

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009060442

DECISION

Administrative Law Judge (ALJ) Susan Ruff, Office of Administrative Hearings (OAH), State of California, heard this matter in Los Angeles, California, on August 13 and September 10, 2009, and by way of a telephone conference call in Laguna Hills, California, on October 14, 2009.

Carly Munson, Attorney at Law, of Disability Rights Legal Center, and Hannah Cannom, Attorney at Law, of Milbank, Tweed, Hadley, and McCloy, appeared on behalf of Student (Student). Student appeared telephonically during part of the hearing and testified on his own behalf.

Barrett Green, Attorney at Law, and Daniel Gonzalez, Attorney at Law, of Littler Mendelson, appeared on behalf of the Los Angeles Unified School District (District).¹

Student filed his due process request on June 5, 2009. On July 29, 2009, the

¹ District representatives, assistants to the attorneys, and other individuals were also present for both sides at times during the case, but only the two lead attorneys for each side are listed above.

parties requested and received a continuance of the hearing. At the close of the hearing, the parties requested and received time to file written closing argument. The matter was deemed submitted upon receipt of the written closing argument on October 28, 2009.²

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE), since June 19, 2008, by failing to offer or provide Student with special education services, including, but not limited to, instruction, transition services and all related services?
2. Did the District deny Student a FAPE since June 19, 2008, by failing to comply with the procedural requirements of the Individuals with Disabilities Education Act (IDEA), the California Education Code, and applicable state and federal regulations by:³
 - a. Failing to notify Student of his procedural rights;
 - b. Failing to adopt or develop an individualized education program (IEP) for Student within 30 days of his transfer from the Barry J. Nidorf Juvenile Hall School to the Los Angeles County Jail on June 19, 2008;
 - c. Failing to hold an annual IEP team meeting to review Student's progress, evaluate his need for re-assessment, if any, and revise his educational program as needed; and
 - d. After Student made a written request for special education, failing to provide prior written notice explaining the reasons for refusing such services.

² Student's written closing argument has been marked as Exhibit S-36, and the District's written closing argument has been marked as Exhibit D-13.

³ Some of these issues have been revised and restated for purposes of clarity.

FACTUAL FINDINGS

1. Student is a 19-year-old man who was previously found eligible for special education and related services under the eligibility categories of specific learning disability and speech and language impairment. Student has an auditory processing disorder and is significantly behind his grade level in reading and math. Student is currently incarcerated in the Los Angeles County Jail, awaiting trial. He has not received any special education since he turned 18 years old.

2. Student's mother has lived in Bell, California, within the jurisdiction of the District, since before Student was born. Prior to Student's juvenile detention and adult incarceration, he lived with his mother. The evidence is undisputed that, were Student to be released from incarceration, he would once again live with his mother in Bell, California. Student's father lives in Los Angeles, but Student did not live with him prior to Student's incarceration, and his father has not been involved with Student's education.

3. Student has received special education since approximately the second grade. In the past, Student has attended school in the District and had IEPs developed by the District. For example, in February 2005, when Student was in the eighth grade, the District held an annual IEP for Student.

4. At some point in 2005, Student began attending the Soledad Enrichment Action Charter School (SEA Southgate). SEA Southgate is a Los Angeles County Office of Education Charter School. Student attended SEA Southgate and received special education services while he attended that school until he was arrested.

5. In February 2006, Student was arrested and detained in juvenile hall. In April 2006, Student was educationally placed at the Barry J. Nidorf Juvenile Hall School. He remained in juvenile detention until he was transferred to the adult jail on June 19, 2008. He received special education while he was in the juvenile facility.

6. Student's most recent annual IEP team meeting was conducted on August

24, 2007, while Student was attending at the Barry J. Nidorf Juvenile Hall School. At that time, the Los Angeles County Office of Education was the local educational agency (LEA) responsible for Student's education and conducted the meeting. The IEP team found Student eligible for special education and related services under the eligibility categories of specific learning disability and speech and language impairment. The IEP called for him to receive special education instruction in a special day class (SDC) for 240 minutes per day, speech and language therapy for 45 minutes weekly, counseling twice monthly for 15 minutes per session and behavior management twice weekly for 15 minutes per session. The IEP also called for him to receive extended school year services. The IEP provided that the special education and related services would continue for one year from the date of the IEP. The IEP noted that Student's triennial assessment would be due in June 2009.

7. In discussing Student's need for special education, the IEP stated:

[Student] currently participates in the highly structured and small sized class where the regular education program is modified to meet the individualized needs for [Student] per academic assessment and ongoing classroom observation. [Student] needs special education support to assist with academic weaknesses in support of the regular education program and to pass Proficiency Tests needed for graduation from high school. This is the least restrictive environment for [Student] at this time. Upon return to district of residence a new IEP will need to be held to determine the most appropriate educational placement within that setting.

8. Student had motivational problems regarding his education when he was at the juvenile facility. His IEP noted that he frequently refused to attend school and turn in

assignments. His IEP contained a behavior support plan related to this problem. In addition, Student missed school when the juvenile detention facility had a “lockdown” due to inmate disputes. These lockdowns might last a day or as long as a week depending on what the disturbance had been. For example, if there was a race riot, it could lead to a very long lockdown.

9. On May 5, 2008, an addendum to the August 24, 2007 IEP was agreed to and signed by the Los Angeles County Office of Education and Student’s mother. The addendum IEP increased the amount of counseling Student received to 30 minutes per week and called for a functional analysis assessment (FAA) to be conducted with respect to Student’s behavior. An FAA report was completed around May 25, 2008. The report noted two behaviors of concern – verbal/physical threats toward students and staff and that Student frequently got out of his seat to walk around the SDC classroom. According to the report, he was off-task in class and did not complete school work.

10. On June 1, 2008, Student turned 18 years old. On June 19, 2008, he was transferred from the juvenile facility to the Los Angeles County Jail. Since his transfer to the jail no IEP team meetings have been held for Student and he has received no special education or related services. The District did not provide him with a notice of his procedural safeguards and did not provide him with a 30-day interim IEP after he was transferred to the adult jail facility. The District has not conducted any assessments of him since that time. No action has been taken with respect to the FAA completed in May 2008.

11. Student has never received a high school diploma. Student wishes to receive a high school diploma to help him pursue vocational opportunities in the future. Student testified that he wishes to receive special education, and that he will participate in school lessons and complete school work if given the opportunity to do so at the jail. Student’s mother believes that Student has matured since he went to the adult jail and now thinks more about his future.

12. Student has attempted to keep his educational skills current during his time in the adult jail by reading books borrowed from other inmates or sent by his mother. His mother also sent him a dictionary to help with his reading. Both Student and his mother believe that his academic skills have regressed during the time he has been in the jail without special education.

13. Student's expert Carlos Flores also believes that Student has regressed educationally. Flores is a neuropsychologist licensed in California. He has a private psychology practice and conducts assessments of children and adults. He has taught college level classes related to psychology in the past and currently supervises psychology doctoral students. He assessed Student and conducted tests in July 2009. Some of the test scores indicated that Student has lost ground educationally. Flores believes that Student's failure to receive any education for over a year contributed to that decline.

14. Flores' assessment of Student took place in the attorney visitation booth in the jail. It was a private booth, although there was often noise from other inmates around them. Student was handcuffed to the desk. The assessment started at 10:00 a.m. and ended around 3:00 p.m. They took small breaks during the testing, but did not take a long lunch break. Flores believes that all the small breaks added up to approximately an hour.

15. On February 12, 2009, Student's attorney sent a letter to the District requesting that Student be provided with special education and related services.

16. On February 20, 2009, the District responded with a letter stating that it was "currently reviewing your request regarding this matter and will respond to you shortly." There was no further response by the District.

17. The County of Los Angeles, Office of the Sheriff (Sheriff's Department), has contracted with Hacienda La Puente Unified School District to provide adult education to inmates in the county jails. The program includes basic elementary school subjects, required high school subjects and elective subjects leading to elementary school

graduation and/or high school graduation. However, that contract does not include special education services for inmates.

18. Student is currently classified as a K-10 inmate in the jail, which is a high security classification that requires Student to be kept away from the rest of the inmate population. Student spends most of his day in his cell. He is permitted visitation by his attorney and family. He is permitted to have books in his cell, but there are security restrictions on things such as the types of book binding. Student is permitted to have pencil and paper and is permitted to write letters.

19. When Student's family visits, Student sees them in the visitor room. There is a glass window between them. His mother is permitted to stay and visit him from a half-hour to two hours, depending on whether the guards permit the longer stay. Student also has regular telephone conversations with his mother. These calls may last from ten minutes to two hours.

20. The Sheriff's Department encourages education of inmates in the jail and will work with a school district to make education available to Student. Any education provided must be within the parameters of the jail's security concerns. For example, the Sheriff's Department would not permit Student to leave the jail facility to attend education elsewhere.

21. During the hearing, neither party produced any evidence regarding the specific manner of providing special education that would be permitted by the Sheriff's Department for Student, given Student's K-10 classification. Lt. Ibelle, the only witness from the Sheriff's Department who testified at the hearing, did not know Student and was only familiar with Student's situation based on third party information. He did not state whether there would be restrictions on what would be permitted for Student, although he confirmed that his office would cooperate with the District's efforts to provide special education to Student as long as security was not compromised.

22. In 2009, Student's counsel filed a compliance complaint with the California Department of Education (CDE). In June 2009, CDE issued a compliance complaint report finding, in part, the District failed to comply with the federal and state education laws by failing to provide Student with special education. However, on July 15, 2009, CDE set aside that compliance complaint decision in light of this pending due process case.

23. Student's expert Flores believes that Student needs special education in order to gain educational benefit. He recommended that Student receive three 1-hour sessions a week of one-to-one math instruction, and two to three 1-hour sessions per week of one-to-one instruction in reading.⁴ The phrase "one-to-one" refers to one educator working directly with Student rather than teaching other pupils at the same time as Student. Flores believes that the education should be provided using a "multi-sensory approach" and that the one-to-one sessions should be provided by a trained special educator.

24. Flores believes that Student needs 90 minutes per week of speech and language therapy, provided in three 30-minute sessions per week. He admitted during his testimony that he is not an expert in speech and language pathology. He also recommended one hour per week of counseling for Student, given by a psychotherapist with experience working with pupils with auditory processing disorders or a cognitive behavior therapist.

25. For compensatory education to remedy the time that Student did not receive educational services after he turned 18, Flores recommended an additional one-

⁴ During his testimony, Flores explained that the one-hour educational block could consist of a 50-minute to one-hour time block. For the sake of simplicity, this decision will use the phrase "one hour" to describe the 50-minute to one-hour time block discussed by Flores.

hour session of one-to-one special education in reading per week and another one-hour session in math per week, as well as an additional 30-minute speech and language session per week.

26. Flores recommended additional accommodations for Student, including: 1) that Student be able to tape-record his educational sessions; 2) that Student receive and be required to complete homework; 3) that educational sessions for Student be held in a quiet environment; 4) that Student be given extra time for tests and time for breaks during his educational sessions; and 5) that the one-hour educational sessions not occur back-to-back. Student presented no evidence as to which, if any, of these accommodations could be provided in Student's current high-security environment. Flores did not testify regarding how these recommendations could be implemented in the jail.

27. The District's expert Jose Gonzalez took issue with Flores' opinion that Student needed psychotherapy. Gonzalez is a neuropsychologist working as a due process specialist for the District. He has taught as a college professor and has numerous publications relating to neuropsychology and children with disabilities. He referred to Student's test results on the Beck Anxiety Inventory and the Beck Depression Inventory conducted by Flores. The test results were in the mild-moderate range in anxiety and in the mild range in depression. In Gonzalez' opinion, these test findings were to be expected for an incarcerated individual, and were not severe enough to demonstrate a need for weekly psychotherapy. In formulating his opinion, Gonzalez did not meet with Student or conduct any testing of Student. Instead, he relied solely on Flores' test results.

28. The District also called Joe Salvemini as a witness to discuss the District's program to provide special education to pupils who are confined to their home or hospitals. However, he was unfamiliar with how services could be provided in a jail.

LEGAL CONCLUSIONS

1. Student, as the party requesting relief, has the burden of proof in this

proceeding. (Schaffer v. Weast (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. In California, eligibility for special education continues after age 18 for a pupil who is receiving or is eligible to receive special education before his or her 19th birthday and who has not completed his or her prescribed course of study, met proficiency standards or graduated from high school with a regular high school diploma. (Ed. Code, § 56026, subd. (c)(3), (4).) A "regular high school diploma" is defined as "a diploma conferred on a pupil who has met all local and state high school graduation requirements." (Ed. Code, § 56026.1, subd. (b).)

4. When a pupil is a minor, his or her parents hold the educational rights for the pupil. Once the pupil reaches the age of majority at 18 years of age, the educational rights transfer to the pupil. (Ed. Code, § 56041.5.)

STUDENT IS ELIGIBLE TO RECEIVE SPECIAL EDUCATION DURING HIS INCARCERATION

5. Both federal and state education law provide that eligible pupils should continue to receive special education and related services while incarcerated in a juvenile or adult correctional facility. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. §§ 300.2(b)(1)(iv); 300.324(d) (2006); Ed. Code, § 56000, subd. (a).) The only exception is for a pupil aged 18 through 21 who, in his or her educational program prior to incarceration, was not actually identified as being a child with a disability or did not have an IEP. (20 USC § 1412(a)(1)(B)(ii); Ed. Code, 56040, subd. (b).)

6. The evidence supports a finding that Student is eligible to receive special

education at the present time. As set forth in Factual Findings 1 – 10, Student has been eligible for special education for many years. He had an IEP finding him eligible for special education at the time he turned 18, and he has never received a high school diploma. He now holds his own educational rights and, as discussed in Factual Finding 11, he wishes to pursue his education and to receive special education. The exception set forth in Title 20 United States Code section 1412(a)(1)(B)(ii) and California Education Code section 56040, subdivision (b), does not apply to him because he had an IEP and was receiving special education and related services before his incarceration in the adult facility. As discussed in Factual Findings 6, 7, and 23, Student's most recent annual IEP found that he needed special education, and the most recent expert to assess Student (Flores) opined that Student still needs special education.

THE DISTRICT IS THE LEA RESPONSIBLE FOR PROVIDING STUDENT WITH SPECIAL EDUCATION

7. The main disputed legal issue in this case involves which LEA is responsible for providing a FAPE to Student while he is incarcerated in the Los Angeles County Jail. Student contends that the District is the responsible LEA and has denied Student a FAPE. The District denies that it is the responsible LEA.

8. This legal issue has been addressed by OAH and the federal court in the past. In *Student v. Los Angeles County Sheriff's Department, et al.* (2009) OAH case number 2009010064, the same Student who filed the instant due process case filed a previous case against various state and local agencies contending that those agencies were responsible for providing Student with a FAPE while he was in the Los Angeles County Jail.⁵

⁵ Los Angeles Unified School District was not one of the parties to that case. Arguably the doctrine of collateral estoppel might apply to the legal findings made in that case. However, because the District was not a party to that case and had no

9. In that case, OAH first recognized the question of which agency is responsible for providing special education to an eligible adult who is incarcerated in an adult correctional facility is a matter of state law. (20 U.S.C. § 1412(A)(11)(c).) The decision then determined that, absent a specific statutory or regulatory section assigning responsibility to a particular agency for an incarcerated adult special education student, the general residency rules for determining the responsible agency would apply. The primary responsibility for providing special education in California rests on the LEA, and a pupil's school of residence is determined by the residency of the parent or guardian. (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High School District* (2004) 117 Cal.App.4th 47, 57.) California Education Code section 48200, California's compulsory education law, requires that a student between six and 18 years of age attend school in "the school district in which the residency of either the parent or legal guardian is located...." That district usually becomes the LEA responsible for providing a FAPE to an eligible student. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a) (2006); Ed. Code, § 56026.3.)

10. With respect to pupils between 18 and 22 years, Education Code section 56041 provides, in pertinent part:

Except for those pupils meeting residency requirements for
school attendance specified in subdivision (a) of Section

opportunity to address the legal issues in that case, the District has been provided an opportunity to raise those legal issues herein. The decision in OAH case number 2009010064 is being considered and cited herein for its persuasive value, not as precedent or to collaterally estop consideration of these legal issues. (Cal. Code Regs., tit. 5, § 3085.)

48204, and notwithstanding any other provision of law, if it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, shall be assigned, as follows:

- (a) For nonconserved pupils, the last district of residence in effect prior to the pupil's attaining the age of majority shall become and remain as the responsible local educational agency, as long as and until the parent or parents relocate to a new district of residence. At that time, the new district of residence shall become the responsible local educational agency.

11. The OAH decision rejected Student's argument that Education Code section 48204, subdivision (a)(3) provided an exception to that rule for Student. That provision provides an exception to Education Code section 56041 for a student whose parent or legal guardian is relieved of responsibility, control and authority through emancipation. The OAH decision differentiated a student who turns 18 years old from an "emancipated" child. As the decision recognized, any other construction of that provision would effectively repeal Education Code section 56041, subdivision (a), because any nonconserved adult would by definition come under the exception. (*Student v. Los Angeles County Sheriff's Department, et al.*, *supra*, at pp. 4 – 6.)

12. The OAH decision determined that the residence of the Student's parent was the key factor in determining which LEA was responsible for Student's education. Because

none of the parties to that action met that residency factor, OAH dismissed that case. The United States District Court, Central District of California, in case number CV 09-1513-VBF(CTx) brought by Student against various entities, also found that Education Code section 56041 was the controlling California authority.

13. As discussed in Factual Finding 2, Student's mother resided within the jurisdictional boundaries of the District at all times relevant to this matter and still resides within the jurisdiction of the District at the present time. Under Education Code section 56041, the District is the LEA responsible for Student's education while he is incarcerated in the Los Angeles County Jail.

14. The District disputes that Education Code section 56041 is applicable to the instant case. The District relies on a 2003 decision from the Special Education Hearing Office (SEHO), OAH's predecessor in hearing California special education cases. In *Student v. Berkeley Unified School District and Albany Unified School District* (2003) SN-03-1989 (Berkeley), an adult pupil who held his own educational rights voluntarily moved into the jurisdiction of the Berkeley Unified School District. The pupil was not conserved and no guardian had been appointed for him. Berkeley argued that the school district in which the residence of the pupil's parents was located should be responsible for his education under Education Code section 56041.

15. The SEHO decision found that the adult pupil essentially became the "parent" for special education purposes once he turned 18 years old and received his educational rights. Therefore, when he chose to move into a new district, the district of his new residence was responsible for providing his education. The decision recognized that the purpose of Education Code section 56041 was to protect school districts with a large number of residential adult facilities from "becoming overwhelmed by the financial responsibility for the education of those adult students." Instead, the Legislature had intended to spread the responsibility for paying for the education of adult pupils in

residential facilities upon the various districts where the parents of the pupils lived. The SEHO decision went on to hold that, because the pupil was not placed in a residential placement in Berkeley by a different school district, but instead chose to move to Berkeley on his own, the exception to the general residency rule contained in Education Code section 56041 did not apply. Berkeley was responsible for providing the pupil with special education.

16. The District's reliance on that case is not well taken. Unlike the pupil in the Berkeley case, Student has not chosen to move into the Los Angeles County Jail. His residence of choice at all times in this matter has been his mother's residence in Bell, California, within the jurisdiction of the District. As discussed in Factual Finding 2, Student lived in Bell, California, at all times before his incarceration and would move back there if released from jail. Even if Student became the "parent" in the instant case when he turned 18, as the pupil did in the Berkeley case, jurisdiction for his special education still lies with the District.

17. The rationale underlying the Berkeley case provides additional support for the finding that Education Code section 56041 is properly applied to the instant facts. Just as many school districts are responsible for assisting with the financial burden of a district with residential adult facilities to prevent the latter district from being overwhelmed by the expense, under Education Code section 56041, multiple school districts may be responsible for providing education to incarcerated adults to prevent the school district in which the prison resides from being overwhelmed by that responsibility. Absent a legislative statement to the contrary, both the explicit language of Education Code section 56041 and the legislative intent behind it support its application to the facts of this case.

18. The District next argues that Education Code section 56041 should not apply because no LEA determined that Student should continue to receive education beyond age 18. This argument fails based on both the law and the facts. The District cites to no law

indicating that section 56041 creates a “condition precedent” of some new finding of eligibility that an IEP team must make before that section applies. Instead, unless and until one of the factors occurs that makes a pupil ineligible for special education, California law mandates that special education shall continue. (Ed. Code, § 56026, subd. (c).) Unless a pupil reaches the maximum age limit (22 years of age) or graduates with a high school diploma, a district must reassess a pupil before exiting that pupil from special education. (Ed. Code, § 56381, subds. (h), (i).) As set forth in Factual Findings 1 – 3, 6 – 7, and 10 – 11, none of the factors excluding Student from special education exist here.

19. Further, even if there was a “condition precedent” created by 56041, that condition has been met here. As discussed in Factual Findings 6, 7 and 10, Student had an IEP in effect at the time he turned 18 years old. That IEP was developed on August 24, 2007, when Student was 17 years old. That IEP called for Student’s special education and related services to remain in effect for one year, until August 24, 2008, after Student’s 18th birthday. The IEP also looked ahead to Student’s next triennial assessment date in June 2009. It was clear that the August 24, 2007 IEP team determined that Student needed special education after age 18.

20. The District’s interpretation of Education Code section 56041 would also violate public policy because it would permit a district to circumvent the procedural requirements of IDEA. In the instant case, no findings of eligibility were made after Student’s 18th birthday because no IEP meetings were held for him. In effect, the District is arguing that, by failing to comply with its statutory duty to hold IEP meetings for Student, a school district can make a pupil ineligible for special education beyond his 18th birthday. In its written closing argument, the District cites Student’s reluctance to attend school while at the juvenile facility as a reason that an IEP team might have decided that Student was not eligible for special education after he turned 18 years old. Perhaps that would have been a factor for the IEP team to consider had an IEP team meeting been properly

held. However, there was no such IEP team meeting and no findings made by an IEP team in this regard. That is not a defense in the instant case.

21. The District argues that the application of Education Code section 56041 would lead to “absurd” results because school districts might be responsible to provide special education to students who are incarcerated many miles away. However, the situation is no different from a residential placement under section 56041, in which a district many miles away may be responsible for providing the education. This “absurdity” argument was considered and rejected by the OAH decision in case number 2009010064 discussed above.

22. The District also contends that a district would not be able to track a pupil who left the district and later ended up in jail. For example, in the instant case as set forth in Factual Findings 3 – 5 above, Student attended SEA Southgate outside the jurisdiction of the District for a few months before his arrest. The District contends that it would be a great burden for school districts to have to track every child who left the district to see if they ended up in jail.

23. While that is a legitimate concern, it does not make Education Code section 56041 inapplicable here. A school district has an obligation to seek out children with disabilities who may need special education within its jurisdiction. (Ed. Code, §§ 56300, 56301.) It is the District’s responsibility to make arrangements with the Sheriff’s Department to notify the District about inmates who are eligible for special education.⁶

24. The evidence supports a finding that the District was responsible for providing Student with a FAPE after he turned 18 and was incarcerated in the Los Angeles

⁶ The CDE compliance complaint report indicated that the jail has made changes to its prisoner intake procedures to try to determine if incoming individuals are eligible for special education, so it can notify the applicable LEA.

County Jail.

THE DISTRICT HAS DENIED STUDENT A FAPE SINCE JUNE 19, 2008, BY FAILING TO OFFER OR PROVIDE STUDENT WITH ANY SPECIAL EDUCATION OR RELATED SERVICES.

25. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.) If a school district's program was designed to address a student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

26. As discussed in Factual Findings 10 – 16 above, in the instant case, the District provided no special education or related services whatsoever to Student, even after the District received actual notice of Student's request for those services in February 2009. Under those circumstances, there is no dispute that the District's program (or lack thereof) did not address Student's unique needs, did not comply with his IEP and was not reasonably calculated to provide him with educational benefit. The District denied Student a FAPE.

27. The District also denied Student a FAPE due to its failure to provide Student with related services, in particular speech and language services. The term "related services" means transportation and "such developmental, corrective, and other supportive

services (including speech-language pathology and audiology services...) as may be required to assist an individual with exceptional needs to benefit from special education....” (Ed. Code, § 56363, sub. (a).) A district is required to provide related services called for by the pupil’s IEP. As discussed in Factual Findings 6 – 7 and 10 – 11, Student’s prior IEP called for him to receive speech and language therapy as a related service. The District never provided that service to Student after he turned 18 years old.

28. Student met his burden of proving that the District denied him a FAPE by failing to provide any special education or related services from and after June 19, 2008, when he was transferred to the adult jail facility.

THE DISTRICT DENIED STUDENT A FAPE BY FAILING TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF IDEA AND CALIFORNIA EDUCATION LAW.

29. The IDEA and California Education law provide numerous procedural requirements that a school district must follow in developing and implementing a special education program for a pupil. Student contends that the District has violated four of these. In particular, Student contends that the District: 1) failed to notify Student of his procedural rights; 2) failed to adopt or develop an IEP for Student within 30 days of his transfer from the Barry J. Nidorf Juvenile Hall School to the Los Angeles County Jail on June 19, 2008; 3) failed to hold an annual IEP team meeting to review Student’s progress, evaluate his need for re-assessment, if any, and revise his educational program as needed; and 4) after Student made written requests for special education, failed to provide prior written notice explaining the reasons for refusing such services. The evidence supports a finding that the District failed to comply with all four of these procedural requirements.

30. An LEA must provide a notice of procedural safeguards to a parent at least one time during a school year. (20 U.S.C. § 1415(d)(1)(A); 34 CFR § 300.504(a) (2006); Ed. Code, § 56301, subd. (d)(2). Once the student turns 18 years old, the notice of procedural safeguards must be provided to both the student and the parent. (Ed. Code, § 56041.5.) As

set forth in Factual Finding 10, the District never provided that notice of procedural safeguards to Student.

31. Under IDEA and California special education law, an LEA is required to hold an IEP team meeting at least annually. (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, §§ 56043, subd. (d), 56343, subd. (d).) As set forth in Factual Finding 10, the District failed to hold any annual IEP team meetings for Student after he transferred to the adult jail.

32. If a pupil moves from one school district to another during the school year, the new district must provide the services from the student's existing IEP for a period not to exceed 30 days, "by which time the [district] shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law...." (Ed. Code, § 56043, subd. (m).) As set forth in Factual Finding 10, the District never implemented the existing IEP services or held a meeting to adopt the existing IEP or draft a new one.

33. An LEA is required to provide written notice to a pupil whenever the LEA refuses to initiate or change the identification, assessment or educational placement of the pupil. (Ed. Code, § 56500.4, subd. (a).) The law specifies in detail the information which must be contained in that notice. (Ed. Code, § 56500.4, subd. (b).) As set forth in Factual Findings 15 – 16, the District failed to provide the prior written notice of its denial of services after Student made his request in February 2009. The District's letter stating that the District would investigate and get back to the Student was by no means the detailed prior written notice required by the code.

34. Not every procedural violation of IDEA results in a substantive denial of FAPE. (W.G. v. Board of Trustees of Target Range School District (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may result in a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;

- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

35. The evidence supports a finding that each of these four procedural violations resulted in a substantive denial of FAPE. The failure to provide Student with his notice of procedural rights impeded his opportunity to participate in the decision making process regarding his education. He did not even know he was entitled to special education in the jail. The failure to hold an interim IEP meeting and an annual IEP meeting caused a deprivation of educational benefits because Student received no special education whatsoever and his skills began to regress. The failure to provide prior written notice regarding the District's refusal to provide Student with special education left him uncertain regarding whether he would receive education from the District, thereby impeding his right to a FAPE.

36. Student met his burden of proving that the District committed procedural violations of IDEA and that those violations resulted in a substantive denial of FAPE.

STUDENT IS ENTITLED TO ONE-TO-ONE EDUCATIONAL INSTRUCTION AND
COMPENSATORY EDUCATION AS A RESULT OF THE DISTRICT'S DENIAL OF FAPE.

37. The final question is the appropriate remedy for the denial of FAPE. When a district fails to provide a pupil with a FAPE, compensatory education may be awarded as a remedy. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (Parents of Student W v. Puyallup School District, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide a day-for-day compensation for time missed. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (Ibid.) The court is given broad discretion in fashioning a remedy, as long as the relief is

appropriate in light of the purpose of special education law. (School Committee of the Town of Burlington, Massachusetts v. Department of Education (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].) ⁷

⁷ During the hearing, the ALJ requested that both parties provide guidance through evidence and argument on what special education services could be provided to Student given Student's high-security environment. In Student's written closing argument, Student complained that this request placed an extra burden of proof on Student, beyond the burden normally held by a petitioner. Student is mistaken. A pupil who seeks compensatory education or other remedies is required to provide evidence to support the type and amount of any education requested, given the pupil's unique circumstances. In the instant case, Student's unique needs and circumstances include his incarceration. Any education provided to Student must, by necessity, take into account the need for his own safety and the safety of others in his current environment. For example, the least restrictive environment appropriate for Student must, due to his current circumstances, be the jail facility where he is incarcerated. (See, 34 C.F.R. § 300.324(d)(2).)

The ALJ's request for guidance was directed to *both* parties, not just Student, and was intended to provide the basis for a detailed order which the District could follow. A specific order of that type would provide Student with the immediate educational services he requires, and hopefully prevent any delay of those necessary services due to a dispute over the manner of providing services. However, because neither party chose to introduce evidence regarding what is logistically permissible in Student's current environment, this Decision will make a more general order for educational services and compensatory education. It will be the District's responsibility to work with the Sheriff's Department and other correctional agencies to determine how best to implement that

38. The District contends that one hour a week of “educational support” would be sufficient to meet Student’s needs and that Student should be educated in a “home study” situation. The District’s proposal is not reasonable given Student’s very severe needs and his lack of any special education services for over a year.

39. Student contends that Flores’ recommendations for services would be appropriate for Student’s education and compensatory education. As discussed in Factual Findings 23 – 28 above, Flores recommended 3 one-to-one sessions of reading and math per week, three sessions of speech and language per week, and one session of psychotherapy per week.

40. Flores’ opinion regarding the reading and math services is persuasive. Flores conducted the most recent assessment of Student and is familiar with his needs. Flores’ recommendation for one-to-one instruction is reasonable given Student’s unique needs and circumstances in the high-security jail. The evidence established that Student is allowed to receive visitors, and is allowed to have some types of books, pencils and papers. Given the depth of Student’s needs, the one-to-one sessions must be provided by a credentialed special education teacher. If the District does not have such a teacher available, it will be responsible for contracting with another agency or a nonpublic agency to provide one.

41. Flores’ opinion that Student needs an additional one-hour session per week of one-to-one instruction in reading and math as compensatory education is also persuasive. Student has lost an entire year of education. He needs this intense extra instruction to help him recover some of the educational time he has lost.

42. Flores’ opinion regarding the speech and language services is more

order to meet Student’s unique educational needs until a new IEP team meeting is held and a new IEP agreed upon by the parties.

troubling, because he admitted during his testimony that he is not a speech and language expert. His recommendation for three 30-minute speech and language sessions per week is twice as much as the 45 minutes per week called for in the last agreed-upon IEP for Student. However, the District presented no expert testimony to counter Flores' opinion in this regard, and Flores' opinion is persuasive that, after losing a year of speech services, Student requires more than he previously received. Flores' opinion that an additional 30-minute session per week of speech and language services is necessary to compensate Student for the year's work of lost services is also reasonable and persuasive.

43. As stated in Factual Findings 24 – 27 above, the parties dispute whether Student requires 60 minutes of counseling per week in order to gain benefit from his special education. Although Gonzalez is a highly qualified and credible expert, Flores' testimony is more persuasive in this case. Flores actually met with Student and assessed him, while Gonzalez based his opinion solely on test results written on paper. The last IEP team to consider Student's unique needs believed that counseling services were required. Although Flores' recommended more counseling than the amount called for in the May 5, 2008 addendum to Student's IEP, Student's circumstances have changed.

44. However, the evidence does not support a finding that only a counselor who has experience working with pupils with auditory processing disorders or a cognitive behavior therapist should provide the counseling services. Student presented no evidence that such an individual exists who would be available and willing to provide counseling in a jail. Instead, the services should be provided by a mental health professional duly licensed to provide services in the State of California.

45. Finally, Student requests that the other accommodations recommended by Flores, discussed in Factual Finding 26, be ordered. However, aside from the one-to-one instruction, it would not be appropriate to order the remaining recommendations. Flores did not testify regarding which of those accommodations could be provided to Student in

jail. The District will already have to work with the Sheriff's Department to determine the appropriate manner to provide the services to meet Student's unique needs. It would not be appropriate to lock the District into an accommodation that may not be available or safe in the jail setting. If Student believes that further accommodations are necessary, Student can request an IEP team meeting to discuss them. That will enable both parties to explore what can and cannot be safely provided to Student in his current high-security environment.

ORDER

1. Student's request for relief is granted.
2. The Los Angeles Unified School District is the entity legally responsible for providing Student with a free appropriate public education while he is incarcerated in the Los Angeles County Jail.
3. Within 60 days of the date of this Decision, the District shall begin providing special education to Student as follows:
 - a. Three 1-hour sessions per week of one-to-one instruction in reading provided by a credentialed special education teacher.
 - b. Three 1-hour sessions per week of one-to-one instruction in math provided by a credentialed special education teacher.
 - c. Speech-language therapy provided one-to-one by a licensed speech-language pathologist for 90 minutes per week, divided into three 30-minute sessions.
 - d. One-to-one counseling for one hour per week provided by a California licensed mental health professional, such as a psychologist, psychiatrist, or social worker, or a credentialed school psychologist.
 - e. The special education and related services described above will continue until Student is no longer eligible for special education, is transferred out of the

Los Angeles County Jail, or a new IEP is signed or ordered as a result of a due process hearing.

4. In addition to the weekly services discussed above, the District shall provide Student with the following special education and related services as compensatory education:

- a. One hour per week of one-to-one special education instruction in math provided by a credentialed special education teacher.
- b. One hour per week of one-to-one special education instruction in reading provided by a credentialed special education teacher; and
- c. 30 minutes per week of speech and language therapy provided by a licensed speech-language pathologist.
- d. The compensatory education services shall begin within 60 days from the date of this Decision and shall continue for one year after the starting date of those services.

PREVAILING PARTY

Pursuant to 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, Student prevailed on all issues heard and decided in this case.

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 in accordance with Education Code section 56505, subdivision (k).

Dated: November 16, 2009

_____/s/_____

Susan Ruff

Administrative Law Judge

Office of Administrative Hearings