BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019110584

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

JANUARY 9, 2020

On November 15, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from San Francisco Unified School District naming Parent on behalf of Student as respondent. Administrative Law Judge, Rita Defilippis, heard this matter in San Francisco on December 10 and 11, 2019.

Attorney Susanne Kim, represented San Francisco Unified School District. Shawn Mansager, Special Education Supervisor, attended the hearing each day on

behalf of San Francisco. Also present at times during the hearing were individuals associated with San Francisco's legal firm, including Attorney, Danielle Houch, and Paralegal, Kristy Avila. Parent attended hearing each day and represented Student. Student was briefly present with Parent on December 11, 2019.

At the request of the parties, OAH granted a continuance to December 27, 2019, to file written closing briefs. San Francisco timely filed a written closing brief. Student did not submit a closing brief. The record was closed and the matter was submitted for decision on December 27, 2019.

ISSUE

Does Student's individualized education program, called an IEP, dated September 9, 2019, offer Student a free appropriate public education, called a FAPE, such that San Francisco may implement the IEP without Parent consent?

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).) San Francisco filed for hearing and has the burden of proof in this hearing. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415()(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student is a seven-year-old second grader who resides within the boundaries of San Francisco Unified School District. She is eligible for special education services as a Student with emotional disturbance, a speech and language impairment and other health impairment, specifically, Attention Deficit Hyperactive Disorder.

ISSUE: DOES STUDENT'S IEP, DATED SEPTEMBER 9, 2019, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION SUCH THAT SAN FRANCISCO MAY IMPLEMENT THE IEP WITHOUT PARENT CONSENT?

San Francisco contends that Student's September 9, 2019 IEP offered Student a FAPE and that Parent's consent to the September 9, 2019 IEP, except for the location for implementation, implied her stipulation that the September 9, 2019 IEP offered Student a FAPE. San Francisco seeks a decision granting it permission to implement Student's IEP, without Parent's consent, at the SOAR Academy at Tenderloin Elementary School, because the IEP offered Student a FAPE. San Francisco asserts it has the unilateral discretion to decide that Tenderloin Elementary School is the location to implement the IEP. SOAR stands for success, opportunity, achievement and resilience.

Parent contends that she consented to the September 9, 2019 IEP, including the SOAR Academy program, but not to the SOAR Academy located at Tenderloin Elementary School. Parent contends that Student should be placed in the SOAR Academy located at Flynn Elementary school so that she can be in the same school as her twin sister, who was attending the SOAR Academy at Flynn at the time of hearing. Parent contends that the sisters have successfully been placed in the same school and classroom in the past and presently take a dance class together in the community without having to be separated.

San Francisco argues that Flynn Elementary School, where Student's twin attends, would not be appropriate. San Francisco contends that Student's progress would be

impeded because her inappropriate behavior is exacerbated in the presence of her twin sister. San Francisco also contends that it is best practice to place twins in separate classes to allow them to develop their individuality.

A free appropriate public education, referred to as a FAPE, means special education and related services that are available to an eligible child that meets state educational standards 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); Ed. Code, §§ 56031,56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 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; *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ___ [137 S.Ct. 988, 1000].)

If a parent will not consent to a proposed IEP component that the school district determines is necessary to provide a FAPE, the school district must initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) Under that provision, the school district must file expeditiously once an impasse with the parent is reached, and cannot opt to hold additional IEP team meetings or continue the IEP process in lieu of initiating a due process hearing. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164,

1170 (*I.R.*).) Notably, Education Code section 56346, subdivision (f) does not authorize a hearing officer to approve only one disputed component. Instead, it provides, "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." That section, in turn, provides that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." (20 U.S.C. § 1415(f)(3)(E)(i).)

Education Code section 563456, subd. (f) and *I.R.* do not address the evidence that is necessary to prove that the contested component of the IEP is necessary to provide a student a FAPE.

California Education Code section 56501 allows a school district to file a complaint when "[t]here is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child," and when "[t]here is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child . . ." (Ed. Code, § 56501, subds. (a)(1), (4).) California Code of Regulations, title 5, section 3042, subd. (a), describes a child's educational placement as including ". . . that unique *combination* of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP . . ." (Italics added.) These provisions authorize OAH to determine the validity of entire educational programs. Neither state nor federal law provides for determining the validity of individual portions of an educational program at a due process hearing.

A FAPE is not modular; it is a unitary whole. Courts routinely determine whether a district provides a FAPE by looking at the IEP as a whole. Under *Rowley*, an IEP provides a FAPE if it offers a child access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Rowley*, *supra*, 458 U.S. at pp. 200, 203-204.) It is the "individualized education program," not some portion of it, which must be reasonably calculated to confer benefit. (*Ibid.*) Educational benefit includes the student's mental health needs, social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

The IEP has been described by the Supreme Court as the "modus operandi" of the IDEA; and "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].) The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) These cases and their progeny consistently recognize the interrelationship of all of the elements of an IEP in providing a FAPE.

The court in *Gregory K. v. Longview School District,* (9th Cir. 1987) 811 F.2d 1307, (*Gregory K.*), acknowledged the need to evaluate the full educational program being

offered to determine whether the student had been offered a FAPE. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed educational program, not that preferred by the parent. (*Ibid.*) Accordingly, a student's educational program consists of all of the components of the offered IEP, not of only one component.

There are two parts to the legal analysis of determining whether a school district's IEP offer complied with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra,* 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

RELIANCE ON IMPLIED STIPULATION TO LIMIT ISSUES

San Francisco argued that because Parent consented, she thereby impliedly stipulated that the September 9, 2019 IEP constituted a FAPE, except for the physical location for implementation. San Francisco contends, therefore that the only issue in dispute at hearing is the location of the SOAR Academy for the implementation of the IEP. San Francisco asserts that narrow question is an administrative decision within the sole discretion of San Francisco to determine. As such, San Francisco asserts that it need not prove that it met the procedural and substantive requirements of the IDEA and *Rowley* in order to implement the IEP without Parent consent.

San Francisco's contention that partial parental consent to an IEP is equivalent to a FAPE stipulation that then narrows its burden of proof, is inconsistent with the cited

authorities. San Francisco conflates parental consent to an IEP with parental agreement that the entire IEP offers a student a FAPE. Such an argument would lead to the absurd result of parents being precluded from filing for due process alleging that an IEP denied their child a FAPE anytime there was written consent to any part of a disputed IEP.

San Francisco cites several cases in support of its contention that it need not prove the appropriateness of every component of the September 9, 2019 IEP for OAH to allow it to implement the September 9, 2019 IEP without Parent consent. First, San Francisco cites OAH Case Number 2019091005, dated November 18, 2019, wherein the ALJ limited the determination of FAPE to only the component in dispute, namely the IEP offer of transportation. In that case, however, the parties filed a written stipulation that the rest of the IEP offered Student a FAPE, which then narrowed the issue to transportation. Prior administrative decisions, although instructive, have no precedential authority for this tribunal. In any event, OAH Case Number 2019091005 is distinguishable because it was decided upon facts which are not present here. The parties in this case did not enter into a stipulation that the September 9, 2019 IEP offered Student a FAPE. Parent, in the present case, disagreed that the IEP offer was appropriate and effective to meet Student's severe educational needs.

The other cases cited by San Francisco are equally unpersuasive. San Francisco cites cases determining that choice of location to implement an IEP is an administrative decision. However the cited cases also addressed the appropriateness of the students' IEP's as well as the appropriateness of the proposed placements. In those cases, the administrative decisions as to location to implement the IEP's did not override IDEA's FAPE requirements.

San Francisco's argument that OAH may authorize it to implement the September 9, 2019 IEP without determining the procedural and substantive appropriateness of the entire offer is especially unpersuasive because Parent disagreed that the IEP offered Student a FAPE.

Student has severe behavioral problems, evidenced at home and at school. Parent consents to IEP's even when she believes that the services are not intensive enough to address Student's educational needs. She consented to the prior IEP in April of 2019, placing Student in a mild to moderate special day class from the general education setting even though she communicated to San Francisco that Student required the more restrictive setting of the SOAR Academy. Parent consented to the September 9, 2019 IEP placement of Student in the SOAR Academy but believed that Student required the more restrictive setting of a nonpublic school because of Student's continued serious behaviors and lack of progress in the mild moderate special day class setting. Parent feels that there are two teams at IEP team meetings, San Francisco's and Parent's. She does not feel heard at IEP team meetings and believes that she must follow the recommendations of San Francisco for her children to receive any services.

San Francisco presented three witnesses at hearing. Mr. Jason Hannon, who served as acting Principal at the school Student attended in the general education program for first grade; Ms. Anne Marin, Principal at Sanchez Elementary School, where Student attended since the beginning of the 2019-2020 school year in a mild moderate special day class; and Mr. Shawn Mansager, Special Education Supervisor for Sanchez Elementary School and Flynn Elementary School. All three witnesses had reviewed Student's discipline records and had personal knowledge of Student's behaviors.

Mr. Hannon and Mr. Mansager each testified that based on their personal experiences with Student and her twin sister, placing Student in the same SOAR Academy as her twin sister would be detrimental as Student's behavior is exascerbated when with her twin sister and Student's progress would be impeded. Mr. Mansager testified that putting the sisters together would be "a recipe for disaster." Their testimony established that San Francisco's position is that Student requires placement in the SOAR Academy at Tenderloin Elementary School, rather than Parent's preferred placement of Student in the SOAR Academy at Flynn Elementary School, to receive a FAPE. Therefore, the question of implementation of that component of Student's educational placement is a question of FAPE, and not an administrative decision solely within the discretion of San Francisco, as it asserts.

San Francisco is seeking to implement Student's IEP at Tenderloin Elementary School because it contends that placement at Tenderloin is necessary to provide Student a FAPE. San Francisco must therefore prove by a preponderance of the evidence that the September 9, 2019 IEP met the procedural and substantive requirements of the IDEA and offered Student a FAPE.

PROCEDURAL VIOLATIONS

In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.)

The September 9, 2019 IEP team determined that Student's needs require a more restrictive setting than had previously been offered. The IEP team determined that

Student requires placement in the SOAR Academy. SOAR is a special day class that has focused supports and interventions for students who exhibit maladaptive social-emotional and behavior skills. There are SOAR classrooms at various elementary schools within San Francisco Unified School District, including Flynn Elementary School, Tenderloin Elementary School, and Diane Feinstein Elementary School.

The September 9, 2019, IEP offer of FAPE includes: 30 minutes, twice per week of group speech and language therapy in a separate classroom in a public integrated facility; 50 minutes per week of individual counseling provided by the Department of Mental Health, at the service provider location; 100 minutes per month of Parent individual counseling provided by the Department of Mental Health at the service provider location; 120 minutes per month of individual agency linkages, including referral and placement, by the Department of Mental Health at service provider location; 360 minutes per day of individual and group specialized academic instruction in a separate classroom in a public integrated facility; 360 minutes per day of intensive individual services provided by a nonpublic agency under contract with the special education local plan areas, called SELPA, or San Francisco Unified School District to be provided in a separate classroom in a public integrated facility.

The IEP includes, in the "comments section" of the specialized academic instruction services, "IEP team should meet within the first 30 days to determine if mainstreaming into general education setting is appropriate at this time." "Once *Student* demonstrates that her behavior has stabilized and she is progressing toward

her goals, she will begin receiving increased minutes of instruction in the general education classroom with some support from a paraprofessional/Behavior Technician." "*Student* will earn increased time in the general education classroom by earning 80 percent of her daily points and not engaging in unsafe "rebootable" behaviors (physical aggression, elopement, sustained disruption, or severe property destruction)." "The team agrees that time spent in the SOAR setting will decrease from 360 minutes to _____ minutes after two weeks (to be determined by the SOAR Team)."

The IEP includes, in the "comments" section of the intensive individual services, "one-to-one behavior technician to support *Student* in behavior goals and school safety." "This also includes a set number of board certified behavior analyst oversight minutes to be determined by NPA." "This is a temporary service set to expire three months from now on 12/8/2019, 'not' a 'stay-put' service." The team discussed different school locations, and San Francisco offered the SOAR academy at Tenderloin Elementary School. Parent consented in writing to the September 9, 2019 IEP, at the meeting, with the exception of the school location of Tenderloin Elementary School.

San Francisco failed to establish that it complied with the IDEA's required procedures, specifically, the requirement to make a clear offer of FAPE. Clarity is a necessary component of a FAPE offer.

In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear,

written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this procedural requirement, stating:

> "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E)." (*Union* , supra, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

The express description of the specialized academic instruction services in the September 9, 2019, is fatally unclear. Both individual and group are indicated, yet there is no delineation of how much time is allocated to each. The services described in the IEP also permits them to be changed on a daily basis at the sole discretion of the SOAR team.

A local educational agency must ensure that the parents of each child with a disability are members of any group that makes decisions about the educational placement o their child. (20 U.S.C. § 1414(d); Ed. Code 56342.5.)

This lack of clarity is highlighted by the blank space for future insert of the duration of the changed services. The specialized academic services are to be adjusted according to points earned in class and progress on behavior, not based on Student's needs, as required by IDEA. The IEP gives the SOAR team, without Parent's knowledge or consent, the unilateral discretion to adjust her specialized academic instruction. That leaves the offer unclear regarding the provision of specialized academic instruction versus her time in a general education setting. As found by the court in *M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1197, the unilateral amendment of an IEP can be a procedural violation of the IDEA because it vitiates parents' rights to participate at every step of the IEP drafting process as required by section 1414(d)(3)(D, F) of Title 20 of the United States Code.

The intensive individual services are also unclear. The undefined minutes of a board certified behavior analyst oversight of Student's intensive individual services lacks the required clarity required by the IDEA. Such services are important to the effectiveness of the one-to-one aide services and the ability of Student to make progress. The failure of San Francisco to define the amount of these services renders the IEP fatally unclear.

The September 9, 2019, IEP lacks clarity in significant ways as previously described. The ambiguity makes it impossible to understand exactly the program and services being offered to Student. Without such clarity, Parent would not have been

able to reasonably consider what was offered. Accordingly, San Francisco failed to establish that the September 9, 2019, IEP offered Student a FAPE.

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. San Francisco did not prove the IEP dated September 9, 2019, offered Student a free appropriate public education such that San Francisco may implement the IEP without Parent consent. Student prevailed on the sole issue heard and decided.

ORDER

1. San Francisco may not implement the IEP without Parental consent.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are 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.

/s/
RITA DEFILIPPIS
Administrative Law Judge
Office of Administrative Hearings