

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NOS. 2019090819
AND 2019080672

PLEASANT VALLEY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

AND

PARENT ON BEHALF OF STUDENT,

v.

PLEASANT VALLEY SCHOOL DISTRICT AND VENTURA COUNTY
OFFICE OF EDUCATION.

DECISION

DECEMBER 23, 2019

On, August 19, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Pleasant Valley School District and Ventura County Office of Education as respondents. A request for due process hearing

is referred to as a complaint. On September 20, 2019, Pleasant Valley filed a complaint with OAH naming Student.

On September 30, 2019, OAH consolidated Student's case with Pleasant Valley's case, naming Pleasant Valley's case the primary case. Administrative Law Judge, Cole Dalton, heard the consolidated matter in Van Nuys, California on October 15 and 16, 2019, and in Camarillo on November 13, 2019.

Attorney Melissa Hatch represented Pleasant Valley and Ventura. Paralegal Kathi Miers attended the first day of hearing on Respondents' behalf. Special Education Director Erin Smith and Principal of Carl Dwire School Stefanie Rodriguez attended the first day of hearing on Pleasant Valley's behalf. Assistant Superintendent Carol Bjordahl attended the third day of hearing on Pleasant Valley's behalf. Executive Director Regina Reed attended all days of hearing on Ventura's behalf.

Parents represented Student. Parents and Student did not attend the first two days of hearing. Parents and Student attended the beginning of the third day, left the hearing during a recess and did not return.

At Pleasant Valley and Ventura's request the matter was continued until December 4, 2019, for written closing briefs. The record was closed, and the matter was submitted on December 4, 2019.

ISSUES

The issues will be separated into separate sections identifying each party's issues.

STUDENT'S ISSUES

1. Did Pleasant Valley and Ventura deny Student a free appropriate public education from February 9, 2018 to the filing of Student's complaint, by failing to provide Student physical therapy and adapted physical education services?
2. Did Pleasant Valley and Ventura deny Student a FAPE by failing to offer an appropriate individualized education program, or deny Parents meaningful participation by refusing to work with Parents to develop an appropriate IEP, for the 2019 to 2020 school year?

PLEASANT VALLEY'S ISSUE

3. Did Pleasant Valley's individualized education program, developed on March 7, 2019, and May 31, 2019, offer Student a FAPE, in the least restrictive environment appropriate for Student, such that Pleasant Valley may implement the individualized education program without Parents' consent?

This Decision refers to a free appropriate public education program as a FAPE, and to an individualized education program as an IEP.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. §1400(d)(1); See Ed. Code, §56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) In this consolidated matter, each party had the burden of proof as to their respective issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student was 11 years old and in sixth-grade at the time of hearing. He was eligible for special education as a child with intellectual disability. Student had medical diagnoses of Fragile X Syndrome, seizure disorder, and a severe pumpkin allergy. He resided within Pleasant Valley's geographic boundaries at all relevant times. Pleasant Valley was Student's local educational agency responsible for Student's educational program.

Student attended Carl Dwire Elementary School, referred to as Dwire School, from January 2018 through the time of hearing. Dwire School was a special education school operated by Ventura. Dwire School served children with moderate to severe disabilities.

Children were referred to Dwire School by their local school districts. Dwire School was located next to Oxnard School District's Christa McAuliffe Elementary School, referred to as McAuliffe School, a general education campus. Student and his peers attending Dwire School interacted with typically developing peers at McAuliffe School during lunch and recess.

ISSUE 1: DID PLEASANT VALLEY AND VENTURA DENY STUDENT A FAPE FROM FEBRUARY 9, 2018 TO THE FILING OF STUDENT'S COMPLAINT, BY FAILING TO PROVIDE STUDENT WITH PHYSICAL THERAPY AND ADAPTED PHYSICAL EDUCATION SERVICES?

Student contends Pleasant Valley and Ventura denied him a FAPE by failing to offer direct services in physical therapy and adapted physical education. Student contends a recommendation from his pediatrician, Dr. Davin Lundquist, meant Pleasant Valley and Ventura had to provide school-based physical therapy services. Student further contends he required such services to address low muscle tone, flat feet, and pigeon toes, resulting in gait issues and falling. The lack of physical therapy and adapted physical education at school, Student contends, caused "damage almost to the point beyond repair of his ankles." Student contends he now requires full braces and may need ankle fusion surgery.

Pleasant Valley and Ventura contend that Student could access his educational environment without direct physical therapy or adapted physical education services. They further contend they met Student's gross motor needs through physical therapy consultation coupled with provision of a specially designed physical education program in his special day class and provision of gross motor activities in the motor room and

with typically developing peers at McAuliffe School. Pleasant Valley and Ventura argue they were not required to provide physical therapy based only upon a medical doctor's recommendation.

A FAPE means special education and related services that are available to an eligible child that meet state educational standards and are provided at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); 34 C.F.R. §§ 300.17, 300.34, 300.39; Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

In general, a child eligible for special education must be provided access to specialized instruction and related services, which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034] (Rowley); *Endrew F. v. Douglas County School District* (2017) 580 U.S. ___ [137 S.Ct. 988, 999] (Endrew F.); *E.F. v. Newport Mesa Unified School District* (9th Cir. 2018) 726 Fed.Appx. 535, 537 [nonpub. opn.] (E.F.).) Special education means specially designed instruction, at no cost to the parents, to meet unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and including instruction in physical education. (20 U.S.C. § 1401(29)(A)&(B); 34 C.F.R. § 300.39(a)(1); see also Ed. Code, § 56031, subd. (a).)

Related services means developmental, corrective, and other support services as are required to assist a child with a disability to benefit from special education and include physical and occupational therapy. (34 C.F.R. § 300.34(a); Cal. Code Regs., tit. 5, §§ 3051, 3051.6.) Related services, when needed, are determined by the IEP. (Cal. Code Regs., tit. 5, § 3051, subd. (a)(2).) In California, related services are also called designated instruction and services. (Ed. Code, § 56363, subd. (a).)

Physical education means the development of physical and motor fitness, fundamental motor skills and patterns, and skills in aquatics, dance, and individual and group games and sports, and includes special physical education, adapted physical education, movement education, and motor development. (34 C.F.R. § 300.39(b)(2).)

Under the IDEA, each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled full time in a separate facility or the child needs specially designed physical education, as prescribed in the child's IEP. (34 C.F.R. § 300.108(b).) If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child must provide services directly or make arrangements for those services to be provided through other public or private programs." (34 C.F.R. § 300.108(c).)

STUDENT DID NOT REQUIRE DIRECT PHYSICAL THERAPY SERVICES TO ACCESS HIS EDUCATION.

On March 7, 2018, Pleasant Valley held Student's annual IEP team meeting with all necessary members, offering Student, among other services, one-on-one occupational therapy for 15 minutes weekly and whole class occupational therapy for 30 minutes weekly. Pleasant Valley offered consultation with the physical therapist as a

support for school personnel. The evidence established these services were reasonably calculated to enable Student to make progress appropriate in light of his circumstances and he received educational benefit from his program. Parents consented to the IEP but asked that Student also receive direct physical therapy services.

Beginning with the March 2018 IEP, Parents asked for school-based direct physical therapy services during several IEP team meetings up to the time they filed their complaint. Parents expressed concern over safety issues such as Student spinning in circles, bumping into others, falling, and limitations on his ability to run and jump. They were concerned about Student's feet turning inward.

Chris Glibert, doctor of physical therapy for Pleasant Valley, conducted a physical therapy assessment in March and April 2018, and prepared a report dated May 2, 2018. Dr. Glibert interviewed Student's teacher Marie Gutierrez, Mother, and Student's aide. He observed Student across settings at school.

Student's abilities and needs were thoroughly discussed in Dr. Glibert's report, during the May 7, 2018 IEP and subsequent IEP meetings, and at hearing by Dr. Glibert, Ms. Reed, Ms. Gutierrez, occupational therapist Heidi Escobar, and adapted physical education specialist Yvonne O'Kane. Student frequently required tactile cues to walk in the correct direction due to his intellectual disability. Student had low muscle tone and loose joints related to Fragile X Syndrome. As a result, he often leaned against solid surfaces when not engaged in gross motor activities, outdoors. He also had decreased stability when walking due to joint movement. At the time of Dr. Glibert's 2018 assessment, Student used inserts, not braces, to stabilize his ankle joints while walking. His lower extremities were slightly internally rotated. He was not yet running with both feet simultaneously off the ground.

Student demonstrated appropriate core strength to access his classroom and campus at Dwire School and McAuliffe School without specialized equipment. He had full day one-on-one aide support to address safety issues and his need for prompting and modeling. Safety issues related to his ability to understand directions and lack of awareness of nearby activities. Student spun in class only once a day. During the 2017-2018 school year, he fell only once at school, without injury, when kicking a ball. In class, Student carried his own backpack, stacked chairs, sat in a regular chair, and corrected his own posture. He squatted to the floor to pick up items. He had full range of motion in his arms and legs.

The IEP team's review of Dr. Glibert's physical therapy assessment resulted in the team adding heavy work as an accommodation to the May 7, 2018 IEP. Heavy work addressed Student's need to maintain core strength. The weight of the evidence demonstrated that, at the time of the May 7, 2018 IEP, Student did not require direct physical therapy services in order to make progress appropriate in light of his circumstances.

Student received appropriate physical education through specially designed physical education, as prescribed in his IEP, in addition to use of the motor room, and participation in gross motor activities on the playground at Dwire School and with typically developing peers at McAuliffe School.

Student's specially designed physical education program included development of physical and motor fitness, fundamental motor skills and patterns, movement to music, age appropriate individual and group games and sports, and motor development. In class and the motor room, he walked on a five-inch wide foam balance beam, balanced on a rocker board and scooter boards. He lowered himself onto the floor to engage in activities and stood back up on his own. He did yoga moves, wall

push-ups, and partial sit-ups. Other motor activities included standing on one foot, placing one foot on the other, jumping over a line, jumping with one-foot forward, doing arm curl-ups, and planks. He worked on ball skills in the motor room.

Student demonstrated several gross motor skills during outside play. He could run after soccer balls, dribble the ball, and kick it. He could catch and throw a six-inch ball from a distance of 10-feet. He threw Frisbees up to 20 feet. In the beginning of 2018, he could run, but not with both feet off the ground. Having both feet leave the ground was an emerging skill during the 2018-2019 school year, demonstrating some progress. Student could climb playground equipment, including swings and slides.

Moreover, Student independently accessed his school campus and classroom. He walked up and down stairs, alternating feet, using the handrail. Parents reported that Student did not need to use handrails. He navigated uneven surfaces. He walked over concrete, onto grass, and through wood chips to access the playground. He sat on a bench without back support, maintaining proper posture.

Student walked with classmates over uneven ground and varying surfaces to participate in lunch and recess with typical peers at McAuliffe School. He carried his own lunch box. He used a lunch tray to obtain food and used the tray to discard trash.

On October 11, 2018, Student's IEP team met to address a recent recommendation Parents provided from certified orthotist Christopher Holloway and Parents' request for direct physical therapy services. Mr. Holloway recommended supramalleolar orthosis to address Student's flat feet, slight leg length discrepancy, and feet turning inward. At hearing, Dr. Glibert described supramalleolar orthosis as supporting the foot above the anklebone. The orthosis could be prescribed for children with flat feet and for ankle stability. Dr. Glibert explained that Student's turned in feet

could be an anatomical condition or due to low muscle tone and mobile hip joints. A medical doctor would typically take x-rays to determine whether an anatomical condition existed. Dr. Glibert opined that Student's condition was likely related to Fragile X Syndrome.

During the October meeting, Parents expressed their belief that the lack of school-based physical therapy resulted in Student becoming more pigeon toed, causing the need for custom-made orthosis. Parents expressed concern over Student falling because he had increasingly been tripping and falling at home. They asserted that a medical doctor prescribed direct physical therapy for Student at school, but did not give the prescription to the IEP team.

Pleasant Valley addressed Student's ability to access his educational needs related to low muscle tone, flat feet, and joint mobility issues with the services offered in his IEPs. The evidence did not show that Student became more pigeon toed over time or that, if he did, it somehow related to IEPs offering inappropriate services.

To address Parents' concerns, school staff collected data on Student's use of orthosis and incidents of falling at school beginning in October 2018. Ms. Dillard and Dr. Glibert attempted to communicate with outside providers regarding specific recommendations on Student's use of the orthosis, which typically required a breaking in period.

On October 23, 2018, Dr. Lundquist sent a letter to Dwire School recommending that Student receive physical therapy. In the letter, Dr. Lundquist stated that Student had physical therapy since he was three-years-old due to low muscle tone, which put him at risk for falling and potential injury. The lack of clarity in the recommendation belied its speculative nature. Dr. Lundquist did not specify the type of physical therapy

recommended, whether direct or through consultation, one-on-one or in small group. He had not recommended the frequency or duration of such service or identify any goals. The evidence did not demonstrate that Dr. Lundquist had knowledge of the placement and services provided to Student through any of his IEPs. Accordingly, the evidence did not show that Student's services should be changed or if so, how.

Throughout the relevant time frame, Dr. Glibert observed Student regularly and collaborated with Student's occupational therapist, aide, classroom teacher and other staff members about Student's needs and progress. He demonstrated extensive training, knowledge, and experience in school-based physical therapy and Student's disability. Dr. Glibert's testimony that Student's educational program appropriately addressed his gross motor needs was credible and persuasive. Dr. Glibert explained that it was not possible to change Student's low muscle tone or hip mobility resulting from Fragile X Syndrome. Student's program appropriately addressed Student's balance and core strength.

The IDEA does not require related services be provided on demand or to address speculative requests. The IDEA "guarantees...an education that is appropriate, not one that provides everything that might be thought desirable by loving parents." (*Tucker v. Bayshore Union Free School District* (2nd Cir. 1989) 873 F.2d 564, 567 (citation and internal quotation marks omitted).) Moreover, recommendations from outside providers do not dictate the addition of related services to Student's IEPs. State and federal special education law require only that an IEP team consider outside recommendations, not that they be adopted by the school district. (34 C.F.R. § 300.24(b)(ii); Ed. Code, § 56341.1, subds. (a), (d)(3).)

Dr. Lundquist's recommendation for physical therapy was based upon the assumption that, since Student had low muscle tone, he was at risk for falling and potential injury. Dr. Glibert, Ms. Gutierrez, and Ms. Dillard credibly established through recorded data and personal observations that Student had fallen only once on campus during the school year. He had not been injured from tripping or falling at school. Tripping or falling at school was not uncommon for elementary school children. Pleasant Valley was not required to add a service to Student's IEP based upon the possibility that he may one day fall and sustain an injury.

Student began wearing his supramalleolar orthosis at school on November 26, 2018. Daily records tracking Student's use of his orthosis demonstrated that he did not wear them to school on a daily basis. Dr. Glibert, Ms. Gutierrez, and Ms. Dillard observed that the orthosis seemed somewhat loose and that Student did not always come to school with supportive shoes. For example, he sometimes wore loose fitting rubber rain boots. Even so, Student demonstrated the ability to walk and run over varying surfaces on campus, without incident.

Student's IEP team met again on January 10, 2019, to consider Dr. Lundquist's physical therapy recommendation and review data on Student's falls on campus. Student had fallen only once in October 2018. Based upon Student's ability to access his educational environment and make progress appropriate in light of his circumstances, Pleasant Valley and Ventura team members recommended continuation of physical therapy as a consultative service.

At hearing, Mother testified that independent physical therapy assessor Rosanna Kirkendall-Azer recommended school-based physical therapy in her July 2019 assessment. On November 12, 2019, one day before the last day of hearing, Parents

agreed to attend an IEP team meeting to review Ms. Kirkendall-Azer's assessment. Student's complaint did not place the independent physical therapy assessment or the November 12, 2019 IEP team meeting at issue.

Student presented no evidence as to the type, frequency, or duration of recommended physical therapy or how such therapy would relate to the program already in place. Though Parents sought direct physical therapy for Student, they did not demonstrate whether Ms. Kirkendall-Azer recommended accommodations, modifications, support for school personnel, individual, or group physical therapy. There was no evidence the private physical therapist had any knowledge of Student's placement, services, or specially designed physical education program or that Ms. Kirkendall-Azer reviewed Student's education records, observed him at school, or was qualified to address his physical therapy related needs at school.

The weight of the evidence demonstrated Student did not require direct physical therapy services to access his education. IEP's developed from February 9, 2018 through the date Student's complaint was filed provided Student with appropriate developmental, corrective, and other support services to address his gross motor needs at school.

STUDENT DID NOT REQUIRE ADAPTED PHYSICAL EDUCATION SERVICES TO ACCESS HIS EDUCATION.

Both the IDEA and California law describe adapted physical education within the context of physical education provided to students eligible to receive special education. (34 C.F.R. § 300.39; Cal. Code Regs., tit. 5, § 3051.5.) Adapted physical education means developmental or corrective instruction for individuals with exceptional needs who are precluded from participation in the activities of the general physical education program,

modified general physical education program, or in a specially designed physical education program in a special class. (Cal. Code Regs., tit. 5, § 3051.5, subd. (a).) The terms specially designed physical education found in California regulations and special physical education found in federal regulations are synonymous.

Here, Student's IEPs from February 9, 2018 through the filing of his complaint offered specially designed physical education at Dwire School in addition to integrated physical education with general education peers at Mcauliffe School. The weight of the evidence established Student was not precluded from participating in general education physical education activities and that he accessed his physical education program in a specially designed physical education program in a special class. Student also participated in gross motor activities in the occupational therapy motor room.

During Student's January 10, 2019 IEP team meeting, Parents expressed concern over his participation in physical education. Parents did not understand why Student no longer had adapted physical education in his IEP. During the meeting, school staff considered Parent's concern, researched the issue, and learned that Student's October 2014 IEP included adapted physical education as a consultative service for staff. Student was not attending Dwire School in October 2014. Pleasant Valley then offered and Parents accepted an adapted physical education assessment plan.

Ms. O'Kane assessed Student and prepared a report dated March 7, 2019. Ms. O'Kane had extensive training and experience in her field. At hearing, she explained her assessment procedures, observations, and conclusions regarding Student's needs in a clear and comprehensive manner. She spoke directly, did not generalize, and was found credible. Her testimony was given significant weight, which it deserved. Ms. O'Kane enjoyed assessing Student. She reviewed pertinent Student records, observed him on campus, and conducted standardized tests in the motor room.

Ms. O’Kane administered the Test of Gross Motor Development, Edition Two, which addressed object control and locomotor skills. Standardized instructions allowed demonstration and verbal description prior to testing. Because of Student’s qualifying disability, he required additional modeling cues, verbal and visual prompts in order to determine his skill level on various tasks. This meant that his performance could not be compared to peers in the normative sample. Ms. O’Kane also administered the Curriculum, Assessment, Resources, and Evaluation, Revised Second Edition, to assess Student’s motor function.

Overall, Student demonstrated gross motor skills mastery at the three to four-year-old level with scattered emerging skills up to five-point-four years. His object control skills fell within the four-point-six to five-year-old range. He demonstrated motor planning by catching balls. He had the ability to access physical education within his specially designed setting. Ms. O’Kane described his physical education program as working on balance, locomotor skills, movement to music, physical fitness tasks, ball skills, age appropriate games, and recreational skills.

Ms. O’Kane reviewed her assessment at Student’s annual IEP, completed on May 31, 2019. Mother provided input regarding perceived deficiencies in Ms. O’Kane’s written report. Mother believed that if Student were given adapted physical education the school would remove his physical therapy. She preferred that, since Ms. O’Kane made accommodation recommendations in her report, the school should prescribe direct adapted physical education in an IEP. Otherwise, in Mother’s opinion, he would not be prepared to engage in general education physical education because she thought he “basically failed” every category of testing.

Ms. O’Kane explained that Student demonstrated several abilities across all areas tested. Though he did not engage in all activities as a typically developing peer would, he demonstrated skills allowing him to appropriately engage in both his specially designed physical education program and integrated general education with typically developing peers. For example, while he used two hands instead of one, he could roll a ball to a peer. While he threw mostly using his wrist, he participated in ball-play because he could throw the ball to his peers. He could play a modified baseball game with typical peers. Student had the necessary skills to play safely and appropriately participate with peers across his physical education settings, showing that he did not require adaptive physical education services.

Ms. O’Kane’s assessment report included a number of recommendations, which addressed Student’s learning style, socialization through game playing, and physical fitness needs. Her recommendations included allowing more time or a slower pace when learning new skills and encouraging Student to spend more time on a task before moving on to the next. This recommendation addressed Student’s cognition, slower rate of learning, and need for repetition in prompting and in practicing new skills. She recommended modified fitness activities such as wall push-ups, high planks, sit and reach, shoulder stretch, and modified curls. She also recommended modifying equipment used, such as balls that were larger, softer, and brighter and lighter weights. She encouraged peer interaction playing catch and other simple balls games for gross motor development. She recommended using footprints on the ground to encourage proper positioning of feet when striking or throwing balls. She recommended that Student practice fitness and ball skills at home.

Ms. Gutierrez already incorporated most of Ms. O’Kane’s recommendations in Student’s specially designed physical education program. Ms. O’Kane provided Ms. Gutierrez with footprints for foot placement to help with motor planning while throwing and striking balls. Ms. O’Kane, Ms. Gutierrez, and Dr. Glibert credibly established Student’s physical education program addressed his development of physical and motor fitness, fundamental motor skills and patterns, and skills in dance, and individual and group games and sports.

The evidence demonstrated that Pleasant Valley provided and Student received appropriate physical education to meet his unique gross motor needs. Student did not prove that he required developmental, corrective, or other supportive services from an adapted physical education specialist in order to make progress appropriate in light of his circumstances.

ISSUE 2: DID PLEASANT VALLEY AND VENTURA DENY STUDENT A FAPE BY FAILING TO OFFER AN APPROPRIATE INDIVIDUALIZED EDUCATION PROGRAM, OR DENY PARENTS MEANINGFUL PARTICIPATION BY REFUSING TO WORK WITH PARENTS TO DEVELOP AN APPROPRIATE IEP, FOR THE 2019 TO 2020 SCHOOL YEAR? AND

ISSUE 3: DID PLEASANT VALLEY'S INDIVIDUALIZED EDUCATION PROGRAM, DEVELOPED ON MARCH 7, 2019 AND MAY 31, 2019, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION?

The IEP for the 2019 to 2020 school year, as Student framed Issue 2, is the IEP developed on March 7, 2019 and May 31, 2019, as Pleasant Valley framed Issue 3. This Decision will refer to the March 7, 2019 and May 31, 2019 for the 2019 to 2020 school

year as the 2019 annual IEP. When a school district seeks a determination that it offered a student a FAPE such that it may implement an IEP without parents' consent, the district must prove that the IEP meets both procedural and substantive legal requirements. Accordingly, whether Parents meaningfully participated in developing the 2019 annual IEP and whether the 2019 annual IEP offered Student a FAPE are addressed in this section. Pleasant Valley and Ventura are collectively referred to as Pleasant Valley in this section.

Student contends the 2019 annual IEP denied him a FAPE because the IEP did not include direct physical therapy and adapted physical education services. Issue 1 resolved this issue in Pleasant Valley's favor. Student further contends, in Issue 3, that Pleasant Valley deprived Parents the right to meaningful participation in the development of an appropriate 2019 annual IEP.

Pleasant Valley contends it complied with all necessary procedural requirements in developing the IEPs. Specifically, Pleasant Valley contends it timely convened the IEPs, obtained attendance of all required team members, offered Parents rights and procedural safeguards, provided Parents with the opportunity to meaningfully participate in the IEPs, and developed a clear written offer of FAPE.

Pleasant Valley contends it offered Student a substantive FAPE in the 2019 annual IEP by developing goals addressing Student's unique educational needs and by offering a program reasonably calculated to allow Student to make progress appropriate in light of his circumstances.

When a school district seeks to demonstrate that it offered a FAPE to a particular student, it must first show that it complied with the procedural requirements of the IDEA. (*Rowley*, supra, 458 U.S. 176, at p.p. 206-207.) Second, the school district must

show that the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (Id.; *Endrew F.*, supra, 580 U.S. ____ [137 S.Ct. 988, at p. 1000]; *E.F.*, supra, 726 Fed.Appx. 535.) Whether Student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d, 1031, 1041.) "An IEP is a snapshot, not a retrospective." (Ibid.)

PLEASANT VALLEY MET PROCEDURAL REQUIREMENTS IN DEVELOPING THE 2019 ANNUAL IEP.

Pleasant Valley provided timely and appropriate notice for Parents to attend Student's 2019 annual IEP. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, § 56341.5.) On February 14, 2019, Pleasant Valley sent Parents notice of Student's March 7, 2019 annual IEP. Parents signed the notice on February 19, 2019, indicating they would not be able to attend. Pleasant Valley received Parents notice on February 20, 2019. On March 1, 2019, Pleasant Valley received an email from Parents who stated they would attend the March 7, 2019 IEP team meeting. On March 6, 2019, Parents sent another email indicating they would not attend. Pleasant Valley and Ventura met on March 7, 2019, to "open" Student's annual IEP, in order to comply with legal timelines. All necessary Pleasant Valley and Ventura team members attended. Parents did not attend. The IEP notes reflect the meeting was opened and would need to be continued to obtain Parents' attendance.

On March 8, 2019 and April 3, 2019, Ventura sent Parents letters attempting to schedule Student's annual IEP. Each letter provided Parents with three separate dates and times for the meeting. Ultimately, Parents agreed to attend Student's annual IEP on May 31, 2019, a date beyond any of the six dates offered by Ventura.

On May 31, 2019, Ventura held Student's annual IEP team meeting. All necessary Pleasant Valley and Ventura team members attended. (34 C.F.R. § 300.321(a); Ed. Code, § 56341, subds. (a), (b).) Pleasant Valley offered Parents a copy of their Parental Rights and Procedural Safeguards.

PARENTS MEANINGFULLY PARTICIPATED IN THE DEVELOPMENT OF THE 2019 ANNUAL IEP.

Parents attended Student's 2019 annual IEP to review placement and services and Ms. O'Kane's recent adapted physical therapy assessment. Parents participated in the IEP process in a meaningful way by attending and expressing disagreement with Pleasant Valley's offer of a FAPE. Moreover, Parents requested revisions to the IEP, including direct physical therapy and adapted physical education, and access to a computer for writing.

Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693;

Fuhrmann v. East Hanover Board of Education (3rd Cir. 1993) 93 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Testimony from Ms. Reed and Ms. O’Kane, along with IEP meeting notes, demonstrated a robust discussion with Parents regarding their request for direct physical therapy and adaptive physical education. Parents pointed to Student’s skill deficits, falling at home, and the many modifications suggested by Ms. O’Kane in her report. In response, Ms. O’Kane and Ms. Reed explained that adapted physical education could be offered to enable Student to access regular physical education or specially designed physical education. Since Student already appropriately accessed his physical education programs, he did not demonstrate a need for such services. The evidence demonstrated that Pleasant Valley came to the IEP with an open mind, heard and responded to Parents’ concerns.

Parents asked that Student use a computer for extensive writing assignments. Pleasant Valley added keyboarding for longer writing assignments as an accommodation. Parents opted out of state testing, which was documented in the IEP. Parents provided input and consented to implementation of Student’s health plan for Fragile X Syndrome, seizure disorder, and severe pumpkin allergy.

That Parents ultimately did not agree with Pleasant Valley’s offer of a FAPE does not mean they did not participate in its development in a meaningful way. Parents attended the 2019 annual IEP, were informed of Student’s needs, expressed disagreement regarding the IEP team’s conclusions, and requested revisions in the IEP. Pleasant Valley was not required to adopt each request as part of Student’s IEP. Pleasant Valley was responsible for ensuring the IEP offered Student an appropriate program. (See, *J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 421.)

PLEASANT VALLEY OFFERED APPROPRIATE ANNUAL GOALS.

Parents received goal progress reports prior to the 2019 annual IEP meeting. The IEP clearly stated Student's present levels of performance, which were also summarized elsewhere in the IEP as part of new goal baselines.

The IEP must state the child's present levels of academic achievement and functional performance, and measurable annual goals. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) The IEP must also contain a statement of how the goals will be measured.

Cognitively, Student assessed in the pre-operational stage of development using the Ordinal Scales. Based upon a March 2017 assessment, Student matched colors, familiar objects, and shapes. He sorted items, given one at a time. He identified body parts and objects and named common items and pictures. He learned through modeling, prompting, and repetition in a slow but steady manner.

Based upon this backdrop, Student met or made meaningful progress on each of the nine goals from his March 7, 2018 annual IEP. He made good progress on academic goals for writing his name legibly using capitals, reading by finding rhyming words in a field of three, and math addition problems up to a sum of 20. He met academic goals for reading a four-word sentence out loud, and math by identifying and matching values of coins and bills.

Student made good progress in his self-care independent living goal but required light physical assistance to get his shoes on over his heels both with and without his orthosis. He met his social emotional goal by becoming one of four role models in class for attending to speakers and activities for up to 20-minutes. In speech and language, he met a communication goal by participating in social conversations

with peers for a minimum of three turns, using short phrases. He made good progress on his other communication goal for using four to five word utterances when speaking, such as, can I have ___ please?

Pleasant Valley proposed new goals based on Student's progress on past goals, on classroom work samples, Unique curriculum and other recent assessments, and school based observations.

Student demonstrated needs in communication, reading, reading decoding, writing, self-care, and math. Ms. Escobar and Ms. Gutierrez drafted goals in academic writing. Ms. Gutierrez drafted academic goals in reading and math and for social emotional and self-care needs. Ms. Mejia drafted goals in communication.

Ms. Escobar, Ms. Gutierrez, and Ms. Mejia persuasively demonstrated the appropriateness of Student's new goals. New goals built upon skills demonstrated in prior goals. For example, in reading, Student had been reading out loud. His new goal required him to identify context clues during a joint reading lesson. Student enjoyed socializing with preferred adults in the hallway and required work on consistently answering social questions asked by adults and peers. To address this need, Ms. Mejia drafted a communication goal to listen and respond appropriately to social questions.

Pleasant Valley drafted new goals in each area of need. Testimony from Student's providers established the goals were appropriate. The goals were measurable, based upon Student's needs, and could reasonably be anticipated to be met within a year.

PLEASANT VALLEY MADE A CLEAR WRITTEN OFFER OF FAPE.

The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The requirement of a formal written offer creates a clear record of the placement and services offered and alerts parents of the need to consider seriously whether the offer was appropriate under the IDEA. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

Pleasant Valley's 2019 annual IEP included a start date for services and modifications and identified the frequency, location, and duration of services offered. The IEP offered Student continued placement in a special day class at Dwire Elementary School. The IEP offered speech and language for 60 minutes weekly, individually, and 30 minutes weekly in a group to address Student's communication and social language needs. The IEP also offered occupational therapy for 15 minutes weekly, individual and 30 minutes weekly in a group to address writing or fine motor skills, visual motor skills, and gross motor skills. Student continued to receive a full time one-on-one instructional aide. Pleasant Valley offered extended school year services with an aide, occupational therapy and speech and language. The 2019 annual IEP contained all required components, written in an orderly manner. Accordingly, the 2019 annual IEP constituted a clear written offer of FAPE.

SPECIAL EDUCATION AND RELATED SERVICES AND SUPPLEMENTARY AIDS AND SERVICES WERE APPROPRIATE.

In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most

recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).

Student's 2019 annual IEP team considered Student's academic, developmental, and functional needs, and addressed Parents' concerns for enhancing Student's education. The IEP team considered the results of Student's most recent evaluations, including March 2018 educationally related health, adaptive functioning, speech and language, and occupational therapy assessments and 2019 physical therapy and adaptive physical education assessments.

With Parent input, Pleasant Valley developed a health care plan addressing Student's Fragile X syndrome, seizure disorder, and severe pumpkin allergy. Parents opted Student out of state testing and provided input on accommodations and modifications. Pleasant Valley adopted Parents request for a keyboarding accommodation. Pleasant Valley offered other accommodations addressing Student's cognitive profile, learning style, and other unique needs. For example, Student benefitted from use of a visual schedule, visual cues, on-task reminders, and verbal encouragement. Such accommodations helped Student engage in academic and other activities for longer periods of time in an appropriate manner. Other accommodations, such as using manipulatives, increased time to respond, and reduced pencil/paper tasks addressed Student's academic, developmental, and functional needs. He benefitted from hands-on learning, required increased processing time, and alternate means of expression.

The IEP offered a one-on-one aide to monitor Student's health care plan, limited safety awareness, social support, transitions, integration, structured teaching, and need for higher level verbal prompts. Pleasant Valley offered rotation of paraeducators to help Student develop greater independence and generalize skills across providers. Sufficient speech and language and occupational therapy services were offered to implement Student's fine motor and communication goals.

Pleasant Valley's 2019 annual IEP offered access to specialized instruction and related services individually designed to provide Student with educational benefit. The evidence showed that Student made appropriate progress in his program at Dwire and that changes made between the 2018 and 2019 annual IEPs addressed his present levels of performance in order to continue such progress. Pleasant Valley offered a placement and services reasonably calculated to enable him to make progress appropriate in light of his circumstances.

PLACEMENT AT DWIRE SCHOOL WAS APPROPRIATE.

Based upon Student's needs and goals, Pleasant Valley offered continued placement at Dwire School in a moderate to severe special day class. The class utilized Unique curriculum, an evidence based modified curriculum. Ms. Gutierrez explained that instruction was based upon California state standards but modified to a level of instruction appropriate to meet Student's needs and instructional level.

In determining the educational placement of a child with a disability a school district must ensure that:

1. the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the

- evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
2. placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
 3. unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
 4. in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
 5. a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(34 C.F.R. § 300.116.)

"Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" and that providing a continuum of alternative placements includes "the alternative placements listed in the definition of special education" and "supplementary services" to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115. (See *M.S. v. Los Angeles Unified School District* (9th Cir. 2019) 913 F.3d 1119, 1121; *R.V. v. Simi Valley School District* (C.D. Cal. April 10, 2008, CV 05-8949-GHK (VBKx) 2008 WL 11335016, *9; *A.D. v. New York City Department of Education*, (S.D.N.Y., March 19, 2013, No. 12-CV-2673 (RA)), 2013 WL 1155570, *8 (A.D.) [Once the district determined the appropriate least restrictive environment where student could be educated, it was not obligated to consider and inquire into more options on the continuum].)

To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate:

1. that children with disabilities are educated with non-disabled peers; and
2. that special classes or separate schooling occur 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.

(20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).)

Here, Pleasant Valley offered Student placement after a meeting with a group of persons, including the Parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The IEP team considered the requirement that Student should be educated in the least restrictive environment appropriate to meet his needs.

The evidence demonstrated that Student required specialized instruction due to the nature and severity of his disability. The IEP team offered Student placement at Dwire School, with specialized academic instruction, and where he would receive education with non-disabled peers to the maximum extent appropriate, given his daily interaction with typically developing peers during lunch and recess. Parents did not dispute Pleasant Valley's offer of placement and presented no evidence that Student did not make progress appropriate in light of his circumstances while attending the same placement over the previous school year.

Pleasant Valley met its burden of proving the offered placement of Dwire School addressed Student's needs in the least restrictive environment appropriate for him and that he made appropriate progress in light of his circumstances.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Pleasant Valley and Ventura prevailed on all issues heard and decided.

Specifically:

1. Student did not prove that Pleasant Valley and Ventura denied him a FAPE from February 9, 2018 to the filing of his complaint by failing to provide direct physical therapy and adapted physical education services.
2. Student did not prove that Pleasant Valley and Ventura denied Student a FAPE by failing to offer an appropriate IEP or by denying Parents' meaningful participation by refusing to work with Parents to develop an appropriate IEP, for the 2019 to 2020 school year.
3. Pleasant Valley proved that the IEP developed on March 7, 2019 and May 31, 2019, offered Student a FAPE, in the least restrictive environment appropriate for Student, such that Pleasant Valley may implement the IEP without Parents' consent.

ORDER

1. All of Student's claims for relief are denied.
2. Pleasant Valley's claim for relief is granted. Pleasant Valley may implement Student's 2019 annual IEP, developed on March 7, 2019 and May 31, 2019, without parental consent if Parents want Student to receive special education services.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings