

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MERCED UNION HIGH SCHOOL DISTRICT.

OAH CASE NO. 2009031283

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this non-expedited matter in Atwater, California, on May 26, 2009.

Student's mother (Mother) represented him by telephone. Student was not present.

Karen E. Gilyard, Attorney at Law, represented the Merced Union High School District (District). Marie Nelson, the District's Director of Student Support Services, was present throughout the hearing.

On March 3, 2009, Student was suspended from school (and was later expelled) for assaulting his one-to-one aide. Mother filed a due process hearing request (complaint) on Student's behalf on March 24, 2009. OAH scheduled the expedited portion of the hearing for April 21 and 22, 2009, to determine whether Student's conduct on March 3, 2009, was a manifestation of his disability, and whether the District had complied with the procedural requirements of the Individuals with Disabilities in Education Act (IDEA) when it determined that Student's conduct was not such a manifestation. On May 4, 2009, the undersigned ALJ filed an Expedited Decision ruling in favor of the District on both issues.

The non-expedited hearing was held on May 26, 2009. After evidence was taken, Mother made an oral closing argument. At the District's request, the matter was continued to May 29, 2009, for the filing of the district's closing brief. On May 29, 2009, the District filed its closing Brief, the record was closed, and the matter was submitted.

## ISSUE

At the non-expedited prehearing conference on May 15, 2009, Mother stated that she desired to present only one remaining issue at the non-expedited due process hearing. After discussion, the parties and the ALJ agreed to the following formulation of that issue:

Did the District deny Student a free appropriate public education (FAPE) in the 2008-2009 school year by sending to Mother, after a January 2009 IEP meeting, an IEP offer that was not the offer she expected as a result of the IEP meeting, and that was missing pages that should have been included, and did Mother sign that IEP offer without realizing that it was not the offer she expected and did not have all the appropriate pages?

## FACTUAL FINDINGS

### BACKGROUND

1. Student is 14 years of age and resides with Mother within the boundaries of the District. He has been receiving special education and related services since 2001. Student's primary qualifying disability is a specific learning disorder (SLD) that takes the form of auditory memory and language processing deficits. His secondary category of

disability is speech and language impairment, which is manifested in receptive and expressive vocabulary deficits.

2. Student completed his elementary education in the Merced City School District and Weaver Union School District. He entered the District's Merced High School in the fall of 2008 as a ninth grader, and, at Mother's request, was transferred to the District's Golden Valley High School (GVHS) in late January 2009. A new individualized education program (IEP) was written for him at that time. The IEP provided that Student would attend most classes in a resource specialist program setting, have a one-to-one instructional assistant (IA) at all times on campus, receive 51 minutes a day of speech and language services, receive five hours a week of instruction at home, and have transportation to and from school. The IEP also contained a detailed behavior support plan (BSP). Mother agreed to these provisions. In addition, Student was offered counseling services. Mother declined the counseling services in January, but agreed to them in March 2009.

3. On March 3, 2009, Student was suspended from GVHS for assaulting his IA. On April 1, 2009, he was expelled from GVHS for that conduct, and assigned to Valley High School in the District.

#### THE JANUARY 9, 2009 IEP MEETING AND OFFER

4. A parent of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to the child, including the development of the child's educational plan. If a school district were responsible for misleading a parent about the content of an agreed-upon IEP, or for procuring her signature on a version of an IEP the parent reasonably did not expect to sign, the district's actions could in some circumstances violate the procedural guarantees of the IDEA and deny the parent's child a FAPE.

5. A procedural violation of IDEA results in a denial of FAPE if it impedes the Student's right to a FAPE, significantly impedes a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or causes a deprivation of educational benefits.

6. The essence of Mother's claim is that Student's September 19, 2008 IEP contained a provision requiring the District to telephone her whenever a disciplinary problem concerning Student began to develop. When the District proposed a new IEP at the January 9, 2009 IEP meeting, she thought the new offer was substantially the same as the September 19, 2008, IEP. Only because she reasonably believed the two IEPs were the same, and believed that they both contained a provision requiring that she be telephoned at the outset of possible disciplinary incidents, did she sign the January 9, 2009 IEP offer. Only later she discovered that the January 9, 2009 IEP she had signed contained no such provision. She would not have signed the IEP offer if she had realized that the provision was missing.

7. Specifically, Mother testified that she attended the January 9, 2009 IEP meeting by telephone, and was not given the draft of the IEP that the rest of the IEP team possessed and discussed. She testified that, at the outset of the meeting, Marie Nelson, the District's Director of Student Support Services and the facilitator of the meeting, told her to obtain the September 19, 2008 IEP so that she could follow the discussion, and she did so. Because she had been invited to read from that September 2008 document, she thought that the proposal being discussed by the IEP team was essentially the same as that earlier IEP.

8. Mother testified further that, after the January 9, 2009 IEP meeting, the District mailed her the proposed IEP for her signature. Believing the offer to be the same as the September 2008 IEP, and believing it to contain a requirement that the District telephone her at the outset of any trouble with Student, she signed it and mailed it

back. Only when she later received a copy of the signed IEP from the District did she realize that she had signed the document in error.

9. Three District members of the IEP team testified. Ms. Nelson, GVHS principal Craig Chavez, and school psychologist Kelli Parreira all testified that the IEP draft they discussed at the January 9, 2009, meeting was different from the September 2008 IEP. It contained no provision that required the District to telephone Mother in the event of developing trouble with Student. Such a provision was neither requested by Mother nor discussed at the meeting. Each witness examined the January 9, 2008 IEP and testified it was complete and had no pages missing.

10. Ms. Nelson acknowledged that the District did not provide to Mother the draft IEP that was discussed at the meeting. She testified that, solely to assist Mother in understanding the structure of the discussion and following it, she suggested that Mother obtain an earlier IEP and refer to it as the meeting proceeded. She did not, however, state that the new IEP being discussed was in any way like the September 2008 IEP. She told Mother repeatedly that the new IEP offer would be mailed to her for approval and signature, and that she and her staff were available to answer any questions about its contents that Mother might have had.

11. A copy of the January 9, 2009 IEP offer, signed by Mother, was introduced in evidence. The content of the document supports the testimony of the District witnesses in every respect. The offer, typewritten on printed forms, is 22 pages long. By agreement, the parties later added to it a twenty-third page on which Mother consented to certain counseling services that she did not at first accept. On each page of the printed forms, in the upper right corner, is the phrase "Page \_\_ of \_\_." Each page of the signed IEP is numbered by hand, starting with "Page 1 of 22," consecutively through "Page 22 of 22." All pages are in order and none is missing.

12. The typewritten IEP offer of January 9, 2009 addresses the subject of communication between Mother and the District in detail. Under the heading "Communications Provisions" and in response to questions on the printed form, the typewritten offer proposed that communication would be by the case manager (Ms. Perreira), that it would be "[c]ontinuous monthly," that the delivery manner would be "[m]ail/phone call if needed," the expected frequency would be "[m]onthly per incident," that the content would be "[p]rogress in terms of target," and that in order to foster two-way communication, "[p]arent may provide written [communication]." The offer also contains a three-page detailed behavior plan. There is no provision anywhere in the offer for telephoning Mother in the event of trouble.

13. In addition to signing the January 9, 2008 IEP offer after it was mailed to her, Mother annotated the document. At seven places in the text of the offer, Mother wrote comments or noted her disagreement. On the signature page she wrote several criticisms of the IEP, the meeting, and the way District staff conducted it. The annotations and comments written by Mother on the signed January 9, 2009 IEP, which were all specifically responsive to statements in the IEP, demonstrate that Mother carefully read and understood the IEP that she signed.

14. The January 2009 offer contained four basic elements: Placement at GVHS in a resource program; speech and language assistance; vocational assessment; and individual and group counseling. Mother accepted the first three elements and, until a mediation in March, rejected the fourth. Her agreement to some but not all of the offer's provisions also demonstrated that she understood the proposal.

15. The District IEP team members made an audiotape of the January 9, 2009 meeting, had it transcribed, and sent the transcript to Mother. Mother introduced the

transcript in evidence at the hearing.<sup>1</sup> The transcript supports the testimony of the District witnesses in all respects. According to the transcript, at the outset of the meeting Ms. Nelson asked Mother if she still had the September 2008 IEP. Mother replied, "No, I didn't get that one." Instead, the transcript shows that Mother was following the discussion using an IEP dated March 17, 2008. Ms. Nelson stated that the IEP under discussion was "another IEP, we have one written, and we're going to go over that and present that to you today." She stated that the new IEP was "[s]imilar to what you're looking at, it has the general information regarding who he is, and the addresses and all." The discussion then turned to the new draft IEP, and there was no further mention of any previous IEP.

16. It is clear from the transcript that the IEP team was discussing a new and different IEP. The draft IEP that was discussed was very different from either the September 19, 2008 IEP or the March 17, 2008 IEP that Mother possessed. The new proposal took Student out of a special day class at Merced High School and placed him in a resource class at GVHS, with a new offer of counseling and new goals and objectives. Based on the recorded discussion at the IEP team meeting, it is clear that no reasonable person participating in the discussion could have confused the new offer with either of the older IEPs. The transcript shows that Mother had requested the IEP meeting in order to obtain a new placement for Student, and was successful in doing so. The transcript shows that Mother well understood the terms of the new IEP offer, and the ways in which it was different from Student's previous placement. She asked many questions

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<sup>1</sup> During the hearing, while not under oath, Mother asserted that the tape and transcript of the January 2009 meeting were inaccurate. However, she did not identify any specific alleged inaccuracy, and did not produce any evidence that the tape and transcript were inaccurate.

and made many observations about the new proposal. At many points in the discussion, the team members emphasized the differences between the January 2009 proposal and earlier IEPs. Late in the meeting, Ms. Nelson stated: "When we receive the IEP back, which allows for these changes to be made, then we will put into place their registration at the new school ..."

17. The transcript shows that, throughout the lengthy IEP meeting of January 9, 2009, the District members made repeated and extensive efforts to explain the new IEP offer to Mother clearly and fairly, and to respond to her numerous questions and comments as well as they could. There is no evidence in the transcript that Mother was confused about the new offer or its many differences from earlier IEPs.

18. The transcript of the January 9, 2009 IEP meeting also confirms the testimony of District witnesses that there was no request for, or discussion of, a possible IEP provision requiring the District to telephone Mother before, during, or after any behavioral incidents concerning Student.

19. The transcript shows that the District members of the IEP team repeatedly offered to assist Mother if, on receipt of the new IEP proposal, she had any questions about its content. There is no evidence that Mother ever accepted those offers, which further shows that she understood the IEP when she read it. There is no evidence that Mother ever claimed she did not understand the IEP, or that it was missing a provision about telephoning her in the event of trouble, until after Student was suspended and nominated for expulsion in March 2009, and until Mother filed the complaint that led to this hearing.

20. In sum, there was no evidence, other than Mother's testimony, to support her claims that the September 2008 IEP contained a provision requiring the District to telephone her if trouble started; or that she participated in the January 9, 2009 IEP meeting using a copy of the September 2008 IEP; or that the District led her to believe



the two IEPs were similar; or that she could reasonably have believed any of those propositions. There was no evidence that she failed to understand the January 2009 IEP offer when it was mailed to her, or that it was missing any provision she could reasonably have expected it to contain, or that it was missing any pages.

21. On the contrary, the evidence showed that Mother followed the discussion using a copy of the March 17, 2008 IEP, not the September 19, 2008 IEP offer; that she was not misled into believing, or given any reason to believe, that the new offer was similar to any previous IEP; that Mother well understood that the January 2009 offer was new and different; and that there never was a provision in an earlier IEP requiring the District to telephone her if Student became involved in behavioral difficulties. The evidence also showed that when Mother received the January 2009 offer in the mail, she read it carefully, understood its provisions, and annotated provisions or statements with which she disagreed. The evidence showed that she signed the document knowing its contents, and was not confused or misled in any way.

22. For all the reasons above, the evidence did not show that the District committed a procedural violation of the IDEA.

#### ALLEGED IMPROPER EXCLUSION OF EVIDENCE

23. On April 3, 2009, Mother filed with OAH and sent to the District a 379-page collection of documents without any accompanying description or request. At the end of the non-expedited hearing, Mother attempted to introduce the entire collection of documents in evidence. The District did not object to the admission of the transcript of the January 9, 2009 IEP meeting, so the transcript was admitted. However, the District objected to the introduction of the rest of the documents on the grounds that it had no notice that Mother would seek to place the documents in evidence. It also objected because, in violation of the Order Following Prehearing Conference, the documents had not been placed in exhibit notebooks for the use of the parties, the witnesses, and the

ALJ, and exchanged five business days before the hearing pursuant to Education Code section 56505, subdivision (e)(7). When the objection was sustained on those grounds, Mother protested that exclusion of the documents (except for the transcript) came as a surprise to her, was unfair, and deprived her of critical evidence. She further claimed that she thought sending documents to OAH and the District on April 3, 2009, was all she had to do to place documents in evidence.

24. Mother's claim that she did not understand the process for introducing documents in evidence was not credible. She was advised three times in writing by OAH of the requirements for introducing evidence. Mother filed her complaint on March 26, 2009. On March 30, 2009, OAH served on her and on the District its standard Scheduling Order and Notice of Expedited Due Process Hearing and Mediation, which set forth dates and times for the expedited and non-expedited due process hearings, and for the prehearing events related to those hearings. The Order also explained basic procedural rules of OAH due process hearings, and encouraged the parties to pay careful attention to its provisions. Among the procedural rules explained in the Order was the proper method for preparing and presenting documentary evidence. The Scheduling Order provided, in relevant part:

Evidence: At least five (5) business days before the hearing, you must give to the other parties a copy of all documents and a list of witnesses that you plan to present at the hearing. Failure to do so may result in the exclusion of your documents and witnesses at the hearing. Exhibits shall be pre-marked prior to the hearing, and shall be placed in binders and tabbed. Each tabbed exhibit binder shall contain a detailed index of its contents, including page numbers. Any documentary exhibit more than four pages in length shall be

Bates-stamped or internally paginated. In the event of duplicate exhibits, the most legible version will be used. Each side shall prepare and have available at the hearing an additional exhibit binder for use by witnesses, and another additional exhibit binder for use by the ALJ.

25. On April 13, 2009, with Mother's participation, a prehearing conference was held in preparation for the expedited due process hearing on April 21 and 22, 2009. The next day, OAH served on the parties, including Mother, an Order Following Expedited Prehearing Conference, which contained an admonition about the preparation and presentation of evidence that was substantively identical to the admonition quoted above. The Order Following Expedited Prehearing Conference ended with the warning that "[f]ailure to comply with this order may result in the exclusion of evidence ..."

26. On May 15, 2009, with Mother's participation and in preparation for the non-expedited due process hearing, a second prehearing conference was held. On that day OAH served on the parties, including Mother, an Order Following Prehearing Conference for Non-Expedited Case that contained admonitions about the preparation and presentation of evidence identical to those contained in the previous Order Following Prehearing Conference.

27. Mother did not comply, at or before either of the hearings in this matter, with the above-quoted requirements for the preparation and presentation of evidence. Nor did she file a Prehearing Conference Statement before either hearing, as the Order of March 30, 2009, required, or provide a written list of witnesses to the District or to OAH at any time.

28. At the expedited due process hearing on April 21 and 22, 2009, Mother demonstrated her familiarity with the process of introducing evidence by participating in

that process. She objected to the proposed introduction of some District exhibits, and declined to object to the introduction of others. She introduced her own evidence. For a day and a half she actively participated in the process she now claims she did not understand. The record of that hearing, and the observations of the ALJ, show that at least by April 21 and 22, 2009, if not before, Mother was familiar with and knew how to use the proper procedure by which documentary evidence is introduced in evidence in OAH special education due process hearings.

29. In order to ensure that no injustice is done, however, Mother's objection to the ALJ's refusal to receive the entire 379-page collection of documents in evidence at the hearing will be deemed here a motion to re-open the record for the introduction of additional evidence. The ALJ has examined the documents in the collection of documents to determine whether, in fairness, the record ought to be re-opened to admit any of them in support of Mother's claims, and has determined that there is no reason to do so.

30. Most of the documents in the disputed collection of documents have no arguable relevance to the issue addressed here. Many of them relate to Student's disciplinary record. Many others chronicle a history of complaints to state and federal agencies. Still others relate only to Mother's other child, who also has special needs.

31. Mother asserted at hearing that a compliance complaint report from the California Department of Education (CDE) dated January 6, 2009, required the District to place into an IEP a provision that required the District to telephone Mother whenever a disciplinary problem with Student began to develop. That report is in the collection of documents, but it contains no such requirement. Nor does any other official document in the collection of documents, from CDE or any other state or federal agency, contain such a requirement. The January 6, 2009 compliance complaint report merely finds that the District did not appropriately document Student's placement, and requires

corrective action to redress that lack of compliance. There is therefore no reason to re-open the record to admit the Report, because it does not support Mother's claim and is irrelevant here.

32. Mother asserted at hearing that the September 19, 2008, IEP offer contained a provision that required the District to telephone Mother whenever a disciplinary problem with Student began to develop. However, that IEP offer only required the District to keep a log of communications with Mother. The meeting notes appended to the IEP state that Mother wanted to be called when trouble began to develop, but the IEP contains no provision requiring the District to call her. Even if it had contained such a provision, Student would not be entitled to its implementation, because Mother did not consent to the September 19, 2008, IEP offer. The IEP is page-numbered in the same way as the January 2009 IEP, and does not appear to be missing any pages. Nor does it contain any pages that might be "missing" from the January 2009 IEP that would have any bearing here. There is therefore no need to re-open the record to admit the September 19, 2008, IEP offer, because it does not support Mother's claim and is irrelevant here.

33. For the reasons set forth above, the motion to re-open the record for the introduction of additional evidence, in the form of some or all of the documents filed by Mother with OAH on April 3, 2009, is denied. There is nothing in those documents that supports her claims.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

## RIGHT OF PARENT TO PARTICIPATE IN IEP PROCESS

2. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a special education student is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards in the IDEA are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9<sup>th</sup> Cir. 2001) 267 F.3d 877, 882.)

3. A procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range Range School Dist. No. 23* (9<sup>th</sup> Cir. 1992) 960 F.2d 1479, 1484.)

## REQUIREMENT OF CLEAR WRITTEN OFFER

4. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in

presenting complaints with respect to any matter relating to the educational placement of the child. (*Id.* at p. 1526).

#### OBLIGATION TO PRODUCE AND EXCHANGE EVIDENCE

5. Subsection (e)(7) of section 56505 of the Education Code guarantees to each party in a special education due process hearing the right to receive from other parties to the hearing, at least five business days prior to the hearing, a copy of all documents and a list of all witnesses and their general area of testimony that the parties intend to present at the hearing.

ISSUE: DID THE DISTRICT DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE 2008-2009 SCHOOL YEAR BY SENDING TO MOTHER, AFTER A JANUARY 2009 IEP MEETING, AN IEP OFFER THAT WAS NOT THE OFFER SHE EXPECTED AS A RESULT OF THE IEP MEETING, AND THAT WAS MISSING PAGES THAT SHOULD HAVE BEEN INCLUDED, AND DID MOTHER SIGN THAT IEP OFFER WITHOUT REALIZING THAT IT WAS NOT THE OFFER SHE EXPECTED AND DID NOT HAVE ALL THE APPROPRIATE PAGES?

6. Based on Factual Findings 6-22 and 30-32, and Legal Conclusions 1-5, the District did not deny Student a FAPE by sending to Mother, after the January 9, 2009 IEP meeting, an IEP offer that was not the one she expected as a result of the meeting, or that was missing any pages that should have been included. Mother did not sign the January 9, 2009 IEP offer without realizing it was not the offer she expected, or without realizing that it did not have all the appropriate pages. The offer was complete and was consistent with the discussion of the parties at the January 9, 2009 IEP meeting. Mother understood the contents of the offer when she signed it.

#### 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. Here, the District prevailed on the single issue decided.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 5, 2009

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/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings