

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

In the Matter of :

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006060624

DECISION

Debra Huston, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on August 17, 2006, in Los Angeles, California.

Student's foster father (Father), represented petitioner (Student) and was present throughout the hearing.

Attorney Donald Erwin, Assistant General Counsel for the Office of the General Counsel, Los Angeles Unified School District, represented respondent Los Angeles Unified School District (District). Lisa Kendrick, Coordinating Specialist with the Due Process Department of the Division of Special Education of District, was in attendance during most of the hearing.

On June 21, 2006, Student filed a request for mediation and due process hearing. The due process hearing was held on August 17, 2006. The record was closed and the matter submitted for decision on the day of hearing.

ISSUES

Whether the District's offer of placement at Cleveland High School for the 2006-2007 school year denies Student a free appropriate public education (FAPE) because it: (1) fails to address Student's unique needs in that it requires a 35 to 45 minute bus ride to and from school; (2) fails to address Student's unique needs in that it deprives him of established friendships that he would maintain by attending a neighborhood school; and (3) is not the least restrictive environment as a result of the distance of the school from Student's residence.¹

CONTENTIONS OF THE PARTIES

During the June 20, 2006 IEP meeting, Student's parents disagreed with the placement in the autism program at Cleveland High School, and requested placement in the autism program at Kennedy High School. Father has visited the autism programs at Cleveland High School and at Kennedy High School, and believes that the placement at Cleveland High School is not appropriate because it is not the safest placement for Student in light of the lengthy bus ride; it will not allow him to maintain friendships, and it is not the least restrictive environment because of the distance of the school from Student's home. Father contends Student should be placed at Kennedy High School.

District contends that the proposed placement at Cleveland High School constitutes a FAPE. Specifically, District contends that Student failed to show the length of the bus ride, which has not yet been established; that Student failed to show that his behaviors on the bus were recent; that Student failed to produce evidence of friendships that constituted a "unique need"; and that Cleveland High School is the least restrictive environment.

¹ The issues were discussed and framed with participation of all parties at the telephonic prehearing conference held on August 10, 2006.

FACTUAL FINDINGS

BACKGROUND

1. Student is 15 years of age, and resides with his foster parents within the jurisdictional boundaries of District. Student is entering the ninth grade and transitioning from middle school to high school for the 2006-2007 school year. Student is eligible for special education and related services due to mental retardation and autistic-like behaviors.

2. Student attended Frost Middle School during the 2003-2004, 2004-2005, and the 2005-06 school years.² Frost Middle School is the middle school in whose jurisdictional boundaries Student resides. Student was in the autism program, which is a self-contained, special day class, at Frost Middle School. There were five to six students in Student's class, including children with autism and mental retardation. The class was taught based on an alternate curriculum³ for students with moderate to severe disabilities. Student received his educational curriculum in the special day class, except for his mathematics curriculum, for which he was mainstreamed in a regular education classroom. Student was provided with an additional adult assistant (AAA) for the full day at Frost Middle School, and also on the bus to and from Frost Middle School.

DISTRICT'S JUNE 20, 2006, OFFER

3. Student's most recent IEP, dated June 20, 2006, was District's offer to Student. That IEP requires that Student participate in an "[a]lternate curriculum for students with

² Student attended Locrantz Elementary School through the 2002-2003 school year, and then Frost Middle School for the next three school years. Student repeated eighth grade at Frost Middle School.

³ An alternate curriculum is for lower-functioning children who are not expected to graduate from high school with a diploma.

moderate/severe disabilities” and offers placement at Cleveland High School in the special day class/autism program. The IEP also requires that Student be included in the general education classroom for homeroom and for a “proper elective.” In addition, the IEP requires that an AAA be with Student for behavior support, and ride the bus with Student to and from school “due to safety issues.” The IEP requires that the AAA be with Student for the entire day, except for the time that Student is in his homeroom class.⁴ Father disagreed, in writing, with District’s offer of placement at Cleveland High School, and filed a request for mediation and due process hearing on June 21, 2006.

UNIQUE NEEDS

4. The right to a FAPE includes special education and related services that are provided at public expense and under public supervision and direction, that meet the State’s educational standards, and that conform to the student’s IEP. Special education is defined as specially designed instruction, at no cost to parents, to meet the “unique needs” of the student, that enables the student to benefit from his or her educational program.

5. Student requires an alternate curriculum to benefit from his education. Student’s level of cognition is such that he requires a very highly structured educational program with modifications and consistent adult assistance throughout the entire school day in order to access an educational program. Student also requires transportation, a related service, to and from school and, because of his behavior issues, Student requires that an AAA accompany him on the bus to and from school.

EDUCATIONAL BENEFIT OF PLACEMENT

6. The autism program at Cleveland High School is self-contained and highly structured. The students in the program have a range of skills, from low to high. The higher functioning students are mainstreamed part of the day, and the students with lower skills

⁴ Other specific requirements of Student’s IEP are not relevant to this decision.

receive an alternate curriculum. The placement offered by District at Cleveland High School is designed to address Student's unique educational needs in that it is reasonably calculated to provide him some educational benefit. Therefore, District's offer of placement at Cleveland High School constitutes a FAPE with respect to Student's educational needs.

BUS RIDE

7. Student's IEP requires that an AAA "be with" Student for "behavior support," and that Student's AAA "ride the bus with [Student] due to safety reasons." Ms. Karen Menacho, who has been Student's AAA for the past two years and his bus assistant for the two years prior to that, has accompanied Student on the bus to and from school each day for the past four years. Ms. Menacho testified credibly that Student "hates" the noise caused by the air brakes on the bus, and he often cannot cover his ears in time to avoid hearing the noise. The noise, the heat, and other stimuli on the bus cause Student to become agitated, and that agitation can last throughout the school day. During the bus ride, Student has taken off his shoes and thrown them at the bus driver or another student. He has struck and injured other students on the bus. Ms. Menacho has had to restrain Student on the bus, and the bus driver has stopped the bus because of concerns about safety as a result of Student's behavior. Longer bus rides leave Student more tired and agitated, and affect his behavior throughout the day.

8. While Ms. Menacho established that Student has behavior difficulties on the bus as a result of his sensitivities, she did not testify as to when, during the four years she accompanied Student on the bus, that the specific behaviors described in factual finding 7 occurred. It was undisputed, however, that while Student's behavior difficulties on the bus continue, the episodes have decreased since Student began attending Frost Middle School, and that Student's behavior and his academic performance improved while he was at Frost Middle School. Student was not having academic issues or negative behaviors at school in his last year at Frost Middle School.

9. Father attributes this improvement to the five to 10 minute bus ride to Frost Middle School, which was shorter than the bus ride to Locrantz Elementary School.⁵ Father believes that because of Student's various sensitivities, discussed *supra*, Student's behavior episodes will increase to their "prior level" if Student attends Cleveland High School because of a "35 to 45 minute bus ride to and from school."

10. Cleveland High School is six miles from Student's home.⁶ Although Father estimated the bus trip would take 35 to 45 minutes each way,⁷ it is undisputed that the bus route had not been established by District at time of hearing, and that it will not be established until the special day class/autism program at Cleveland High School is filled. After the class is filled, the bus route will be determined based on the students' addresses. Given that Cleveland High School is six miles from Student's home, it is reasonable to conclude that the bus ride each way between Student's home and Cleveland High School will be approximately three times longer, or 15 to 30 minutes, than the bus ride each way between Student's home and Frost Middle School.

11. Student has established that he has behavior episodes on the bus, and that these episodes decreased and his academic performance and his behavior improved during the time that he attended Frost Middle School. However, Student failed to establish that his improved behavior and academic performance over the past three years resulted solely from a shorter bus ride, and not from any other cause, such as increased maturity, improved

⁵ The bus ride from Student's home to Lokrantz Elementary School was longer than the bus ride from Student's home to Frost Middle School, but less than 35 to 45 minutes.

⁶ Kennedy High School, Father's school of choice for Student, is two miles from Student's home.

⁷ Father's estimate of 35 to 45 minutes was based on a 12 mile drive. However, Father conceded that Cleveland High School is six miles away from his home.

coping skills, improved behavior in general, or repetition of eighth grade. Student has failed to establish that a 15 to 30 minute bus ride, while accompanied by an AAA, would cause Student to experience agitation during that the school day in high school such that he would not be able to receive some educational benefit from his placement. Therefore, Student has failed to meet his burden of proving that District's offer of placement fails to meet Student's unique needs and denies him a FAPE as a result of the bus ride.⁸

FRIENDSHIPS

12. Although social skills may be a "unique need" of a child with a disability, Student's IEP does not include social skills as one of Student's unique needs, nor does it include goals and objectives or services relating to social skills, or relating to Student maintaining friendships in order to further Student's social skills. Even if Student's IEP had identified social skills as an area of unique need for Student, and if Student's IEP had provided goals, objectives, and services relating to social skills, Student would have failed to meet his burden of proving that District's offer of placement failed to meet unique needs in this regard. While Student established generally that he interacted with other students while at Frost Middle School, Student failed to establish that he had any particular friendship bonds, to offer evidence regarding any particular established bonds, or to

⁸ While Student has not met his burden with respect to the issue involving the bus ride on the evidence presented at the due process hearing, Student clearly has unique needs relating to his autistic-like behaviors and sensitivity to noise and other stimuli on the bus ride that cause acting-out behavior and requires the use of an AAA on the bus. If Student's bus route, when established, is very lengthy and presents a danger to Student or to others that cannot be ameliorated by the use of an AAA for Student, it may not address his unique needs and an alternative mode of transportation may be required to and from school.

establish that any other student with whom Student is bonded will attend Kennedy High School. Therefore, Student has failed to meet his burden of proving that Student has unique needs with respect to social skills, or that District's offer of placement fails to meet unique needs Student may have with regard to social skills.

LEAST RESTRICTIVE ENVIRONMENT

13. A special education student is entitled to an educational program in the least restrictive environment. In this connection, a school district is required to ensure that a student with a disability is educated in the school he would attend if not disabled, unless the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, the school district is required to ensure that the child's placement is as close as possible to the child's home. However, this proximity preference is one of many factors for a district to take into consideration in determining a student's proper placement, and does not amount to a presumption that a student with a disability should attend his or her neighborhood school. Petitioner established that Cleveland High School is six miles away from Student's home, Kennedy High School is two miles away from Student's home.

THE EDUCATIONAL BENEFITS TO STUDENT

14. While Father testified that Kennedy High School's autism program could also be an appropriate placement for Student, District established that it could not provide a FAPE to Student at Kennedy High School, and that Student could not receive educational benefit there. Kennedy High School does not offer a program that meets Student's needs. The autism program at Kennedy High School is "without walls," which means that students in the program are fully included in all general education classes at the school. Student cannot function at the general education level. Kennedy High School does not offer an alternate curriculum. Students in the autism program at Kennedy High School are higher functioning than Student. While the autism program at Kennedy High School is full, even if there were openings, it would not be an appropriate placement for Student.

THE NON-ACADEMIC BENEFITS TO STUDENT

15. While Kennedy High School is closer to Student's home than Cleveland High School and, therefore, Student would have a shorter bus ride if he attended Kennedy High School, Student has not established that a 15 to 30 minute bus ride would not meet his unique needs.

16. Based on the foregoing, Student failed to meet his burden of proving that District's offer of placement is not the least restrictive environment because of the distance away from his home. Cleveland High School's special day class/autism program is a FAPE for Student.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A)⁹; Ed. Code, § 56000.¹⁰) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to

⁹ The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The allegations in this matter involves an IEP developed after July 1, 2005. Accordingly, the IDEIA will be applied and all citations to Title 20 of the United States Code are to sections in effect after to July 1, 2005. (See *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882, fn. 1.)

¹⁰ The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. (Stats. 2005, ch. 653.) All citations to the Education Code are to sections in effect after October 7, 2005.

the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include, in pertinent part, transportation as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

2. A school district must provide a "'basic floor of opportunity' . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 201 [hereafter *Rowley*].) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 [hereafter *Gregory K.*].) To determine whether a school district's offer constitutes a FAPE, the analysis must focus primarily on the adequacy of the proposed program. (*Gregory K., supra*, at p. 1314.) If the school district's program was reasonably calculated to provide the student some educational benefit, the school district's offer will constitute a FAPE even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefits to the student. (*Ibid.*)

3. The public educational benefit must be more than *de minimis* or trivial. (*Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.* (3rd Cir. 2000) 205 F.3d 572, 577.) If a parent disagrees with the IEP and proposed placement, he or she may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

4. A school district is 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; 34 C.F.R. § 300.550; see also *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 [Court held that the determination of whether a particular placement, as opposed to a regular classroom, is the “least restrictive environment” for a particular child involves an analysis of four factors].) In *Rachel H.*, 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 educational 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. (*Id.*, at pp. 1400-1402.)

5. Federal law requires that “In determining educational placement of a child with a disability, . . . , each public agency shall ensure that . . . [t]he child’s placement . . . [i]s as close as possible to the child’s home.” (34 C.F.R. § 300.552(b)(3).) Federal law further requires that each public agency ensure that “[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” (34 C.F.R. § 300.552(c).) The court in *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J* (10th Cir. 1995) 51 F.3d 921, 929: “A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), unless the child’s IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible. [Citations omitted.]” The proximity preference is merely one of many factors for a district to take into consideration in determining a student’s proper placement and does not amount to a presumption that a

student with a disability should attend his or her neighborhood school. (*Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.* (5th Cir. 1996) 91 F.3d 689, 693-694.)

6. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹¹ An IEP is “a snapshot, not a retrospective[,]” and it must be evaluated in terms of what was objectively reasonable when the IEP was drafted. (*Ibid.*) The focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at p.1314.)

7. As the petitioner, the Student has the burden of proving that the District has not complied with the IDEA. (*Schaffer v. Weast* (2005) 546 U.S._____[126 S.Ct 528].)

DETERMINATION OF THE ISSUES

1. Based on factual findings 4 to 11, inclusive, Student has established that he has unique needs with respect to transportation in that he has behavior difficulties on the bus. However, Student did not prove that District’s offer fails to address Student’s unique needs as a result of the length of the bus ride. The bus ride between Student’s home and Cleveland High School will be approximately 15 to 30 minutes, while his bus ride to Frost Middle School was five to 10 minutes. Student’s behavior has improved significantly during the time he has attended Frost Middle School. Student’s IEP requires than an AAA accompany Student on the bus ride. The fact that Student had a long bus ride in elementary school and behavior episodes that affected his academic performance during

¹¹ 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 (*Christopher S. v. Stanislaus County Office of Educ.* (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 Sch. Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

the school day does not establish that Student will experience the same difficulties in ninth grade, or that he will not be able to receive educational benefit in the ninth grade.

Therefore, Student has failed to meet his burden of proof.

2. Based on factual finding 12, Student's IEP does not include social skills as a unique need of Student's. Student has failed to prove that District's offer of placement fails to address unique needs in that it deprives Student of established friendships.

3. Based on factual findings 13 to 16, inclusive, Student failed to establish that the program offered at Cleveland is not the least restrictive environment because of the distance of the school from Student's home.

4. Based on factual findings 4 to 16, inclusive, District's program is designed to address Student's unique educational needs, and is reasonably calculated to provide him some educational benefit in the least restrictive environment. Therefore, District's offer of placement at Cleveland High School constitutes a FAPE.

ORDER

Student's requests for relief are denied.

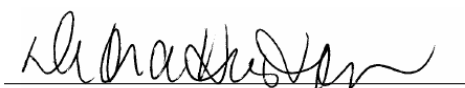
PREVAILING PARTY

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 all issues.

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, subdivision (k).)

DATED: September 7, 2006.

A handwritten signature in black ink, appearing to read "Debra R. Huston", written over a horizontal line.

DEBRA R. HUSTON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division