

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matter of:

PARENTS on behalf of STUDENT

v.

MODESTO CITY SCHOOLS

MODESTO CITY SCHOOLS

v.

PARENTS on behalf of STUDENT

OAH CASE NO. 2008030735

OAH CASE NO. 2008040702

CORRECTED DECISION¹

This hearing convened in Modesto, California, from May 20 to 23, June 10 to 13, and June 26, 2008, before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH).²

Attorney Tamara Loughrey represented Student, and attorney Justin Arnold was also present on behalf of Student. Student's mother (Mother) attended the hearing. Student's father (Father) attended most days of the hearing.

Attorney Marcy Gutierrez represented Modesto City Schools (District).³ SELPA director Virginia Johnson attended the hearing on behalf of the District.

¹ This decision is amended solely to correct the paragraph numbering on page 24. No other substantive changes have been made to this decision.

² As detailed further in the May 15, 2008 Order Following Prehearing Conference, pursuant to the joint request of the parties, the ALJ conducted this hearing concurrently with the hearing regarding Student's twin brother in OAH Consolidated Case No. 2008030731/2008040643. However, the respective cases for each pupil remain separate.

³ Previous OAH orders had identified Modesto City Schools Special Education Local Plan Area (SELPA) and the District separately. However, at hearing the District clarified that it is the only school

3. Did the District fail to develop an appropriate functional behavioral assessment (FBA) with an appropriate behavior support plan?
4. Did the District fail to conduct an appropriate speech-language assessment, which failure denied Student a FAPE and entitles Parents to an independent educational evaluation (IEE)?
5. Did the District deny Student a FAPE by failing to offer him appropriate speech-language services?
6. Are Parents entitled to reimbursement for an IEE in the area of functional behavior because:
 - A. Parents properly requested an IEE and the District failed to file for due process without unnecessary delay;
 - B. The District improperly attempted to limit Parents' choice of assessors for the IEE?

DISTRICT'S ISSUES

1. Did the District offer Student a FAPE for the 2007-2008 school year, so that the proposed IEP may be implemented over Parents' objections?
2. Did the District conduct an appropriate speech-language assessment of Student?
3. Are Parents entitled to an IEE in the area of speech-language?
4. Did the District conduct an appropriate FBA?
5. Are Parents entitled to reimbursement for an IEE in the area of functional behavior?

EVIDENTIARY MATTERS

1. On May 9, 2008, the District requested that OAH take official notice of three documents: (1) California State Senate Bill 527, introduced by Senator Steinberg on February 22, 2007, with subsequent amendments; (2) California State Senate Bill 1563, introduced by Senators Steinberg and Perata on February 22, 2008, with subsequent amendments; and (3) a September 2007 report from the California

Legislature's Blue Ribbon Commission, entitled "An Opportunity to Achieve Real Change for Californians with Autism Spectrum Disorders."⁶

2. The Administrative Procedure Act (APA), California Government Code section 11515, provides that in an administrative hearing, official notice may be taken of "any generally accepted technical or scientific matter within the agency's special field, or of any fact which may be judicially noticed by the courts of this State."⁷ California Evidence Code section 452 lists what a court may, within its discretion, accept for judicial notice. Among the items for which a court has the discretionary option to take judicial notice are "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).)

3. In the present case, the California State Senate bills concern proposals to create programs similar to the partnership between the Valley Mountain Regional Center (VMRC) and other agencies and stakeholders within VMRC's geographical area, as partly described in the *Early Intensive Behavioral Training (EIBT) Procedures and Program Guidelines (PPGs)* that were admitted into evidence in this case. Because of the nature of Student's claims, the ALJ admitted evidence regarding the PPGs; however, ultimately the PPGs had limited relevance to the issues for determination at hearing. The California State Senate Bills under consideration here are not relevant to the hearing issues, and there is no need to take official notice of those documents.

4. The California Legislature's Blue Ribbon Commission Report on "An Opportunity to Achieve Real Change for Californians with Autism Spectrum Disorders" contains findings from the Commission regarding topics including appropriate programs and services for pupils with autism. Given that those topics are at issue in the present case, the Commission's report is relevant to the hearing issues. Accordingly, the ALJ takes official notice of this document.

FACTUAL FINDINGS

Jurisdiction

1. Student is four years and nine months old. During all times at issue in this case, he was a resident within the boundaries of the District, where he lives with family, including his identical twin brother (Brother). Student has been diagnosed

⁶ During the hearing, the parties made legal arguments regarding taking official notice of these documents. Following those arguments, the ALJ took this evidentiary matter under submission.

⁷ This section of the APA is applicable to special education due process hearings. (Cal. Code Regs., tit. 5, § 3089.)

with autism and is eligible for special education services under the category of autistic-like behaviors.

Factual Background

2. In 2006, Student was determined eligible for and began receiving Early Start special education services pursuant to an individual family service plan (IFSP) from San Andreas Regional Center in Santa Cruz County, where Student and his family resided.

3. In November 2006, Student turned three years old, and began receiving special education services from the Santa Cruz County Office of Education (SCCOE), pursuant to an IEP. Student and Brother both received related services and attended SCCOE's Chrysalis program, a special day class (SDC) which primarily serves preschoolers on the autistic spectrum.

4. On or about August 7, 2007, Student and his family moved to Modesto, California, within the boundaries of the District. In late August 2007, Parents contacted the District regarding provision of special education services for Student. Also in August 2007, Student was evaluated by Dr. Michael Jones, licensed clinical psychologist. Dr. Jones confirmed a previous examiner's diagnosis of Autistic Disorder, pursuant to the criteria of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV).⁸ Dr. Jones also gave Student a provisional DSM-IV diagnosis of Mild Mental Retardation.

5. On September 10, 2007, the District convened an IEP meeting for Student.⁹ Based upon Student's previous IEP from SCCOE, the District offered a 30-day interim placement at an autism SDC at the District's Garrison Elementary School (Garrison) for 30 hours per week. The IEP also offered related services of speech-language therapy twice a week for 30 minutes per session, and occupational therapy (OT) delivered in the SDC twice a week for 30 minutes per session. During this IEP meeting, Parents signed their consent to the District's proposed assessment plan, which proposed assessing Student in the areas of academics, speech-language, and OT/motor skills.

6. Also during the September 10, 2007 IEP meeting, Parents stated that they were interested in placing Student and Brother in an intensive one-to-one ABA program. District staff explained that, for the upcoming 30-day period, the law required the District to offer an SDC placement similar to the one Student and Brother attended in Santa Cruz County. However, District staff agreed that they would make

⁸ Both Dr. Jones and the previous examiner, Dr. Arnold Herrera, made the same DSM-IV diagnoses for Brother.

⁹ The IEP team members also participated in an IEP meeting for Brother on the same date.

a referral to VMRC for Student and Brother to be placed on an "interest list" for an intensive one-to-one ABA program operated by a non-public agency (NPA). VMRC and local educational agencies (LEAs) in the region have an agreement to co-fund EIBT programs for young children with autism. Once a child becomes eligible for an EIBT program through VMRC, the District IEP team then determines whether that program would be appropriate for the child.

7. The EIBT PPGs distributed by VMRC, defines EIBT in part as an intensive one-to-one ABA program provided by an NPA to children with autism. The PPGs state that EIBT programs are "highly structured, typically in-home or center-based program[s]," wherein "[c]hildren receive instruction from trained tutors for 35 to 40 hours a week (20 to 30 hours a week for children under age 3)" for 47 weeks a year. The PPGs distinguish EIBT programs from SDCs operated by public schools. In contrast, the District defines EIBT more broadly. The District's special education director explained that, while VMRC uses the term "EIBT" to mean only programs delivered by NPAs, the District defines EIBT to include all intensive behavioral programs for preschool students with autism, not just programs provided by NPAs.

8. On September 13, 2007, Parents signed their consent to the District's IEP, but wrote that they agreed to the IEP with the understanding that it was a 30-day interim placement while they waited for placement in an EIBT program.

9. On September 17, 2007, Student and Brother began attending the Garrison SDC. Subsequently, Student missed days of school due to illness. On October 2, 2007, Student fell from a 5-foot play structure on the school playground. Thereafter, except for a few days, Student no longer attended the Garrison SDC due to Parents' concerns about the safety and educational benefit of the class.

10. On October 16, 2007, Student's IEP team convened to review the 30-day administrative placement. In part due to Student's absences from the Garrison SDC, District staff had not completed the assessments of Student. Parents agreed that Student would temporarily return to the Garrison SDC for half-days, until the assessments were completed. During the meeting, Parents explained their concerns about why they believed the Garrison SDC was inappropriate for Student. District staff again discussed with Parents the process of obtaining placement in an EIBT program through the VMRC co-funding option, but warned Parents that VMRC had at least a three-month wait for such placement. On October 17, 2007, Parents signed their consent to portions of the IEP, stating in part that they were "signing this IEP in agreement to an interim placement while we await placement in the intensive 1:1 ABA program."

11. On October 22, 2007, the IEP team convened to review Brother's 30-day interim placement. During that meeting, Parents requested an FBA for Student, due to concerns about biting and other behaviors. The District agreed to conduct an FBA, and Parents signed an assessment plan.

12. During this time period, the parties also communicated by telephone, electronic mail (e-mail), and formal correspondence regarding educational programs for both Student and Brother. For example, in a letter dated October 22, 2007, Parents requested several changes to Student's October 16, 2007 IEP, including that both Student and Brother be placed in a general education preschool with a behaviorally trained aide. In a letter dated October 23, 2007, Parents requested that the IEP team consider an intensive one-to-one ABA program for 35 to 40 hours per week, or a general education setting with supplemental aids, supports, and services. The District's special education director, Virginia Johnson, responded with a letter stating in part that, regarding the Parents' for an ABA program provided by an NPA, "the District must defer a more specific response until the agreed-upon assessments are completed."¹⁰ Ms. Johnson's letter further explained that the IEP team will reconvene once the assessments are completed, and that IEP meeting "will provide an opportunity to discuss your request for ABA services through an NPA."

13. On November 20, 2007, Student's IEP team convened to review the assessment results and discuss Student's placement and services. Following presentation of the assessment results, the District offered the Garrison SDC as Student's placement, and offered various related services including OT services, OT consultation, speech-language therapy, speech-language consultation, one-to-one aide supervision during recess, and behavioral consultation by the school psychologist. The District's proposed educational program offered Student a total of 30 hours of instruction per week. Parents did not agree to the District's offer.

14. In late October, 2007, Parents stopped bringing Student to the Garrison SDC altogether. For the remainder of the 2007-2008 school year, Mother and her sister home-schooled Student and Brother, primarily using strategies Mother learned from attending 40 hours of ABA training.

15. On December 5, 2007, Brother's IEP team convened. During the meeting, Parents disagreed with the results of the FBAs for both Student and Brother, and requested that the District fund IEEs for both boys in the area of functional behavior.

Parents' Meaningful Participation In IEP Process

16. Student argues that the District denied Parents meaningful participation in the IEP process because District staff failed to consider the possibility of placing Student in a one-to-one ABA program operated by an NPA. The District argues that Parents meaningfully participated in the IEP process, and that District staff fully considered Parents' opinions and responded to Parents' requests.

¹⁰ Ms. Johnson's letter reflects a date of October 26, 2006. However, testimony at hearing established that the actual date of the letter was October 26, 2007.

17. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. An LEA must fairly and honestly consider the views of parents expressed in an IEP meeting. An LEA that does not consider the parents' requests with an open mind has violated the parents' right to participate in the IEP process.

18. When a special education student with an approved IEP transfers from one California district to a new California district in a different SELPA within the same academic year, the receiving district must provide the student services comparable to those described in his previously approved IEP. Within the 30-day period the receiving district must also adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law.

19. Because Student began the 2007-2008 school year as a pupil transferring from another California school district in a different SELPA, District staff offered the Garrison SDC as a 30-day interim placement comparable to the SDC placement identified in his last approved IEP from SCCOE.¹¹ Student does not dispute that, at this meeting, the District was only obligated to offer a 30-day administrative placement comparable to his IEP from his previous school district, and was not yet obligated to develop his IEP for the 2007-2008 school year. Moreover, Parents participated in this meeting, and District staff responded to their questions and made adjustments to the interim placement based upon Parents' input. Parents accepted the Garrison SDC as the interim placement.

20. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. At the time of Student's October 16 IEP meeting, the District's new assessments of Student were not completed, and his past assessments did not provide sufficient current information about his needs to support development of a new IEP. Because Student's October IEP team did not yet have his assessment results, the District reasonably sought to extend Student's interim placement and delay a formal offer for his placement for the 2007-2008 school year, until the assessment results were available. After discussion, Parents agreed to this proposal.

21. The September and October 2007 IEP teams discussed potential NPA placement only as it could be obtained through the VMRC co-funding process; despite Parents' stated interest in an NPA placement, District staff did not inform Parents that they could request such placement through the District's IEP process. The lack of such discussion suggests that the District staff did not have an open mind

¹¹ Because Student's transfer occurred over the summer, it is not clear whether the District was obligated to offer a placement comparable to Student's last approved IEP from SCCOE, or could have treated Student as a new pupil pursuant to 34 Code of Federal Regulations part 300.323.

