

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

In the Matter of:

SAN JACINTO UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2006110432

DECISION

Administrative Law Judge, Jacqueline Jones, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on December 18, 2006, in San Jacinto, California.

Petitioner San Jacinto Unified School District (District) was represented by Gregory Alexander III, Coordinator of Special Education. Also present on behalf of the District was Eric Mora, Director of Special Education.

Respondent Student was not present and no one appeared on his behalf at the hearing. District placed calls to the mother (Parent) on the day of hearing. Both the cell telephone number of the Parent and the home telephone number were not in service. Parent had adequate notice of the hearing. There were no requests for continuances received. The hearing was scheduled to begin at 9:30 a.m. After waiting 30 minutes, the hearing began at 10:00 a.m.

On November 16, 2006, District filed a request for mediation and due process hearing. On December 6, 2006, a mediation was scheduled. No one appeared on

Student's behalf at the mediation.

Oral and documentary evidence were received, the record was left open, and the matter was continued for good cause until January 3, 2007, so that a written closing argument could be submitted.

ISSUE

Did the District provide Student with a free appropriate public education (FAPE) at the individualized education program (IEP) meeting on September 14, 2006?

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Student is a 15-year-old boy who resides within the geographical boundaries of the District.

FACTUAL BACKGROUND

2. In school year 2006-2007 Student was in the tenth grade.
3. On April 30, 1996, the District determined Student eligible for special education services based on Emotional Disturbance.

2005-2006 SCHOOL YEAR

4. At the annual IEP meeting, on March 24, 2006, the IEP team developed a Behavior Support Plan¹ to address behavior issues. The District enrolled Student in a Special Day Class (SDC) at Beaumont High School (County Program) in Beaumont, California.

5. Student received a suspension for one day, on May 23, 2006, at the County

¹ This term is frequently used interchangeably with behavior intervention plan.

Program for being disrespectful to staff and cursing at staff.

6. At Parent's request, a new IEP was developed on May 25, 2006. The purpose of the IEP meeting was to discuss the appropriateness of placement.

7. A discussion of change of placement occurred on June 8, 2006, at an IEP meeting. Parent agreed to the transfer of Student to Keystone School, a nonpublic school (NPS).

2006-2007 SCHOOL YEAR

8. Student attended Keystone beginning on August 28, 2006.

9. Student engaged in physical aggression towards another student on September 7, 2006. Student also engaged in physical and verbal aggression towards staff on the same day.

10. A 30-day review by the IEP team occurred on September 14, 2006. The team determined that a Behavior Support Plan was required in order to address the following:

- A. Classroom behaviors that impede the Student's learning or the learning of others.
- B. Classroom or school behaviors that may lead to disruption, aggression, or disciplinary action.
- C. Aggressive or destructive behaviors that can cause potential injury to self, others, or property and result in disciplinary actions.

Three IEP goals related to these behaviors were identified. The goals were in the areas of staying on-task, behavior and social/emotional.

11. At the September 14, 2006 IEP meeting, Parent refused to sign Keystone's behavior management plan and time out procedures including use of physical restraint. District then filed the pending due process complaint.

STUDENT'S NEEDS

12. As discussed in Legal Conclusion 1, it is the District's responsibility to provide Student with FAPE.

13. Eric Mora is the Director of Special Education for the District. Mr. Mora has a bachelor's degree in psychology and a master's degree in school psychology. Mr. Mora has a tier-one Administrative credential. Mr. Mora's background includes working as a school psychologist for three years. Mr. Mora was familiar with Student and has reviewed Student's IEPs, and assessments.

14. Mr. Mora related that Student has an inability to maintain social contact with peers and adults and has difficulty with impulse and anger management. Student can read a passage but his comprehension is low. Student has very basic math skills and the ability to grasp some algebra skills. Student has a history of behavioral and academic problems. In Mr. Mora's opinion, placement at a state-certified nonpublic school (NPS) addresses Student's needs. The class ratio is small at the NPS. Mr. Mora indicates that the NPS specializes in behavior management.

REASONABLY CALCULATED TO PROVIDE SOME EDUCATIONAL BENEFIT

15. As discussed in Legal Conclusions 3 and 4, 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.

16. The evidence demonstrates that the offered program is reasonably calculated to provide some educational benefit because it offers a small class size and behavior management.

COMPORT WITH THE IEP

17. Legal Conclusion 4 provides that the program offered must comport with

the IEP.

18. Gregory Alexander III is the Coordinator of Special Education for the District. Mr. Alexander has a bachelor's degree in political science and a Master's degree in education administration and a master's degree in education/special education. Mr. Alexander has worked with students with special needs for the last seven years. Mr. Alexander is familiar with Student and has attended the Student's IEP meetings on May 25, 2006, June 8, 2006 and September 14, 2006.

19. Mr. Alexander related that at the June 8, 2006, IEP meeting Parent agreed to Student's attendance at the Keystone School. Parent signed the consent and placement to attend Keystone.

20. The offered program comports with the last agreed upon IEP of June 8, 2006.

LEAST RESTRICTIVE ENVIRONMENT

21. Legal Conclusion 4 provides that school districts are required to provide each special education student with a program in the least restrictive environment. School districts may provide a special education student with a program in a more restrictive environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. Whether the offered placement of Student on a NPS campus such as Keystone is appropriate requires an analysis of four factors, known as the *Holland* factors.²

² Sacramento City Unified Sch. Dist. v. Rachel H. (9 th Cir. 1994) 14 F.3d 1398, 1403. See Legal Conclusion 4.

EDUCATIONAL BENEFITS OF PLACEMENT IN A REGULAR EDUCATIONAL ENVIRONMENT

22. Placement on a comprehensive public high school campus would not be appropriate because Student has below grade level academics and socio-emotional challenges. Student requires an educational environment where his behaviors can be better managed. Education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily.

NON-ACADEMIC BENEFIT OF A REGULAR EDUCATION PLACEMENT

23. Mr. Mora related that Student did not meaningfully interact with regular education students. Student has difficulty with impulse and anger management.

EFFECT STUDENT HAD ON STAFF AND CLASSMATES

24. Evidence established that Student posed a risk of injury to himself and to those around him. Student disrupted the educational environment of his fellow students, thus depriving them of full access to their educational content.

COSTS OF MAINSTREAMING

25. This was not raised as an issue.

26. District offered educational and related services that were calculated to provide some educational benefit, in the least restrictive environment, a nonpublic school placement at Keystone.

BEHAVIOR INTERVENTION PLAN

27. As stated in Legal Conclusion 6, federal and state law require that an IEP team consider strategies, including positive behavioral interventions and supports when a child's behavior impedes the child's learning or that of others.

28. Student's behavior on September 7, 2006 included refusal to follow school and classroom rules, exhibiting off-task behavior, talking out, defiance, distracting others,

racial comments, verbal aggression, damaging property, yelling and sexual talk. This behavior impeded Student's learning and that of others. Mr. Alexander's testimony established that Student requires a nonpublic school placement with an appropriate behavior intervention plan.

29. District responded appropriately in recommending a behavior intervention plan and timeout procedures including use of physical restraint to ensure the Student's safety and the safety of other students.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed .Code, § 56000 et seq.)³ The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parent, that meet state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(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. § 1401(29).)

2. District, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 543 U.S. 1145 [126 S.Ct. 528, 163 L.Ed.2d 387].)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement 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

³ All references to the Education Code, pertain to the California Education Code.

education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 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. (*Id.* at p. 201.)

4. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District*) (9th Cir.1987) 811 F.2d 1314.) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student's IEP, then the district provided a FAPE, even if student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code § 56031.) In order to measure whether a placement is in the least restrictive environment the Ninth Circuit, in *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class, and (4) the costs of mainstreaming [the student].

5. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district,

not on the alternative preferred by the parents. (*Gregory K. supra*, F.2d at p.1314.)

6. There are two situations in which federal and state law require that a child's behavior be addressed. First, when a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Second, when a school district subjects a child to certain types of discipline, it must conduct a functional behavior assessment and implement a behavior intervention plan, or review and modify the behavior intervention plan if one is already in place. (20 U.S.C. § 1415(k)(1)(B); 20 U.S.C. § 1415(k)(1)(D), (F), effective July 1, 2005; 34 C.F.R. § 300.520(B); Ed. Code, § 48915.5 [a student receiving special education services may be suspended or expelled as provided by 20 U.S.C. 1415 (k) and 34 C.F.R. §§ 300.519, 300.529]; *Alex R. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 614.)

7. Federal law does not impose any specific requirements for a functional behavior assessment or behavior intervention plan. (*Alex R. supra* 375 F.3d at p. 615.) Although the comments to the 1999 federal regulations offer guidance about what may be included, further requirements were not imposed in order to give the school district's discretion to determine what is appropriate depending upon the needs of the child (64 Fed. Reg 12588 (Mar. 12, 1999). The comments indicate that it may be appropriate for the IEP team to identify the circumstances or behaviors of others that may result in inappropriate behaviors by the child. (*Ibid.*) It may also be appropriate to include specific regular or alternative disciplinary measures that may result from infractions of school rules. (*Id.* at p. 12589.) A functional behavior assessment that meets the definition of an evaluation must meet the requirements of an evaluation. (*Id.* at p.12620.)

8. While California law does not define a functional behavior assessment, a behavior intervention plan is required when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the

student's IEP. (Cal. Code Regs., tit., 5, section 3001, subd. (f).) Behaviors that are self-injurious, assaultive, or cause serious property damage, and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective, constitute a serious behavior problem that may require a behavior intervention plan. (*Id.*, section 3001, subd. (aa).)

9. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.3469(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and reduction or problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) If a student's behavior impeded learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist., supra; Neosho R-V School Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. Of Education* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

DETERMINATION OF ISSUES

Issue 1: Did the District provide Student with a free appropriate public education (FAPE) at the individualized education program (IEP) meeting on September 14, 2006?

10. Yes. As discussed above in Factual Findings 9-29 and Legal Conclusions 1-9, the District provided FAPE to Student.

ORDER

1. The District's IEP dated September 14, 2006, is appropriate and if Parent continues to seek special education services from the District for Student, she must sign the Behavioral Intervention Plan so that Student can attend Keystone (NPS) which is being offered by the IEP.

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 the issue heard and decided.

RIGHT TO APPEAL THIS DECISION

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 ninety days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 16, 2007


JACQUELINE JONES

Administrative Law Judge

Special Education Division

Office of Administrative Hearings