

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

In the Matter of:

STUDENT,

Petitioner,

v.

BURLINGAME ELEMENTARY SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006051035

DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on August 23 and 24, 2006, in Burlingame, California.

Perry Calvin Leonard, attorney, represented Petitioner (Student). Student's mother and father also attended.

Sarah Daniel, attorney, represented Respondent Burlingame Elementary School District (District). Lourdes Desai, District's Director of Special Education, also attended.

The request for a due process hearing (Complaint) also named San Mateo County Office of Education (County) as a respondent. District and County filed a joint motion to dismiss County, which was granted at the pre-hearing conference on August 11, 2006.

Student filed the Complaint on May 26, 2006. On July 7, 2006, a continuance was granted. The record was held open and an extension of time to render a decision was

granted to permit the submission of closing briefs. Closing briefs were filed and the matter was submitted on September 6, 2006.

ISSUES

1. Did District deny Student a free appropriate public education (FAPE) by failing to have a representative from County present at the May 24, 2006 individualized education program (IEP) team meeting?
2. Did District offer Student levels of assistive technology (AT) and alternative augmentative communication (AAC) services in the May 24, 2006 IEP that were not reasonably calculated to provide educational benefit?
3. Did District fail to offer Student a FAPE by offering placement in a special day class for orthopedically-impaired students with insufficient mainstreaming opportunities with the co-located private preschool, in music class, on the playground, and at recess?¹

CONTENTIONS OF THE PARTIES

Student contends that District was required to have a representative from County attend Student's May 24, 2006 IEP meeting because District was offering to place Student in a County-run special day class for students with orthopedic impairments. Student argues that his parents were prevented from meaningfully participating in the IEP

¹ The issue was re-framed based on the evidence at hearing. The Complaint and the pre-hearing conference order frame this issue as a failure to offer Student a placement in the least restrictive environment. However, the evidence presented at hearing and the arguments submitted by the parties inadequately addressed whether the placement was in the least restrictive environment. (See *Sacramento City Unified School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

decision-making process because no one at the IEP meeting was able to answer their questions about the special day class, the playground, and inclusion opportunities. District contends that a representative of County was not required to attend the IEP meeting, District personnel who attended the meeting fulfilled all the legal requirements, and Student's parents were able to and did fully participate in the IEP meeting.²

Student contends that District did not offer appropriate levels of AT and AAC services because District did not assess Student and relied upon assessments that were not current. District contends that the IEP team relied upon appropriate and relevant information concerning Student's unique needs and offered him levels of AT and AAC services that were reasonably calculated to provide him educational benefit.³

Student contends that District offered Student insufficient mainstreaming opportunities in the private preschool, a music class, on the playground, and at recess. District contends that it offered sufficient mainstreaming opportunities and is able to implement all of the requirements of Student's IEP. District further contends that it will provide any necessary accommodation or modification required to give Student access to the playground.⁴

² Student contends for the first time in his reply to District's closing brief that no general education teacher was present at the May 24, 2006 IEP team meeting and that the District never gave Student a specific, prior written offer. These violations are not alleged in the Complaint and are not at issue.

³ Student contends for the first time in his reply to District's closing brief that Student was not assessed as required by Government Code section 7572. This is not alleged in the Complaint and is not at issue.

⁴ Student contends for the first time in his reply to District's closing brief that no mainstreaming activities were offered and specifically, no mainstreaming opportunities in

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student is a four-year-old boy diagnosed with cerebral palsy who is eligible for special education services due to an orthopedic impairment. Student and his parents have resided in the District since August 2005.

2. Student has poor muscle control throughout his body. He uses a manual wheelchair and a pommel walker. Due to oral-motor dysfunction, Student's speech is mostly unintelligible. Student has used a variety of low-tech AAC devices. He has recently begun using an advanced, speech-generating AAC device. Student's receptive language is within normal limits. His expressive language skills are significantly delayed as a result of his severe motor speech impairment. Student has never attended a District school. He attended the Bridge School, a non-public school, for the 2005-2006 school year.

MAY 24, 2006 IEP TEAM MEETING

3. As discussed in Legal Conclusion paragraph 7, a representative of the local education agency who is knowledgeable about the availability of resources must attend an IEP team meeting. An IEP team meeting was held on May 24, 2006. Student's parents; Student's attorney; Lourdes Desai, District's Director of Special Education; a District

the private preschool co-located with the special day class were offered. The Complaint specifically alleges that Student was offered mainstreaming opportunities in a music class and on the playground. In addition, the parties agreed at the pre-hearing conference on August 11, 2006, that an issue for hearing was District's failure to provide sufficient mainstreaming opportunities in the private preschool, music class, on the playground, and at recess time. The allegation that District did not offer any mainstreaming opportunities is not included in the Complaint and is not at issue.

program specialist; a District speech pathologist; a District teacher; and staff from the Bridge School, among others, attended the IEP meeting. No one from County attended.

4. District offered Student the following program: (1) a special day class for students with orthopedic impairments; (2) AAC services, four hours per week, individual sessions; (3) AT services, three hours per month, individual sessions; (4) AT consultation services up to 16 hours per month; (5) training and consultation for staff as needed concerning speech-generating devices and aides; (6) speech and language services, 405 minutes per month, individual and group sessions; and (7) occupational therapy/physical therapy, two times per week, individual and group sessions. County operates the special day class and provides the AAC and AT services.

5. Student's parents visited the special day class in October and November 2005 when it was offered at a prior IEP that is not at issue. After each visit, they sent a letter outlining various concerns they had about the special day class. They were concerned that it was not an AAC-focused classroom that offered AAC and AT strategies throughout the day; the classroom staff did not have sufficient AAC training and experience with the type of device Student uses; students in the class had behavioral issues that threaten Student's safety; none of the other children in the class uses a device similar to Student's; Student would not have opportunities to practice AAC strategies with typically-developing peers; and Student could not access the playground during recess because the surface was not suitable for his walker. Student's parents did not receive a response to their concerns and questions.

6. Student's parents continued to express their concerns during the May 24, 2006 IEP meeting. No one at the meeting was able to provide specific information in response to their concerns about the accessibility of the playground or integration opportunities. Ms. Desai offered Student's parents the opportunity to reconvene the meeting so that someone from County could attend to answer their questions. They

declined this suggestion because the IEP had already been delayed and it was difficult to schedule all of the people who needed to attend the meeting.

7. Prior to the May 24, 2006 IEP meeting, District staff was aware of the concerns that Student's parents had about the program and playground. District was required to have someone at the May 24, 2006 IEP meeting who was knowledgeable about the program and resources being offered. It could have fulfilled this requirement with someone from District or County. Student's parents did not consent to this person's absence from the meeting. District failed to have a necessary member of the IEP team present at the May 24, 2006 meeting.

8. As described in Legal Conclusions paragraph 8, this procedural violation will not result in a denial of FAPE unless it infringed the parents' opportunity to meaningfully participate in the IEP process. Student's parents attended this meeting along with their attorney. They actively participated in the discussion and repeated their concerns. When offered an opportunity to reconvene the meeting so that someone knowledgeable could attend and answer their questions, the parents declined. Any claim the parents might have had that they were denied an opportunity to meaningfully participate because of the composition of the IEP team was undermined when they refused the offer to reconvene the meeting.

LEVEL OF AT AND AAC SERVICES

9. As described in Legal Conclusion paragraphs 1 through 3, Student is entitled to receive specially-designed instruction and related services that meet his unique needs and are necessary to assist him to benefit from his education. While District is not required to maximize Student's potential, it is required to provide instruction and related services that are reasonably calculated to provide him some educational benefit.

10. District offered Student four hours a week of AAC services. This is the same level of AAC services recommended by staff of the Bridge School. It is also the amount

recommended by Dr. Marilyn Buzolich, co-founder of the Bridge School who evaluated and provided AAC services to Student when he was between the ages of two and three.⁵ The IEP team increased its offer of AT consultation hours from 15 to 16 hours in response to a recommendation by Bridge School staff. Student offered no evidence supporting his argument that the recommendations for service levels by Bridge School staff required that they be provided in a program substantially similar to the Bridge School's program.

11. According to Dr. Buzolich, the amount of services needed by a student depends on the child's needs and the experience and resources available. In her opinion, 12 hours a month of AAC services is appropriate for a special day class for students with orthopedic impairments who are all cognitively normal, learning a general education curriculum, and are using AAC devices. Dr. Buzolich also believes that if only one student in a class was using an advanced AAC device, the student would make some progress with this level of service. However, the student's progress would not be as great or as fast as if there were other users. According to Dr. Buzolich, the level of direct service, consultation and training hours in Student's IEP is appropriate for a child like Student using an advanced AAC device. Dr. Buzolich's credentials as an expert in the field of AAC services are undisputed. Although the weight of her testimony is limited somewhat because she has not evaluated Student since March 2005 and she is not familiar with the special day class the District offered him, her testimony is entitled to significant weight. Student did not offer any countervailing evidence.

⁵ Dr. Buzolich holds a Ph.D. in speech and hearing science; a M.S. in speech-language pathology; a certificate of clinical competence in speech pathology; a special education teaching credential in speech, language and hearing; and a license as a speech and language pathologist. She is founder and director of Augmentative Communication & Technology Services, a non-public agency that provides assessments and direct services in AT and AAC.

12. Linda Vaughn, a certified AT and AAC specialist with County, assesses students for AT and AAC services, and provides consultation and training concerning AT and AAC devices. Ms. Vaughn has two students in her caseload using an AAC device that is similar in complexity to the one that Student uses; none of the other students are in Student's classroom. Ms. Vaughn opined that based on reports she reviewed concerning Student and the goals in his IEP, the amount of AT and AAC services offered to him would be more than enough to support his educational needs. Although the weight of Ms. Vaughn's testimony is limited because she has not evaluated Student, it is entitled to some weight. Student offered no countervailing evidence.

13. The students in the offered special day class have a range of communication abilities: some have stronger communication skills than Student, some are not as strong, and some are very similar to Student's communication skills. Almost all of the children in the special day class are cognitively average or above average. The majority of the students in the class are verbal communicators. Bonnie Roberts, County's Director of Educational Services, Early Childhood Education Program, opined that the special day class comports with the description of services recommended for Student by staff of the Bridge School. Student offered no countervailing evidence.

14. Student argues that the AT and AAC services offered by District were not reasonably calculated to provide educational benefit because District did not perform its own assessments. However, Student neither alleged that District failed in its obligation to assess Student, nor offered evidence that it was not reasonable for District to rely upon the assessments, information, and recommendations it considered at the May 24, 2006 IEP meeting. Student's own expert witness, Dr. Buzolich, opined that the level of AT and AAC services would provide Student with educational benefit. Student failed to prove that the offered level of AT and AAC services were not reasonably calculated to provide him educational benefit.

MAINSTREAMING OPPORTUNITIES

15. As discussed in Legal Conclusions paragraphs 1 through 3, Student is entitled to receive specially-designed instruction and related services that meet his unique needs that are required to assist him to benefit from the instruction.

16. Student's unique needs are not in dispute. He needs classroom peers who are cognitively average or above average; appropriate communication partners with whom he can use his AAC devices; and opportunities to interact with typically-developing peers.

17. The IEP provides that Student participates in general education classes and activities between 1 and 39 percent of the time. There is nothing in the IEP that describes when and how Student will participate in mainstreaming or inclusion activities.⁶ Three of the IEP's 11 goals involve Student's communication in a regular education environment or with a non-disabled peer. The IEP team discussed that Student would spend time with typically-developing peers in music class, on the playground, during recess, and in activities with a private preschool located at the same site as the special day class. District offered these mainstreaming opportunities to Student.⁷

18. Student uses a pommel walker which allows him to ambulate more independently on smooth, hard, flat surfaces. It allows Student to remain upright,

⁶ The Complaint does not allege that this is a procedural violation or a denial of FAPE. As discussed in footnote 5, the Complaint alleges that Student was offered specific mainstreaming opportunities.

⁷ Both parents testified that the only inclusion opportunities offered were the music class with the private pre-school, recess, and the playground. When the parties clarified issues during the pre-hearing conference, Student's attorney agreed that mainstreaming opportunities at the private pre-school, in addition to the music class, were part of District's allegedly inadequate offer.

strengthen his muscles, develop visual perception, develop motor planning skills, and engage his peers at eye level.

19. The playground used by the special day class has three surfaces. Student has considerable difficulty navigating his walker on each of these surfaces. The wheels do not operate smoothly and it requires considerable effort for him to move from one place to another. The purpose of the walker is to give Student physical independence; it is not appropriate for others to routinely assist him when he is using the walker. Without additional accommodations or modifications, the playground offers Student limited mainstreaming opportunities.

20. The playground is not the only venue available for Student's inclusion activities. He will participate in a music class and other group activities with typically-developing peers at the private preschool. Student will be able to participate in general education classes and activities between 1 and 39 percent of the time, as required by the IEP. There is insufficient evidence that Student required more mainstreaming opportunities in order to be provided a FAPE.

LEGAL CONCLUSIONS

APPLICABLE LAW

REQUIREMENTS OF A FAPE

1. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially-designed instruction and related services that meet the unique needs of a child with a disability and are required to assist the child to benefit from

instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include developmental, corrective, and supportive services, such as speech-language pathology services and occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) A school district is required to provide any AT device or service that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.308(a); Ed. Code § 56341.1, subd. (b)(5).)

2. The IDEA requires a school district to 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].” (*Bd. Of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201.) The intent of the IDEA is to “open the door of public education” to a child with a disability; it does not “guarantee any particular level of education once inside.” (*Id.* at p. 192.) A school district is not required to maximize a child’s potential. (*Id.* at p. 197.) However, a district is required to provide an education that confers some educational benefit upon the child. (*Id.* at p. 200.)

3. The analysis focuses 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.) Even if the parents’ preferred placement would be better for the child, this does not necessarily mean that the district’s offer did not constitute a FAPE. (*Ibid.*) As long as the school district’s offer was reasonably calculated to provide educational benefits, it constitutes an offer of a FAPE. (*Ibid.*) Nevertheless, the district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Education* (4th Cir. 1985) 774 F.2d 629, 636.) While a school district is not required to provide a student with a disability the educational

equivalent of a "Cadillac," it must provide a "serviceable Chevrolet." (*Doe v. The Bd. of Education of Tullahoma City Schools* (6th Cir. 1993) 9 F.3d 455, 459-460.)

4. 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: the school district must comply with the procedural requirements of the IDEA, and the IEP must be reasonably calculated to provide the child with educational benefits. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at pp. 206-207.)

5. 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. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.) To constitute a denial of a FAPE, procedural violations must result in one of the following: the loss of educational opportunity; a serious infringement of the parents' opportunity to participate in the IEP process; or a deprivation of educational benefits. (*Ibid.*)⁸

BURDEN OF PROOF

6. As the petitioner, Student has the burden of proving that the District did not comply with the law. (*Schaffer v. Weast* (2005) 546 U.S. [126 S.Ct. 528, 163 L.Ed.2d 387].

PARTICIPATION IN IEP TEAM MEETINGS

7. The IEP team must include a representative of the local educational agency who is qualified to provide, or supervise the provision of specially-designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general

⁸ A substantially similar standard was codified in the IDEIA (20 U.S.C. § 1415(f)(3)(E)(ii)) and is codified in California law (Ed. Code, § 56505, subd. (f)(2)).

education curriculum; and is knowledgeable about the availability of resources of the local educational agency. (20 U.S.C. § 1414(d)(1)(B)(iv); 34 C.F.R. § 300.344(a)(4); Ed. Code, § 56341, subd. (b)(4).) A local educational agency may designate another local educational agency member of the IEP team to serve this role. (Ed. Code, § 56341, subd. (e).)

8. A member of the IEP team may be excused from attending a meeting if the parent and local educational agency agree that the member's attendance is not necessary because his or her area of the curriculum or related services is not being modified or discussed. (Ed. Code, § 56341, subd. (f).) An IEP team member whose area of curriculum or related service is being modified or discussed may be excused from attending a meeting if both the parent and local educational agency consent, and the member submits information concerning the development of the IEP in writing to the IEP team prior to the meeting. (Ed. Code, § 56341, subds. (g) and (h).)

PARENTAL PARTICIPATION IN IEP PROCESS

9. 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) [parents are members of IEP team], 300.345 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*)

10. A parent has meaningfully participated in the development of an IEP when the parent is informed of his or her child's problems, attends the IEP team meeting, expresses his or 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 v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

DETERMINATION OF ISSUES

DID DISTRICT DENY STUDENT A FAPE BY FAILING TO HAVE A REPRESENTATIVE FROM COUNTY PRESENT AT THE MAY 24, 2006 INDIVIDUALIZED EDUCATION PROGRAM (IEP) TEAM MEETING?

11. As discussed in Legal Conclusions paragraphs 7 and 8, District was required to include someone knowledgeable about County's special day class, its program and resources at the May 24, 2006 IEP team meeting. As determined in Factual Findings paragraph 7, the District failed to do so. As determined in Factual Findings paragraph 8, Student's parents actively participated in the meeting and refused District's offer to reconvene the meeting so their questions could be answered. District did not deny Student a FAPE by failing to have a representative from County present at the May 24, 2006 IEP team meeting.

DID DISTRICT OFFER STUDENT LEVELS OF AT AND AAC SERVICES AT THE MAY 24, 2006 IEP MEETING THAT WERE NOT REASONABLY CALCULATED TO PROVIDE EDUCATIONAL BENEFIT?

12. As discussed in Legal Conclusions paragraphs 1 through 3, District was required to provide Student AT and AAC services that were reasonably calculated to provide educational benefit. As determined in Factual Findings paragraphs 10 through 14,

District offered AT and AAC services that were reasonably calculated to provide educational benefit.

DID DISTRICT FAIL TO OFFER STUDENT A FAPE BY OFFERING PLACEMENT IN A SPECIAL DAY CLASS FOR ORTHOPEDICALLY-IMPAIRED STUDENTS WITH INSUFFICIENT MAINSTREAMING OPPORTUNITIES WITH THE CO- LOCATED PRIVATE PRESCHOOL, ON THE PLAYGROUND, AND AT RECESS TIME?

13. As discussed in Legal Conclusions paragraphs 1 through 3, Student is entitled to receive specially-designed instruction and related services that meet his unique needs that are required to assist him to benefit from the instruction. As determined in Factual Findings paragraphs 16 through 20, Student failed to prove that District denied Student a FAPE by failing to offer sufficient mainstreaming opportunities.

ORDER

Student's request for relief is denied.

PREVAILING PARTY

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

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: September 14, 2006

A handwritten signature in black ink, appearing to read "A Kopec", is written over a horizontal line.

JUDITH A. KOPEC

Administrative Law Judge

Special Education Division

Office of Administrative Hearings