

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

In the Matter of:

SAN RAMON VALLEY UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006050839

DECISION

Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Danville, California, on June 15, 2006.

Matthew Juhl-Darlington, Attorney at Law, represented the San Ramon Valley Unified School District (District). Karen Heilbronner, District's Assistant Director of Special Education, was present during the hearing.

Eileen Matteucci, Attorney at Law, represented the Student. Student was not present during the hearing. Student's Mother was present during the hearing.

The record remained open until July 5, 2006, for submission of written argument. Upon timely receipt of the parties' written arguments, the record was closed and the matter deemed submitted on July 5, 2006.¹

¹ On July 7, 2006, OAH received from Mr. Juhl-Darlington a request that OAH not consider Student's closing brief as Ms. Matteucci purportedly did not timely serve the brief on the District. Mr. Juhl-Darlington did not submit any evidence, such as a facsimile

ISSUE

For the period of May 4, 2006 through the June 12, 2006 Individualized Education Program (IEP) meeting, did the District offer and/or provide Student with an appropriate behavioral intervention service provider to meet Student's unique needs?²

FACTUAL FINDINGS

PRELIMINARY FINDINGS

1. Student was born October 1, 1997, and lives with his parents within the District. Student is eligible for special education service under the designation of autism. Student also has Fragile X syndrome. Student began receiving special education services from the District while in preschool.

PROVISION OF BEHAVIORAL CONSULTATION SERVICES TO STUDENT

2. On February 1, 2006, Student's IEP team met. At the IEP meeting, the District offered to provide Student with nine hours per week of behavioral consultation at school and Student's home through a nonpublic agency (NPA) through January 31, 2007. The IEP did not designate the number of hours at each location. Milestones, a NPA, through Becky Mengarelli, was providing Student with behavioral consultation services. The IEP contained a plan for Milestones to supervise and approve, in consultation with Parents and Student's classroom teacher, a transition of behavioral services from Student's current paraeducator to a District Behavior Support Paraeducator.

transmission report, that Ms. Matteucci did not timely submit Student's closing brief. The District's request is denied.

² District's May 4, 2006 letter amended the February 1, 2006 IEP. The June 12, 2006 IEP is not at issue in this hearing, and this Decision will not determine the appropriateness of the District's offer.

3. At the time of the February 1, 2006 IEP meeting, Student participated in a full inclusion program in a District general education classroom. Student required a one-on-one aide and behavioral support services to improve Student's classroom skills. The IEP addressed Student's behavior problems of humming, grabbing, yelling, biting, and a need for sameness. The proposed IEP goals sought to improve Student's classroom learning behaviors. The goals included staying seated in class, using an appropriate vocal tone and volume, responding to questions by raising his hand and following directions and a schedule.

4. Mother did not initially consent to the IEP. In a letter dated February 15, 2006, Parents consented to the District's offer of behavioral support services.

5. Ms. Mengarelli stopped providing Student with behavioral support services on March 27, 2006, due to a severe medical condition. On April 9, 2006, Milestones informed the District and Parents that Ms. Mengarelli was not able to provide Student with behavioral support services. Milestones stated that it could not provide this service as Milestones did not have replacement behaviorist. Ms. Mengarelli is still unable to work with Student.

6. Soon after Milestones informed the District of Ms. Mengarelli's unavailability, the District's case manager for Student, Jim Cox, District Program Specialist, died unexpectedly. Due to Mr. Cox's death, the District delayed in responding to Milestones' letter.

7. On May 4, 2006, Doni DeBolt, a District Program Supervisor, wrote Parents about Ms. Mengarelli's absence. The District stated that Angela Conner, a District behavioral analyst, had started to work with Student and would complete the transition plan duties that Ms. Mengarelli handled.

8. Based on her education, training and work experience, Ms. Conner is knowledgeable about behavioral problems associated with autistic children and their specific social and emotional needs. Ms. Connor is also knowledgeable about children with

Fragile X syndrome. Before providing services to Student, Ms. Connor reviewed the February 1, 2006 IEP, including the transition plan. Ms. Connor was well-informed about her responsibilities, as defined by the IEP, and Student's particular education, behavioral and emotional needs.

9. On May 14, 2006, Ms. Conner went to Student's home to provide behavior consultation services. Mother did not allow Ms. Conner to provide Student these services in the home. Mother considered Ms. Conner unqualified because Mother felt that Ms. Conner did not know enough about Student's behavioral needs and program. Subsequently, Ms. Conner provided Student with the nine hours per week of behavioral services at Student's school. Ms. Connor spoke with Ms. Mengarelli and followed Ms. Mengarelli's plan for Student. Ms. Conner worked with Student's paraeducator and service providers. Ms. Conner provided suggestions, such as controlling Student's environment to reduce overstimulation that increased Student's behavioral problems. With the change in service provider, Ms. Connor has had to work on building a relationship with Student. This is not unusual when working with autistic children, such as Student, who value sameness in routines.

10. Ms. Connor is not scheduled to work in the summer and will not provide Student with behavioral support services during the 2006 Extended School Year (ESY). Neither Ms. Connor nor Ms. Heilbronner knew who was to provide Student behavioral support services during the summer. The District scheduled Ms. Connor to resume providing Student with behavioral support services at the start of the 2006-2007 school year.

11. On June 12, 2006, the District convened an IEP meeting to discuss its offer to provide Student's behavioral support services with Ms. Connor through January 31, 2007. Mother did not consent to the District's offer.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The District has the burden of proof as to the issue designated in this Decision. (*Schaffer v. Weast* (2005) 546 U.S.____ [163 L.Ed.2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code § 56000.³) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8) (IDEA 1997); 20 U.S.C. § 1402(9) (IDEIA 2004).) "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(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

3. Likewise, 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. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26) (IDEIA 2004).) In California, related services may be referred to as designated instruction and services. (Ed. Code § 56363, subd. (a).)

³ All statutory citations to the Education Code are to California law, unless otherwise noted.

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

5. 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.)

6. 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.)⁴ It must be evaluated in terms of what was objectively reasonable when the

⁴ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an

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. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

7. *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA as part of the FAPE analysis. Pursuant to 20 U.S.C. section 1415(f)(3)(E)(ii), of IDEIA, for a procedural violation to deny the student FAPE the procedural violation must either: 1) impede the student's right to FAPE; 2) significantly impede a parent's opportunity to participate in the education decision making process; or 3) caused a deprivation of educational benefits.

8. Pursuant to 20 U.S.C. section 1415(b)(3), a school district is required to provide written notice to the parents of the child whenever the school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.⁵

IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist.* No. 24J (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

⁵ Education Code section 56500.4 states: Pursuant to paragraphs (3) and (4) of subsection (b) and paragraph (1) of subsection (c) of Section 1415 of Title 20 of the United States Code, and in accordance with Section 300.503 of Title 34 of the Code of Federal Regulations, prior written notice shall be given by the public education agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and when the public education agency proposes to initiate or change, or refuses to initiate or change, the identification,

9. Title 20 United States Code section 1415(c)(2)(E) and Education Code section 56502(e) provide that a party may amend the Complaint only if the Administrative Law Judge grants permission, or the other party consents to the filing of an Amended Complaint.

10. Title 20 United States Code section 1415(f)(3)(B) and Education Code section 56502(i) provide that a party is not allowed to raise at hearing issues that the party did not raise in the complaint, unless the other party consents.

DETERMINATION OF ISSUES

FOR THE PERIOD OF MAY 4, 2006 THROUGH JUNE 12, 2006, DID THE DISTRICT OFFER AND/OR PROVIDE STUDENT WITH AN APPROPRIATE BEHAVIORAL INTERVENTION SERVICE PROVIDER TO MEET STUDENT'S UNIQUE NEEDS?

1. The District had the legal obligation to ensure that Student received the behavioral services identified in the IEP when Milestones informed the District that it could no longer provide Student with behavioral services. The District met its legal obligation by having Ms. Connor provide Student with behavioral services from May 4, 2006 through the end of the 2005-2006 school year. Pursuant to Factual Finding 8, Ms. Connor has the educational and work experience to provide behavioral services to Student. Ms. Connor knew of Student's program and needs before providing Student with any services. Pursuant to Factual Finding 9, while Ms. Connor could not provide Student with behavioral services in Student's home, Ms. Connor provided Student with adequate services at school to meet Student's unique needs. The District provided sufficient prior written notice in its May 4, 2006 letter concerning the change of service providers as the District needed to provide this service until the parties could meet at an IEP meeting.

assessment, or educational placement of the child, or the provision of a free appropriate public education to the child.

2. Pursuant to Factual Finding 11 and Legal Conclusion 10, the District modified its May 4, 2006 offer at the June 12, 2006 IEP meeting. The District did not amend its Complaint to include the appropriateness of this IEP offer. Because the District did not amend the Complaint, OAH cannot make a determination about the appropriateness of the District's June 12, 2006 offer.

ORDER

For the period of May 4, 2006 through the end of the 2005-2006 school year, the District offered and provided Student with an appropriate behavioral support service provider to meet Student's unique needs.

PREVAILING PARTY

Pursuant to 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 for the time period of May 4, 2006 through the end of the 2005-2006 school year.

RIGHT TO APPEAL THIS DECISION

The parties may appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code § 56505(k).)

DATED: July 18, 2006

A handwritten signature in cursive script, appearing to read 'P. P. Castillo', is written over a horizontal line.

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings

Special Education Division