

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 2005080746

DECISION

Robert S. Eisman, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter at the offices of the Los Angeles Unified School District in Los Angeles, California, on September 26, 2005.

Father, Attorney at Law, represented Student (petitioner). Petitioner was also present during the hearing. Father is petitioner's father.

Rachel C. Disario, Esq., Lozano Smith Attorneys, represented Los Angeles Unified School District (LAUSD or respondent). Diana Massaria, a specialist in the LAUSD Due Process Unit, was also present during the hearing.

Petitioner and respondent offered documents, sworn testimony, and argued the case. The record was closed and the matter submitted on September 26, 2005.

The Administrative Law Judge makes the following factual findings, legal conclusions and order:

ISSUES

The parties agreed that the following issue is to be resolved:

Should LAUSD dual-enroll petitioner at this time (i.e., during the Fall 2005 semester) so that he takes two classes per day at Parkman Middle School and the balance of his classes at Parkhill School?

FACTUAL FINDINGS

The following facts were determined by a preponderance of the evidence:

1. Petitioner is an eleven year eight-month old male, born on January 15, 1994. He resides within the jurisdictional boundaries of LAUSD and is eligible for special education services under Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) based on "other health impairment." As a result of behavior problems at school, in June 2003 petitioner commenced attendance at Parkhill School, a non-public school (NPS) that provides specialized education services to children with specific learning disabilities and children with emotional, social, and behavioral disabilities.

2. Parkman Middle School is the public middle school in petitioner's area of residence.

3. Several of petitioner's Individualized Education Plans were offered into evidence.

Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with IDEA. It contains the following information:

- A statement of the child's present levels of academic achievement and functional performance;
- A statement of measurable annual goals;

- A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided;
- A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child;
- A statement of the program modifications or supports for school personnel that will be provided for the child;
- An explanation of the extent, if any, to which the child will not participate with non disabled children in the regular class;
- A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments; and,
- The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

4. Although petitioner's first IEP team meeting was in April 2001, the earliest IEP received in evidence was a triennial IEP review dated January 22, 2004. The most relevant portions of petitioner's IEPs are the assessments related to his "social/emotional" and "behavior" performance. Other areas of performance such as math and writing are primarily affected by petitioner's demonstrated attributes and deficiencies in the social, emotional, and behavioral performance areas.

5. At the time of the January 22, 2004 IEP meeting, petitioner was a 10-year-old fourth grade student. The IEP team noted petitioner "maintains a diagnosis of Attention Deficit Hyperactivity Disorder" and is taking various prescription medications to control the affects of his disability. Special education services offered to petitioner included

"designated instruction and services" (DIS) counseling (60 minutes per week), occupational therapy services, and "temporary support aid" (TSA)¹ support.

In the area of "social/emotional" performance, petitioner was described as having made "strides" in the last six months and was continuing to learn how to initiate and/or reciprocate in a developmentally appropriate fashion to most social situations. The IEP team also noted the following:

Student is highly sensitive to changes in his environment. When routine has been disturbed, Student will react in a regressive manner (i.e., sulking, flinging personal items). At times, Student will behave in a distracting manner when he is faced with a new situation.

In the area of "behavior" performance, the IEP team noted:

Student is beginning [to] use his words to express his feelings. He has improved in his ability to accept consequences for his actions 70% of the time, but needs one to one aid to set limits, encourage and give praise for his efforts. It has also been observed that when his routine is disrupted, he has had major incidences at school.

The IEP team determined that petitioner's disability limits his ability to meet district grade-level standards due to his difficulties associated with concentration, impulsive characteristics, and social/emotional preoccupations. Petitioner's needs could not be met in

¹ "Temporary support aid" is also referred to as "additional adult assistance" (AAA).

a general education setting because his "emotional, behavioral, and attentional difficulties merit a more intensive educational milieu."

PETITIONER'S FATHER CONSENTED TO THE IEP.

6. On May 26, 2004, a follow-up IEP meeting was held to address occupational therapy services and review the findings of petitioner's then current assessment. Teacher reports indicated "pervasive hyperactivity," impacting petitioner's ability to access the educational curriculum and perform at grade-level standards. The IEP team agreed to continue petitioner's special education services.

7. On December 15, 2004, an annual review IEP meeting was held. The IEP team determined that petitioner had made progress in the performance area of behavior, but needed more time to meet his objectives.

In the area of "social/emotional" performance, the IEP team described petitioner as having made "great strides" since the January 2004 IEP. However, he continued to be highly sensitive to changes in his environment. Although petitioner continued to react in a regressive manner when his routine was disturbed, the intensity of such reactions decreased and the period between such incidents increased. The IEP team focused on helping petitioner develop realistic expectations for himself and others.

In the area of "behavior" performance, although the IEP team described petitioner as having "improved greatly" over the past year, they also noted that during the year his behavior throughout the day was inconsistent and he spent the majority of his day in the "Behavior Intervention Room"

The IEP team again determined that petitioner's social/emotional difficulties limited his ability to meet district grade-level standards and that his needs could not be met in a general education setting "due to [the] nature and severity of Student's emotional/behavioral concerns."

IEP team members agreed that petitioner continued to need a small, structured NPS environment, DIS counseling, and a TSA in order to access the school's curriculum.

However, TSA services had decreased over time and the school was continuing to "fade" TSA support as petitioner demonstrated an ability to be more independent.

Although Father was not physically present during the IEP meeting, IEP notes indicate that Father conferred via teleconferencing. Since petitioner had met his occupational therapy goal, petitioner's father agreed with the recommendation of the IEP team that those services be ended.

8. On May 11, 2005, another annual review was made of petitioner's IEP. On that date, the IEP team indicated that petitioner had met all the goals of his then current IEP.

In the area of "social/emotional" performance, the IEP team again described petitioner as continuing to make great strides. Also, in the area of "behavior" performance, the IEP team described petitioner as having "improved greatly" within the past year. However, the team also noted

Student continues to need improvement in the way he speaks to other people when he does not approve of what they are doing. On a bi-monthly basis Student displays more severe action in the classroom as a result of consequences to his behaviors, such as not following directions. These behaviors include cussing, banging or kicking desk, banging door on way out of classroom, or knocking over chairs.

Once more, the IEP team determined that due to social/emotional concerns petitioner's disability limits his ability to meet district grade-level standards, and his needs could not be met in a general education setting "due to the nature and severity of Student's emotional/behavioral concerns." However, the team did feel that petitioner no longer required one-to-one TSA support.

9. During the May 2005 IEP meeting, petitioner's father expressed interest in having petitioner dual-enroll at Parkhill School and Parkman Middle School. Although petitioner's father wanted him dual enrolled as soon as possible, Parkhill School staff members who work directly with petitioner expressed reservations regarding his ability to be successfully dual enrolled at that time. The team members determined that an amendment IEP meeting should be held at a future date, when they deemed petitioner ready for dual enrollment.

There is no indication that petitioner's father consented by signing the May 2005 IEP.

10. The most recent IEP meeting was held on June 23, 2005, to specifically address petitioner's progress at Parkhill School and dual enrollment.

In the area of "social/emotional" performance, the IEP team again described petitioner as "behaving in an overly anxious manner, behaving more compulsively" and it appeared that his tolerance of others had actually decreased. This regression occurred after petitioner's DIS counselor changed his counseling day from Mondays to Fridays, which was purposefully done in order to promote skills and behaviors that would help him succeed in public school (i.e., by increasing his ability to delay gratification, sustain self control during times of unfavorable experiences or changes not under his control, and decrease his dependency on the unique supports available at Parkhill School).

In the area of "behavior" performance, the IEP team noted that petitioner had been completely weaned from his one-to-one TSA support, but had shown some regressive behaviors. The team stated:

Student is able to handle most consequences to his behaviors, but approximately once every other week, Student continues to display explosive behaviors in the classroom, the yard, and the behavior intervention room. . . . When Student reacts explosively

to consequences, behaviors include knocking over or throwing chairs, yelling at staff or other students, cussing, elopement from [the] behavior intervention room and kicking staff.

Although there has been much progress in Student's ability to cope with consequences, Student continues to need and utilize the support and structure of Parkhill School.

The IEP team determined that petitioner's needs could not be met in a general education setting due to the nature and severity of his attention deficit and impulsiveness. However, petitioner's father stated he felt that petitioner would be able to succeed academically at Parkman Middle School and wanted him to start dual enrollment there for two periods per day. Although petitioner's father was aware that petitioner had some emotional concerns, he wanted him to start dual enrollment in September, when the rest of the sixth grade students would transition from elementary to middle school. Petitioner's father believed that petitioner would benefit from the social interactions and academic stimulation provided at the public school. Other members of the IEP team, including the Least Restrictive Environment (LRE) counselor from LAUSD and petitioner's teacher at Parkhill School, indicated they still had concerns and thought since petitioner had only recently been weaned from his 1:1 TSA support and had continuing, albeit decreased behavior problems, his "educational needs are being best met full time at Parkhill."

Petitioner's father formally disagreed with the IEP because he wanted petitioner to commence "dual enrollment." He also documented his desire both to schedule an informal conference to resolve the issue and request a Due Process hearing, pending the results of the informal conference. An LAUSD representative indicated the school district would assist petitioner's father in pursuing resolution of this issue.

11. During the due process hearing, petitioner, petitioner's father, the LAUSD LRE counselor, the administrator of Parkhill School, and petitioner's DIS counselor, provided testimony regarding petitioner's preparedness for dual enrollment.

12. Petitioner's father stated that in December 2004 or January 2005 he wanted Parkhill School to start preparing his son for dual enrollment and considered the start of the Fall 2005 semester at Parkman Middle School to be an optimal time for the initial transition in petitioner's placement. He anticipated that petitioner would then be prepared to dual enroll in additional classes at the public school for the Spring 2006 semester.

At the June 2005 IEP petitioner became aware that preparations for the dual enrollment transition had not occurred and that members of the IEP team did not support petitioner's dual enrollment in September. Although petitioner's father stated that he wanted to pursue both informal resolution and a due process hearing (as documented in petitioner's IEP), LAUSD elected not to file petitioner's request for a due process hearing and proceeded only to schedule an informal conference. It was not until August 16, 2005, after he realized that informal discussions would not favorably resolve the issue, that petitioner's father learned that LAUSD had not filed his request for a due process hearing. The next day, petitioner's father filed his own request for a due process hearing. Unfortunately, time had passed, the matter had not resolved informally, and petitioner was then at the threshold of the Fall 2005 semester.²

13. The Fall 2005 semester at Parkman Middle School commenced on September 9, 2005. Petitioner remains enrolled only at Parkhill School.

14. Petitioner testified that since September 2005 his behavior is much improved, in part due to his use of medications, and that he is doing well academically. He

² LAUSD was remiss for not assisting petitioner's father in filing for a due process hearing pending the outcome of attempts at informal resolution of this matter. However, the school district's procedural error did not result in denial or loss of petitioner's free appropriate public education and is not actionable. (See Ed. Code, § 56505, subd. (j); see also, *W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F.2d 1479, 1484; *DiBuo v. Bd. of Educ.* (2002 4th Cir.) 309 F.3d 184.)

wants to start attending Parkman Middle School because he had not gone to a "normal school" in a long time and thinks he would do well there. Petitioner's father commented on how well petitioner behaved during the hearing, considering the circumstances under which they received late notice of the hearing.³

15. Gilbert Freitag testified during the due process hearing. He is a licensed clinical psychologist and is the administrator of Parkhill School. He is entering his third year as the school's administrator, having spent approximately 25 years in other NPS settings. He earned his doctorate in clinical psychology from Yale University and has been state licensed since 1970.

16. Dr. Freitag described Parkhill School as serving students with specific learning and/or social, emotional, or behavioral disabilities. The school covers grades 1-12. Approximately 90 students are enrolled at the school.

Parkhill School operates under a three-pronged philosophy:

- Individualization of a child's educational program with emphasis on the student-relationship as central to student learning;
- Necessity for an academically and behaviorally structured program in a therapeutic environment where counseling is a central part of the student program; and,

³ The due process hearing commenced on a Monday afternoon. Friday evening, prior to the due process hearing, petitioner's father understood the parties had reached a final settlement agreement. It was not until late Monday morning that petitioner's father learned the agreement was not accepted by the school district and that the due process hearing would be held in the afternoon, as previously scheduled. Since petitioner's father had to make a court appearance in another case, he had to make last-minute arrangements to attend the hearing with his son. Understandably, the situation was a cause for anxiety.

- Collaborative relationship (partnership) with parents and outside professionals, if any are involved.

17. With respect to dual enrollment, Parkhill has a standardized plan in place that was developed with other NPSs to afford children every opportunity to be successful in the transition from a small, private, protected school environment to a public school setting. Transition into a public middle school is considered a major change for a Parkhill student because the comparatively "huge" public school campus has fewer key resources. This necessitates a systematic introduction of the student into the new academic environment; an introduction that provides for oversight and monitoring with adequate structure and support for the transition.⁴

In any given semester, Parkhill School has about eight or nine students dual enrolled in a public school.

18. The Parkhill School plan for dual enrollment preparation addresses the following:

- the student's ability to self-regulate (i.e., self-control, self-management, and skills for coping with daily stressors);
- the student's ability to get along with peers and follow school rules;
- the student's readiness with respect to the expectations and challenges that the student will face in a new setting that has less structure and support (i.e., the ability of the student to function independently); and,
- the student's demonstrated readiness and confidence in his ability to achieve objectives in an environment that has less structure and support.

⁴ Dr. Freitag illustrated the magnitude of the change in campus environments by stating that a typical NPS has 50 – 100 students and a typical public middle school has 3500-3800 students.

19. Dr. Freitag has known petitioner since 2003, when petitioner first enrolled in Parkhill School. Dr. Freitag stated that petitioner's behavior "improved enormously" as documented in petitioner's most recent IEPs. He described petitioner as having made improvements and noticeable change, being polite and respectful, and as being "truly a nice young man."

Dr. Freitag believes that petitioner is a good candidate for dual enrollment; that is, insofar as dual enrollment is a "realistic end goal." He deferred to and concurred with the general consensus of the members of petitioner's IEP team regarding the timing of dual enrollment (i.e., that petitioner is not ready for dual enrollment at this time).

When asked why he felt petitioner was not ready for dual enrollment at this time, Dr. Freitag responded that he had reviewed petitioner's records and believed that given the relatively recent removal of petitioner's one-to-one teacher support aid, he would like a longer period for petitioner to demonstrate a "consistent pattern of model behavior," greater stability, greater evidence of an ability to handle the frustration and stressors of unpredictable change, and a demonstrated ability to handle delayed gratification. Overall, Dr. Freitag would like to see a longer period of time wherein petitioner demonstrates independent stability.

When asked if he believed that petitioner should have to wait until January 2006 to dual-enroll at Parkman Middle School, Dr. Freitag replied that the question was difficult to answer, but "yes."

20. Dr. Freitag believes that petitioner's preparation for transition into dual enrollment needs to address the following: coping skills, speaking appropriately with staff, managing relationships with peers, anticipating changes, and developing skills to respond to changes without anxiety, anger, or disruption. The goal is to prepare petitioner psychologically and emotionally for the new challenges presented at Parkman Middle School.

Specifically, Parkhill School would do the following to prepare a student psychologically, emotionally, and behaviorally for transition:

- Continue petitioner in his program at Parkhill School and continue pursuing and helping petitioner meet his IEP behavior and counseling goals and objectives;
- Continue withdrawing petitioner's many accommodations that are in place but will not be available at Parkman Middle School;
- Monitor petitioner's reaction to the withdrawal of structure and support, and help him see what he needs to do to perform and behave in a public school setting;
- Remind petitioner of what is expected of him at Parkman Middle School;
- Consult with the Parkman special education coordinator, LRE counselor, and the teacher, if known, to gain their expectations of petitioner and introduce petitioner to those individuals and the setting; and,
- Try to duplicate for petitioner the setting and challenges he will be confronted with at Parkman Middle School.

The goal of this preparation process is to maximize the student's chance of success in the public school setting. Otherwise, Parkhill School would feel it did the student a disservice by sending the student out too early with the potential of not succeeding, which could be detrimental.

Usually, this transition preparation is done at Parkhill School the semester before the candidate student commences dual enrollment. However, the preparation can be accelerated or delayed depending on the student's situation. Transition preparation can also be done concurrently with dual enrollment placement, but such is not the norm.

Dr. Freitag is not aware of any IEP-initiated transition preparation that is being applied to petitioner's curriculum at Parkhill School.

21. Sungalina Lee has a master's degree in counseling and has been petitioner's DIS counselor at Parkhill School for the past two and one-half years. She

testified that petitioner's current classroom setting consists of six other students and that since the removal of petitioner's TSA support in May 2005, she has personally observed some regression in petitioner in the form of a lower level of tolerance and more demands. She believes that although petitioner has been doing well the past few weeks (i.e., since the start of the Fall 2005 semester), he needs further observation by staff to assess his coping skills without TSA support.

Ms. Lee stated that petitioner now appears "invested" in improving his behavior and is a good candidate for dual enrollment because he is "very bright, naturally curious, likes to excel, and there could be more experiences offered to him in a public school setting." However, more time is needed to transition petitioner into a dual-enrollment program because change is very difficult for him. When there is change in petitioner's perception, he tends to regress. When there is a methodical or systematic preparation for change, petitioner experiences more success.

22. Janyce Leibman has been an LRE counselor for LAUSD for 12 years and is credentialed as a teacher and student counselor. She is familiar with LAUSD's dual enrollment program and follows students during their transition into public school. Ms. Leibman is familiar with the attributes and preparations that support a successful transition from an NPS to a public school. She testified by telephone and stated that she is familiar with the LAUSD dual enrollment process, which is used to "test the waters" when a student in an NPS demonstrates self-control and responsibility, and is deemed ready to be transitioned back into a public school setting. The transition usually starts with the student attending two classes per day in the public school setting. Since there is no TSA support, the student needs to be self-responsible. After commencing dual enrollment, an LRE counselor monitors the student in his new placement to see if his behavior, attendance, and academic performance indicate a successful transition. If transition is not successful or it appears that placement in a public school setting was premature, the student may be placed in an appropriate NPS. Based on her observations of petitioner and discussions with

other team members during petitioner's June 2005 IEP meeting, she supported the team's decision that petitioner was not ready for dual enrollment.

23. Based on the record in this matter, petitioner is not ready for dual enrollment at this time and is receiving a free appropriate education in the least restrictive environment. As indicated by the consensus of the IEP team members, more time is needed to insure that petitioner has the social / emotional skills and behavioral attributes to succeed in a dual enrollment environment.

24. At the end of the due process hearing, petitioner's father requested that LAUSD convene an IEP meeting to address implementation of a dual-enrollment transition program for petitioner.

LEGAL CONCLUSIONS

1. In general, when a school district seeks to change the placement of a student, the burden is on the school district to prove that it complied with IDEA and is providing the student with a free appropriate public education in the least restrictive environment. However, "absent clear statutory language to the contrary, procedural questions are resolved by neutral principles that are independent of any particular statute's substantive policy objectives." "Allocation of the burden of proof has long been governed by the rule that the party bringing the lawsuit bears the burden of persuasion with respect to the requested remedy." (*Clyde K and Sheila K. v. Puyallup School District No. 3* (9th Cir. 1994) 35 F.3d 1369, 1398-1399.)

In this case, respondent school district and petitioner bear their respective burdens of proof with respect to establishing whether dual enrollment at this time is necessary for petitioner to obtain a free appropriate public education in the least restrictive environment.

2. Title 20 United States Code section 1412, subdivision (a)(5); Title 34 Code of Federal Regulations Part 300.550, subdivision (b); and California Education Code section 56031 define policies and procedures pertaining to "least restrictive environment" (LRE) requirements. Under subdivision (b) of the federal regulation:

Each public agency shall ensure --

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non disabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

3. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, the court established a four-part test to determine whether a disabled student's placement represents the least restrictive environment.

In applying the test, a court considers: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Id.* at 1401, 1404.)

4. In the most recent IEP that was approved by petitioner's parent (May 11, 2005) the IEP team had reservations regarding dual enrollment of petitioner. Although the most recent IEP (June 2005) states that petitioner has shown steady improvement in his social/emotional and behavior performance, it also indicates he needs to demonstrate further improvement before he could be deemed ready to return to a public school placement.

5. Petitioner should not be dual enrolled until such time as his IEP team members feel that he is prepared for that transition.

An unsuccessful transition into dual enrollment should be avoided as it could result in petitioner becoming frustrated and demoralized, causing pronounced behavioral regression. Given the magnitude of the change in settings between Parkhill School and Parkman Middle School, the added stresses posed by possibly mismatched academic curricula, and the difficulties inherent in being accepted by already established social groups, mid-semester dual enrollment may be viewed as a recipe for an unsuccessful transition.

6. Although transition preparation and counseling could be done concurrent with dual enrollment, the rush to get petitioner's "foot in the door" at Parkman Middle School must be subordinate to proper advance preparation so that petitioner is ready to succeed in that environment.

Dual enrollment of petitioner prior to his completion of formal preparation for transition would constitute an inappropriate placement. It would mean placing petitioner in an environment where there are unsatisfactory risks associated with his ability to meet the challenges imposed by the new school setting. Due to these concerns, the potential benefits of dual enrollment at this time are outweighed by the potential negative effects that may result. Therefore, dual enrollment at this time would constitute placing petitioner in other than the least restrictive environment.

7. Respondent school district established that it is currently providing petitioner with a free appropriate public education in the least restrictive environment.

Petitioner did not establish that dual enrollment of Student in Parkman Middle School is necessary for petitioner to obtain a free appropriate public education in the least restrictive environment.

8. Pursuant to Education Code section 56507, subdivision (d), respondent LAUSD prevailed on the issue in this matter.

9. LAUSD is required to honor the request by petitioner's father that an IEP meeting be held as soon as possible to address preparation and implementation of a dual-enrollment transition plan for petitioner. The IEP team would presumably consider adopting a transition plan that would provide for reassessment of petitioner's readiness for dual enrollment prior to the Spring 2006 semester at Parkman Middle School.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Petitioner's request that LAUSD dual-enroll petitioner at this time is denied.

This is a final administrative decision, each party shall be bound by this decision. Either party may appeal the decision to a court of competent jurisdiction with 90 days of receiving notice of the final decision. (Ed. Code, § 56505, subd. (h) and (k).)

Dated: October 19, 2005

ROBERT S. EISMAN

Administrative Law Judge

Office of Administrative Hearings