

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005110041

DECISION

Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California heard this matter on March 13-16, 2006, in Los Angeles, California.

Petitioner (Student) was represented by Tara Canady, Esq. Student's mother (Mother) was also present.

Los Angeles Unified School District (District) was represented by Mary Kellogg, Esq. Susan Glickman, Due Process Coordinator, was also present.

Oral and documentary evidence were presented. On March 16, 2006, testimony was concluded and the matter was scheduled for briefing. Both parties' closing briefs were due concurrently on April 3, 2006. Student's brief was timely received and was marked for identification as Exhibit RC-28. Respondent's brief and table of authorities were timely received and were collectively marked for identification as Exhibit 40. The matter was submitted for decision on April 4, 2006.

The following witnesses were called to testify by District: Paul Singer, Bryndis Gudmundson, Joelene Walker, George Woods, Claudia Oviedo, Karen Ehrlich, and Mona Albert. Respondent's Exhibits 1-39 were admitted into evidence.

The following witnesses were called to testify by Student: Lawrence Lyons, Kristine Lind, Student, and Mother. Student's Exhibits RC1-RC26, and RC 27-1, 27-2, 27-3, and 27-4, were admitted into evidence.

ISSUES PRESENTED

1. Did the District violate Student's procedural rights in the 2005-2006 school year by failing to adhere to mandated individualized education program (IEP) guidelines and by failing to provide proper notice regarding its refusal to hold a timely IEP meeting?¹

2. Did the District deny Student a Free Appropriate Public Education (FAPE) in the 2005-2006 school year by failing to offer an educational program in the Least Restrictive Environment (LRE)?

FACTUAL FINDINGS

JURISDICTIONAL BACKGROUND

1. Student is a 13 year-old student who is in the seventh grade and who is eligible for special education services under the category of Other Health Impaired (OHI) by virtue of his diagnosis of Attention Deficit and Hyperactivity Disorder

¹ At hearing, District moved to dismiss Issue No. 1. That motion was denied without prejudice and District was allowed the opportunity to brief its contention that the ALJ should not issue a "declaratory ruling." The parties stipulated that Student is not seeking compensatory damages or reimbursement as a remedy under Issue No. 1.

(ADHD). As a result his ADHD, Student has difficulty paying attention for long periods of time, has difficulty focusing, requires breaks, and is sometimes hyperactive and anxious.

2. During the periods relevant to the due process hearing, Student was a resident and student within the District. Student was adopted by Mother in October 2001.

3. On October 30, 2005, Mother filed a Request for Due Process Hearing. Student alleged that his placement at Kayne-Eras (KE) school was not the LRE and also that the District failed to timely and properly conduct an IEP meeting after Mother requested one.

STUDENT'S EDUCATIONAL HISTORY

4. The parties stipulated to the following educational history: From second grade to early fifth grade, Student attended The Country School (CS), a private school that the District funded. Thereafter, Student attended Coldwater Canyon Prep. for approximately one week. He was then home-schooled from September 2003 to February 2004. Student next attended Almansor Center, a non- public school, for approximately one month. Thereafter, he was then again home- schooled between March 2004 and June 2004. In October 2004, Student enrolled at KE, a non-public school. All students at KE are special education eligible. At KE, Student was placed in a special day class (i.e. a non-general education classroom). He attended Extended School Year (ESY) at KE from July 2005 to August 2005. Student last attended KE from September 2005 to October 2005. Mother then removed Student from KE and he has not attended a formal school since that time.

5. From November 1, 2005, to March 7, 2006, Student received some home tutoring from credentialed teacher Kristine Lind.

PRIOR LITIGATION BETWEEN THE PARTIES

6. In October 2004, Mother agreed to place Student at KE by way of settlement of a prior due process case. Mother later contended that the placement and services provided by KE did not provide Student a FAPE. Mother filed a due process request and the matter proceeded to hearing. After hearing, a decision was issued by Tracy Tibbals, Hearing Officer, California Special Education Hearing Office (CSEHO), on July 22, 2005, in Case No. SN 05-00855. The Hearing Officer found that the District's placement and services for Student at KE during the 2004-2005 school year did provide Student a FAPE. However, as Student had not contended that Student's placement at KE was not the LRE, the Hearing Office made no findings as to LRE. The parties have had ongoing disputes regarding Student's education since approximately 2003.

STUDENT'S SCHOOLING AT KE

7. KE has approximately 210 special education students of which approximately 50 percent are classified as ED. An adult constantly supervises the students. Each KE classroom has 12 or fewer students and at least 2 adults. KE provides a structured school environment. KE's "point system" daily monitors each student's behavior and provides students with positive reinforcements for good behavior. KE has an "in-house" room for students to de-escalate or re-focus when they are having difficulty, are upset, or are behaving inappropriately. Every staff member at KE is trained in crisis prevention intervention (CPI) techniques. The CPI program teaches staff how to verbally de-escalate a student who is having behavioral difficulty. The CPI program also trains staff in the appropriate manner in which to physically intervene with students without causing them harm. Supports of this nature and level are not typically available on a general education campus.

8. KE is a school environment that provides Student with the therapeutic support he requires to address his behavioral issues. Staff at KE regularly consult with each other regarding difficulties that a particular student may be experiencing. KE counselors also have a small caseload in order to be able to make themselves readily available to their students. Student is able to access his counselor at KE upon request.

9. KE staff is allowed to use physical force, if necessary, to restrain students. Student has been physically restrained by KE staff. Student suffered minor physical injuries as a result of physical altercations with KE staff members. It was not established that KE staff caused those injuries. Mother filed two incident reports with the Culver City Police Department as a result of these physical altercations. The police investigated, but found no wrongdoing by KE staff. Student does not feel safe attending KE.

10. When Student began attending KE, his behavior worsened. Student's use of profanity, defiance to authority figures, and aggression toward peers increased. However, the cause of this increased negative behavior was not established. Student contends that he "models", or imitates, other students' negative behavior. However, Student is many times the initiator of negative behavior, not an imitator. Also, Student was, and now is, getting older and growing into his teenage years. It is not uncommon to see an increase in negative behavior simply because of Student's age.

STUDENT'S UNIQUE NEEDS AS OF THE MARCH 29, 2005 IEP

11. Student's triennial IEP team meeting was convened on March 29, 2005. Student had average to high average cognitive ability, but was functioning below grade level. Student had difficulty with aggression, hyperactivity, peer interaction, and following school rules. He often teased and bullied his classmates, complained about rules, and argued with his teacher. The IEP team determined that Student required a "structured school environment with an emphasis on developing his interpersonal,

organizational, coping, and self-regulating skills.” The District’s FAPE offer for Student for the remainder of the 2004-2005 school year was KE with one hour per week of designated instruction and services (DIS), counseling, and AB 3632 services from the Los Angeles County Department of Mental Health (DMH).

12. In early to mid 2005, Student had difficulties at KE. According to Student and Mother, Student was accused of committing acts he did not commit and the KE staff manhandled him. However, the weight of the evidence presented established that Student was disruptive in the classroom, was uncooperative with KE staff, and even jumped on a vehicle in the school parking lot. Multiple KE staff witnessed Student’s acts of misconduct. The staff that testified appeared credible and also appeared to care for Student’s well-being.

STUDENT’S UNIQUE NEEDS FOR THE 2005-2006 SCHOOL YEAR

13. a. The District’s offer to Student for the 2005-2006 school year was placement at KE with one hour per week of DIS counseling and AB 3632 services from DMH.

b. At the end of the 2004-2005 school year, Student’s behavior regressed, increasing in severity and frequency. This regression occurred at approximately the conclusion of the prior due process hearing. During this time, Student jumped on a KE staff member’s car, exhibited severe rage, cursed at school staff, and was physically aggressive with KE staff and his peers. The timing of this negative behavior, just prior to the 2005-2006 school year, is critical. The issue before the ALJ is whether or not Student’s placement during the 2005-2006 school year was in the LRE. There is no issue before the ALJ as to whether Student’s initial placement (during the 2004-2005 school year) was in the LRE.

14. During the beginning of the 2005-2006 school year, Student continued to have difficulty following adult directions and school rules, exercising appropriate self-regulation, and behaving appropriately with peers and adults. In class, Student

was frequently disruptive, made jokes, or left his seat or the classroom without permission. Student also instigated negative behavior among other students in the classroom. During unstructured times at KE, Student continued to show aggression and inappropriate behaviors.

MOTHER'S WITHDRAWAL OF STUDENT FROM KE

15. On approximately October 20, 2005, Mother stopped sending Student to school at KE. From November 1, 2005, to March 2006, Student was home-schooled.

STUDENT'S UNIQUE NEEDS AS OF THE MARCH 7, 2006 IEP

16. a. Student's annual IEP team meeting was convened on March 7, 2006. At that time, Student had been out of school for almost four months. Based on his performance at the time he left KE and the information available to the IEP team, Student was still having difficulty appropriately expressing his needs to KE staff and peers. Prior to his departure from KE, Student's academic achievement was at or near grade level.

b. Student's March 7, 2006 IEP team discussed Mother's request for Student to attend King Middle School (King), a general education school. KE staff felt that Student should return to KE in order to improve his behavior skills before transitioning to King. For the remainder of the 2005-2006 school year, the District continued to offer Student placement at KE with one hour per week of DIS counseling and AB 3632 services from DMH. Mother declined the District's offer and Student remains at home. The above information is described for the sake of completeness. However, for purposes of determining if the District offered a LRE at KE, it is the March 29, 2005 IEP at issue.

KING MIDDLE SCHOOL

17. Student requests placement in general education classes at King which is Student's home school. Approximately 3,000 students are enrolled at King. However, because it is a year-round school, only approximately 1,800 students are on campus simultaneously. King's classrooms have approximately 35-45 students and one teacher. Most classrooms do not have a teacher's assistant.

18. Student has friends who are positive role models at King. Student also has a sister, who is eligible for special education, who attends King. Student's travel to King would be preferable to the long commute he has to KE.

19. a. There is little doubt that it would be preferable if Student could attend King. His travel time would be less and he could attend school with his neighborhood friends. The District could also supply supports and modifications, as necessary, to support Student at King. While this is true, it is Student's behavior that is at issue. Student has not shown, to date, that he has the skills or desire to control his negative behavior.

b. KE is a very structured and restrictive environment. However, even in this environment, Student has had behavioral issues. It was not established that Student could control his behavior at a general education school. Unfortunately, if Student had improved his behavior during the prior school years, he would likely have already been transitioned to King. Presently, the District proposes having Student return to KE for the remainder of the 2005-2006 school year. If Student is able to improve his behavior, a transition during the 2006 ESY could be attempted between KE and King. If all went well, Student could go to King during the 2006-2007 school year. This possibility exists because Student was performing at or near grade level. His being out of school since March 2006 is not helpful to his situation.

MOTHER'S MAY 12, 2005 WRITTEN REQUEST FOR AN IEP TEAM MEETING

20. On May 12, 2005, Mother requested an IEP team meeting to discuss Student's goals, objectives, and behavior. An IEP meeting was not held within 30 days as required.

21. On June 10, 2005, Mother wrote a letter requesting an IEP meeting to discuss Student's behavior, transition to the next school year, other available placement options, and to discuss any changes to Student's IEP for the 2005-2006 school year.

22. On June 10, 2005, the District notified Mother that an IEP team meeting was scheduled for July 12, 2005.

23. On June 14, 2005, Mother sent a letter requesting that the District invite the following persons to the July 12, 2005, IEP team meeting: a District program specialist (other than the school psychologist); a District LRE specialist; a nurse; Bryndis Gudmundsson, Student's KE counselor; the District's NPS coordinator; Dwight Counsel, KE principal; Mr. Woods, KE assistant principal for middle school; a KE behavior specialist; Peter Adzhyan, a District school psychologist who assessed Student on February 29, 2004; and a regular education teacher.

THE JULY 2005 IEP TEAM MEETINGS

24. The District convened an IEP team meeting on July 12, 2005. The meeting was not completed and was reconvened on July 22, 2005. The IEP team discussed Student's attendance at KE for the 2005 Extended School Year (ESY) and his attendance at KE for the 2005-2006 school year. Student attended the 2005 ESY at KE from approximately July 26, 2005, until the end of the 2005 ESY.

25. There is no indication in the IEP that Student's goals and objectives or placement options were discussed in depth. Mother signed the IEP in approval of ESY eligibility only.

LEGAL CONCLUSIONS AND DISCUSSION

1. Student has the burden of proving at an administrative hearing the essential elements of his claim. Thus, Student has the burden of proving that the District's offered placement at KE was not in the LRE and that the untimely held IEP meeting resulted in denial of a FAPE. (*Schaeffer v. Weast* (2005) ___ U.S. ___; 126 Supreme Court 528.)

2. Pursuant to the Individuals with Disabilities Education Act (IDEA) and State special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (California Education Code², § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, and conform to the child's IEP.

3. "Special education" is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Code § 56031.) "Related services" means transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. State law refers to related services as "designated instruction and services" (DIS) and provides that DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Code § 56363, subdivision (a).)

4. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet

² All further statutory references to "Code" are to the California Education Code.

those needs, and determine specific services to be provided. (Code §§ 56300 – 56302; 20 U.S.C. §1412.)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 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 designed to meet the student's unique needs and 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 pp.198- 200.) The Court stated that school districts are required to provide only a basic floor of opportunity that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

6. Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483.)

7. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p.1484.) Procedural violations may constitute a denial of FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process.

Issue No. One: Did the District violate Student's procedural rights in the 2005-2006 school year by failing to adhere to mandated IEP guidelines and failing to provide proper notice regarding its refusal to hold a timely IEP team meeting?

8. Section 56343.5 requires that the District convene an IEP team meeting within 30 days of a parent's written request. The District did not convene an IEP team meeting within 30 days of Mother's May 12, 2005 written request. The District convened IEP team meetings on July 12, and 22, 2005. (Factual Findings 20-25.)

9. Student did not allege that the procedural violations enumerated in his first issue denied him a FAPE, nor did Student seek any remedy. The procedural violations concerning the delayed IEP would be most appropriately addressed by compensatory remedies. However, Student has not requested any such remedy. Therefore, compensatory remedies are unavailable. Student has requested a prospective remedy, placement at King. However, the District's past failure to adhere to procedural requirements concerning the timeliness of an IEP team meeting is insufficient to grant Student's requested prospective relief. It would be inappropriate to transfer Student to another school simply because an IEP meeting was not held in a timely fashion. Because neither prospective nor compensatory remedies can be awarded with respect to Student's first issue, a decision in Student's favor would amount to a declaratory judgment. However, as the ALJ's conclusion is in favor of the District, it resolves the issue and is not a declaratory judgment.

THE PROCEDURAL VIOLATION DOES NOT RISE TO A DENIAL OF FAPE.

10. It must first be determined whether the District complied with the procedural steps required under the IDEA. If not, then a determination regarding whether the procedural denials resulted in a substantive denial of FAPE must be made. Procedural flaws do not automatically require a finding of a denial of a FAPE. Only procedural violations that result in a loss of educational opportunity, seriously infringe the parents' opportunity to participate in the IEP formulation process, or

result in a denial of educational benefits arise to a denial of FAPE. (*W.G. v. Bd. of Trustees of Target Range School District, No. 23* (9th Cir. 1992) 960 F.2d 1479; see also 20 U.S.C. § 1415 (f)(3)(E)(ii).)

11. Student contends that the District failed to invite persons requested by Mother to the IEP meeting, failed to provide proper notice regarding refusal to hold a timely IEP meeting, and failed to discuss Mother's concerns regarding goals and objectives at the IEP meeting. A finding on each of these contentions is not necessary, as discussed immediately below. (Factual Findings 20-25.)

12. Student did not meet his burden to establish that any procedural violation: (a) would have resulted in any change to Student's educational program; (b) that such change was necessary; and (c) that the Student lost an educational opportunity or was denied educational benefits as a result. At the time of Mother's May 12, 2005 request for an IEP team meeting, the District and Student were already embroiled in a due process dispute (which led to the prior decision) regarding the very same matters that Mother sought an IEP team meeting to address. Additionally, the decision in CSEHO Case No. SN 05-00855 found that the District's educational program during the 2004-2005 school year was appropriate for Student. Therefore, changes in Student's educational program were not warranted during the 2005-2006 school year unless Student's needs or circumstances had changed. Student did not establish that his needs or circumstances had changed. In fact, Student's behavior had become worse. Thus, it was highly unlikely that Student's educational program or placement would have been changed if the IEP meeting had been held in June 2006 rather than July 2006. This conclusion also applies to Student's argument that the IEP team did not discuss all issues raised by Mother or include all the personnel requested by Mother. Accordingly, Student did not suffer a loss of educational opportunity and was not denied educational benefits as a result of any failure by the

District to timely convene and properly conduct the IEP team meeting after Mother's May 2005 request. (Factual Findings 11-14 and 20-25.)

Issue Two: Did the District deny Student a FAPE in the 2005-2006 school year by failing to offer an educational program in the LRE?

13. The educational program that the District offered Student at the start of the 2005-2006 school year is set forth in Student's March 29, 2005 IEP. The IEP team meetings convened on July 12, and 22, 2005, did not result in substantive changes to Student's IEP. At Student's March 7, 2006 IEP team meeting, the District's offer remained substantially similar to that contained in his March 2005 IEP. (Factual Findings 11-12 and 16.)

14. A school must ensure that children with disabilities are educated with nondisabled children to the maximum extent appropriate and that removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. § 300.550, subdivision (b). This is commonly referred to as the right to be educated in the least restrictive environment (LRE).

15. In some cases, LRE can be achieved by the "mainstreaming" model. The term "mainstreaming" is the placement of a child with a disability in a regular education class with the expectation that he or she will meet the curriculum requirements for the class, with supplementary aids and services.

16. KE is a nonpublic school containing only special education students. There are no opportunities for the students to interact with nondisabled peers and at no time are the students allowed to socialize independently without adult supervision. Also, Student is required to travel at least one hour each way between home and school. This type of placement is a restrictive educational environment.

The issue before the ALJ is whether or not Student has established that this restrictive environment was unnecessary. (Factual Findings 17-19, Issue No. 2.)

17. In determining the educational placement of a child with a disability, each public agency shall ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child that is as close as possible to the child's home, and unless the IEP requires some other arrangement, the child is educated in the school that he would attend if nondisabled. 34 C.F.R. § 300.552, subdivision (a)–(c). In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 C.F.R. § 300.552, subdivisions (d) and (e); [20 U.S.C. §1412](#) (a)(5).

18. In determining whether the placement proposed for the student satisfies LRE requirements, federal appellate courts have considered the following factors: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom; (2) the non-academic benefits to the disabled child of interaction with non-disabled children; (3) the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and (4) the costs of supplemental aids and services necessary to mainstream the disabled child in a regular classroom setting. (*Sacramento City Unified School District v. Rachel Holland* (9th Cir. 1994)14 F.3d 1398; cert. denied.)

19. KE is a structure school environment that provides Student with the therapeutic support he requires to address his behavioral issues. Because of his behavior issues, Student needed a small school and class setting with available therapeutic support and staff that are trained to deal with Student's explosive behaviors. Student needed a stable, consistent, structured, and supportive school

environment. Student provided insufficient evidence to establish that Student's needs could have been met in general education classes at King. (Factual Findings 27-30.)

20. a. Student was able to work at the academic level required for attending a general education classroom. However, Student's behavior in class and during unstructured school activities would likely prevent him from presently being successful at King. Student's behavior would likely be disruptive, resulting in frequent removal from class or school; and would prevent Student from receiving sufficient educational benefit. Student needs to be able to exercise self-control, prevent his behavior from escalating, and follow directions in order to succeed at King. Student has not consistently demonstrated these skills in a school setting and continues to need the type of support and structure provided by KE in order to obtain these skills. (Factual Findings 7-14 and 17-19.)

b. Evidence was presented regarding where Student should presently be enrolled. The issue before the ALJ is whether the 2005-2006 placement at KE was in the LRE. As it was not established by Student that KE was not the LRE, further discussion about Student's present placement is an issue for a future IEP team. (See Issue No. 2.)

21. It was not established by Student that the District's placement of Student at KE during the 2005-2006 school year was not the LRE. (Factual Findings 7-19.)

ORDER

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. The following findings are made in accordance with this statute:

The District prevailed on Issues No. 1 and 2.

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 under California Education Code, section 56505, subdivision (k).

DATED: May 1, 2006.

CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings