District, and the matter was taken under submission.

ISSUES²

1. Did Student require more than 60 minutes per week of speech and language therapy offered by the District for the 2010-2011 school year (SY)?
2. Did Student require more than 60 minutes per week of adaptive physical education (APE) offered by the District for the 2010-2011 SY?
3. Did Student require more than 600 minutes per year of occupational therapy services (OT) offered by the District for the 2010-2011 SY?
4. Did Student require physical therapy (PT) to be provided by the District for the 2010-2011 SY?

FACTUAL FINDINGS

1. Student resides with Parents within the boundaries of the District, and has for most, if not all of his life. He is eight years old, and began receiving special education services from the District when he was three years of age. At the time of the hearing Student was attending the MRM special day class (SDC) at 10th Street. It is unclear when Student began attending this SDC.³

² Prior to the commencement of the hearing, the parties agreed to dismiss Parents' issue contesting placement of Student in a Mentally Retarded Moderate (MRM) classroom at 10th Street Elementary School (10th Street) in Los Angeles. Accordingly, that issue has been eliminated. The issues, as stated herein, have been renumbered and reworded for clarity by the ALJ. Except as stated herein, there are no other changes to the issues.

³ Parents did not consent to an individualized education program (IEP) placement recommendation presented to them on May 24, 2010, which called for Student to attend an MRM SDC. However, at the commencement of the due process hearing on November 15, 2010, the ALJ was informed that Student was now attending the MRM SDC at 10th Street, and Parents were withdrawing the issue contesting this placement.

2. Student's primary eligibility for special education is under the category of mental retardation, now known as intellectual disabilities.⁴ Student also has autistic-like behaviors. The documentary evidence provided by the District contained information that Student has microcephaly, and this may be the cause of Student's intellectual disability. Further, as a result of the microcephaly, Student has some physical disabilities, but there was no evidence presented as to the type or extent of these physical disabilities.⁵ Student's abilities in most areas are within the 18 month to four-year-old level, averaging in the range of 24 months. When he was assessed in April and May 2010, Student was not toilet trained, and could not feed or dress himself independently.

3. Student is a client of Lanterman Regional Center (Lanterman). Prior to age three, he received speech and language services, PT and OT through Lanterman. There was some evidence that some or all of these services continued after that time.

4. The District also provided Student with services beginning at age three, although it was unclear exactly what services the District provided. Parents testified that they believed that, at one time, Student was receiving three hours each week of speech and language services, as well as three hours each week of OT, although it was unclear whether these services were provided by the District, or Lanterman, or both. It was also unclear exactly when Student stopped receiving this level of services, although the evidence established that he did not receive services at this level during 2009-2010 SY.

5. Student began attending a preschool class for students with special needs for the 2005-2006 SY, and continued to do so until he entered an SDC at Leo Politi Elementary School (Politi) for the 2007-2008 SY. Student was placed in a first grade SDC at Politi for children with mild to moderate disabilities for the 2008-2009 SY.

6. At an IEP meeting in May 2009, the District's IEP team offered Student placement in a class for students with moderate to severe intellectual disabilities at 10th Street for the 2009-2010 SY. However, Parents did not agree to the proposed placement. Student attended the Politi SDC for children with mild to moderate disabilities for the 2009-2010 SY as a second-grader.

⁴ PL 111-256 (S. 2781), was signed by President Obama on October 5, 2010. This legislation, also known as Rosa's Law, mandates that any reference to "mental retardation" in any federal statute, including the Individuals with Disabilities Education Act (IDEA), shall be deemed to refer to "intellectual disabilities."

⁵ One of the assessors reported that Student was seated in a chair during circle time, rather than on the floor with the other children in the class, and this was due to his physical disabilities. However, there was no other evidence about Student's physical disabilities or how they affect him in the educational environment.

7. The IEP team met on May 24, 2010, for a triennial IEP. Prior to the meeting, the District formally assessed Student to determine his need for speech and language therapy, OT, and APE. A school psychologist also assessed Student. Each assessor participated in the IEP meeting. Again, the District offered placement in the SDC at 10th Street. On June 21, 2010, Parents declined to sign the IEP. Parents filed this action in August 2010.

Psychoeducational Assessment

8. Stacy Copeland-Weiss conducted a psychoeducational assessment of Student in April 2010.⁶ Ms. Copeland-Weiss observed Student in his SDC at Politi on April 19, 2010, and observed him on the playground on April 23, 2010. She also administered the Southern California Ordinal Scales of Development (SCOSD), and had Father complete the Vineland Adaptive Behavior Scales, Second Edition (Vineland II), and the Gilliam Autism Rating Scale, Second Edition (GARS-II).⁷ Student's SDC teacher also completed both the Vineland II, and the GARS-II. In addition, Ms. Copeland-Weiss interviewed Student's teacher, reviewed a written report prepared by the teacher, and also reviewed previous assessments and IEPs for Student.

9. Student's cognitive ability is in the well below average range, based on the results of the SCOSD. When Ms. Copeland-Weiss observed him in his SDC at Politi, she found that he was functioning academically at a level well below the six other students in the SDC. In addition, the results of the Vineland II showed that Student's adaptive skills are low. Only one percent of same-aged students assessed scored lower on the Vineland II. Student had difficulty following single step instructions independently. He also had great difficulty working independently and completing tasks independently.

⁶ Ms. Copeland-Weiss received her bachelor's degree in psychology from the University of California at Los Angeles in 1997. She received her master's degree in school psychology from California State University at Northridge in 2002. She received her Pupil Personnel Services credential as a school psychologist at that time. Ms. Copeland-Weiss was a long-term substitute teacher at the secondary level from 1999 to 2002, working with special education students some of that time. She also worked as a resource specialist program (RSP) teacher. She began contract employment with the District in 2002. As a school psychologist, Ms. Copeland-Weiss primarily conducts assessments of students and attends IEP meetings in that capacity. She assesses students with intellectual disabilities, and conducts 20-50 such assessments per year.

⁷ The SCOSD is a play-based assessment instrument that measures a child's sensory-motor and conceptual skills. The assessor, for example, will show a child how to build a bridge with three blocks by demonstrating how to do so, and then see if the child can do so. It is not a language-based assessment. The Vineland II measures adaptive skills in the areas of communication, daily living skills, and socialization. The GARS-II measures the likelihood that a person is autistic.

10. The results of the GARS-II showed that it was very likely that Student is autistic. However, this is secondary to his cognitive deficits, which have a greater impact on him in the school environment.

11. Ms. Copeland-Weiss testified persuasively that placement in an SDC for children with moderate to severe intellectual disabilities was more appropriate for Student than placement in an SDC for children with mild to moderate disabilities such as the SDC at Politi that Student attended for first and second grade. In addition, she explained that due to his low cognition, Student would not benefit from speech and language services at a higher level than that offered by the District's IEP team for the 2010-2011 SY.

12. Ms. Copeland-Weiss's testimony was bolstered by that of Ginevra Shaw, Student's teacher for both the 2008-2009 SY and the 2009-2010 SY.⁸ Ms. Shaw's testimony established that Student's academic abilities were well below those of other students in her class during those two school years.

Speech and Language Services

13. The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. Speech and language therapy is a related service. The District offered Student 60 minutes each week of speech and language services for the 2010-2011 SY. Parents contend that he needs 180 minutes per week of these services to receive educational benefit, and he received services at this level at some time in the past.

14. Sharon Jacobs was Student's speech and language therapist when he attended Politi.⁹ She also conducted the triennial speech and language assessment of Student that was reviewed at the IEP meeting on May 24, 2010.

⁸ Ms. Shaw received her California multiple subject teaching credential in 2003, and her special education credential in 2009 through an internship program. She has taught for the District since 2001.

⁹ Ms. Jacobs obtained her bachelor's degree from Queens College of City University of New York (CUNY) in communication arts and sciences, and her master's degree in speech pathology from Brooklyn College of CUNY. She has a license in speech pathology and a Certificate of Clinical Competence from the American Speech and Hearing Association. She began working in schools in New York City in 1980, and began working in schools in California in 1985. She has also worked in California as a speech therapist in private practice. She is currently a speech and language therapist for the District. She has 30 years of experience in the area of speech and language therapy. She typically performs 15-30 assessments each year, and has done so since 1980. She also performs alternative and augmentative communication assessments for the District.

15. Due to Student's intellectual disabilities, Ms. Jacobs was unable to use standardized speech and language instruments for the assessment. She attempted to do so, but due to Student's inability or unwillingness to attend to her, as well as his inability to understand what was expected of him, formalized testing could not be completed. Instead, Ms. Jacob's written assessment reported her classroom and clinical observations of Student during her work with him when he attended Politi, information she received during an interview with his teacher, and a review of work samples. She also reviewed prior assessments and IEPs.

16. Student is severely delayed in speech and language development. In the past, attempts were made to teach him sign language, and also to teach him to use a picture-based system of communication, but Student was unable to learn these means of communication, although he recently showed some interest in picture-based communication. Student has difficulty producing speech and imitating words. At times he is unable to produce words he has previously produced. His speech is not clear or readily understandable; he often omits final consonants and other sounds. He usually communicates with single sounds or words, or with gestures. Although his parents speak Spanish at home, Student usually speaks English words at school. It is unknown as to whether his speech and language delays are due to his intellectual disabilities, or caused by other factors.¹⁰

17. Ms. Jacobs testified persuasively that, due to his intellectual disabilities, Student does not benefit exclusively from one-to-one clinical sessions with the speech and language therapist. Rather, he has been motivated to develop words and language in his natural environment, i.e., the classroom, by interacting with peers and adults, especially with prompting and modeling. As a result, the District's recommendation at the May 24, 2010 IEP meeting, was that Student be provided with the collaborative direct services of a speech and language therapist who would work with classroom staff to provide them with strategies to assist Student in acquiring speech and language skills in the classroom environment. The proposed IEP called for Student to receive speech and language collaborative services for a total of 60 minutes each week. Student's previous IEP had called for only 45 minutes of direct speech and language services.

18. No professional testified that Student needs more than 60 minutes per week of speech and language services. Parents did not produce any evidence, other than their own testimony, to support their contention that Student requires more than 60 minutes per week of speech and language services, and that much of this must be individual therapy with Student. The current speech and language assessment did not show that Student needed additional speech and language services, although additional services may have been recommended in a previous assessment. Parents did not argue that they have any professional training or credentials in speech and language therapy. Accordingly, there was

¹⁰ There was no evidence that Student's speech and language difficulties were due to his being primarily instructed in English at school, and having Spanish as the primary language used in his home.

no evidence that Student requires more than 60 minutes per week of speech and language services for the 2010-2011 SY.

APE

19. APE, like speech and language therapy, is a related service. The District's IEP team recommended that Student receive two 30-minute sessions each week of APE services. Parents contend that he requires 180 minutes per week of this service.

20. The purpose of APE is to teach children skills to enable them to participate in physical education (PE) activities with other children, and to teach them the skills in ways that will give them the opportunity to be successful, and in a way that is non-threatening and safe. The grade level standards for physical education are modified to meet the needs of the children in APE, and they are taught in a variety of ways, often with modified equipment.

21. APE teacher, Koko Lytie, assessed Student using the Adaptive Physical Education Assessment Scale.¹¹ Based on the results of her testing, she recommended that Student be found eligible for APE for the 2010-2011 SY. He was not eligible for APE before then because he could not understand or comply with even one-step directions, and did not have a PE goal. Ms. Lytie worked with students in the SDC at Politi on a weekly basis during the 2009-2010 SY, and Student participated, although he did not have an APE goal. However, based on the testing by Ms. Lytie, the District's IEP team agreed that Student could now benefit from receiving APE services and having an APE goal for the 2010-2011 SY.

22. Students in grades one through six in California are required to participate in physical education for 200 minutes each 10 school days. (Ed. Code § 51210, subd. (g).) Student would participate in 60 minutes of APE each week for the 2010-2011 SY, and the remainder of his PE time requirements would be met by participation in PE activities with the rest of his class. Ms. Lytie explained that in APE, Student would work on becoming more proficient catching a ball, and this was one of his IEP goals for the 2010-2011 school year. In addition, Student would be taught how to be safe on the playground, such as being able to avoid being hit by a ball accidentally hit or thrown in his direction.

23. Ms. Lytie testified persuasively that Student would not benefit from more than 60 minutes of APE each week. Studies have shown that elementary school students benefit from APE in 30 minute increments twice a week, but do not gain a greater benefit when provided with additional APE. More APE would interfere with other classroom activities

¹¹ Ms. Lytie received her bachelor's degree from the University of Wisconsin, LaCrosse in physical education and health education, with minors in psychology and adaptive physical education. She has a California teaching credential, and an APE credential. Ms. Lytie has been teaching for 23 years, and is a mentor teacher.

and is not necessary. When Student reaches middle school, he will have APE every school day, if he qualifies for it, and would benefit from it.

24. Parents did not present any evidence, other than their own testimony, to support their contention that Student requires 180 minutes per week of APE. Accordingly, the evidence did not establish that Student required more than 60 minutes per week of APE offered by the District for the 2010-2011 SY.

OT

25. OT is also a related service. The District offered Student 600 minutes per year of consultative OT services for the 2010-2011 SY. This means the occupational therapist would work with classroom staff to develop strategies that would provide Student with opportunities to increase his gross and fine motor skills. Parents believe that Student requires 180 minutes per week of direct OT services, which they contend he received when he was younger.

26. Student was assessed for OT services in April 2010 by Kelly Beckler.¹² Ms. Beckler was also Student's occupational therapist for the 2009-2010 SY when he received direct OT services for 50 minutes per week in an OT room at Politi. He met both of his two OT goals for that school year.

27. For her assessment, Ms. Beckler reviewed previous IEPs and assessments, interviewed Ms. Shaw, and conducted both classroom and clinical observations of Student. Because of Student's intellectual disabilities, and inability to understand and follow directions, it was not possible to conduct formal standardized assessments, although Ms. Beckler attempted to do so.

28. Ms. Beckler found that Student has deficits in the area of fine motor skills which affect him in the classroom. He disliked and had difficulty performing tasks which required him to work with a pencil or crayon and paper, such as tracing letters or coloring, which are pre-writing activities. Student also could not coordinate his right and left hands so that he could use scissors or open containers.

29. Because Student has deficits in motor planning, which is the ability to determine how to coordinate a series of movements to perform a task, he had difficulty learning new skills, or engaging in new activities. Ms. Beckler found that Student learned new activities best by working with peers and through practice and repetition.

¹² Ms. Beckler received her bachelor's degree from Rockhurst University in 2007 and her master's degree in OT from Rockhurst University in 2009. She is licensed as an occupational therapist in California and also has national certification as an occupational therapist. She began working for the District as an OT intern in 2008, and was hired by the District as an occupational therapist in January 2010.

30. Based on her experience with Student in the 2009-2010 SY, Ms. Beckler found that Student did not benefit from direct occupational therapy in a clinical setting. Therefore, the District's IEP team recommended that Student receive 600 minutes of OT in the classroom for the 2010-2011 SY, to be provided directly and in collaboration with the SDC teacher and staff. The occupational therapist would meet with the teacher and staff and create strategies so that his fine motor skills deficits could be addressed by giving Student appropriate classroom tasks that would target his areas of need. By not restricting OT services to a certain number of minutes each month, collaboration could be provided as needed, with more services available earlier in the school year to help classroom staff introduce new activities or skills to Student.

31. Parents presented no evidence, other than their own testimony, to support their contention that Student would benefit from, or required 180 minutes of direct OT services from the District for the 2010-2011 SY. Although previous assessments may have recommended additional OT services, the current OT assessment did not. Rather, Parents seemed to want an increased level of OT services simply because he had received them in the past. Accordingly, Parents failed to prove that Student required more than 600 minutes of OT services for the 2010-2011 SY.

PT

32. PT is a related service. Student's initial IEP in September 2005 indicated that based on the results of an assessment, Student did not require PT services to assist him in accessing his curriculum so that he could receive educational benefit. Therefore, the District did not offer him PT services. There was no evidence that the District had ever provided Student with PT, although Lanterman had done so in the past, and may have continued to do so after September 2005.

33. Parents contend that Student needs PT. However, based on their testimony, it appears that Parents may have confused PT with OT or APE. They were unable to articulate why they felt he needed these services, and discussed problems such as being unable to open a container, or independently dress himself as reasons why he might require them. The assessment plan signed by Parents for the triennial assessments in the spring of 2010 did not call for a PT assessment, and there was no evidence that Parents requested such an assessment. Other than testimony about Student's asthma, there was no evidence of any other physical disabilities Student had which might require PT. Accordingly, Parents failed to prove that Student required PT in the school setting.

LEGAL CONCLUSIONS

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student has the burden of proof in this matter because he is the complainant.

Elements of a FAPE

2. Under both the IDEA and State law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149.)

4. In deciding whether a school district has offered a student an appropriate placement and services, the focus is on the adequacy of the school district's proposed program. (*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.*)

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) The issues in this case are not procedural. Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

Did Student require more than 60 minutes per week of speech and language therapy offered by the District for the 2010-2011SY?

6. Based on Legal Conclusions 2-5, and Factual Findings 2-18, the evidence established that Student only requires 60 minutes per week of speech and language services to receive educational benefit. Student learns best in the classroom environment. Therefore, Student could best be served by a speech and language therapist by allowing the therapist to work with his teacher and classroom staff to devise ways of providing him with opportunities to improve his skills in this area, as well as by the provision of direct services either one-to-one, or in small groups. Parents provided no persuasive evidence that Student requires additional speech and language therapy to gain educational benefit.

Did Student require more than 60 minutes per week of adaptive physical education (APE) offered by the District for the 2010-2011 SY?

7. As established by Legal Conclusions 2-5, and Factual Findings 17-24, Student does not require more than 60 minutes per week of APE. Only recently did Student develop the ability to follow one-step directions. Until he was able to do so, he could not benefit from APE. Under the offered IEP, Student would continue to be provided with at least 200 minutes every 10 school days of PE as required by the Education Code, and 60 minutes a week of APE will constitute a part of these 200 minutes. Parents did not meet their burden of proof in establishing that 60 minutes of APE each week was not sufficient for Student to gain educational benefit.

Did Student require more than 600 minutes per year of occupational therapy services (OT) offered by the District for the 2010-2011 SY?

8. Legal Conclusions 2-5, and Factual Findings 2-12, and 25-31, establish that Student does not require more than 600 minutes of OT for the 2010-2011 SY. Ms. Beckler provided Student with direct OT services for the 2009-2010 SY for 50 minutes each week in the school's OT room, and he met his OT goals. Ms. Beckler testified persuasively that direct services in a clinical setting were not necessary for him to receive educational benefit in this area. Student's deficits in the areas of fine motor skills and motor planning are related to his intellectual disabilities. His other sensory and motor skills are within normal limits for someone at his developmental level, taking into account his intellectual disabilities. Student will gain the most benefit from an occupational therapist providing his classroom teacher and aides with strategies to help him improve his skills in these areas. A collaborative model that allows the occupational therapist to consult with classroom staff as needed, without prescribing a certain number of minutes each week or month, is the best way to meet Student's need for OT. Parents did not provide any evidence to the contrary.

Did Student require physical therapy (PT) to be provided by the District for the 2010-2011 SY?

9. Based on Legal Conclusions 2-5, and 7-8, and Factual Findings 2-4, 7, and 32-33, there was no evidence that Student required PT to receive educational benefit. During the course of the hearing it became clear that Parents did not understand the difference between APE, OT, and PT. There was evidence that Student could benefit from OT and APE, but no evidence that he required PT. Parents did not request a PT assessment as part of the triennial assessment process, nor was there evidence that the District had ever provided him with these services. Accordingly, Parents did not meet their burden of proof on this issue.

ORDER

Student's requests for relief are denied.

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. The District prevailed on all issues.

RIGHT TO APPEAL

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. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: March 17, 2011

/s/
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings