

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

STUDENT,

Petitioner,

OAH NO. N2005060639

vs.

EAST WHITTIER CITY ELEMENTARY SCHOOL
DISTRICT,

Respondent.

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Whittier, California on September 20, 2005.

Student (student) was represented by his parents

Darin W. Barber, Esq. represented the East Whittier City Elementary School District (district).

Oral and documentary evidence was received and the matter was submitted.

ISSUES

1. Did the district deny student a free appropriate public education (FAPE), as required under the Individuals with Disabilities Education Act (IDEA) and related California laws, by failing to provide 24 speech and language therapy sessions during the 2004-2005 school year?

A. If so, what, if any remedy is appropriate?

2. Is student's Individualized Education Program (IEP), dated June 6, 2005, an appropriate offer of a FAPE?

A. If not, what, if any modifications should be made?

B. If so, should the ALJ order that the IEP be implemented notwithstanding student's parent's disagreement with the IEP proposal that student's speech and language therapy sessions be reduced in number?

FACTUAL FINDINGS

1. Student, whose date of birth is July 11, 1997, is an eight-year-old male who qualifies for special education and related services due to a diagnosis of autism.

2. When student was five years old he transferred from a Kindergarten class for developmentally delayed children at Orchard Dale Elementary School in Whittier to a Kindergarten class in the district. Student has been, and currently is, attending a first grade, full-inclusion class in the district. Student has a "shadow aide" who is with him daily, for the entire school day.

3. The currently operative IEP, for the 2004-2005 school year, was developed on May 17, 2004. The parents agreed with, and still agree with, the contents of that IEP. One of student's unique needs, identified by the IEP team, was in the area of speech and language. Student's then present levels and needs were established by the IEP team during the 2004 IEP process and several speech and language goals were promulgated. Specifically, the team set the following five goals for student during the 2004-2005 school year: 1) By 2-17-05, student will answer basic questions about familiar topics without pictures with an accuracy rate of 4/5 over three sessions; 2) By 2-27-05, student will produce selected sentence structures without a model with an accuracy rate of 4/5 trials during picture/book activities; 3) By 5-17-05, student will answer basic questions about familiar topics without pictures with an accuracy rate of 8/10 over three sessions; 4) By 2-27-05, student will produce selected sentence structures without a model with

an accuracy rate of 8/10 trials during picture/book activities; and, 5) By 5-17-05, student will take at least three conversational turns (such as a response, a question, or a comment) during a group conversation with minimal prompting. (Exhibit C.) To meet these goals student was provided with speech and language services five times per week. The speech and language services were provided during the school day by the district. Each session was 30 minutes in length. The five sessions were to be provided by a district speech and language specialist. The five sessions were divided into two group sessions and three individual sessions.

4. At the instant hearing the school district and student's parents stipulated that from December 6, 2004 through May 27, 2005, the district failed to provide student with 24 of the speech and language sessions described in paragraph 3, above.

5. Student's mother (mother) called the district on December 7, 2004 after she learned that two speech and language sessions had been missed by the district, and expressed her concern about the missed sessions. The district representative with whom she spoke apologized; however, the district took no remedial measures.

6. On March 8, 2005, after the district failed to provide twelve of the required speech and language sessions, mother contacted a private entity and placed student on the waiting list for speech and language services.

7. By April 14, 2005, 17 speech and language sessions had been missed. Mother again called the district and expressed her concerns. During this conversation mother was told that the matter would be discussed with student's speech and language specialist and the specialist would then contact mother. However, neither the therapist, nor any other district representative contacted mother about the missed sessions.

8. On April 25, 2005, student consulted with Peggy Bailey Lett, MA, CGC, Speech and Language Pathologist (Bailey), concerning receiving private speech and language therapy.

9. Bailey referred student to the Robert L. Douglass Speech-Language Clinic at California State University, Los Angeles for evaluation. That evaluation occurred on April 28, 2005 and a report (Exhibit G) was authored by the evaluators. None of the evaluators from the Robert L. Douglass Speech-Language Clinic (the clinic) appeared at the instant hearing to testify concerning the report. Accordingly, the only evidence of the evaluation and the resulting recommendations is contained in Exhibit G. Counsel for respondent had no ability to ask questions of the evaluators; accordingly, the complete background, training, experience and qualifications of the evaluators is unknown. Additionally, there was no foundation established to help the fact-finder judge the accuracy of the report and its resulting recommendations. Accordingly, the report is of little value except for establishing the parents' beliefs that the district's program may be inadequate to meet student's speech and language needs. Based on their beliefs, student's parents began paying for private speech and language sessions on May 4, 2005.

10. On May 4, 2005, student began receiving 45 minutes per week of private speech and language services from Bailey.

11. On May 25, 2005, mother met with the district's speech and language specialist and again informed the specialist that the district was failing to provide all the speech and language sessions, as required by the current, May 17, 2004 IEP (as of May 25, 2005, the district had failed to provide 22 of the required speech and language sessions). Mother also notified the specialist that student was receiving private speech and language therapy due to the district's failure(s) to conform to the speech and language requirements of student's current IEP. Mother also indicated that she wanted

all future speech and language services to be provided through student's current, private provider (Bailey).

12. Student's parents were justified in providing student with private speech and language therapy sessions given that the district failed to provide 24 therapy sessions and failed to offer compensatory sessions. From May 4, 2005 through the date of student's annual IEP meeting, June 6, 2005, student's parents paid a total amount of \$300.00 for private speech and language therapy.

13. Student's annual IEP meeting was held on June 6, 2005. According to the district's Director of Special Education, student had accomplished 87 to 89 percent of the speech and language goals established in his May 17, 2004 IEP, notwithstanding the 24 missed speech and language sessions. Due to student's progress in the area of speech and language the district's speech and language experts recommended that student's speech and language services be reduced from five sessions per week to three sessions per week. Additionally, during the June 6, 2005 IEP meeting student's parents were offered compensatory services for the 24 missed speech and language sessions. The district offered to provide the missed sessions during the summertime. Student's parents did not agree with the district's recommendation that student's speech and language services be reduced to three 30 minute sessions per week. They wanted to continue with five 30 minute sessions per week. Student's parents did not want the compensatory services district offered because they had already scheduled student for private speech and language services over the summer break from school. Student's parents did not provide the district with any private reports or assessment's during the June 6, 2005 IEP meeting. Student's father testified that Bailey's report was only in draft form at the time and was not ready for dissemination; however, since the clinic report was dated April 28, 2005, it should have been available at the time of the June 6, 2005 IEP. In any event, on June 6, 2005, the IEP team did not know of the clinic assessment or

Bailey's assessment(s) of student. Student's parents declined signing the June 6, 2005 IEP, told the district they were going to proceed to the "next step" in the process, and the meeting ended. Later, student's parents filed for Due Process and the instant proceedings ensued.

14. In an undated report, submitted into evidence as Exhibit D, Bailey indicates that she evaluated student in May and June 2005. As a result of the evaluations, Bailey opines: "It is highly recommended that speech and language therapy continue on a daily basis to significantly improve [student's] receptive and expressive vocabulary...." (Exhibit D, pg. 12.) Bailey did not appear at the hearing and testify in support of her report. Accordingly, as with the clinic report, counsel for respondent was denied the opportunity to examine Bailey concerning the contents of her report and there was no foundation established for gauging the accuracy of the tests administered, the results, the information provided to Bailey by the parents, or Bailey's resulting opinions and recommendations. The report itself causes some concerns about its accuracy. For example: the report indicates that student's evaluations occurred in May and June 2005; however, the testing information included with the report as Exhibits D-2, D-3, and D-4, indicates the assessments all occurred in May, there are no reported assessment or results for the alleged June 2005 assessment(s); and, Bailey indicates in the report that at the last IEP the district recommended reducing student's speech and language therapy sessions from five times per week to "2 sessions each week" (Exhibit D-1, pg 2.) This is inaccurate. At the IEP meeting in question, June 6, 2005, the district recommended three speech and language sessions per week, not two. Additionally, Bailey's report and recommendations must be viewed with caution. Bailey is not an independent evaluator, she is providing services to student for which she charges \$75.00 per 45 minute session; consequently, she has a financial interest in having student receive five privately

provided therapy sessions per week. In the absence of Bailey's personal appearance and testimony at the instant hearing, her report, standing alone, lacks evidentiary weight.

15. The district's speech and language specialist, who appeared at the instant hearing, testified that she first saw the clinic report and Bailey's report the day before the hearing commenced, September 20, 2005. She expressed concerns about the accuracy of the information contained in Bailey's report and testified that the reports did not change her recommendation to reduce student's speech and language sessions from five times per week to three times per week.

LEGAL CONCLUSIONS

1. Under both state law and IDEA, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).)

As set forth in Findings 4, 5, 6, 7, 11, and 12, student was not provided services in conformity with his IEP. Specifically, he did not receive the required hours of speech and language therapy. The district argues that the failure to conform to student's IEP did not result in denial of a FAPE because, notwithstanding the lack of 24 required speech and language sessions, student progressed. As set forth in Finding 13, student achieved 87 to 89 percent of his goals. Accordingly, the district asserts that obviously the missed sessions were not essential and no harm to student's progress resulted.

The district's position lacks merit. Perhaps student would have achieved a greater percentage of his goals had all the speech and language therapy sessions been provided; or, perhaps student met 87 to 89 percent of his goals because of the parent's remedial actions in providing him with private speech and language therapy sessions. We will never know; however, we do know that the IEP specifically required the district

to provide five speech and language therapy sessions per week so that student could reach his goals. The district missed 24 sessions. This is not an inconsequential number of sessions. If one or two sessions were missed, the district's argument would have some validity and the ALJ could be persuaded that the district substantially complied with student's IEP; however, failing to provide 24 sessions, or 12 hours of therapy without notifying student's parents of the missed sessions and arranging make-up sessions is inexcusable. Consequently, the ALJ concludes that student was denied a FAPE and the parents were justified in mitigating the damages to student's progress by providing him with private speech and language therapy. (See Findings 9,10, and 12.)

2. Given the conclusion that student's parents were justified in providing student with private speech and language therapy sessions, the ALJ further concludes that the only fair and equitable remedy is to require the district to reimburse student's parents for the sessions. This is the only remedy that will adequately address the district's failure(s) to comply with student's IEP; thus providing "compensatory education" to student.

3. Courts have consistently held that the authority to award compensatory education is derived from 20 United States Code, section 1415, subdivision (i), subsection (12), subparagraph (B), subsection (ii), which authorizes a court to grant such "relief as it determines is appropriate." Compensatory education is an equitable remedy, it represents part of a court's inherent power to craft appropriate relief. (See *Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489) When considering compensatory education, it is first necessary to determine whether a school district failed to provide a FAPE. If so, the next question is what compensatory services are necessary to provide an appropriate education under the law. As previously concluded, in the present instance student was denied a FAPE and the only appropriate way to compensate student is by ordering the district to reimburse student's parents for their

remediation of the district's failure(s). As set forth in Finding 12, student's parents paid \$300.00 for the time period in question; May 4, 2005 until the date of the IEP, June 6, 2005. Student's parents did not request that the district assess student's progress, nor did they inform the district that they were obtaining private assessments of student's progress and needs. Accordingly, the district is not obligated to reimburse student's parents for the costs associated with their actions in obtaining those assessments.

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. V. Rowley* (1982) 458 U.S. 176, 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.) The Court also recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205.) Thus, the analysis of whether a student has been provided a FAPE is twofold. The ALJ must determine whether the procedural safeguards of the IDEA have been satisfied and whether the FAPE provided was substantively appropriate. (*Id.* at 206-207.) To constitute a FAPE as required by the IDEA and *Rowley*, the district's offer must meet the following substantive requirements: (1) have been designed to meet student's unique needs; (2) have been reasonably calculated to provide student with some educational benefit, (3) have comported with his IEP; and (4) be provided in the least restrictive environment (LRE). (See also *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314) Under the facts of the

instant case, as set forth in Findings 9, 13, 14, and 15, the only competent evidence presented during the hearing establish that student's current IEP meets the substantive requirements necessary to constitute a FAPE. The district established, through expert testimony, that three sessions per week of speech and language therapy will meet student's unique speech and language needs and there was no competent evidence presented to contradict this testimony.

Since the evidence presented supports the district's position that student's June 6, 2005 IEP adequately addresses student's unique needs and will provide him with a FAPE, that IEP shall be implemented despite student's parent's disagreement with it and their refusal to sign it. The June 6, 2005 IEP addresses student's unique needs and it is in the best interests of the student to implement that IEP.

The district and the courts have an obligation to implement an appropriate IEP, even though a student's parents disagree with the IEP, when implementation of the IEP is deemed to be in the best interests of the student. (See Educ. Code § 56346(c); See also *Murphy v. Timberline Regional School District* (1st Cir. 1994) 72 F.3d 1186, at 1195-1196.)

5. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, student prevailed on issue 1 and the district prevailed on issue 2.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is granted in part and denied in part.
2. The district shall pay student's parents the sum of \$300.00 as reimbursement for the compensatory educational services provided to student from May 2005 through June 6, 2005. Said payment shall be made within 60 days from the date of this decision.

3. The district shall implement student's June 6, 2005 IEP.

Dated: September 28, 2005

ROY W. HEWITT Administrative Law
Judge Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.