

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010010587

DECISION

Administrative Law Judge (ALJ) Lisa O'Brien, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on April 6 and 7, 2010, in Van Nuys, California.

Student's mother (Parent) represented Student, and attended both days of hearing.

Attorney Mary L. Kellogg, of Lozano Smith, represented the Los Angeles Unified School District (District). Lisa Kendrick, Administrative Coordinator of the Due Process Unit for the District, was present throughout the hearing.

Student's request for due process hearing (complaint) was filed on January 12, 2010. A continuance was granted on March 3, 2010. At the hearing, oral and documentary evidence were admitted. At the close of hearing, a continuance was granted until April 30, 2010, for the purpose of filing closing briefs. The record was closed and the matter was submitted for decision on April 30, 2010.

ISSUES

1. Did District fail to provide Student a free appropriate public education (FAPE) during the 2009-2010 school year (SY), in conformity with his individualized education program (IEP), by failing to provide Student home instruction? ¹
2. If so, does District owe Student compensatory education for the 2009-2010 SY?

CONTENTIONS

Student, whose medical condition limits his ability to attend a school campus, contends that District failed to provide him a FAPE by refusing to allow his Parent to choose the specific instructor for his home instruction program. Student argues that his medical illness requires structure, consistency and routine, and that the “revolving door” of instructors provided by the District will not allow him to make progress on his educational goals. Student contends that District owes him compensatory education for the 2009-2010 SY because of that failure.

District contends that it provided Student a FAPE by offering to continue home instruction at the beginning of the 2009-2010 SY; and that Parent was not entitled to refuse the services of a different teacher. District further contends that any student attending District’s Carlson Home Instructional Program and Hospital School (Carlson) must provide a medical referral for each enrollment period; and that Parent failed to provide medical referrals authorizing home instruction for the 2009-2010 SY.

¹ Parent testified about certain allegations against the District that were not alleged in the complaint and, therefore, were not considered in this Decision.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is an eight-year-old boy who resides in the District with his mother and sister. He is eligible for special education and related services because of multiple orthopedic disabilities and mental retardation. He has been diagnosed with congenital neuroblastoma, leukodystrophy, epilepsy, feeding difficulty and global developmental delay. He must wear a helmet for safety reasons while at school.

2. Student's first recorded attendance at school was his enrollment in the District for the 2008-2009 SY. Parent contacted District in October 2008 and Student has received home instruction through Carlson from December 2008 through the 2008-2009 ESY.

2008-2009 SY AND ESY

3. Student's IEP team met on March 20, 2009, for a three-year re-evaluation. Student previously had an IEP in preschool, but it had long been inactive as Student was never enrolled in school. The team developed an IEP covering the period of March 2009 through March 2010. Parent agreed to the goals in the proposed IEP and to certain assessments, but declined to consent to the recommended placement in a special day class (SDC) at the Lokrantz Special Education Campus (Lokrantz). Parent was concerned about Student's exposure to other children's illnesses, as Student has a compromised immune system. Student's physician participated in the IEP and provided the first medical referral form, recommending home instruction until the conclusion of the 2008-2009 SY, at which time the recommendation was a campus setting for the 2008-2009 ESY.

4. The parties entered into a written agreement (Agreement) on April 27, 2009, providing that, beginning with the 2008-2009 ESY, Student would attend Lokrantz.

Under the Agreement, Student was to receive home instruction in the interim. After completing the 2008-2009 SY, Student was hospitalized for 11 days. The 2008-2009 ESY began July 5, 2009. Upon Student's discharge from the hospital, Parent provided a medical referral for home instruction valid through the 2008-2009 ESY. Student was provided home instruction, from July 20 through July 30, 2009, for the ESY instruction he had missed during his hospitalization. Teacher Anna Marie Morse, who had provided Student home instruction since December 2008, was assigned to instruct him for the ESY.

MEDICAL REFERRAL FORMS FOR THE 2009-2010 SY

5. In order to continue receiving home instruction, Student must have a medical referral form from his physician recommending home instruction. The referral must have a projected date for Student's return to a school campus. In order to ensure that home instruction services are not interrupted, a new referral for home instruction services must be submitted prior to the expiration of the projected date on the previous referral. Parent submitted Student's second medical referral form on July 15, 2009. This referral recommended home instruction for the 2008-2009 ESY, with a projected return date to a school campus of "unknown." Upon receipt of this medical referral, District staff telephoned Student's physician requesting a projected date to return to a school campus so that home instruction services would not be interrupted. District was advised that Student had a medical appointment on September 25, 2009, and he would be re-evaluated at that time. However, District never received a completion date for the second referral. At the beginning of the 2009-2010 SY, District had not received a medical referral recommending that Student continue in-home instruction.

6. At the hearing, Parent provided a letter from Student's physician, dated April 2, 2010, stating that she had completed the third medical referral form in November 2009. This medical referral form recommended home instruction for the

2009-2010 SY through March 1, 2010. The letter made no assertion that she provided District with that referral. The physician was not called as a witness. District established that Parent provided this third, and final, medical referral form to District on March 2, 2010, and that it had expired the day before District received it. Student had no complete medical referral form recommending home services on file at the beginning of the 2009-2010 SY.

REFUSAL OF HOME INSTRUCTION FOR 2009-2010 SY

7. Anticipating that a third medical referral for home instruction would be provided after the follow-up medical appointment on September 25, 2009, District attempted to provide home instruction at the beginning of the 2009-2010 SY. District established that it offered services "on or about" the beginning of the 2009-2010 SY. District assigned home instruction teacher, Linda DeMarco. District assigned Ms. DeMarco because, under its contractual obligations to the teachers' union, Ms. DeMarco had a higher priority for assignment to home instruction than Ms. Morse. Ms. DeMarco called Parent on September 9, 2009, and Parent refused her services. District telephoned Parent again on September 22, 2009, and offered to assign a home instruction teacher. Parent continued to refuse the services and requested that Student's previous teacher, Ms. Morse, be re-assigned. Student has a difficult time adjusting to change, and requires structure, consistency and routine. Parent was concerned that changing to another teacher would have what she called "a revolving door" effect on Student, preventing him from reaching his educational goals. However, the evidence showed that it only took Student "a couple of weeks" to adjust to Ms. Morse. District established that Ms. DeMarco was a qualified home instruction teacher, who was able to meet Student's needs. Student presented no evidence that the home instruction services of Ms. DeMarco were, or would have been, inadequate to meet Student's needs to further his

educational goals. Because of Parent's refusal, Student has not received special education or related services since July 30, 2009.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as petitioner, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

ELEMENTS OF A FAPE

2. Under the Individuals with Disabilities Education Act (IDEA) 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).) "[S]pecial 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 are required to assist the child in benefiting from special education. (Ed. Code, § 6363(a).) Related services include "(i)nstruction in the home or hospital." Instruction in the home or hospital is specifically included as a DIS in California. (Ed. Code, § 56363, subd. (b)(4).)

3. 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. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690](*Rowley*).) Second, the tribunal must decide whether the IEP

developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (Ibid.)

4. In determining whether a district offered a student a FAPE, the proper focus is the adequacy of the district's placement offer, not on any alternative proposal. (Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1314.). The Supreme Court has noted that the IDEA assumes parents, as well as districts, will cooperate in the IEP process. (Shaffer v. Weast, *supra*, 546 U.S. at p. 53 [noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools"]; see also, John M. v. Board of Educ. of Evanston Tp. High School Dist. 202 (7th Cir. 2007) 502 F.3d 708, 711, fn. 2; Patricia P. v. Bd. of Educ. of Oak Park (7th Cir. 2000) 203 F.3d 462, 486; Clyde K. v. Puyallup School Dist., No. 3 (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5 [rejecting a "my way or the highway" approach by parents' attorney].). Parents who refuse to cooperate in a district's efforts to formulate an IEP are not entitled to relief. (See, e.g., Loren F. v. Atlanta Indep. Sch. Sys. (11th Cir.2003) 349 F.3d 1309, 1312; MM v. Sch. Dist. of Greenville Cty. (4th Cir.2002) 303 F.3d 523, 535; M.S. v. Mullica Tp. Bd. of Educ. (D.N.J. 2007) 485 F.Supp.2d 555, 568 [denying reimbursement because parents failed to cooperate in completion of IEP]; E.P. v. San Ramon Valley Unified School Dist. (N.D.Cal., June 21, 2007, Case No. C05-01390) 2007 WL 1795747, pp. 10-11 [nonpub. opn.]). When parental non-cooperation obstructs the process, courts usually hold that violations do not deny the student a FAPE. (See C.G. v. Five Town Community School Dist. (1st Cir. 2008) 513 F.3d 279.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (Rowley, *supra*, 458 U.S. at p. 208.) Parents generally have no right to compel an assignment of particular teachers or other educational personnel to implement the IEP. These decisions are normally within the discretion of the school district. (Moreno Valley Unified School District (OAH 2009) 109

LRP 50610), citing Letter to Hall, 21 IDELR 58 (OSEP 1994), and Rowley, *supra*, 458 U.S. at pp. 207-208.).

ISSUE NO. 1: DID DISTRICT FAIL TO PROVIDE STUDENT A FAPE DURING THE 2009-2010 SY, IN CONFORMITY WITH HIS IEP, BY FAILING TO PROVIDE STUDENT HOME INSTRUCTION?

5. In order to receive home instruction, a student must have "a medical report from the attending physician and surgeon...stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil's return to school." (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).) Based on Factual Findings 5 and 6, Student failed to provide a complete medical referral for home instruction services for the 2009-2010 SY.

6. Placement at home is one of the most restrictive placement options. Instruction in the home is limited to those pupils who have been identified as individuals with exceptional needs and for whom the IEP team recommends such instructions or services. The task of providing current medical referrals was the responsibility of the Parent, who failed to ensure that Student's medical providers complied with this requirement. The referral provided by Student, prior to the 2009-2010 SY, failed to include a projected calendar date for the student's return to school. Based on Factual Findings 5 and 6, and Legal Conclusions 1 and 5, District was not obligated to provide home instruction due to Parent's failure to provide a current medical referral for the 2009-2010 SY.

7. Had the District been obligated to provide home instruction under these circumstances, these facts do not warrant a finding that District's failure to do so denied Student a FAPE. When a district does not provide educational or related services as called for by the IEP, the district does not deny the child a FAPE, unless it is shown to

have materially failed to implement the child's IEP. Material failure occurs when there is more than a minor discrepancy between services provided to the disabled child and those required by the IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 822). Here, District offered to provide home instruction and the sole reason Student did not receive the services was Parent's refusal because she disagreed with the choice of teacher. Based on Legal Conclusion 4, District was not required to assign the teacher Parent requested. As a result, as determined in Legal Conclusion 4, any failure by District to provide home instruction did not result in the denial of a FAPE.

COMPENSATORY EDUCATION

8. An Administrative Law Judge may order a school district to provide compensatory education to a pupil who has been denied a FAPE. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1486). Based on Factual Findings 2 through 9 and Legal Conclusions 1 through 8, the weight of the evidence does not support a finding that District denied Student a FAPE; therefore, District does not owe Student compensatory education for the 2009-2010 SY.

ORDER

Student's requests for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

Dated: May 20, 2010

_____/s/____

LISA O'BRIEN

Administrative Law Judge

Office of Administrative Hearings