

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

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO.: N 2005120568

DECISION

Elizabeth Feyzbakhsh, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on February 14, and February 15, 2006, in San Diego, California.

Sundee Johnson, Attorney, Atkinson, Andelson, Loya, Ruud, & Romo, represented Petitioner Poway Unified School District.

Michael Cochrane, Attorney at Law, represented Student. Student's mother was present throughout the hearing.

The parties requested written closing argument. The closing arguments were received on March 6, 2006. On Friday March 17, the Administrative Law Judge requested further briefing. The briefs were received on March 31, 2006, the record was closed and the matter submitted.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

Both the school district and the Student initially filed for due process in this matter. The Student filed claiming that the District had not offered a free and appropriate public education (FAPE) for the 2005-2006 school year and requesting various remedies for that failure. The school district filed on the issue of whether or not it had offered a FAPE to student in its 2005-2006 Individual Education Plan (IEP). Student withdrew his request for due process on January 27, 2006. There is no proof that Student served the District with the withdrawal and the District was unaware of the withdrawal until the day of the hearing. Nonetheless, Student presented witnesses, evidence, and argument regarding the issue of denial of FAPE for the 2005-2006 school year and requested remedies for the various alleged failures of the District.

The record was reopened on the request of the Administrative Law Judge so that further briefing could be received on the issue of whether the Office of Administrative Hearings had jurisdiction to grant Student's request for remedies despite the fact that Student withdrew his request for due process hearing on January 27, 2006.

The only operative pleading in this case involves the issue of the appropriateness of the offer of FAPE made by the District. Only issues and resolutions arising therefrom are appropriate for decision in this case. A party may not seek remedies, such as compensation for unilateral private school placement, in the issues and resolutions statement required by Education Code section 56505 (e)(6). Student voluntarily withdrew the request for due process hearing. Therefore, the issues to be resolved at this hearing are listed below.

ISSUES

Issue 1: Was the Individual Education Plan, developed for Student in September and October 2005, designed to confer a meaningful educational benefit and thereby a FAPE for the 2005-2006 school year?

Issue 2: Did the District deny Student a FAPE by committing procedural violations of the IDEA?

FACTUAL FINDINGS

1. Student is a 15 year old sophomore who qualifies for special education under the category of Other Health Impaired (OHI) due to a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). At approximately 18 months of age, Student suffered a traumatic brain injury as a result of a collision with another child. At that time he suffered a grand mal seizure. It is unknown if he suffers petit mal seizures.

2. Student resides within the geographical boundaries of the Poway Unified School District. For the 2004-2005 school year, Student attended Westview High School (Westview) as a freshman year. For the 2005-2006 school year, Student attended Westview from September through January 31, 2006, when his parents placed him in a private school called Fusion.

3. On September 15, 2005, the IEP team met to discuss student's 2005-2006 IEP. Present at the meeting were Student's special education case carrier, Student's ceramics teacher, a school administrator, the program specialist and Student's mother and Student. The IEP team was not able to finish, so another meeting needed to be scheduled.

4. Student's ceramics teacher was invited to the IEP team meeting as the general education teacher. She did not remain throughout the entire meeting. She was present at the meeting for approximately 12 minutes. She was invited to the meeting because she had the time available on her schedule and was not scheduled to be teaching at the time of the meeting.

5. Prior to the IEP team meeting, Student's special education case carrier spoke to Student's general education teachers regarding his progress. The teachers

consistently stated that Student's work completion affected his academic performance. His teachers indicated that Student is polite and sweet and is not a disciplinary problem.

6. Draft goals and objectives were prepared prior to the meeting. The goals and objectives in the September 15, 2005, IEP were never implemented.

7. Student was offered Wolverine Time which is a period of time during the school day when students have the option of obtaining tutoring time or taking a break.

8. The district offered the Learning Strategies Program (LSP) for one period per week. The LSP was set up as a supplemental to English class to help Resource Specialist Program (RSP) kids who are primarily mainstreamed in general education courses but need more individualized attention. The students attending the class receive academic support in the form of tutoring, time to complete assignments and specific academic skills training. The first fifteen minutes of each class, a learning strategy such as note taking, organization, or development of thesis is taught. During the rest of the class time the students are expected to utilize those learning strategies in a study hall setting. Student was enrolled in the LSP beginning in August 2004. He was enrolled in the program for one period per day at that time.

9. Pursuant to a stipulation of the parties in a previous case, Student agreed to attend LSP only every other Tuesday during the fall semester of 2005. He did not do so. He attended LSP when he didn't have a water polo game and when he didn't have a headache. Based on his failure to attend every other Tuesday, he received a failing grade in that course.

10. Proper notice of a 10/10/2005 IEP team meeting was given by the District. Student's mother sent an email to Student's special education case manager, on October 4, 2005, indicating that she believed that the parties were in a due process hearing regarding prior IEP's on that date so she was "not sure" if they (Student's parents) could attend. The Due Process Hearing did not go forward on that date because it was a holiday for all State offices. Student's special education case carrier knew the hearing was not going forward on October 10, 2005, prior to receiving Student's mother's email.

11. On October 10, 2005, Student's special education case carrier called Student's mother from his office to find out if the parents would be attending the meeting. On the phone Student's mother indicated that she would not be attending. During the meeting, Student's program specialist contacted Student's mother by speakerphone. Student's mother indicated that she did not wish to participate in the meeting by telephone, and that she felt it was inappropriate to conduct the meeting during the pendency of the due process hearing. Student's parents had previously refused to participate in IEP meetings with the District regarding a prior IEP.

12. Student's English teacher attended the October 10, 2005 IEP team meeting. The IEP team reviewed Student's progress. Student's English teacher participated in the development of Student's goals and objectives. A Behavior Support Plan was added at the October 10, 2005 IEP team meeting. No functional analysis was completed.

13. The IEP developed during the September 15, 2005 and October 10, 2005 indicates that the following primary services were considered: general education, designated instruction, resource specialist, special day class and non-public school. The District offered the Resource Specialist Program for Student.

14. The IEP set forth Student's present levels of educational performance. According to the IEP, Student's reading skills were adequate; however, he had difficulty with specialized vocabulary and core terminology. Student's writing skills were below average and his math skills were average.

15. The team determined that Student's areas of need were reading and writing. The team indicated that both Student's gross motor skills and his fine motor skills were age appropriate, but that his fine motor skills had been identified as an area of need because his handwriting speed was slow and impacted his note taking ability and his ability to complete lengthy written assignments. Student had difficulty advocating for himself and asking for clarification in large groups. The team indicated that this is an area of need because Student was reluctant to approach the teacher for clarification or support.

16. The IEP contained measurable annual goals in the following areas: a writing, creative writing, editing mechanics, note taking, reading, organizational skills, study skills, and self advocacy.

17. The team offered Student participation in the general education environment for all electives, humanities, sciences, math and English. The team further offered Learning Strategies five days a week for one period each day. The reason for the placement in the LSP was that Student benefits from a small group, and a well structured environment. The IEP recommended RSP five days a week per block schedule, one period per day. The amount of time Student was to be outside of the general education classroom for special education services was 23.1% of the school day.

18. The District offered the availability of a word processor or Alphasmart, editing checklist, graphic organizers, highlighters, copies of notes, proximity to teacher, verbal/non- verbal cues for attending, chunking of long term assignments and projects, weekly printout of learning points, use of sticky notes for highlighting, use of visual aids, Wolverine log and extended time on tests. The IEP provided access to word processor with the spell checker turned on for daily writing assignments.

19. The IEP indicated a serious need for a Behavior Support Plan (BSP) because Student needed to be redirected by verbal and non-verbal cues and teacher reminders, Wolverine time and special education support from the Learning Strategies Program. The goal of the BSP was for Student to complete and turn in assignments within an appropriate time (per IEP), pass tests and assignments, and pass his classes.

20. Student's IEP included accommodations for State and District testing. He was allowed extra time and supervised breaks within a subtest session. Student's accommodations for California State Assessments and District wide assessments were extra time and supervised breaks within a subtest. Student was to receive supervised breaks within subtests for the California High School exit exam. The IEP does not provide extended time for completion of assignments.

21. Student's special education case carrier developed an Individual Transition Plan (ITP). He developed the ITP with Student's input. Student's special education case carrier met with Student on September 13, 2005, and went through the ITP form with him. He did not discuss workability with Student or his parents because workability usually starts in the junior or senior year, rather than the sophomore year.

22. Student's parents unilaterally transferred Student to a private school called Fusion. Student's mother was concerned about her son's declining grades so she decided to place him at Fusion. At the time of the hearing, he had been attending Fusion for approximately seven days.

LEGAL CONCLUSIONS

FAPE REQUIREMENTS

1. The purpose of the Individuals with Disabilities Education Act (IDEA) is to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. (20 U.S.C. § 1400(d).)

2. The term "special education" in federal law means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29). California Education Code section 56031 augments this definition to include "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."

3. A free appropriate public education (FAPE) is one provided at public expense, under public supervision and direction, and in conformity with an IEP which is developed for the child. (20 U.S. C. § 1401(8).)

4. The obligation to provide a FAPE does not require a state to “maximize” each child’s potential. (*Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 200 (Rowley).) A school district must provide a basic floor of opportunity consisting of access to specialized instruction and related services which are individually designed to provide educational benefit to the child with a disability. School Districts are required to provide access to an education which is sufficient to confer some educational benefit upon the child. (*Ibid*).

5. In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. Thus, the analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the Individual Education Plan must be reasonably calculated to provide the child with educational benefits. (*Rowley, supra*, 458 U.S. 176, 206-207).

6. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. A procedural violation by a District does not result in the denial of a student’s right to a FAPE, unless there is a loss of educational opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F2d. 1479). This rule was codified in the 2004 reauthorization of the IDEA. (20 U.S.C. § 1415 (f) (3) (E) (ii).

7. As the petitioner, the School District has the burden of proving that it has complied with the IDEA. (*Schaffer v. Weast* (2005) ____ U.S. ____ [126 S. Ct. 528].)

REQUIREMENTS OF AN IEP

8. An IEP must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child’s progress toward the goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i),

(ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

9. Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G.*, supra, 960 F.2d 1479, 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

10. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹ "An IEP is a snapshot, not a retrospective." (*Ibid.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

PARENTAL PARTICIPATION IN THE IEP PROCESS

11. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1); Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team].) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. §§ 1414(c)

¹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(c)(2)(iii) [during IEP meetings], 300.346(a)(1)(i) [during development of IEP], (b) [during review and revision of IEP], 300.533 (a)(1)(i) [during evaluations]; Ed. Code, §§ 56341.1, subd. (a)(1) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in IEP].)

12. The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (*Ibid.*)

13. School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12478 (Mar. 12, 1999).) A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her 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.) A 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. (*Fuhrmann*, *supra*, 993 F.2d 1031, 1036.)

14. A local educational agency must provide parents with prior written notice, when it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3).)

15. With regard to the prior written notice requirement, the 34 C.F.R. section 300.503 states as follows:

Notice. (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency (i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (2) If the notice described under paragraph (a)(1) of this section relates to an action proposed by the public agency that also requires parental consent under Sec. 300.505, the agency may give notice at the same time it requests parent consent.

16. 20 U.S.C. section 1414(d)(1)(A)(i)(VIII) requires that an Individual Transition plan be developed for special education students. Beginning not later than the first IEP to be in effect when the child is sixteen, and updated annually thereafter, appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills must be developed.

DETERMINATION OF ISSUES AND PREVAILING PARTY

17. *Issue 1: Was the Individual Education Plan, developed in September and October 2005, designed to confer a meaningful educational benefit and thereby a FAPE for the 2005-2006 school year?*

18. Based on Factual Findings paragraphs 7, 8, 9, 10, 11, 12, and 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, the IEP developed in September and October 2005 meets Student's unique needs, is designed to confer a meaningful educational benefit for Student and constitutes a FAPE for the 2005-2006 school year.

19. The District drafted appropriate goals and objectives for Student. The goals were based on the areas of need identified by the team, the goals were measurable so that the team can assess progress, and the goals were designed to meet Student's individual needs.

20. The District's offer of placement and services met Student's unique needs and was reasonably calculated to provide him educational benefit. The LSP offered Student the opportunity to improve his study habits, complete his homework and improve his organizational skills. In fact, the evidence showed that when Student did attend the LSP his grades improved. The District did not include extra time for assignments in Student's IEP. It is clear that Student was not turning in his assignments on time. It is not clear that Student would have required extra time for assignments had he attended LSP five days a week. Therefore, the failure to include extra time for assignments did not amount to a denial of FAPE.

21. The District included an appropriate Individualized Transition Plan for Student. The ITP developed was appropriate for a sophomore student who indicates a desire to attend college. Student was interviewed and the appropriate transitional issues were discussed and addressed.

Issue 2: Did the District deny the Student a FAPE by committing procedural violations of the IDEA?

22. Based on Factual Finding paragraphs 5, 6, 9, 10, 13, 14, 15, and 16, the District did not deny Student a FAPE due to procedural violations of the IDEA. Student argued that the District failed to offer FAPE by failing to review and revise the IEP in a timely manner. Both parties agree that the IEP was "overdue" but there was no testimony or argument regarding the reasons for the delay and no testimony or argument that the delay amounted to a denial of FAPE.

23. Student argued that District failed to offer FAPE in its 2005-2006 Individual Education Plan by failing to ensure participation of at least one general education teacher at the September 15, 2005 IEP team meeting.

24. The District did fail to ensure participation of at least one general education teacher at the September 15, 2005 IEP meeting. However, this failure did not result in a denial of FAPE. At the September 15, 2005 IEP meeting, the ceramics teacher was only in attendance for approximately twelve minutes. This participation is not sufficient to comply with the procedural requirements of the IDEA. However, the IEP was developed during two separate meetings and the participation of Student's English teacher and his Science teacher at the October 10, 2005 IEP meeting ensured that the procedural defect did not amount to a denial of FAPE.

25. Student argued that District failed to provide prior written notice with a sufficient description of the following subjects: the proposed placement and how such placement would assist student; the method of determining present levels of education performance; a description of the specialized instruction Student would receive; and the options considered by the District and why they were rejected.

26. Written notice must be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The District did not fail to provide the requisite prior written notice to the Student's parents. In this case, the appropriate written notice is the IEP document. The placement offered was not a change in placement. Student had been enrolled in the Learning Strategies Program since August, 2004. Student's mother observed the class on at least two occasions. There was no change in placement from the offer in the 2004-2005 IEP which has been held to be an offer of FAPE.

27. Student argued that the District failed to offer FAPE by failing to ensure that a parent was a member of the IEP group. This contention lacks merit. The parent did attend the September 15, 2005 IEP team meeting. The October 10, 2005 IEP team meeting

was appropriately noticed by the District. The e-mail from Student's mother indicated that she was "unsure" if she would be in hearing on that day. Student's special education case carrier knew that the hearing would not be going forward on that day. There is a history of parental refusal to participate in the IEP process and Student's mother indicated that she did not think it was appropriate to have an IEP meeting during the pendency of the due process hearing. The District had an obligation to complete the IEP therefore, holding the October 10, 2005 IEP meeting without the mother, did not amount to a denial of FAPE.

PREVAILING PARTY

1. Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code §56505, subd. (k).)

Dated: May 3, 2006

ELIZABETH R. FEYZBAKHS
Administrative Law Judge
Special Education Division
Office of Administrative Hearings