

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT,
v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008080110

DECISION

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter in Murrieta, California, on September 23 and 24, 2008.

Attorney at Law Cynthia Vargas represented Murrieta Valley Unified School District (District). The District's Director of Special Education, Zhanna Preston, was present for most of the hearing. Neither Student nor Student's parents participated in the hearing.¹

¹ On September 17, 2008, educational advocate Tim Jon Runner notified OAH that the parents had withdrawn Student from school in the District, and they had instructed Mr. Runner to take no further action on behalf of Student. On September 23, 2008, prior to the commencement of the hearing, Student's father brought an envelope addressed to the "OAH Judge" to the District's administrative offices where the hearing was taking place. The envelope contained three documents. The first was a letter from the father explaining that the parents would not be appearing at the hearing, nor would they be represented. The second letter was another version of the letter Mr. Runner sent to OAH on September 17, 2008. The third document was a copy of a letter to Ms. Preston from the father dated

The District filed the request for due process hearing on July 30, 2008. There have been no continuances. Oral and documentary evidence were received during the hearing. The District submitted a written closing argument on September 26, 2008, at which time, the record was closed and the matter was submitted for decision.²

ISSUE

Was the District's offer to place Student in a special day class (SDC) for severely handicapped (SH) kindergarten and first grade students at Antelope Hills Elementary School (AHES) for the 2008-2009 school year reasonably calculated to provide student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

FACTUAL FINDINGS

JURISDICTION

1. Student is five years of age and resides with his parents within District boundaries. Student initially entered into special education on May 12, 2006, under the category of established medical disability. The evidence established that this is an eligibility category applicable only to children under the age of five years. At an IEP meeting held on May 22, 2008, the IEP team changed Student's eligibility category for special education to mental retardation, with a secondary disability of speech and language impairment (SLI), and an additional disability of other health impairment (OHI).

September 12, 2008, in which the father advised Ms. Preston that the parents were withdrawing Student from school in the District. These documents were not marked as exhibits and were not admitted into evidence, but have been filed by OAH and are a part of the OAH case file.

² The District's written argument has been marked as District's Exhibit 32.

FACTUAL BACKGROUND

2. Student began attending a District preschool SDC at E. Hale Curran Elementary School (Curran) in 2006.³ Student was the most severely disabled student in the class. The SDC had twelve students during the 2007-2008 school year, with one teacher and one classroom aide. Student was provided with related services of speech and language therapy, occupational therapy (OT) and adaptive physical education (APE) during his two years of attendance at Curran.

3. In the spring of 2008, District personnel conducted evaluations and assessments of Student in the areas of speech and language, OT, APE, and psycho-educational needs. Student's current related service providers conducted the speech and language, OT, and APE assessments. In addition, Student's preschool teacher, Estela Dominguez, prepared an educational profile of Student based on formal and informal observations.⁴

4. On May 22, 2008, an IEP team meeting was held to discuss the aforementioned assessments, as well as placement and related services for Student for the 2008-2009 school year. The parents attended the IEP meeting. Also attending the meeting were Lorrie Coleman, a District administrator who coordinated special education programs, and was a substitute teacher in the Curran preschool SDC; Amy Brennan, Student's OT; Kim Matlock, Student's APE teacher; Rosa Parra, the school psychologist who

³ Some witnesses referred to this class at Curran as a pre-kindergarten class.

⁴ Some witnesses indicated that these assessments were conducted for Student's triennial review, although it appears that Student was initially assessed in 2006 and therefore was not due for his triennial review until 2009. Other witnesses indicated that the assessments were conducted because Student was transitioning from preschool to kindergarten.

assessed Student; Emily Woodacre, Student's speech and language therapist; and Ms. Dominguez.

5. The IEP team discussed the results of the assessments, Student's present levels of performance (PLOPs), proposed goals and objectives, and placement and services for the 2008-2009 school year. The parents actively participated in the IEP meeting and agreed with the results of the District's assessments, the PLOPs, the proposed goals and objectives, and the offer of related services in the areas of speech and language therapy, OT, and APE. However, the parents disagreed with the District's offer of placement in the SH-SDC at AHES. They stated that their ultimate goal was to have Student fully included in a general education classroom, but agreed that it was premature at that time and it would not be in Student's best interest to be placed in a full inclusion classroom. Parents asked that Student be placed in a SDC at Tovashal Elementary School (Tovashal) for mild to moderately (MM) disabled children. Because the parents did not agree with the proposed placement in the SH-SDC at AHES, it was decided that the IEP team would meet at a later date, and the kindergarten SDC teachers from AHES and Tovashal would attend and discuss their respective programs.

6. The IEP team developed a twenty-six page draft IEP⁵ at the May 22, 2008 meeting. The IEP contained PLOPs in the areas of reading, writing, math, communication development, gross/fine motor development, social emotional/behavior, health, and vocational and adaptive/daily living skills. The IEP team also developed eighteen goals related to these areas, and a nineteenth goal, suggested by the parents, was added at a subsequent IEP meeting. The parents signed the May 22, 2008 IEP indicating they had received the assessment reports, been advised of and given a copy of procedural

⁵ The written IEP document is referred to as the IEP.

safeguards, and that they had been advised of the full continuum of program options. However, they did not consent to the IEP.

7. On June 9, 2008, another IEP meeting was held with both parents attending. Also attending the June 9, 2008 IEP meeting were Ms. Coleman, Kelli Miles, the teacher of the SH-SDC at AHES, Rebecca Diephouse, the teacher of the MM-SDC at Tovashal, and Ms. Dominguez. Prior to this meeting, Ms. Diephouse and Ms. Miles were provided with copies of the May 22, 2008 draft IEP, and Ms. Dominguez's educational profile that showed Student's current level of functioning. During this meeting, Ms. Diephouse and Ms. Miles described their respective classrooms and programs. The June 9, 2008 IEP is identical to the May 22, 2008 draft, with the exception of meeting attendees, the notes from the meeting, the addition of the nineteenth goal, and minor changes to goals ten and thirteen. The parents signed the IEP and consented to all aspects of the IEP except for placement. The parents requested that the District place Student in the MM-SDC at Tovashal, accompanied by a one-to-one aide, and again rejected the offer of placement in the SH-SDC at AHES. The parents gave several reasons why they objected to the placement at AHES, and wanted placement at Tovashal, one of which was a fear Student would mimic the maladaptive behaviors of other children in the SH-SDC at AHES.

8. A third IEP meeting was held on September 3, 2008, to resolve the placement issue. Among those in attendance were the parents, District personnel, the District's attorney, Ms. Vargas, and the parents' advocate, Mr. Runner. The parents disagreed with the proposed placement at AHES and requested that Student be permitted to return to the preschool SDC at Curran.

DISTRICT'S COMPLIANCE WITH PROCEDURAL REQUIREMENTS

9. The Individuals with Disabilities Education Act (IDEA) requires a District to convene IEP meetings at least annually. As noted above, the District conducted three IEP meetings between May 22, 2008 and September 3, 2008. The parents attended each of

these meetings and were active participants, and they were given notice of the procedural safeguards. Each IEP meeting was attended by the District personnel necessary for that meeting, and the IEP team members worked collaboratively to determine Student's PLOPs, goals and objectives, placement, and recommendations for continued related services. The evidence demonstrated that the District complied with the procedural requirements of the IDEA and there was no evidence presented to the contrary.

STUDENT'S UNIQUE NEEDS

10. Student is a child with Down syndrome and resultant global delays. Although he is five years of age, his cognitive functioning is in the low to very low range, placing him in the .1 percentile for children his age. Student's receptive and expressive language skills are generally at the two-year-old level, and he communicates with either sign language (both American Sign Language or his own signs) or verbally, speaking only one or two words at a time. He has similarly delayed fine motor and visual motor functioning, and poor motor planning skills. The APE evaluation shows that Student possesses overall gross motor skills similar to a child between two years and eight months, to three years of age. Student also has Hirschsprung's disease, a condition that manifests itself as an inability to feel the sensation of a bowel movement. As a result, Student is not toilet trained, and there are no toilet training goals. Student wears a diaper or pull-ups, and sometimes requires changing during the school day. He likes to play with toys that are considered most appropriate for infants and toddlers such as simple cause and effect toys, and toys that make noise or music or have lights.

11. Student has a very short attention span, particularly when he is presented with non-preferred activities. Academic tasks are non-preferred. He is unlikely to attend to an activity that he dislikes for more than a couple of minutes, and requires constant adult reinforcement and encouragement to remain on task. If an activity is new or challenging to Student, his response is to turn or run away, hit or push people or objects

away, or throw himself to the ground and scream. Recently he has begun to repeatedly hit his head with his hand when unhappy or frustrated. This maladaptive behavior is often seen when Student is presented with tasks that are academic in nature. In order to learn, Student requires verbal directions combined with visual cues, repeated verbal prompts, praise, and rewards. Several service providers testified that Student was most successful when learning is imbedded in play.

APPROPRIATENESS OF DISTRICT'S OFFER OF PLACEMENT

12. Ms. Diephouse credibly testified about the MM-SDC at Tovashal. Employed by the District since 2003, and a designated mentor teacher, she taught an SH-SDC class at Tovashal for three years, which was then moved to AHES and is now taught by Ms. Miles. Ms. Diephouse then began teaching the MM-SDC at Tovashal. Therefore, she is very knowledgeable about both programs and the students served by each program. In her opinion, Student is suitable for the SH-SDC at AHES, not the MM-SDC at Tovashal. Ms. Diephouse established that Student does not have the skills to access the academic curriculum in the Tovashal SDC. As a result, he will be very frustrated. His inability to stay on task for more than a few minutes, combined with the resultant maladaptive behaviors when frustrated by a challenging task, will impede his learning and be highly disruptive to the other students in the class, thereby impeding their learning. Even if the curriculum is significantly modified so that Student can access it with the help of the one-to-one aide, Student will be isolated from the other students in the class as he will not be participating in the small groups that are used to teach academics.

13. Ms. Miles testified about the SH-SDC that she teaches at AHES. This is her second year of teaching, although she has worked with children with disabilities since 2001. In the past she worked with three children who have Down syndrome, and has two such children in her class this year. Based on what she read about Student in Ms. Dominguez's evaluation and the May 22, 2008 IEP document, she believes many of the

children in her class function at levels similar to where Student is functioning, and many of these children have similar needs.

14. The SH-SDC at AHES has five classroom aides in addition to the teacher, Ms. Miles. The student-adult ratio is 2-1, and if related service providers are in the classroom, the student-adult ratio is closer to 1-1. The classroom has schedules posted for each student, a calendar area, a play area, and three small academic centers, one for reading, one for math, and one for fine motor and speech and language therapy. Ms. Miles reviewed Student's PLOPs in the IEP document from May 22, 2008, and the goals and objectives that were developed. Ms. Miles persuasively established that she would be able to meet Student's unique needs in all the areas addressed in the IEP, and would be able to implement his goals in the SH-SDC at AHES. Ms. Miles described several programs routinely utilized in her classroom that would assist Student in meeting his IEP goals such as "Handwriting Without Tears." She also established that sign language is used in her classroom, and there are many toys in the classroom for students to play with that can also be used to encourage and reward students for completing a task.

15. Student's behaviors when frustrated are similar to the behaviors of several other children in the SH-SDC at AHES. There are many objects in the classroom that are used to provide sensory breaks for students who are inattentive, or close to meltdown, and a sensory gym is located nearby that can also be accessed. Because there are so many classroom aides, a student in meltdown can be taken to the sensory gym without disrupting the rest of the class. Several students in the SH-SDC at AHES are not toilet trained, and wear diapers or pull-ups. There is a restroom in the classroom that is used for changing children who wear diapers or pull-ups.

16. Ms. Miles and Tamara Jung, the APE teacher at AHES, testified about the collaboration between service providers and the teacher and classroom aides for the SH-SDC at AHES. There is almost daily communication about specific students by email,

telephone, written notes, or face-to-face. If a student is working on a specific goal with one provider, the teacher, aides and other providers can also do things to reinforce the goal. For example, if the teacher says a student needs to practice saying "I want," the APE teacher will give the child a choice of balls to play with so he or she can ask for the ball using the phrase, "I want." This collaboration enables "everyone to work across the curriculum so that students are working on all their goals in all areas, all of the time." Ms. Jung also testified that Student's APE needs and goals were similar to those for other students she works with at AHES, and she would be able to help him meet his goals.

17. Ms. Miles and Ms. Jung both persuasively described their work and the children in the SH-SDC at AHES, and established that the District's offer of placement in the SH-SDC at AHES is appropriate for Student. His PLOPs are similar to those of many other students in the class, and the classroom environment, the 2-1 student-adult ratio, and the teaching methods utilized in the classroom appear to be optimal for Student to meet his IEP goals. The curriculum has been modified and is functional rather than academic. Manipulatives are often used, there is a sensory stimulation program, and there is an emphasis on developing functional skills. It is clear that Student will fit into the SH-SDC at AHES very well. In addition, Ms. Miles has not observed her students with Down syndrome mimicking the behaviors of the students with autism, and if that were to occur with Student, he could easily be redirected.

LEAST RESTRICTIVE ENVIRONMENT

18. State and federal law require that students with special needs be placed in the least restrictive environment. This means that, to the greatest extent possible, they should be placed in classrooms with typically developing students. However, there is recognition that in some instances placement in a general education classroom may be inappropriate. Among the factors to be considered in determining whether a student can be placed with typically developing peers are (1) the education benefits to the child of

placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.⁶

19. Student cannot be placed in a general education classroom because his needs are so great he will not receive an educational benefit with such a placement. In addition, his developmental level is so far below that of other children in such a class that it is unlikely he will receive any non-academic benefits. Even in an MM-SDC, such as the one at Tovashal, Student cannot receive an educational benefit without a full-time aide, and having an aide would result in him being isolated from other students, and therefore, he would not receive non-academic benefits. Finally, his maladaptive behaviors in class would be disruptive for both the teacher and the other children in both a general education classroom, and an MM-SDC such as Tovashal. However, even though the SH-SDC at AHES is a more restrictive environment, the evidence established that Student will be mainstreamed appropriately during part of the day with typically developed students in accordance with his unique needs. There are four general education kindergarten classes at AHES, all located within the SDC in the "kindergarten block." The kindergarten block at AHES is gated and has its own play structures and benches. Children in the SH-SDC take recess with the other kindergarten classes. They attend assemblies with the rest of the school, and plays and performances are put on by all of the kindergarten classes, including the SH-SDC. The SH-SDC often goes on field trips with the general education classes, and

⁶ The cost of educating a child in the regular classroom was not in dispute and is therefore not addressed in this decision.

the day before the hearing, all of the kindergarten classes celebrated Bubba Bear's birthday together.⁷

20. After thoroughly assessing Student and determining his unique needs and PLOPs, and developing appropriate goals and objectives to address Student's needs, the District offered Student an appropriate placement in a SH-SDC that could meet his needs and help him to achieve his goals and objectives. The parents were active participants in three separate IEP meetings, and helped to determine Student's PLOPS and to develop the goals and objectives. However, they disagreed with the District's proposed placement. Nevertheless, all of the evidence supports a finding that placement at the SH-SDC at AHES is one that will provide Student with a FAPE in the LRE.

LEGAL CONCLUSIONS

APPLICABLE LAW

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. The District filed the request for due process, and therefore has the burden of persuasion in this matter.

Fape

2. Under the federal Individuals with Disabilities Education Act (IDEA) and companion 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

⁷ Bubba Bear is a Zoophonics cartoon character.

standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. IDEA and state law require that, in order to provide a FAPE, a school district must develop an IEP that is designed to meet the unique needs of the student, and be reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049].) A disabled child's IEP must be tailored to the unique education needs of that particular child who, by reason of disability, needs special education and related services. (*Heatherv. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045.) The term "unique educational needs" is to be broadly construed to include the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

4. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley v. Board of Hendrick Hudson, supra*, 458 U.S. 176, 198.) 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. 200.)

5. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. (Ed. Code, § 56341.1, subd. (a).)

6. 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. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 200 [73 L.Ed.2d 690].) Second, the tribunal must decide whether the IEP developed through those

procedures was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Ibid.*) If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the 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.

Lre

7. To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the district actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) In addition, federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. § 300.114, et seq. (2006).) A special education student must be educated with non-disabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)(ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.)

8. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F. 3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the education benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared

to the cost of educating the child in the district's proposed setting. However, the Supreme Court has noted that IDEA's use of the word "appropriate" reflects congressional recognition that "some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.) When determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. (34 C.F.R. § 300.552(d).) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

WAS THE DISTRICT'S OFFER TO PLACE STUDENT IN A SDC FOR SH KINDERGARTEN AND FIRST GRADE STUDENTS AT AHES FOR THE 2008-2009 SCHOOL YEAR REASONABLY CALCULATED TO PROVIDE STUDENT WITH A FAPE IN THE LRE?

9. Student is a child with disabilities and therefore entitled to a FAPE. The District has educated him since 2006 in a preschool SDC for children with disabilities, and now that he is five years old, the District wants to place him into a kindergarten class where he will be provided with a FAPE. There is no disagreement with the District's offer of related services, the PLOPs in the IEP documents, or the proposed goals and objectives. (Factual Findings 1-6 ; Legal Conclusions 2-3 and 5.)

10. As determined in Factual Findings 3 to 9 and Legal Conclusions 5 and 6, the District complied with the procedural requirements of IDEA, and there was no evidence to the contrary.

11. Student has global delays, and functions at the level of a two- or three-year-old child in most areas. Based on all of the evidence, it is clear that Student is severely handicapped with multiple disabilities. Based on all the evidence, particularly the assessments and evaluations from April and May 2008, the IEP documents from each of the three IEP meetings, and the testimony of all the witnesses, the District's offer of placement in the SH-SDC at AHES is the most appropriate placement for Student, and will provide him with a FAPE. The proposed placement is designed to meet Student's unique

needs because the classroom instruction is functional rather than academic. In addition, the structure of the classroom and the adult-student ratio of 1-2 is likely to reduce Student's maladaptive behaviors which are manifested when Student is required to do non-preferred tasks, or becomes frustrated. The SH-SDC at AHES has its own bathroom, which is also important because Student has Hirschsprung's disease. Student's unique needs are consistent with those of other children in that class, and he will fit in well. There was no evidence that a student with Down syndrome would imitate the behaviors of autistic children in the class, and in any case, the teacher, Ms. Miles, testified that such behavior would be handled with redirection if it occurred. Tovashal was not appropriate because Student does not have the skills necessary to access the academic curriculum, and his maladaptive behaviors will impede his learning and disrupt the class. This is true even if Student is accompanied with a one-to-one aide. (Factual Findings 10-20, Legal Conclusions 2-6.)

The SH-SDC at AHES is also the LRE for Student. The parents and the IEP team agreed that he could not be placed in general education class. However, there are many opportunities for Student to participate in school activities with typically developing children, especially during recess, assemblies, performances by all the kindergarten class, field trips and other special events. (Factual Findings 5 and 18-20; Legal Conclusions 7 and 8.)

ORDER

The District's offered placement in a special day class for severely handicapped kindergarten and first grade students at Antelope Hills Elementary School for the 2008-2009 school year is reasonably calculated to provide Student with a free and appropriate public education in the least restrictive environment.

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 only issue in this case.

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

Dated: October 14, 2008

_____/s/____

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings