

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

EASTSIDE UNION SCHOOL DISTRICT
(LANCASTER).

OAH CASE NO. 2012050086

DECISION

Administrative Law Judge (ALJ) Marian H. Tully, from the Office of Administrative Hearings (OAH), State of California, heard this matter on July 31, and August 1, 2012, in Lancaster, California.

Student's father (Father) represented Student. Student's mother (Mother) attended both days of the hearing.¹ The hearing was open to the public at Parents' request.

Attorney Sundee Johnson represented Eastside Union School District (District). District Superintendent Dr. Mark Marshall attended both days of the hearing.

Student filed a request for due process hearing on May 2, 2012, and filed an amended request on May 15, 2012 (complaint). On June 27, 2012, for good cause shown, OAH granted Student's unopposed request to continue the hearing to July 31, 2012.

At the close of the hearing on August 1, 2012, the ALJ granted the parties' request for a continuance to file written closing arguments by August 10, 2012. The

¹ Father and Mother are also referred to collectively as Parents.

record was closed and the matter was submitted upon receipt of written closing arguments on August 10, 2012.

ISSUE

Did District commit a procedural violation of the Individuals with Disabilities Education Act (IDEA) by holding an interim individualized education program (IEP) meeting on April 26, 2010, without notification to Student's Parents, which prevented the Parents from participating in the IEP decision making process?

FACTUAL FINDINGS

1. Student was 16 years old at the time of hearing. Student was found to be eligible for special education and related services under the category of emotional disturbance (ED) in December of 2009. In December 2009, Student lived with her Parents in the Westside School District. Pursuant to an IEP dated February 25, 2010, Student attended eighth grade at Joe Walker Middle School in an ED special day class (SDC) program.

2. On April 13, 2010, Student was involved in a fight during a bus ride on the way home from school and was suspended from Joe Walker Middle School. That same day, she ran away and was taken into police custody. The Department of Child and Family Services placed Student in foster care on April 14, 2010.

3. Student was placed with a foster parent who resided within District. Student resided with the foster parent within the boundaries of District at all times relevant to this matter.²

² As of the time Student filed the complaint in this matter, she was attending the Devereux School in League City, Texas.

4. On April 26, 2010, District and the foster parent executed an IEP Administrative (Interim) Placement form and a referral to an ED SDC program at the Yellen Learning Center in the Palmdale School District.³ The February 25, 2010 IEP was attached to the interim placement form. Parents' names, correct address, and home, work and cell phone numbers appeared on the first page of the IEP. District made no attempt to contact Parents. The foster parent, District representative David Howard, and the District psychologist were the only participants in the placement decision.

5. Mr. Howard did not know Student, did not review or consider Student's IEP, and never met the foster parent. District made no attempt to determine whether the foster parent had been granted the right to make educational decisions on Student's behalf. Mr. Howard was familiar with special education law but he did not think it was pertinent to determine who held educational rights.

6. The referral to the Yellen Learning Center was expected to take approximately two weeks to process. In the interim, Student was placed in an SDC at Cole Middle School, the school of residence of the foster parent. Cole Middle School did not have an ED SDC program. Student was enrolled in Cole Middle School from April 30, 2010, until May 14, 2010. Student attended three full days, four partial days, and was absent one day. On May 10, 2010, Student was suspended for three days following a physical altercation in a classroom.

7. On April 30, 2012, the Los Angeles Superior Court issued an order to return Student to her school of origin, Joe Walker Middle School, and affirming Parents as the holder of educational rights. District was not aware of this order until documents were exchanged in preparation for this hearing.

³ District, Westside School District, and Palmdale School District are all within the Antelope Valley Special Education Local Plan Area (SELPA).

8. Student returned to Joe Walker Middle School on May 14, 2010, and she graduated from the eighth grade there on June 5, 2010.

9. The parties stipulated: (1) District now knows Parents had educational rights from April 26, 2010 through May 14, 2010; (2) Parents were not contacted by the District at any time during Student's enrollment in District; (3) Parents were not invited or provided notice of any IEP team meetings during Student's enrollment in District; and (4) District did not provide Parents with any educational records during Student's enrollment in District.

10. Dr. Mark Marshall, District superintendent, testified at hearing and acknowledged that the change in placement without Parents' participation was not authorized under the IDEA and should not have happened. Student's case was the first case he had seen involving a situation like this. Generally, school principals find out who holds educational rights. Following this incident, District's enrollment forms were changed to include information about who holds educational rights. District also now presumes biological parents have educational rights in the absence of documents to the contrary.

11. Parents did not learn of the District's participation in the April 26, 2010, change in placement until Father discovered the IEP Administrative (Interim) Placement form in documents Father obtained in March 2012. Father persuasively established that he would not have consented to placement at Cole Middle School because it did not have an ED SDC program, and had he been part of the process, he would have advised District accordingly and would not have consented to the placement. No evidence was presented concerning the difference between the SDC program at Cole Middle School and the ED SDC program at Joe Walker Middle School.

LEGAL CONCLUSIONS

1. Student contends District committed a procedural violation of the IDEA and thereby denied Student a free appropriate public education (FAPE) by failing to notify Parents of, and failing to obtain Parents' participation in, the April 26, 2010, decision to change Student's placement. In the complaint, Student sought a return to her school of origin as a remedy, however, at hearing, Father acknowledged that this was not practical in light of Student's graduation from middle school and current placement. In her closing argument, Student did not request a specific remedy.

2. District admits Parents should have been contacted regarding the change of placement and afforded the opportunity to participate. District contends, however, this procedural violation of the IDEA did not result in a denial of FAPE because, even if Parents had participated in the process, District's interim placement offer would have been the same. Lastly, District contends, even if the procedural violation denied Student a FAPE, there is no appropriate remedy.

APPLICABLE LAW

3. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

4. A request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, sub. (I).) This time limitation does not apply to a parent if the parent was prevented from requesting a due process hearing because the district withheld information that the district was required to provide to the parent. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the

action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Education*. (2d Cir. 2003) 334 F.3d 217, 221.)

5. A child with a disability has the right to a FAPE under the IDEA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (p).)

6. In *Board of Education 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; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

7. In the case of a child with a disability who, within the same academic year, transfers into a district from another district operating within the same SELPA, the new district shall continue, without delay, to provide services comparable to the services described in the child's existing IEP unless the parent and the local educational agency agree to develop adopt and implement a new IEP. (20 U.S.C. §1414 (d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e) (2006); Ed. Code, § 56325, subd. (a)(2).)

8. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational

placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4; see also 34 C.F.R. § 300.116 (2006) (parents required to be involved in placement decisions and there is a preference toward placing children in the school closest to their home).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 195 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

9. For purposes of the IDEA, the term "parent" means a biological or adoptive parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. (20 U.S.C. § 1401(a)(23); 34 C.F.R. § 300.30(a)(1) & (b) (2006).)

10. Written notice must be given to the parents of a child with a disability a reasonable time before a public agency proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a FAPE to the child. (20 U.S.C. § 1415 (b)(3); 34 C.F.R. § 300.503(a) (2006).)

11. In *Rowley*, the Supreme Court emphasized the importance of adherence to the procedural aspects of the IDEA. In pertinent part the court stated: "...we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard." (*Rowley*, 458 U.S. at pp. 206-207.)

12. A procedural error does not automatically require a finding FAPE was denied. A procedural violation results in the denial of a FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

13. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School. Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) These are equitable remedies. Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child, when the school district has failed to provide a FAPE. (*Id.*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496.) In addition to reimbursement of expenses incurred by parents, school districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Puyallup, supra*, 31 Fed.3d at p. 1496.) An award to compensate for

past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington, supra*, 471 U.S. at p. 374.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 Fed.3d at p.1496.) The ALJ has the authority to order a school district to comply with the procedures of the IDEA. (Ed. Code, § 56505, subd. (f)(4).) The IDEA does not provide for an award of monetary sanctions or damages as compensation for a loss of educational benefit.

Analysis

14. As an initial matter, Student demonstrated an exception to the two year statute of limitations. There is no conflict in the evidence. District withheld information it was required to provide to Parents. Parents first learned of Student's placement at Cole Middle School in March 2012. Thus, Parents' claim accrued in March 2012 when they first learned of the placement they believed to have been inadequate. Therefore, this action is not barred by the statute of limitations. (Factual Findings 9 through 11; Legal Conclusion 4.)

15. As to the substance of the issue, Student has proven that District committed a procedural violation of the IDEA by not giving Parents notice of the April 26, 2010 interim placement, which Parents contend was not comparable to the ED SDC program in Student's current IEP, and denied Parents the opportunity to participate in the decision. Student was enrolled in the ED SDC program at Joe Walker Middle School when Student was placed in foster care on March 14, 2010. District had a copy of the current IEP. The IEP contained Parents' names and contact information, and showed that

Parents were active participants in the IEP process. The IEP was dated approximately a month before District was required to provide a program comparable to Student's existing IEP, yet District made no effort to determine whether Parents continued to have educational rights and made no effort to notify Parents. The interim placement without notification to Parents, District deprived Parents of the opportunity to participate in the process. In sum, Student met her burden to prove she was denied a FAPE by District's procedural error. (Factual Findings 1, 4 through 6, 9 and 10; Legal Conclusions 5 through 12.)

16. District argues that there was no denial of a FAPE because District's offer would have been the same with or without Parents' participation. This argument fails. Student is not required to prove she was denied an educational benefit or that the interim placement did not provide a FAPE. The failure to provide notice eliminated any opportunity for Parents to participate in the decision. The IDEA expressly provides, consistent with *Rowley's* emphasize on procedure, that significantly impeding a parent's right to participate in placement decisions is a denial of a FAPE. Accordingly, Student has met her burden of showing denial of a FAPE on the ground District did not follow IDEA procedure regarding parental participation. (Factual Findings 1, 4 through 6, and 9 through 11; Legal Conclusions 6, 7 and 9 through 12.)

17. Although Student has met her burden of proof she was denied a FAPE, there is no evidence to support an appropriate remedy. When determining an award of compensatory education, the inquiry must be fact-specific. (*Reid, supra*, 401 F.3d at p. 524.) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*) Here, Parents were understandably upset when they learned there had been a brief change in Student's placement without notice or their participation. However, Parents did not learn of this change of placement until

approximately two years after the events occurred and after Student had graduated from Joe Walker Middle School. Parents presented no evidence at hearing to show that the educational program Student received during her brief time at Cole Middle School was materially different from the services she had been receiving under her IEP at Joe Walker Middle School. Thus for purposes of determining if compensatory education is appropriate, there was no evidence of, and no way by which to calculate, any loss of educational benefit that might have resulted from the difference between the few days Student attended the SDC program at Cole Middle School and the educational benefit she would have obtained from the ED SDC program at Joe Walker Middle School. In sum, Parents did not put on any evidence of what compensatory services would be of benefit to Student to make up for any loss of educational opportunity during the short period of time that Student's living situation was in flux due to actions by the Superior Court. (Factual Findings 2, 3, 7, 8 and 11; Legal Conclusion 13.)

18. To the extent Parents were deprived of their opportunity to participate, the evidence did not support any equitable remedy such as ordering an IEP team to meet to consider Parents' input, or ordering District to comply with the IDEA. Student was returned to her original placement within a matter of days, which is what Parents would have requested had they participated in the decision process. As discussed above, given that over two years have passed and Student is now in high school, ordering a do-over of the IEP at issue would serve no purpose. Lastly, although OAH may order a District to comply with IDEA procedures, District has acknowledged that it failed to comply with the IDEA in this case. This appears to have been an isolated situation and District currently has in place procedures which would secure future compliance. In sum, although Student demonstrated that District committed a violation of IDEA procedures, Student is not entitled to a remedy. (Factual Findings 1, 6 through 8, and 10; Legal Conclusion 13.)

ORDER

All of Student's requests for relief are denied.

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. In accordance with that section, the following finding is made: Student prevailed on the sole issue heard and decided in this case; however, District prevailed on the issue of remedy.

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: September 4, 2012

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings