

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

OAH CASE NO. 2009050182

v.

VALLEJO CITY UNIFIED SCHOOL DISTRICT
AND MARE ISLAND TECHNOLOGY
ACADEMY.

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter on August 31, 2009, in Vallejo, California.¹

Student's Mother represented Student, and Student was present at the hearing. Both Mother and Student left before the conclusion of the non-expedited hearing.

Elisa J. McArthur, Attorney at Law, represented the Vallejo Unified School District (District) at the hearing. Beth Majchrzak, the Director of Special Education for the District, was present throughout the hearing. Julie D. Robbins, Attorney at Law, represented the Mare Island Technology Academy (MIT) at the hearings, and Rick Van Adelsberg, MIT's Director, was present throughout the hearing.

¹ When Student originally filed this matter there were both issues that were "expedited" and "non-expedited." On May 29, 2009, the expedited hearing began, at which time the parties entered into a settlement of all expedited issues. The expedited case was dismissed at that time and the parties agreed to continue the non-expedited issues to August 31, 2009.

On April 30, 2009, Student filed a request for a due process hearing. On June 24, 2009, OAH granted Mother's request for a continuance of the hearing. At the hearing, oral and documentary evidence were received. Mother left before the hearing concluded. At the conclusion of the hearing, the District and MIT made oral closing arguments, following which the record was closed, and the matter was submitted.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) in the 2008-2009 school year (SY) by failing to modify the sixth grade curriculum specified in her individualized education program (IEP) to her third or fourth grade learning level?
2. Did the District deny Student a FAPE in SY 2008-2009 by not providing Student with the speech therapy services required by her IEP?

REQUESTED RELIEF

In her complaint, Student sought an order that MIT modify Student's curriculum to her third or fourth grade learning level and that MIT provide additional, and more convenient, speech therapy to Student. In her prehearing conference statement, Student added several requests for "monetary reimbursement," though no expenditures were alleged in the original complaint.

PROCEDURAL ISSUES

ADDITIONAL ISSUES FOR HEARING

Mother did not file a required prehearing conference statement before any of the three prehearing conferences held in this matter, and did not appear at the first two prehearing conferences. At the third prehearing conference on August 19, 2009, Mother sought for the first time to introduce additional issues to be decided at the non-expedited hearing scheduled to begin on August 31. MIT and the District did not

consent to the addition of new issues. The Order Following Third Prehearing Conference, filed August 19, 2009, advised Mother that she could introduce additional issues only by filing a motion to amend her complaint, allowing time for MIT and the District to respond, and that OAH lacked jurisdiction to grant such a motion less than five days before the beginning of a due process hearing. (Ed. Code, § 56502, subd. (e).) These requirements were also explained to Mother during the conference.

Mother did not attempt to add issues for hearing by the method explained during the third prehearing conference and repeated in the resulting Order. Instead, on August 24, 2009, she faxed to OAH a pleading entitled "Prehearing Conference Statement." The document was not accompanied by any claim that it had been served on the parties.² It made no request to add issues or to amend Student's complaint. Instead, it purported to list, as existing issues in the matter, the additional issues Mother wished to add. At hearing, the ALJ ruled that the document was not effective in adding any issues for hearing.

EXHIBITS AND WITNESSES

State and federal law require that a party to a due process hearing must, at least five business days before the hearing, deliver to the other parties copies of all exhibits the party intends to introduce at hearing, and a list of witnesses the party expects to call, with a brief explanation of the expected testimony of each witness. Any party has the right to exclude evidence not presented in compliance with those requirements. Mother was advised of these disclosure requirements in OAH's standard Scheduling Order and

² At hearing, Mother established that she had delivered copies of her "Prehearing Conference Statement" the next day, August 25, 2009, to the offices of the District and to someone on the MIT campus, though not to the attorneys for the parties.

Notice of Expedited Due Process Hearing and Mediation, filed and served on May 6, 2009, and in the orders following each of the three prehearing conferences.

After discussion of exhibits and witnesses at the third prehearing conference on August 19, 2009, Mother was instructed in the Order Following Third Prehearing Conference, filed the same day, that she was required to serve her exhibits and witness list on the attorneys for the District and MIT by the close of business on August 24, 2009, in order to comply with federal and state law. Mother failed to do so. MIT and the District then moved for an order in limine excluding all documentary evidence Mother might offer, and any witness Mother might call, on the ground that MIT and the District had not received Student's exhibits or witness list five business days before the hearing. In the event the motion was granted, MIT and the District also moved for an order of dismissal on the ground that Mother was unable to present a prima facie case.

The Order Following Third Prehearing Conference also instructed Mother to meet and confer by telephone on August 24, 2009, with attorneys for MIT and the District in order to establish a list of witnesses. Mother briefly participated in that conference but did not cooperate in producing the required list.

The Order Following Third Prehearing Conference also instructed Mother to provide one copy of Student's exhibits for the ALJ and one copy for witnesses at the beginning of the hearing. Mother failed to do so, although she brought with her a stack of loose paper that, she stated, constituted her own set of Student's exhibits. An evidentiary hearing was held on the motion in limine, which concluded when MIT and the District offered to make copies of Mother's papers, bind and identify them for use at the hearing, and distribute the copies for use by all the parties, the ALJ, and witnesses. The ALJ accepted the offer, over Mother's objection, and Student's exhibits were then reproduced and bound in usable form and distributed. The ALJ also accepted the

witness list in Mother's belated prehearing conference statement, though it had not been timely served. The motion in limine was denied.

MOTHER'S DEPARTURE FROM THE HEARING

When Mother examined the first two of her witnesses, she was unsuccessful in eliciting testimony that would support Student's claims. Because she asked many questions that were either irrelevant, or were directed to the new issues she wished to assert, several evidentiary rulings against Student were made. Mother contested some of these rulings with increasing vehemence.

During the authentication by an MIT witness of a lengthy exhibit in MIT's exhibit binder, counsel for MIT directed the witness's attention to five pages that were copies of five short emails the witness may have sent or received. Mother interrupted to object that she could not read those pages because the print was too small. The exhibit had not yet been fully authenticated or offered in evidence, and the emails were of such tangential relevance, if any, that they might well have not been admitted. The ALJ ruled that the emails, though in small type, were readable, and allowed the questioning to continue. Mother continued to assert the same objection, making further questioning of the witness impossible. Then Mother accused MIT and the District of deliberately giving her exhibits with print that was smaller than the print in the exhibit binders distributed to the ALJ and the witnesses, so that she would be unable to read the exhibits. The ALJ compared Mother's exhibits with his, ruled that the print size was identical, and rejected the accusation.³ Before solutions to Mother's reading difficulty (such as enlarging her

³ Subsequent examination of the exhibit binders produced by MIT and the District showed that, with the exception of the five emails, all proposed exhibits were normal and legible. Some of Mother's own exhibits were in small type and no more readable than the disputed emails. Mother had cross-examined witnesses using exhibits

copies of the emails) could be discussed, Mother claimed that she could not read half the exhibits in the evidence binders, that the proceeding was unfair, and that the ALJ was biased. She announced that she would no longer participate in the hearing and would file a complaint with the United States Office of Civil Rights. She then left the hearing room with Student. Attempts to persuade her to remain were unsuccessful.

After Mother and Student departed, MIT and the District renewed their motion to dismiss. The motion was denied. MIT and the District then presented witnesses, who were questioned by counsel for MIT and the District, and frequently by the ALJ. The hearing continued without Mother and Student until its conclusion.

FINDINGS OF FACT

BACKGROUND AND JURISDICTION

1. Student is a twelve year old girl who lives with Mother within the geographical boundaries of the District. She is eligible for, and has been receiving, special education and related services due to vision impairment and a specific learning disability. She has been diagnosed as having ocular albinism, nystagmus, and photophobia (abnormal sensitivity to light). Her uncorrected vision is poor, although she is not legally blind. When her vision is aided by glasses it is approximately 20/80. She suffers from visual processing delay and visual and other motor impairment. She is of average cognitive ability, but has difficulty with math, writing, articulation, and auditory conceptualization due to her disabilities. She also has difficulties with behavior.

no more legible than the emails. Mother's claim that she could not read half of the exhibits was therefore baseless. Mother stated that she is disabled because of brain surgery, but did not claim that her disability had any effect on her vision.

2. Before the school year (SY) 2008-2009, Student was home-schooled by Mother, and received special education support and services in the home. At the beginning of SY 2008-2009, Mother enrolled Student in the Mare Island Technology Academy (MIT), a charter school chartered by the District. MIT placed Student in a general education sixth grade class with services and supports including resource room, speech therapy, support of a vision specialist, and numerous accommodations and modifications directed toward assisting her vision and adapting curriculum to her needs. An IEP setting forth these decisions was created by MIT and the District, and signed by Mother, on January 6, 2009, and is the last agreed-upon and implemented IEP. Although Student had an earlier IEP during the fall semester, it is not in dispute and was not introduced in evidence.

GRADE LEVEL OF CURRICULUM

3. Student's contention that she required a third-to-fourth grade curriculum in all her subjects was unsupported by any evidence. The evidence showed that Student's grade-level abilities varied according to subject; she was able to do fifth-grade work in English language arts, although only second-to third grade level work in math. There was no evidence that a general reduction of the grade level of her curriculum would meet her unique needs or allow her to obtain educational benefit.

4. Student's January 6, 2009 IEP placed her in sixth grade general education class 80 percent of the school day, and in individual or small group instruction one hour a day in the resource room, one hour a week with a speech therapist, and 30 minutes a month obtaining vision support. The IEP set forth several goals not challenged here. It also provided for numerous accommodations and modifications to address her vision difficulties, including preferential seating, large print textbooks, access to a computer with a screen magnifier, audio books and accompanying computer software, various magnifying equipment, visual aids such as graphics organizers, and use of a calculator.

The modifications and accommodations for her processing difficulties included shortened tasks; testing in an individual or small group setting; oral reading of test questions; additional time to complete tests; and frequent breaks, including during tests. Student also received counseling for behavioral issues, and was ruled eligible for the extended school year.

5. Part of Student's January 6, 2009 IEP was a report by school psychologist Dyana Vukovich, who conducted a psychoeducational evaluation of Student in November and December 2008. Ms. Vukovich reported that Student's cognitive skills "fall well within the average range for her age," that her thinking and reasoning skills "fall within the normal range," and that she "clearly has the cognitive ability to learn at a rate similar to that of her peers." Ms. Vukovich also reported that, although Student had significant difficulties in math and writing, her functional reading level "ranges between the 4th and 5th grade level, which should be within the instructional range of most of her classes."

6. Oliver Taban, Student's small group instructor, testified that he believed Student was generally capable of doing sixth grade level work, at least in some subjects. He established that, at the beginning of the school year and after the January 6, 2009 IEP was signed, he relayed Student's required accommodations and modifications to all of her teachers and instructors. The evidence showed that Student actually received the accommodations and modifications the IEP required. It also showed that, on an individual basis, Student's teachers added various informal accommodations and modifications to the written list, and adapted Student's curriculum to the level at which she was capable of working.

7. Anna Hamilton, Student's sixth grade general education teacher, implemented all the accommodations and modifications required by Student's IEP. She ensured that Student received enlarged handouts as well as texts. She shortened

Student's test and assignment instructions as the IEP required. In addition, Student was given previews and reviews of those instructions, and Ms. Hamilton broke down instructions into small parts, checking with Student between parts to ensure Student understood them. Instead of written work, Ms. Hamilton allowed Student to type her essays on a computer and complete work on a graphic organizer. She allowed Student to select independent reading materials at her own reading level. She provided Student preferential seating at a particular table so that Student could have assistance from her "buddies," and provided individual assistance when needed. A special education instructional aide also frequently provided individual assistance to Student in her general education class. Ms. Hamilton, an experienced and well-credentialed teacher, testified credibly that the January 6, 2009 IEP offered Student a FAPE.⁴ She attended the January 6, 2009 IEP meeting and testified that "we [the IEP team] came up with everything we could possibly think of to assist her."

8. Ms. Hamilton reported to the IEP team in January 2009 that Student was frequently unprepared for class and did not complete class work and homework. She did not attribute these failings to Student's disabilities, but rather to her extremely poor attendance. The evidence showed that, at most, Student attended school on about 50 percent of school days. She was absent entirely during the last two weeks of instruction in 2008, did not appear for the first week of school in 2009, and missed many classes because of suspensions. According to an MIT letter to Mother on February 18, 2009, by

⁴ Ms. Hamilton has a master's degree in administrative services and a multi-subject teaching credential. She has taught for eight years at her current grade level, and has previously taught in other charter schools, private schools, and colleges. In addition, for eight to ten years she was part of a group of teachers who studied special education matters.

then Student had missed classes 223 times. Ms. Hamilton also reported that Student refused in her general education class to use the large print resources or the other tools that were in place for improving her vision, and rarely wore her glasses to school.

9. Michael Ryder taught Student's small group math support class. He credibly testified that he implemented all the accommodations and modifications required by Student's IEP.⁵ In addition, he used PowerPoint presentations to break down math skills into smaller, clearer parts, and allowed his students to work as a group. He testified that Student's math skills were approximately at the second or third grade level. He instructed her individually at her perceived skill level, and attempted to make sure she understood the materials and requirements. He frequently checked her work.

10. Rick Van Adelsberg, the Director of MIT, testified that he personally visited Student's classes to ensure that she received all the accommodations and modifications required by her IEP. He encouraged Student to attend her classes and her speech and language therapy, usually without success. He attended Student's IEP meetings. He testified credibly that, in his opinion, the January 6, 2009 IEP offered Student a FAPE and was fully implemented.⁶

⁵ Mr. Ryder has a multiple subject credential and a master's degree in curriculum and instruction with an emphasis on technology. He also has a bachelor's degree in computer administration. He is beginning his twelfth year of teaching, about two years of which has been with special education students.

⁶ Before he became MIT's Director, Mr. Van Adelsberg was a social science teacher for ten years, and a school principal for 16 years.

SPEECH AND LANGUAGE THERAPY

11. Andrea Brembry, a speech and language pathologist employed by the District, provided individual speech and language therapy to Student. Ms. Brembry has worked as a speech and language pathologist for the District for 21 years, and has worked in that capacity for 25 years. She testified that she was always available on campus for Student's appointments and ready to provide services, but Student showed up for speech and language therapy only about five times in the fall semester, and not at all in the spring semester until June. On all other occasions she would not appear, and no one would inform Ms. Brembry whether Student would or would not be present. Ms. Brembry would frequently ask others on campus whether Student was in school, and generally would be told that Student had either already gone home or had not come to school at all. Ms. Brembry's log of appointments and sessions with Student was introduced in evidence, and corroborated her testimony about Student's failure to attend. There was no evidence that the District failed to make the speech and language services required by Student's IEP available to her.

12. The evidence described above showed that Student's January 6, 2009 IEP addressed all her unique needs, was reasonably calculated to allow her to obtain educational benefit, and was fully implemented. There was no evidence that Student had any unique need that was not adequately addressed, or needed any accommodation or modification not provided. Nor was there any evidence that MIT and the District did not fully implement Student's IEP to the extent they were able, given her poor attendance. There was no evidence to the contrary. Mother did not establish any defects in the IEP or its implementation during her brief questioning of two witnesses.

13. Student received low grades in SY 2008-2009 and failed some classes. On this record, the evidence demonstrated that the most likely causes of Student's academic difficulties were extremely poor attendance; wearing her glasses only rarely;

refusing to wear contact lenses; failure to take advantage of the many available devices for improving her vision during her general education class; and failure to take advantage of available speech therapy. The record also shows that Student's education suffered because her attitude and attention were uneven, and her behavioral outbursts sometimes involved fighting, theft, profanity, aggression, and threatening others. Finally, the record shows that Student's education was often interrupted by Mother's unannounced, uninvited, and disruptive appearances on campus and in Student's classes.

LEGAL CONCLUSIONS

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].)

LIMITATION OF ISSUES

2. A party who requests a due process hearing may not raise issues at the hearing that were not raised in her request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

3. A party who requests a due process hearing may amend her complaint only if the other party consents, or by permission of an ALJ, but such permission may not be granted later than five days before the hearing. (20 U.S.C. § 1415(c)(2)(e); Ed. Code, § 56502, subd. (e).)

PREHEARING DISCLOSURE OF EVIDENCE AND WITNESSES

4. A party to a due process hearing has the right to receive from the other parties, at least five business days before 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. (Ed. Code, § 56505, subd. (e)(7).) Any party has the right to prohibit the introduction of any evidence at a due process hearing that has not been disclosed to that party at least five business days before the hearing. (34 C.F.R. § 300.512(a)(3); Ed. Code, § 56505, subd. (e)(8).)

ELEMENTS OF A FAPE

5. Under the Individuals With Disabilities in Education Act and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

6. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

7. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with

the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Issue No. 1: Was Student denied a FAPE in SY 2008-2009 because her sixth grade curriculum, as provided in her IEP, was not modified to her third or fourth grade learning level?

8. Based on Factual Findings 1-13, and Legal Conclusions 5-7, Student was not denied a FAPE because her curriculum was not modified to her third or fourth grade learning level. Student's learning level varied from course to course. In each course, her instructors adapted her curriculum to her apparent learning level. Student's January 6, 2009 IEP addressed all her unique needs, was reasonably calculated to allow her to obtain educational benefit, and was fully implemented. Student's academic difficulties did not result from any defect in the design or implementation of her IEPs. Instead, those difficulties were a consequence of Student's chronic absenteeism; refusal to wear her glasses to school; refusal to utilize, in her general education class, the many available tools to improve her vision; refusal to attend speech therapy; uneven attitude and attention, undesirable behavior, and frequent interruptions of her education by her Mother's visits to campus.

Issue No. 2: Was Student denied a FAPE in SY 2008-2009 because Student was not provided with speech therapy services, as required by her IEP?

9. Based on Factual Findings 1-2 and 11-13, and Legal Conclusions 5-7, Student was not denied a FAPE in SY 2008-2009 because she was not provided with

speech therapy services as required by her IEP. At all times the District was prepared to deliver the required 60 minutes a week of speech therapy, but Student failed to take advantage of those services. Student attended her speech therapy sessions only about five times in the fall semester, and not until June in the spring semester.

ORDER

Student's requests for resolution 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 and MIT prevailed on both 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 17, 2009

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings