BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA
IN THE MATTER OF: PARENT ON BEHALF OF STUDENT,
v.
LONG BEACH UNIFIED SCHOOL DISTRICT OAH CASE NO. 2019010600

DECISION

Mother on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, often referred to as OAH, on January 16, 2019, naming Long Beach Unified School District. Long Beach filed its response to Student's complaint on February 8, 2019. On February 21, 2019, OAH granted the parties joint request to continue the hearing dates.

Administrative Law Judge Ted Mann heard this matter in Long Beach, California, on May 7, 2019.

Mother appeared on behalf of Student. Father testified as a witness during the hearing but was not a party to the case. Student did not attend the hearing.

Debra Ferdman, Attorney at Law, appeared on behalf of Long Beach. Long Beach's Director of Student Services, Wendy Rosenquist, attended the hearing.

The parties requested a continuance to allow them to submit written closing arguments. OAH continued the matter to June 3, 2019. The record closed upon timely receipt of written closing arguments and the matter was submitted on June 3, 2019.

ISSUES

Did Long Beach deny Student a free appropriate public education, commonly referred to as "FAPE", from the beginning of the 2017-2018 school year by failing to hold monthly "progress clinic" meetings?

Did Long Beach deny Student a FAPE from the beginning of the 2018- 2019 school

year by refusing to allow Parent to record monthly "progress clinic" meetings?

SUMMARY OF DECISION

This Decision finds that Student did not prove either that the monthly meetings were required pursuant to his individualized education program, commonly referred to as an IEP, or that the monthly meetings were the functional equivalents of IEP team meetings for the purposes of the Individuals with Disabilities Education Act, often referred to as the IDEA, or California law. Student did not prove that he had a right to record the monthly meetings absent consent by the subjects of the recording.

FACTUAL FINDINGS

Student was 14 years of age at the time of hearing. He resided within Long Beach's boundaries during the applicable time frame. Student received special education under the eligibility category of autism. Student's primary educational challenge arose from autism, and his related struggles with attention, behavior and social-emotional skills.

Student attended middle school in Long Beach during the sixth, seventh and eighth grades. He attended a general education program with one resource class at Marshall Academy of the Arts, beginning in the sixth grade during the 2016-2017 school year.

MARCH 21, 2017 – TRIENNIAL IEP

Long Beach held Student's triennial IEP team meeting on March 21, 2017. Long Beach offered Student an IEP on the same date. Parents and all required Long Beach IEP team members, including Cheryl Stroll, Student's non-public agency behavioral supervisor, and Dennis Sweningson, Long Beach autism coordinator, attended the meeting. Ms. Stroll discussed her report of Student's behavior. Mr. Sweningson presented his report. The IEP team discussed holding an addendum IEP meeting in three months to

review data from Student's behavioral aides to determine if Student needed a social skills goal. Parents acknowledged that the school had facilitated parent involvement in the IEP process.

The IEP included seven behavior goals with progress to be measured through observations made by the non-public agency under contract with Long Beach to provide behavioral services. The IEP offered Student specialized academic instruction from March 21, 2017, to March 20, 2018, for five sessions per week for 48 minutes per session. The IEP offered Student direct, individual behavior intervention services for 370 minutes per day in order for him to have a one-to-one behavioral aide with him throughout the school day. The IEP also offered Student consultation/supervision for his behavior intervention services for 480 minutes per month in order for him to have a behaviorist consult with and supervise members of his educational team involved in his behavior. The IEP did not offer monthly clinic meetings. Clinic meetings are typically held by non-public agencies to share information and ensure consistency across providers. Parents consented to the IEP with the exception of their wish for Student to continue with an extended school year program for the summer break. Student received all of the programs and services specified for him in the March 21, 2017 IEP, including in the area of behavior.

MARCH 14, 2018 - ANNUAL IEP

Long Beach held an annual IEP team meeting for Student on March 14, 2018, with an IEP offer to Student on the same date. Student's father and all required Long Beach IEP team members, including Ms. Stroll and Long Beach administrator Kimberly Banua, attended the meeting.

The IEP included four behavior goals with progress to be measured through observations made by the non-public agency under contract with Long Beach to provide behavioral services. The IEP team discussed the Autism Behavior Consultant's report, dated March 14, 2018, and attached a copy to the IEP. The IEP offered Student specialized

academic instruction from March 14, 2018 to March 13, 2019 for five sessions per week for 48 minutes per session. The IEP offered Student direct, individual behavior intervention services for seven sessions of 48 minutes per session per day in order for him to have a one-to-one behavioral aide with him throughout the school day. The IEP offered Student consultation/supervision for his behavior intervention services for 60 sessions of one hour each for the school year in order for him to have a behaviorist consult with and supervise members of his educational team involved in his behavior. The IEP did not offer monthly clinic meetings. Parent consented to the IEP subject to a letter from Student's father, dated May 3, 2018, requesting minor notes and corrections to the IEP. Student received all of the programs and services specified for him in the March 14, 2018 IEP, including in the area of behavior.

JANUARY 30, 2019 – GOAL AMENDMENT IEP

Long Beach held an IEP team meeting for Student on January 30, 2019, in order to add a goal to the IEP. Student, Student's mother, Ms. Banua, Ms. Stroll and Catherine Wombold, Long Beach administrator attended the meeting. Ms. Stroll presented Student's progress on his behavioral goals. She also presented a proposed social goal for Student. Student's mother also requested that monthly clinic meetings be made into IEP meetings so that she would be able to record the meetings. Student's mother recorded the IEP meeting, but stopped the recording when Student spoke because he asked her not to record that part of the meeting.

MONTHLY CLINIC MEETINGS

Ms. Stroll was a clinical supervisor for Autism Behavior Consultants during the relevant time periods in this matter. She was with Autism Behavior Consultants for the past 11 years. She had approximately 40 to 50 clients during that time. She knew and worked with Student on his behavior since he was in kindergarten. As a clinical supervisor,

she supervises and oversees behavior programming for students assigned to her and helps write goals and design programs and protocols for students. As part of her duties as the Autism Behavior Consultants clinical supervisor, she conducts monthly clinic meetings for students under her supervision. Prior to working for Autism Behavior Consultants, she worked for Autism Partnership for 8 years as a clinical supervisor. She has attended hundreds of IEPs during her career.

Monthly clinic meetings were held by the non-public agency, Autism Behavior Consultants, providing Student's behavioral aides and behavior supervisor an opportunity to review and discuss data obtained during the preceding month by the behavioral aides. Such monthly meetings of behavioral staff are largely a creation of applied behavioral analysis providers as part of their ongoing management and supervision of student clients. Ms. Stoll used part of the supervision hours in Student's IEP to conduct the monthly clinic meetings. It was important for her to meet with Student's behavioral aides to review their direct observations of Student as they provided aide services to him throughout the month. She would use the data collected by the aides to prepare a monthly report on Student's behavior, mapping the data onto Student's behavioral goal objectives, and analyzing his progress and his struggles. The monthly report served as a record of the monthly clinic meetings, whether the meeting included only Autism Behavior Consultants employees, or others.

The monthly meetings were not held in place of an IEP as that was neither their purpose, nor did a full IEP team attend. A monthly clinic meeting could involve other members of a student's educational team such as a case carrier, a special education teacher, or a student's parents. Monthly meetings were typically held at the non-public agency's offices, but could also be held at a student's home, or at a student's school of attendance. Monthly meetings were scheduled informally by Ms. Stroll, and were not scheduled based upon formal notice as was required of an IEP meeting. For the 2017-2018 school year, Mr. Sweningson required monthly meetings to be held on the school

campus if the meeting involved anyone other than Ms. Stroll and the behavioral aides. As a result, due to the unavailability of Student's case carrier during the 2017-2018 school year, the meetings were not held on campus.

REQUESTS TO RECORD MONTHLY MEETINGS

Pursuant to divorce proceedings, the Family Court gave Student's mother permission to record Student's father whenever they were together. Student's mother requested that Long Beach allow her to record the monthly clinic meetings held by Autism Behavior Consultants. Both Long Beach and Autism Behavior Consultants declined to allow her to record monthly meetings. Student failed to establish that there was an educational purpose to the requested recordings of the monthly meetings. Student also failed to establish the terms of the Family Court order, other than the order generally allowed Student's mother to record Student's father when they were together. Student did not offer the Family Court order as evidence at hearing.

LEGAL AUTHORITIES AND CONCLUSIONS INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA

This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (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.) Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated. The two main purposes of the IDEA are to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed.

Code, § 56000, subd. (a).) A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement for each child with a disability. It is developed under the IDEA's procedures. Parents and school personnel participate in developing the IEP. An IEP describes the child's needs, academic and functional goals related to those needs. The IEP includes a statement of the special education, related services, and program modifications and accommodations that will be provided for the child. The IEP's purpose is to allow the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).) In 1982, the United States Supreme Court rendered the seminal and guiding decision in special education law. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034; 73 L.Ed.2d 690] (*Rowley*).) In the decision, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards to the development of the child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled

child with a "basic floor of opportunity." (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a "potential-maximizing education." (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that "confers some educational benefit upon the handicapped child." (*Id.* at p. 200.)

The Supreme Court clarified its ruling in *Rowley* in the recent case of *Endrew F. ex rel., Joseph F. v. Douglas County School Dist*. (2017) 580 U.S. [137 S.Ct. 988, 996] (*Endrew F.*). The Court clarified that "[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id*. at 999 (citing *Rowley*, *supra,* 458 U.S. at pp. 203-04).) The Court went on to say that the *Rowley* opinion did not "need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." (*Id*. at 1000.) For a case in which the student cannot be reasonably expected to "progress smoothly through the regular curriculum," the child's educational program must be "appropriately ambitious in light of [the child's] circumstances . . . " (*Ibid*.) The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id*. at 1001.) Importantly, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (See also,*E.F. v. Newport Mesa Unified School Dist*. (9th Cir. 2018) 726 Fed.Appx. 535.)

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, evaluation, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

At the hearing, the party filing the complaint has the burden of persuasion by a

preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student filed the complaint and bears the burden of proof.

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).)

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 program. (*See Gregory K., supra,* 811 F.2d at p. 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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.) An IEP is "a snapshot, not a retrospective." (*Ibid.,* citing *Fuhrmann, supra,* 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

STUDENT'S ISSUE 1: FAILURE TO HOLD MONTHLY CLINIC MEETINGS

Student contends that Long Beach denied him a FAPE by failing to hold monthly clinic meetings that Parents could attend during the 2017-2018 school year. Long Beach contends that it was not required to hold a monthly clinic meeting that a parent could attend as the meetings were not part of Student's IEP.

A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a

disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).)

The methodology used to implement an IEP is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley*, *supra,* 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141,1149-1150; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84 (*citing Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra,* 458 U.S. at pp. 207-208.)

Here, the March 21, 2017 and March 14, 2018 IEPs are the operative IEPs for the period at issue. The relevant portions of each IEP called for Student to receive a full day of one-to-one, direct individual behavioral aide service, along with 8 hours a month of behavior supervision services. The IEP document does not mention monthly clinic meetings as a related service, support or accommodation. The monthly meetings undertaken by Ms. Stroll, as Student's behavior supervisor for Autism Behavior Consultants, were not mandated by the IEP or by state or federal law.

Ms. Stoll credibly testified that she held monthly clinic meetings primarily for her purposes as a behavior supervisor. The meetings allowed her to review, discuss, and compile Student's monthly behavioral data with his one-to-one behavioral aides. The weight of the evidence demonstrated that Long Beach did not deny Student a FAPE by not holding monthly clinic meetings, which included school personnel, and that were accessible to Parents during the 2017-2018 school year. Student's contention that Long Beach must host the monthly meetings so as to allow Parents and/or Long Beach personnel to attend is unpersuasive. Simply put, the IEP's had no such provision. Similarly, there is no dispute that Student received all of the programs and services specified in his

IEP's. A school district's methodology is its to decide, and it does not have to meet the demands of parents. That authority applies here. Although including Parents and or school personnel in the monthly meetings may have been Parents' preferred course, there is no legal requirement that the meetings be held in that manner.

STUDENT'S ISSUE 2: FAILURE TO ALLOW RECORDING OF MONTHLY CLINIC MEETINGS

Student contends that Long Beach denied him a FAPE by failing to allow Student's mother to record monthly clinic meetings during the 2018-2019 school year. Long Beach contends that it was not legally required to allow Student's mother to record monthly clinic meetings that she attended.

The California Legislature has found electronic recording devices to be a serious threat to the exercise of personal liberties that cannot be tolerated in a free and civilized society. (Pen Code § 630). It is a crime to intentionally audio record a confidential communication without the consent of all parties, and the violation is subject to punishment by fines and imprisonment. (Pen. Code § 632.)

The California Education Code expressly provides that, notwithstanding Penal Code 632, parents and school districts have the right to audio record IEP team meetings, which are otherwise confidential. (Ed. Code §56341.1, subd. (g)(1).) However, to exercise this right, the parents or the district "shall notify the members of the individualized education program team of his, her or its intent to audio record a meeting at least 24 hours prior to the meeting." (*Ibid*.). If the school district initiates the notice, and parents refuse to attend if the meeting is recorded, the meeting may not be recorded. (*Ibid*.)

Despite the exception in Education Code §56341.1, subdivision (g)(1), nothing in the law authorizes a parent to record any other school-related proceeding absent the necessary consent of all participants. As such, absent the consent of all participants to the

monthly meeting, there is no legal basis to allow Student's mother to record such a meeting.

Student argues that the monthly meetings were similar or equivalent to IEP meetings. However, Student presents no legal authority or basis for such a conclusion. In fact, the ability of parties to record an IEP meeting is a narrow exception to the broad prohibition of such recordings. Student also fails to demonstrate any similarity between a monthly clinic meeting with non-public agencies and the unique nature of an IEP meeting in addressing a student's needs and providing a student with an IEP offer designed to provide a student with a FAPE. A monthly clinic meeting, despite broadly advancing a student's educational program, is undertaken for a very different purpose and in a very different manner than an IEP meeting.

ORDER

All of Student's requests for relief are denied.

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. Long Beach prevailed on both issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: July 9, 2019

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearings