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. 2014090068

DECISION

Parents, on behalf of Student, filed the due process request (complaint) with the Office of Administrative Hearings, State of California, on September 2, 2014, naming Los Angeles Unified School District.

Administrative Law Judge Sabrina Kong heard this matter in Van Nuys, California, on October 14, 2014.

Student's parents represented Student. Student's parents attended the hearing. Anahid Hoonanian, Attorney at Law, represented District. Ryan McNeill, District's Specialist for Compliance Monitoring, attended the hearing.

The record was closed and the matter was submitted for decision when the hearing concluded on October 14, 2014.

ISSUES[1]

1. Did District deny Student a free appropriate public education from August 12, 2014, to the filing of the due process complaint on September 2, 2014, by:

a. Failing to provide Student an appropriate teacher for home instruction; and

b. Failing to place Student at Eagle Rock High School, her school of residence?

SUMMARY OF DECISION

Student demonstrated that District denied Student a FAPE by not providing an appropriate teacher for 15 school days while enrolled in the Carlson Home Hospital School (Carlson). As a remedy, Student is awarded 25 compensatory hours of home instruction. Further, District shall designate a case representative familiar with Student's needs and her individualized education program with whom Parents may communicate. Student did not meet her burden of establishing that District denied Student a FAPE by not placing Student at her school of residence.

FACTUAL FINDINGS

1. Student is a 14-year-old girl who resided within District at all relevant periods. Student was eligible for special education under the category of multiple disabilities with orthopedic and visual impairments. Student's diagnoses included cerebral palsy spastic quadriplegia, optic atrophy and cortical vision impairment/blindness, and suffered from seizures and global delays. District placed Student in Perez Special Education Center for the 2013-2014 school year where she

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[1] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

received home instruction, and at Carlson for the 2014-2015 school year, because Student's physician determined she was medically fragile. Both Perez and Carlson are District-sponsored home instruction programs. The physician's referral for home instruction was silent on what hours of the day Student should receive the home instruction.

2. District held an annual IEP team meeting on April 9, 2014, and an amendment IEP team meeting on May 29, 2014, where speech and language/communication services were added to Student's IEP. Both IEP teams concluded that home instruction was the least restrictive environment for Student and that Student needed to receive her education 100 percent outside of the general education environment. The IEP's reported that Student had not met three out of her four goals because of prior inadequate instruction time. Parents consented to both IEP's which provided Student with 300 minutes a week of home school instruction. The IEP documents did not specify in what increments the 300 minutes District would deliver instruction or during which hours of the day. The IEP team also did not discuss whether Student would receive home instruction in the late afternoon, outside of the regular 8:00 a.m. to 3:00 p.m. school day.

3. Carlson's first day of school was August 12, 2014, but because of District's oversight, a home teacher through Carlson was not provided to Student beginning on the first day of instruction. On or about August 19, 2014, Mother called Carlson and informed the school of this oversight. In response, Carlson began to search for a home teacher because it did not have one available. On August 25, 2014, when Mother called the assistant principal, Margie Oliveres, Ms. Oliveres informed Mother that a home teacher had been assigned and would be contacting Parents. That evening, teacher Rosalie Cagungun informed Mother that she was available the following day, August 26, 2014, from 4:30 p.m. to 6:30 p.m. to provide home instruction to Student. Mother

informed Ms. Cagungun that Student was not alert and would not be awake between the hours of 4:30 p.m. to 6:30 p.m., and asked that Ms. Cagungun come at 9:00 a.m., or in the morning. Ms. Cagungun informed Mother that she worked as a special education teacher in an elementary school from 7:30 a.m. to 3:30 p.m., and as a supplemental teacher for Carlson in the afternoon. She was only available to provide home instruction to Student in the late afternoon. Mother told Ms. Cagungun not to come in the late afternoon. District did not inform Parents that it would provide home instruction to Student outside of the 8:00 a.m. to 3:00 p.m. regular school day until Ms. Cagungun first informed Parents on August 25, 2014.

4. On August 26, 2014, Mother called Ms. Oliveres informing her that Student was not alert or awake in the afternoon, and incapable of learning, and requested a morning home teacher. Ms. Oliveres informed Mother that no home teachers were available to teach Student in the morning. On August 27, 2014, Ms. Cagungun spoke with Father and informed him that she would be available to provide home instruction to Student starting at 4:00 p.m. or 4:30 p.m., on an interim basis until District could locate a morning teacher. Father informed Ms. Cagungun that, because of her unique needs, Student needed a morning teacher, and declined Ms. Cagungun's late afternoon instruction on an interim basis. Parents did not believe that Student could learn or benefit from home instruction beginning at 4:00 p.m. because of Student's special needs, including medicinal impact on her alertness. On August 28, 2014, Carlson's principal for eight years, Joe Salvamini, sent a letter to parents confirming the availability of Ms. Cagungun, and Carlson's inability to secure a home teacher for the morning.

5. Carlson provided a morning teacher, Anthony Morales, to Student around September 15, 2014.

6. At hearing, Mr. Salvamini concluded that, pursuant to the May 29, 2014 IEP, from August 12, 2014 to September 12, 2014, Student missed 22 school days of

instruction based upon the 300 weekly home instruction minutes, or the equivalent of one hour per school day. Further, Mr. Salvamini confirmed that Mr. Morales was available to make-up those hours to Student by December 20, 2014, and beyond that date if necessary. Mr. Salvamini also shared that Carlson provided home instruction between 8:00 a.m. and 7:00 p.m. He explained that Carlson had a set number of full time instructors who provided instruction between 8:00 a.m. and 3:00 p.m., and another group of instructors, who provided instruction from 3:00 p.m. to 7:00 p.m.

7. Student missed 15 school days, or 15 hours of home instruction, from August 12, 2014 until September 2, 2014.

8. In Parents' opinion, replacing the amount of time of home instruction Student missed hour for hour was inadequate because the May 2014 IEP team had already documented that Student had not met three out of her four goals because of prior inadequate instruction time. Parent requested that District provide a total of 55 hours to compensate for the home instructional hours lost from and after the first day of the 2014-2015 school year, consisting of 25 hours of instruction from Mr. Morales, and 30 hours of instruction from a non-public agency.

9. Although both Parents agreed that Student was incapable of attending Eagle Rock High School because of her medically fragile condition necessitating home instruction, they wanted Student to be placed there "administratively" for handling paperwork and to provide Parents the convenience of having a building close to home to go for questions regarding Student's IEP and services. Parents also believed that placement at Eagle Rock High School would give Student a sense of community involvement even though she could not physically attend school there.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[2]

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)[3]; Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible 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(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "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); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and

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[2] Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below

[3] All subsequent references to the Code of Federal Regulations are to the 2006 edition.

services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Disrict v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "'meaningful' educational benefit," all of these

phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents or local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must 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. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).) At the hearing, the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

ISSUE 1(A) – NO APPROPRIATE TEACHER PROVIDED

5. Student contends that District denied her a FAPE because District did not provide an appropriate teacher for 15 school days during the 2014-2015 school year. District contends that it did not deny Student a FAPE because failure to provide a teacher for home instruction for 10 school days, until it offered the afternoon teacher, was not a material failure to implement the IEP. Further, District contends that as of August 26, 2014, a teacher was available to provide home instruction to Student, but Parents refused the offer because of their preference of having a morning, instead of an afternoon, teacher.

6. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) (*Van Duyn*) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.* at p. 822.) "We also emphasize that nothing in this opinion weakens schools' obligation to provide services "in conformity with" children's IEPs." (*Id.* at p. 822.)

7. This was not a situation where there was a discrepancy in the amount of instruction provided to Student and the amount required by Student's IEP. District's failure to provide Student with any of her 300 minutes of weekly home instruction for 15 school days, and more, is not a "minor discrepancy between the services a school provid[ed] to a disabled child and the services required by the child's IEP" under *Van Duyn*. The student at issue in *Van Duyn* received some but not all of the services under the IEP which led the court to conclude that a minor discrepancy in implementation was an immaterial failure by that school district. Here, Student did not receive *any* home instruction for 15 school days because District did not have an available teacher during regular school hours. Further, Student showed that a likelihood of demonstrable harm would result from her not receiving home instruction during those 15 days because Student's 2014 IEP's had previously reported that she did not meet three out of her four goals because of inadequate instruction time. The evidence established that missing more instructional time would impact whether Student could meet her goals. The evidence did not support District's contention that the lapse in instruction time was immaterial.

8. District contends that it provided an appropriate teacher, Ms. Cagungun, on August 26, 2014, but Parents refused Ms. Cagungun's services based on their personal preference for morning instruction. Before August 25, 2014, the parties had not discussed the possibility that Carlson would only be able to provide Student with the equivalent of one hour of home instruction per school day in the late afternoon, outside of a regular school day. Because the IEP's did not state that District would provide home instruction outside of a regular school day, District's provision of instruction outside of the regular school day would require an amendment to the IEP and parental consent. Parents were persuasive in showing that refusing Ms. Cagungun as an interim teacher until a morning teacher could be assigned to Student was related to Student's medical condition and her related ability to access her education, and not merely their personal preference.

9. Given Student's special needs and findings by the IEP team that she did not meet her goals because of inadequate instruction time, the evidence established that Student would likely suffer further setbacks from not receiving any home instruction for 15 school days. Student met her burden by the preponderance of evidence that District denied Student a FAPE by not providing Student a home instructor during the regular school day for 15 school days.

ISSUE 1(B) – PLACEMENT AT EAGLE ROCK HIGH SCHOOL

10. Student contends District should have administratively placed Student at Eagle Rock High School (even though Parents agreed that actual instruction was to occur in the home) and District's failure to do so was a denial of FAPE. District contends that it provided a FAPE because Carlson was the appropriate least restrictive environment, not Eagle Rock High School.

11. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K.*

v. Longview School District (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

12. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.) "Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" and that providing a continuum of alternative placements includes "the alternative placements

listed in the definition of special education" and "supplementary services" to be provided in conjunction with regular class placement." (34 C.F.R. § 300.115.)

13. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra,* 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: 1) regular education, 2) resource specialist programs, 3) designated instruction and services, 4) special classes, 5) nonpublic, nonsectarian schools, 6) state special schools, 7)

specially designed instruction in settings other than classrooms, 8) itinerant instruction in settings other than classrooms, and 9) instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

14. In this case, no dispute exists that home instruction was the appropriate educational environment for Student. The IEP team considered the least restrictive environment for educating Student and concluded that the home was the appropriate environment because of Student's medical needs. This was confirmed by a physician who ordered that Student receive home instruction because of her medical fragility. Parents consented to the IEP for home instruction . At the hearing Parents confirmed that home instruction was appropriate for Student during the relevant period and stated that Student was not physically well enough to receive instruction at Eagle Rock High School. Parents' request for an administrative placement at Eagle Rock High School was unsupported by any evidence that doing so was an appropriate least restrictive environment for Student or otherwise necessary for Student to access her education. Instead, the evidence established that the request was based on parental preference for the convenience of having a physical school in the community for administrative accountability--which was not an appropriate basis for changing Student's placement. Student did not meet her burden on this issue. District did not deny Student a FAPE by failing to administratively place her at Eagle Rock High School.

REMEDIES

1. Student prevailed with respect to Issue 1(a) because she demonstrated that District failed to provide an appropriate home teacher for 15 school days during the 2014-2015 school year. However, as to Issue 1(b) Student did not prevail because she failed to demonstrate that Eagle Rock High School was an appropriate placement in the

least restrictive environment. As a remedy for Issue 1(a), Student requests[4] 55 hours of compensatory education to compensate for the 15 hours of home instruction Student would have received if District provided an appropriate home teacher. Further, Student requests an order that a written procedure be in place for each year, semester, or change in placement or services, and that Parents be notified in advance of each change. Student also requests that a District representative or counselor be assigned to Student's case to communicate with Parents on all matters. District contends no remedies are appropriate because Student did not meet her burden of persuasion on any issue.

2. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996, 85 L.Ed. 2d 385].) In addition to reimbursement, school districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p.1496.)

3. An award of compensatory education need not provide a "day-for-day compensation." (*Student W. v. Puyallup School Dist., supra,* at p. 1497.) 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.*)

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[4] Student's request for a home teacher during the morning hours was moot at the time of the hearing, because District provided one after the filing of the complaint.

4. Student missed 15 school days, or 15 hours of home instruction from August 12, 2014, until September 2, 2014. Although an hour for hour replacement of home instruction for the hours lost would be inadequate based upon the IEP team's findings that Student needed more instruction time to meet her goals, Parents' request for 55 hours of compensatory instruction time, close to four times the actual number of instructional hours lost during the relevant period, was excessive and not supported by any credible evidence. Further, Parents did not provide any evidence establishing that, based on her unique needs, Student would be able to access that quantity of hours in addition to the hour a week of regular instruction. Likewise, Parents did not establish why Student required 30 hours of instruction from a non-public agency as opposed to a District teacher, especially because District confirmed that the home teacher was available to provide the compensatory hours until they were used. Based on the above, a block of 25 home instruction hours, or a little less than twice the number of home instruction hours lost during the relevant period, is reasonable. District shall provide Student with a block of 25 hours of home instruction with a credentialed District teacher. The block of 25 instruction hours will expire if not used by August 30, 2015, or when Student is no longer a District resident.

5. To address Parent's concerns about communication with District about implementing Student's IEP, District shall designate a case representative who is familiar, or shall become familiar, with Student's needs and her IEP, with whom Parents may communicate. Student's request for a written procedure for changes in placement or services, and that Parents be notified in advance of each change is already addressed by the IDEA governing special needs students, with which District has to comply. Therefore, a separate order for District to comply with the IDEA is duplicative and unnecessary.

ORDER

1. District shall provide a block of 25 hours of compensatory home instruction hours to Student to be provided by a credentialed District teacher. The compensatory hours shall be made available to Student within 30 days of the date of this decision.

2. Within 30 days of the date of this decision, District shall communicate to Parents the name of a designated case representative who is familiar, or shall become familiar, with Student's needs and her IEP, with whom Parents may communicate.

3. Any compensatory education time awarded by this Decision must be used by August 30, 2015, or it will be forfeited. In addition, District's obligation to provide compensatory education under this Decision will end if Student is no longer a District resident.

4. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party as to Issue 1(a), and District was the prevailing part as to Issue 1(b).

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 20, 2014

/s/

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings