

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. 2008031009

DECISION

Administrative Law Judge Gregory P. Cleveland, Office of Administrative Hearings (OAH), State of California, heard this matter in Los Angeles, California, on May 20, 2008, and May 21, 2008.

Throughout the hearing, Student was represented by his mother. Los Angeles Unified School District (District) was represented by My Huynh, Attorney at Law. Fred Church, Due Process Office Specialist, also attended the hearing on behalf of the District during the morning session on May 20, 2008, and through the entire session held on May 21, 2008. Joyce Kantor, Due Process Office Specialist, attended on behalf of the District during the afternoon session on May 20, 2008.

A request for due process hearing was filed by Student on March 26, 2008. At the hearing, the ALJ received sworn testimony and documentary evidence. Timely closing briefs were filed by both parties, and on May 30, 2008, the record was closed and the matter was submitted.

ISSUES¹

1. Did the District fail to annually assess Student's hearing?
2. Did the District deny Student a free appropriate public education (FAPE)

from March 26, 2006, through the present by:

- a) failing to provide adequate speech services at the Los Angeles Speech Center;
- b) failing to teach Student phonics;
- c) failing to provide Student with one-to-one instruction in a small class environment;
- d) failing to reimburse parent for mileage for transportation to and from school;
- e) failing to provide Student required accommodations?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is an 11-year-old male, fourth-grader who lives with his mother within the District boundaries. He qualifies for special education services under the deaf/hard of hearing (DHH) category, with severe to profound sensorineural hearing loss in his left ear and profound sensorineural hearing loss in his right ear. His native language is English, although he also communicates with American Sign Language.

2. Student has been provided bilateral hearing aids but only wears the left ear hearing aid because of feedback when he wears his right ear hearing aid.

¹ The issues have been renumbered and reworded for the purposes of clarity and ease of analysis.

Failure to provide annual hearing assessments

3. All students, unless their parents object, shall have their hearing and vision tested while enrolled in a school district. Students that qualify for special education programs and services must be assessed at least once every three years, and not more than once yearly, unless the parents and school district otherwise agree to a different assessment schedule. Student's mother contends that Student is entitled to an annual "hearing test."

4. Student had audiologic evaluations in calendar years 2003 and 2004, and most recently on March 24, 2006, all at the House Ear Institute. The March 24, 2006, evaluation provided accurate information on Student's hearing loss, both unaided, and aided while wearing his left side hearing aid. No evidence was offered that Student's hearing ability changed after March 24, 2006, so as to require the District to propose a subsequent hearing assessment.

5. The District has not tested Student's hearing on an annual basis because of the information provided by the House Ear Institute and because annual hearing tests are not required. In Student's case, the audiology tests are done at House Ear institute because only that facility can adjust Student's hearing aid.

6. At the individualized education program (IEP) meeting on February 11, 2008, Student's mother and District Audiologist Pamela Kirkham discussed having a hearing test performed on Student, but Student's mother has not submitted a formal written request for a hearing test. An audiology assessment was offered to Student on May 12, 2008, but Student's mother then refused, pending the outcome of this due process proceeding.

7. The District possessed accurate information from the March 24, 2006, evaluation by the House Ear Institute. The District therefore did not require an updated assessment of Student's hearing to address Student's audiological needs. Moreover

there has been no request for an assessment from Student's mother or an agreement otherwise to conduct an audiology assessment. Accordingly, the District was not required to assess Student's hearing annually.

Adequacy of Non-Public Agency(NPA) Services

8. Under the Individuals with Disabilities Education Act (IDEA) the District's proposed program must: (1) be designed to meet Student's unique needs, (2) be reasonably calculated to provide Student with some educational benefit, (3) comport with the Student's IEP, and (4) be provided in the least restrictive environment (LRE).

9. It is undisputed that Student has unique needs in nearly all areas of communication. Student's mother contends Student's communication needs were not provided for in a manner that would provide FAPE through the District's offer of speech and language services. Student's IEP of February 12, 2007, provided Student with a 60-minute session with a NPA speech therapist, twice per week. The sessions were to address Student's unique articulation and language needs, as an articulation assessment revealed Student's age equivalent articulation level was below 2 years of age. Objectives were therefore proposed, calling for Student's use of age appropriate speech sounds and getting Student to use 4- to 5-word sentences with proper grammar and syntax. The sessions were scheduled at the Los Angeles Speech and Language Therapy Center and the IEP did not require Student to be pulled out of class time for the sessions.

10. While the February 12, 2007, IEP provided for the NPA sessions to address Student's articulation and language needs, the Los Angeles Speech and Language Therapy Service dropped Student from his therapist's schedule, two months later in April 2007 due to inconsistencies in attendance. On May 2, 2007, and again in September 2007, Student was offered sessions at 5:00 pm, but Student's mother declined those sessions due to traffic problems and time conflicts with a pre-paid karate class Student attended. Overall during calendar year 2007, Student attended only 18

sessions at Los Angeles Speech and Language Therapy, and only one of those sessions was for speech and language therapy, while all others were for social skills training. Student last attended a speech and language therapy session on April 11, 2007.

11. Student's IEP of February 11, 2008, reflected that Student had not met any of his IEP speech and language goals from the February 12, 2007, IEP. In articulation and language, Student made only minimal progress due to missed sessions. Therefore the prior goals remained unfulfilled and were continued in the February 11, 2008, IEP. Another goal was added to have Student increase the use of 2- to 3-word phrases to express wants, needs and ideas. To satisfy the earlier goals and to meet the new goal, NPA sessions were again offered, twice weekly for 60 minutes per session, for the purpose of enabling Student to produce age appropriate phonemes, and to get Student to use 4- to 5-word sentences with proper grammar and syntax. Student did not attend any NPA sessions from November 2007, until the week of May 12, 2008.

12. The NPA services offered Student were adequate to provide FAPE because the goals set forth for Student through the NPA services were reasonable when proposed on February 12, 2007, and on February 11, 2008. Student's non-attendance makes it impossible to gauge whether the goals needed modification over time in order for Student to receive educational benefit from the NPA services.

Phonics

13. Student has a unique need in reading. His reading skills in spring 2007 were far below basic level. In the February 11, 2008, IEP Student's need in reading was to improve sight word vocabulary. Student's mother felt that Student needed training in phonics rather than sight reading because Student needed to learn to sound out unfamiliar words. She contends that Student was denied FAPE because his IEP of February 11, 2008, did not include a goal that Student be taught to read phonetically.

14. During the 2006-2007 and 2007-2008 school years, Student attended a special day class (SDC) taught by Ms. Bonnie Miller.

15. When Student was in the SDC he was one of nine pupils in grades 2 through 5, all with some degree of hearing loss. Along with Ms. Miller there is a full-time teaching aide and a sign language interpreter in the SDC. Ms. Miller's teaching method for all the pupils emphasizes "total communication." This means she utilizes verbal speech, sign language, and visual cues.

16. Student's mother asked Ms. Miller why Student was not taught phonics. Ms. Miller does teach phonics as part of speech reading (which is a part of the overall total communication system), even though Ms. Miller has not observed Student sound out words based on the first letter of the word. Ms. Miller also taught speech pronunciation of letters and words outside of reading, and had the pupils practice pronunciation with repetition and re-phrasing.

17. As part of Student's IEP dated February 11, 2008, one of his articulation goals at the NPA is for Student to be able to produce age appropriate phonemes at the word level with 80 percent intelligibility.

18. In addition to his SDC class and his NPA services, Student's IEPs of February 12, 2007, and February 11, 2008, provided for in class auditory training, with speech pathologist Dawn Sawyer. Student's objectives in auditory training called for him to discriminate between words focusing on vowel and consonant sounds.

19. Since December 12, 2007, Student has not attended school, as his mother has taught him at home. Prior to December 12, 2007, Student often arrived late at school, resulting in Student missing language development.

20. Based on the teaching method for Student in his SDC, his auditory training and his NPA provider, Student's IEP was reasonably calculated to provide him training in phonics as part of overall pronunciation and reading. Student's lack of progress in that

regard is due to his non-attendance in class or at the NPA, or lack of language development training due to tardiness.

One-to-One Instruction

21. Student's mother contends Student needs one-to-one teaching or assistance to meet Student's unique needs. She feels that teaching Student in class with pupils in different grades, with differing levels of hearing and speaking abilities, is not an individualized education specially tailored just for Student.

22. Student's SDC class has a teacher, aide and interpreter who work with nine pupils, resulting in a 3:1 adult to pupil ratio at all times, but his mother still feels the adult to pupil ratio is insufficient with Student requiring one-to-one teaching in class.

23. Student's mother testified that Student has made significant progress while working one-to-one with her at home since December 12, 2007. However no specific evidence was offered revealing the extent of progress Student made, or how much time Student's mother works with Student on a one-to-one basis.

24. Student's mother's testimony about his progress at home is supported somewhat by Cherice Effinger. Ms. Effinger, who is a personal friend of Student's mother, has observed Student working directly with his mother at home. She believes that Student is progressing more at home with his mother than he did at school; however, she has not observed Student in class for over one year. Her testimony is only accorded minimal weight as she lacks educational expertise, and her lack of observation in class over the past year indicates she does not have a good basis of knowledge of Student's school instruction to compare with her observations at Student's home.

25. In contrast to Student's mother and Ms. Effinger, the school professionals working with Student testified persuasively that Student does not need full time one-to-one instruction. Ms. Miller testified that Student does not need a one-to-one aide full time because she works with Student one-to-one on a daily basis, when Student attends

class. When she works on an assignment for the entire class, she tailors the content sought for Student.

26. Ms. Miller's testimony, along with the information in Student's IEPs, demonstrates that Student was provided adequate instruction without full-time one-to-one teaching. Student's progress is primarily impeded by inconsistent school attendance and regression when Student misses school, as opposed to a lack of full time one-to-one teaching.

Transportation Expenses

27. The District must provide all services in conformity with Student's IEPs. Pursuant to the IEP of February 12, 2007, the District must provide Student transportation to and from school, but Student's mother elected to drive him. The rate of reimbursement owed Student's mother is \$7.26 per day.

28. Student's mother has not been reimbursed for mileage since November 7, 2006. According to Student's mother's un rebutted testimony on this subject, she did submit additional reimbursement forms since November 7, 2006, but was told the District would no longer reimburse her. Student attended school between November 7, 2006, and December 12, 2007. The speech therapy notes of Dawn Sawyer reveal Student was at school, on at least 16 occasions between April 11, 2007, and December 12, 2007.² Even though Student's mother lacked documentation of the mileage requests she submitted after November 7, 2006, her testimony is unrefuted. Absent any documentation of reimbursement for travel after November 7, 2006, Student has proven lack of reimbursement for transportation expenses since that date. At a minimum,

² The speech therapy logs reveal Student attended school on 4/16/07, 4/18/07, 4/23/07, 5/7/07, 5/14/07, 5/16/07, 5/23/07, 9/12/07, 9/17/07, 9/19/07, 9/26/07, 10/01/07, 10/31/07, 11/7/07, 11/14/07, and 12/5/07.

Student's mother is owed \$116.16 for the 16 days of school attendance documented by Ms. Sawyer.

Accommodations

29. Once a child is determined eligible for special education, the IEP team, with the parent's input, determines the child's educational needs, and identifies the child's present levels of performance, and the services and accommodations that the child requires.

30. Student's mother contends Student needs an accommodation allowing her to remove Student from school early in order for Student to attend his NPA sessions. Student's NPA sessions began at 2:00 pm. In order to get Student to those sessions on time his mother would pull Student out of class at approximately 1:00 pm. The ordinary school day hours are from 7:56 am until 2:20 pm on all days except Tuesdays, when school ends at 1:20 pm. While Student's mother did attempt to get Tuesday sessions at the NPA, the NPA did not have available appointments on Tuesdays.

31. When Student is pulled out of class early he misses out on the state mandated hours of in class instruction. Nothing in either the November 12, 2007, or the November 11, 2008, IEP provided for Student to be pulled out of class early for his NPA sessions. Ms. Drusilla Hale is the vice principal at Student's school. She advised Student's mother that when Student leaves school early he does not meet the attendance requirements of the California Education Code.

32. In the IEP dated February 12, 2007, Ms. Hale inserted language that Student's Early departure from school caused a concern over Student missing out on needed instruction. During her testimony, Ms. Hale explained that Student's non-attendance caused Student to not meet his IEP goals as he can not fully access the school curriculum when pulled out of school early.

33. In the February 11, 2008, IEP parent expressed her concern that an accommodation should be made for her to remove Student from school before the end of the school day in order to attend his NPA speech sessions. The reason given for the requested accommodation was that the NPA offered other session times aside from 2:00 p.m. that were not conducive to the mother's schedule. The requested accommodation was considered but rejected by the IEP team based upon attendance information establishing that Student had missed 46.6 percent of his overall school instruction days between first and fourth grades, not including time Student missed when arriving at school late or leaving early.

34. Although Student's IEPs provide for Student to receive NPA speech services, as noted above, there is nothing in either IEP which provides Student an accommodation allowing him to be pulled out of ordinary classroom instruction to attend NPA sessions. What occurred is that Student's mother pulled Student out of class to attend the NPA, based on convenient traffic times and Student's karate class schedule, rather than scheduling Student at the NPA at a time when he would not have to miss class instruction.

35. Had Student arrived at school on time, attended on a daily basis, not been pulled out of class early, and attended NPA sessions after school, he would have had greater opportunity to meet his IEP goals. Student was therefore not denied a FAPE due to lack of an accommodation for Student to miss class instruction.

CONCLUSIONS OF LAW

1. As the petitioning party, the Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related

services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services are also referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

3. 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, and be reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) 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.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

4. 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. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It

must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

5. The California legislature has declared its intent that individuals with exceptional needs be provided special assistance programs that “promote maximum interaction with the general school population in a manner that is appropriate to the needs of both, taking into consideration, for [DHH] children, the individual’s needs for a sufficient number of age and language mode peers and for special education teachers who are proficient in the individual’s primary language mode.” (Ed. Code, § 56001(g).)

6. Under special education law, a re-assessment of a student must be undertaken by the district, if the re-assessment is requested by the parents, or is warranted by the student’s needs and performance. (20 U.S.C. § 1414(a)(2)(A).) The re-assessment must occur at least every 3 years, and shall not occur more often than once per year, unless the parents and the district otherwise agree. (20 U.S.C. § 1414(a)(2)(B)(i)-(ii); 34 C.F.R. § 300.303(b).)

7. A hearing and vision test is required of a school district for each pupil enrolled in the district, unless the parents object. The test shall be adequate in nature and administered by qualified health supervisors, certificated employees, or other qualified persons under contract with the school district. (Ed. Code, § 49452.) Additionally, all pupils being assessed for initial and three-year review for special education services shall have had a vision and hearing screening, unless parental permission was denied. All pupils continuing to fail a threshold hearing test shall be assessed by a licensed or credentialed audiologist and such assessment shall be part of the assessment plan. (Cal. Code Regs., tit. 5, §§ 3027, 3028.)

8. Student’s IEPs of February 11, 2008, and February 12, 2007, both included the results of Student’s audiology evaluations from the House Ear Institute. The instruction and services offered Student were based upon Student’s hearing loss and

aided hearing abilities according to the House Ear Institute evaluations. Further, there is no evidence Student's hearing changed after the most recent evaluation on March 24, 2006, which would require the District to re-assess Student, nor did Student's mother request in writing any additional audiology assessments. Factual Findings 4 through 7 and Legal Conclusions 6 through 7, establish that Student did not require annual audiology assessments.

9. Considering Student's IEPs of February 11, 2008, and February 12, 2007, at the time they were developed, both provided Student with the opportunity to receive articulation and language services through a NPA, Los Angeles Speech and Language Therapy Service. Those services were offered in order to increase Student's speaking communication ability and were reasonably calculated to provide Student with some educational benefit. Factual Findings 9 through 12 and Legal Conclusions 2 through 4, establish Student did not achieve his goals through the NPA due to Student not keeping his NPA speech sessions, rather than a flaw in the goals or provision of services designed to meet Student's unique needs.

10. Phonics are an integral part of a student's ability to learn to read. While Student contends he was not provided instruction in phonics, Factual Findings 13 through 20 and Legal Conclusions 2 through 4, establish that phonics were utilized as part of Student's classroom instruction in speech-reading, in his articulation services through the NPA, and as part of his auditory training, and that Student's goals included development of proper phonemic pronunciation.

11. Student's IEPs did not provide for full time one-to-one instruction, because Student's unique needs were met by the District without full time one-to-one instruction. Factual Findings 15, 22, and 25 through 26, along with Legal Conclusions 2 through 5, establish that Student received sufficient direct instruction or small group

instruction that was specially tailored to Student's unique needs, including instruction with language mode peers and fellow DHH role models.

12. Transportation expenses are one of the related services which California law provides when needed, to ensure that a special education student receives a FAPE. Factual Findings 27 through 28, along with Legal Conclusion 2, establish that Student's mother transported Student to school after November 7, 2006, on at least 16 occasions. At a minimum therefore Student's mother is entitled to additional reimbursement in the amount of \$116.16, for transportation costs since November 7, 2006.

13. While Student needed to attend his NPA sessions, his IEPs did not provide that he was allowed to miss regular classroom instruction, nor was such an accommodation warranted. California law requires Student to attend school a certain amount of hours daily and when Student left early or arrived late (or did not attend at all) he missed out on his opportunity to access the curriculum. Factual Findings 9, 10 and 31 through 35 along with Legal Conclusions 2 through 4 and 8, establish that an accommodation that would allow Student to miss required instruction time, would therefore be detrimental to Student.

ORDERS

The District is ordered to reimburse Student's mother for transportation expenses in the amount of \$116.16.

Within 30 days of this decision Student's mother may submit additional transportation expenses, upon a proper showing of Student's attendance at school on days not included in the present reimbursement order for the period November 7, 2006,

through December 12, 2007,³ and the District shall pay such request within 30 days of receipt.

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. Here, Student prevailed on subpart (e) of issue number 2. On issue number 1 and all other subparts of issue number 2, the District prevailed.

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: June 17, 2008



GREGORY P. CLEVELAND

Administrative Law Judge

Office of Administrative Hearings

³ The additional days requested would be for those days between November 7, 2006, and December 12, 2007, and not specified in footnote 2, above.