

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. 2014120504

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 8, 2014, naming the Los Angeles Unified School District. On January 7, 2015, the parties jointly requested a continuance. On January 8, 2015, a continuance was granted.

Administrative Law Judge Ted Mann heard this matter in Van Nuys, California, on April 14, 2015.

Student's mother represented Student. Student was not present during the hearing. The Office of Administrative Hearings provided Mother a Spanish interpreter during the hearing.

Christine Wood and Donald Irwin, Attorneys at Law, represented District. Patricia Tamez-Simplicio, District Special Education Specialist, attended the hearing on behalf of District. Jennifer Choi, a District Legal Intern, was excluded from the hearing at Mother's request.

At the conclusion of the hearing on April 14, 2015, oral closing arguments were made by both District and Student, the record was closed, and the matter was submitted for decision.

ISSUE¹

Did District deny Student a free appropriate public education when it failed, in the November 12, 2014 individualized education program, to offer a one-to-one aide to address Student's attentional and academic needs.

SUMMARY OF DECISION

Student contended that he was denied a FAPE as a result of District's failure to adequately address Student's attentional and academic needs in the IEP of November 12, 2014. The Student contended that he had significant attentional and academic challenges that were unmet so as to require a one-to-one aide.

District contended that the IEP of November 12, 2014, provided Student a FAPE, since Student's attentional and academic issues did not require a one-to-one aide, and that student's attentional and academic issues were adequately addressed in other ways.

Student did not meet his burden of proof on the issue as the evidence showed that the Student did not have attentional and academic issues that would necessitate a one-to-one behavioral aide, nor was such a one-to-one aide consistent with methodologies used to address student's challenges in accessing his education. Accordingly, District was not required to provide a one-to-one aide for Student, and the District did not deny Student a FAPE in the IEP of November 14, 2014.

FACTUAL FINDINGS

Jurisdiction

1. Student is an eight-year-old boy who resided in the District at all relevant times, and is currently eligible for special education under the category of Specific Learning Disability. He originally entered District's special education program on November 24, 2009, just after his third birthday. Student's initial eligibility was under Developmental Delay. His eligibility was changed to Speech or Language Impairment in March 2012. Thereafter, his eligibility was changed again in April 2014 to Specific Learning Disability.

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Background and Educational History

2. Student attended his home school, Lankershim Elementary School, from pre-kindergarten through second grade. He was in a general education classroom with supports and services in first and second grade. For third grade, the 2014-2015 school year, Student transferred to a magnet program at Monlux Math/Science Magnet, where he was also placed in a general education classroom with supports and services.

Second Grade

3. Student's special education resource teacher at Lankershim for approximately the second half of the 2013-2014 school year was Arthur Ball. Mr. Ball received a bachelor's degree in sociology from the University of California at Los Angeles in 1989. He received his teaching credential in 2004 from California State University at Northridge. Mr. Ball has worked for District since 2003. He has taught at Lankershim since February 2014.

4. In February 2014, Mr. Ball became Student's resource teacher, and implemented Student's then-existing IEP. Student's IEP offered a general education placement with daily resource specialist services of 250 minutes weekly in math and 250 minutes weekly in language arts. All resource specialist support was delivered on a pull-out basis, meaning Student would receive the services in a classroom separate from his general education classroom. When he began teaching Student, Mr. Ball observed that Student was not producing much work and was frequently "zoning out" passively. He did not observe any behavioral issues related to disruptiveness, aggression, or violence by Student at that time.

5. Mr. Ball attended Student's April 24, 2014 IEP meeting. Based in part upon his observations and recommendations, the IEP team recommended an increase in Student's resource specialist minutes so as to address Student's withdrawal and inattention to task. To implement the recommendation, the team increased Student's resource services by 160 minutes per week, on a push-in basis in the general education classroom. Push-in resource services are provided in the general education classroom allowing Student to remain in a general education setting. The team believed the additional resource services would allow Mr. Ball or his aide to prompt, direct, and assist Student in getting and staying on task and doing his schoolwork in a general education setting.

6. In response to the push-in services, Student would sometimes work and at other times not work. He appeared to get overwhelmed at times and then "zone out" in response. Mr. Ball did not observe any behavioral problems during the push-in services. Rather, he observed that Student was compliant and passive.

7. The one-to-one resource services provided by Mr. Ball or his aide were different than those provided by a one-to-one behavioral aide. The resource services were designed to work on Student's academics directly through use of such approaches as manipulatives, graphic organizers, and providing one-step directions. In contrast, a behavioral aide was intended to help address and control problem behaviors and ultimately protect Student from himself and others from Student. Mr. Ball's opinion was that Student did not need a one-to-one behavioral aide, nor would Student benefit from one. He also was concerned that Student would sometimes become frustrated while working with an adult on a one-to-one basis.

Third Grade

8. Jasmine Leone provided resource specialist services to Student at Monlux for the first month of the 2014-2015 school year, and then again beginning in January 2015. Ms. Leone received her bachelor's degree and general education teaching credential in 2005 from California State University at Northridge. She subsequently obtained a mild-moderate special education teaching credential, a master's degree in teaching, and an administrative credential. She also has an autism certificate. Ms. Leone has been a resource teacher at Monlux for several years.

9. Ms. Leone reviewed Student's April 24, 2014 IEP in preparation for providing him with resource specialist services. She then provided the pull-out portion of the resource specialist services for Student. At the beginning of the 2014-2015 school year, Student was having a lot of difficulty with reading, writing, and math. Ms. Leone changed his reading instructional level from third grade to second grade and he began to have more success and progress as he could better access the material with his existing skills.

10. The one-to-one resource specialist services provided by Ms. Leone or her aide were different than those provided by a one-to-one behavioral aide. The resource specialist services she or her aide provided were designed to work on Student's academics, not on behavioral issues, but the services did address attentional problems by using the one-to-one and small group model. Ms. Leone's opinion was that Student did not need a one-to-one behavioral aide, nor would Student benefit from one. In her opinion, Student was off-task not because of problem behaviors, but because he had difficulty comprehending and understanding the curriculum due to his processing deficits.

11. Student's mother testified at the hearing. She believed that Student was doing better at Monlux than he had been at Lankershim. He benefitted from the speech and language services he received, and he has progressed and been happier at Monlux. Mother does not have any training or experience in the special education field and does not have a teaching credential. She has never observed a one-to-one aide in the classroom, nor the push-in resource specialist services delivered in Student's classroom.

Psychoeducational Assessment

12. Hasmig Barsam, M.A., conducted a psychoeducational assessment of Student in Fall 2013, when Student was almost seven years old and in the second grade. She issued a report of her findings and conclusions on October 21, 2013. Ms. Barsam received her bachelor's degree from California State University at Northridge in psychology and child development and holds master's degrees in psychology and school counseling. She has been employed by District since 2004 as a school psychologist, has conducted hundreds of observations and assessments, and has participated in a similar number of IEP's.

13. In conducting the assessment, Ms. Barsam utilized materials and procedures for assessment that were selected and administered so as not to be racially, culturally, or sexually discriminatory and were considered valid and reliable for her evaluation. In preparing her findings and making her conclusions, she conducted a comprehensive review of Student's cumulative file records including prior assessments, prior IEP's, and other educational records. She also conducted observations of Student in the school setting, interviewed Student, Mother, and his general education teacher, reviewed questionnaires completed by Student, Mother, and the teacher, and administered a battery of standardized tests.

CLINICAL OBSERVATIONS AND EVALUATIONS

14. The Student was cooperative and respectful with Ms. Barsam during testing. He presented with a very good effort and a generally great attitude. Student's attention and concentration depended on the particular task, and appeared to decrease with more difficult tasks. Student had significant delays in speech, and his speech was unintelligible at times.

15. Ms. Barsam observed Student twice in a classroom setting. Student had intermittent difficulties with attention and concentration. At times he would follow directions, and at other times he would withdraw and be non-participatory. Student was generally on task when working with an aide in a group of five students, although he worked quite slowly. Ms. Barsam did not observe Student engage in any disruptive behavior, or display any other behavioral problems.

16. Ms. Barsam observed Student once in a playground setting. She did not note any significant behaviors of concern, and found Student to have appropriate social skills for his age, despite having speech and language impairments.

STANDARDIZED TESTS

17. Ms. Barsam administered the following standardized tests: the Cognitive Assessment System, including the Planning, Simultaneous, Attention, and Simultaneous Processing subtests; the Test of Auditory Processing, Third Edition; the Test of Visual

Processing Skills, Third Edition; the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition; and the Behavior Assessment Scale for Adolescents, Second Edition.

18. The Cognitive Assessment System was administered to assess Student's cognitive processing and related abilities, and consisted of four subtests entitled Planning, Simultaneous, Attention, and Successive Processing. The Planning subtest required Student to determine, select, apply, and evaluate solutions to problems. The Simultaneous subtest required Student to relate separate pieces of information into a group or to see how the parts related as a whole. The Attention subtest required Student to focus on a cognitive activity or a particular stimulus and ignore others. The Successive Processing subtest required Student to work with ordered information.

19. Student's overall standard score on the Cognitive Assessment test was 105 which ranked at the 63rd percentile, meaning Student performs at an equal or greater level than 63% of all same age children. He scored at an average level on the Planning subtest. He scored a standard score of 116 on the Simultaneous subtest which ranked at the 83rd percentile and within the above average range. He scored a standard score of 110 on the Attention subtest which ranked at the 75th percentile. He scored a standard score of 84 on the Successive Processing subtest which ranked at the 14th percentile. The 14th percentile was at the below average range and was an area of significant weakness for Student affecting his word decoding, syntax structure comprehension, word pronunciation and segment sequencing, and ability to follow multiple steps.

20. The Auditory Processing Test measured Student's auditory skills as related to the development, use, and understanding of language. He scored in the borderline range overall, with significant deficiencies in cohesion skill, which confirmed that Student had significant auditory processing deficits.

21. The Visual Processing Skills Test measured Student's visual processing, including visual memory, perception and manipulation of visual information, spatial visualization, alertness to detail, and perceptual organization. He scored in the above average range overall, and visual processing was an area of significant strength for Student.

22. The Test of Visual Motor Integration measured Student's integration of visual perception and fine motor skills. The testing revealed average abilities, but apparent difficulties in fine motor skills.

23. The Behavior Assessment Scale measured Student's various behaviors and assessed for areas of problem behaviors, based upon questionnaires that were completed by Parent, Student, and Student's general education teacher. Both Parent, and Student's general education teacher Ms. Maria Garcia, successfully completed their questionnaires, and the results were found to be valid. Student did not successfully complete his questionnaire, rendering his questionnaire results invalid.

24. Both Parent and teacher had similar results for Student's behaviors. Their ratings fell in the Clinically Significant range in the area of Functional Communication, which was indicative of poor receptive and expressive language. A score in the Clinically Significant range suggests a high level of maladjustment, and is an area of greatest concern. Both Parent and teacher found problems with Attention Issues and Withdrawal, rating them as At Risk. Scores in the At Risk range identify either a significant problem that may not be severe enough to require formal treatment or a potentially developing problem that needs monitoring.

PSYCHOEDUCATIONAL ASSESSMENT SUMMARY

25. Ms. Barsam concluded that Student has significant auditory processing deficits, but strong visual processing skills, and average overall cognitive functioning. She found a significant discrepancy between Student's cognitive abilities and his academic achievement. She also found that Student had poor receptive and expressive language skills resulting in significant difficulties for Student in functional communication. Student also had issues with attention, social skills, and withdrawal. Ms. Barsam did not note any concerns about Student's behavior in terms of aggression, danger to others, or danger to himself.

26. Ms. Barsam concluded that Student has a Specific Learning Disability with a significant deficit in auditory processing, along with attentional problems. Among many other recommendations, Ms. Barsam was of the opinion that Student may benefit from a small, structured environment. Her summary did not recommend that Student have a one-to-one aide. Ms. Barsam reinforced this point at the hearing when she testified that she did not think that such an aide was a necessary part of Student's services.

November 14, 2014 IEP MEETING

27. District convened an IEP meeting on November 14, 2014. All required members of the IEP team attended. The IEP team discussed Student's present levels of performance, and progress on goals. The team developed new goals in all areas of need. The team agreed that Student would continue placement in the general education setting at Monlux. The team agreed that Student's instructional accommodations would include a multimodality approach, frequent repetition, and small group and individualized instruction. Additionally, the team offered 375 minutes weekly of pull-out resource specialist services to address articulation, and 160 minutes weekly of pull-out resource specialist services to address English language development.

28. Mother agreed with all parts of the IEP, except that she requested the IEP provide Student with a one-to-one aide, and increase Student's speech and language services.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.³; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District 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

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, because Student filed the complaint and requested the hearing, Student has the burden of proof.

One-to-One Aide

5. Student contends that the November 14, 2014 IEP should have offered Student a one-to-one aide in order to provide Student a FAPE. District contends that the program and services offered by District in the November 14, 2014 IEP provided Student with a FAPE. As discussed below, Student failed to meet his burden of proving by a preponderance of the evidence that the absence of an offer of a one-to-one aide in the November 14, 2014 IEP precluded an offer of FAPE by the District.

6. 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 Dist.* (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, the 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.*)

7. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) *Rowley* requires a school district to provide a disabled child with meaningful access to education; it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, 458 U.S. at p. 200.)

8. Here, Student's Mother believes that a one-to-one aide would allow her son to make additional progress. However, she testified at hearing that Student is making progress at his current school, and, in fact, is doing better at Monlux than he was at Lankershim. She acknowledged that he is happier at Monlux, and he is making educational progress at Monlux. Further, Student did not offer any credible evidence that a one-to-one aide was necessary for the District's IEP offer of November 14, 2014 to provide a FAPE. As discussed above, Student has the burden of proof. Since Student has not presented evidence to support his claims, Student has not met his burden of proof.

9. On the other hand, District has presented evidence that Student is making progress despite his educational challenges. Further, District has presented evidence that the program and services offered in the November 14, 2014 IEP were designed to meet Student's unique needs. The pull-out resource specialist services offered by District allowed the special education teacher or their aide to work with Student in a small group and/or individualized setting, as provided for in Student's IEP. This setting allowed District to specifically employ strategies to prompt and engage student, thereby addressing attentional issues, as well as concurrently addressing his academic needs. None of the three witnesses offered by District thought that a one-to-one aide was necessary for Student to obtain some educational benefit from the program and services offered by District in the November 12, 2014 IEP.

10. Much of the dispute between Mother and District comes down to District's choice of methodologies. As explained, above, the choice of methodologies falls to District. District's choices are then analyzed to determine whether the combination of placement and services has resulted in some educational benefit to Student. Here, District has used both pull-out and push-in resource specialist services to provide language and speech services and academic support to Student. The current IEP calls for 535 minutes weekly of pull-out resource services. As stated above, those services are reasonably calculated to address Student's attentional and academic needs in precisely the setting recommended by Ms. Barsam in her report. District has a rational, reasoned basis for employing these methodologies and Student has made progress in his program. Significantly, Mother agrees that Student is making progress and happier with his new placement at Monlux, and the attendant program and services.

11. On the behavioral side, Mother presents little or no evidence of behavioral problems by Student in his current placement. Whether he may have had issues at Lankershim, or at some other point in the past, does not weigh in the examination of the current placement. In fact, both Mother and District agree that Student, if anything, is withdrawn and passive, and not engaging in the types of behaviors that would trigger the need for a one-to-one aide to address Student's behavioral needs. District's witnesses were unanimous that Student does not require such behavioral assistance at this time.

12. In sum, Student did not prove by a preponderance of the evidence that District's offer of placement and services as contained in the IEP of November 14, 2014, failed to offer Student a FAPE.

ORDER

All relief sought by Student in his complaint is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on the sole issue presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: May 27, 2015

/s/

TED MANN
Administrative Law Judge
Office of Administrative Hearings