

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GARVEY SCHOOL DISTRICT.

OAH CASE No. 2014110367

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 30, 2014, naming Garvey School District. The matter was continued for good cause on November 17, 2014.

Administrative Law Judge Judith L. Pasewark heard this matter in Rosemead, California, on June 2 and 3, 2015.

Carolyn Olson, Attorney at Law, represented Student. Mother attended the hearing on behalf of Student. Student did not attend the hearing.

Sharon Watt, Attorney at Law, represented District. Alma Guerrero, Special Education Coordinator, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 24, 2015. Upon timely receipt of the written arguments, the record was closed and the matter submitted for decision.

ISSUES

1. Whether District denied Student a free appropriate public education by

failing to offer Student an appropriate placement as of October 1, 2014, through October 30, 2014.<sup>1</sup>

2. Whether District denied Student a free appropriate public education by failing to provide home-hospital instruction from October 1, 2014, through December 2014.

## SUMMARY OF DECISION

Student is a resident of Garvey School District who attended school in the Alhambra Unified School District. During the time Student attended school in Alhambra, Alhambra was responsible for providing him with a FAPE. Student contends he left Alhambra and returned to District in October 2014, and that District failed to provide him an appropriate placement for October 1, 2014, through October 30, 2014. Student has failed to establish that he withdrew from his placement in Alhambra during this period. Instead, the evidence supports a finding that Student presented information to Alhambra suggesting only a temporary absence from school, and Alhambra initially attempted to schedule an IEP meeting to discuss a change of placement. While Alhambra may have failed to track Student's attendance or follow up on Student's placement, District had no information to support a finding that Student intended to terminate his placement in Alhambra or return to District prior to October 31, 2014.

Student contends District failed to provide him with home-hospital instruction between October 1, 2014, and December 4, 2014. Dr. Jaqueline Silk's October 28, 2014 letter did not obligate District to provide Student with home-hospital instruction. As

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<sup>1</sup> Student withdrew his third issue regarding failure to assess during the pre-hearing conference. Further, at hearing, Student withdrew his request for remedy of non-public school.

stated above, District was unaware Mother had unilaterally removed Student from his Alhambra special day class until October 31, 2014. Student failed to establish that home-hospital instruction was required after October 31, 2014.

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTION

1. Student is an eight year old boy living with his mother and maternal grandmother within the boundaries of District. He qualifies for special education under the category of autism. Pursuant to the due process complaint filed on his behalf, Student attended an autism special day class in Alhambra, for the 2013-2014 school year and the 2014-2015 school year through the date of filing his complaint on October 30, 2014.<sup>2</sup> No testimony or evidence was presented to explain why Student was attending school outside of his school district of residence or whether his placement was part of a multi-district or SELPA program.

2. Pursuant to his April 5, 2013 individualized education program for the 2013-2014 school year, Student completed first grade in Michelle Yang's autism special day class at William Northrup Elementary School in Alhambra.

### 2014-2015 SCHOOL YEAR

3. On March 31, 2014, Alhambra held Student's annual IEP team meeting for determination of Student's placement and services for the 2014-2015 school year. The IEP team, including Parent, determined Student would continue to attend Ms. Yang's autism special day class for the second grade. Ms. Yang was considered an exceptional

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<sup>2</sup> Student dismissed Alhambra Unified School District from this complaint prior to this hearing.

teacher. The autism-based special day class was highly structured, utilized applied behavior analysis, and supported communication and socialization skills. The March 31, 2014 IEP also provided Student with individual occupational therapy services 30 minutes per week, and group speech and language services 60 minutes per week. Parent consented to this IEP.

4. Toward the end of the 2013-2014 school year, Mother noted Student appeared stressed and began acting out. She discussed Student's behavior with Ms. Yang. Ms. Yang did not know why Student was anxious, and reported no problems in class. School personnel, including the school psychologist, who had observed Student in the classroom throughout the first grade, reported Student was engaged and cooperative in class; he was doing very well and progressed on his goals. On the other hand, Student did not participate in the extended school year program, as Mother believed him to be too stressed to attend.

5. In the fall of 2014, Student began the second grade in Ms. Yang's special day class at Northrup. Again, Mother noted Student was very stressed and did not want to go to school. Mother again asked Ms. Yang what was upsetting Student in class. Ms. Yang reported Student was doing fine in class and there was nothing unusual to report.

6. Early in September 2014, Mother took Student to school. He was upset and crying. When Mother asked Student what was wrong, Student stated Ms. Yang had hit him. Mother believed Student, and emphasized that although Student is autistic, he does not exhibit bad behaviors, nor does he lie. While it remains disputed whether any incident with Ms. Yang actually occurred, Student's stress was real according to his pediatrician and psychologist.<sup>3</sup>

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<sup>3</sup> The issues in this case do not revolve around whether Ms. Yang hit Student or whether or not Student developed his extreme anxiety from other sources. Therefore, this decision will not further discuss the diverse opinions of whether a hitting incident

7. On September 26, 2014, Ms. Yang contacted Mother by email at Stacie Colman-Hsu's request. Ms. Colman-Hsu is the Principal at Northrup. Ms. Yang reported that Student listened to teachers, followed rules and showed his best in her class. Sometimes he got upset because she (Ms. Yang) corrected his mistakes. "He never has any hard time in my class." Ms. Yang suggested a meeting or perhaps an IEP meeting to discuss Mother's concerns.

8. Mother responded by email on September 26, 2014, reporting that something was wrong. Student cried constantly and said he didn't want to go back to class on a daily basis. Student was not able to completely express himself and could not give a reason with details. Mother requested an IEP meeting.

9. On September 29, 2014, Ms. Yang forwarded the September 26, 2014 emails to Nick Laahs, the school psychologist at Northrup, and Ms. Colman-Hsu. Ms. Yang confirmed that she had never had any behavior problems with Student, and was very frustrated by Mother's concerns. Ms. Yang wanted to work this issue out in an IEP meeting with Mother. Ms. Yang also indicated in her email that she planned to suggest Student move into District's general special day class at his next annual IEP meeting, because Student had been showing great progress and could be more successful in a less restricted environment than the autism class.

10. Subsequently, in September 2014, Mother contacted Mr. Laahs to discuss Student's increasing anxiety towards attending school. Mother requested an evaluation of Student's behavior. She also requested to observe Student in his classroom. Mother spoke directly with Mr. Laahs only once. He acknowledged Mother's report of Student showing unexplained stress in the school setting, and Mother's request for an IEP meeting. No one from Alhambra responded to Mother's requests for assessment,

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actually occurred.

observations, or an IEP meeting during September 2014. While Mr. Laahs recalled speaking with Mother in October 2014, a record review indicates he actually spoke with Mother on September 29, 2014, at which time he emailed various Alhambra staff members to set up the IEP meeting requested by Mother. Mother's preferred date for the IEP meeting was October 10, 2014, at 1:10 p.m. There is a handwritten note indicating Parent cancelled the IEP meeting on October 8, 2014. Mother insists she did not cancel the IEP meeting; nor did she ever receive an invitation to an IEP meeting. No IEP invitation or notice of IEP meeting was presented at hearing.

11. On September 29, 2014, Mother spoke with Ms. Colman-Hsu regarding her concerns that Student did not want to go to school. Ms. Colman-Hsu's had frequently observed Student arriving at school in August-September 2014. She never saw Student in distress; he appeared to be "a happy kiddo" at school. Ms. Colman-Hsu agreed to allow Mother to observe Student at school. Mother did not ask Ms. Colman-Hsu for an IEP meeting or assessment, nor did Ms. Colman-Hsu observe any necessity for an IEP meeting.

12. In an attempt to allay Student's apparent stress, Ms. Colman-Hsu consented to Mother's request that a family member be allowed to walk Student to his classroom each morning. Pursuant to school policy, all non-staff persons, including family members, must check in at the school office prior to entering the school campus or classrooms. This agreement was an exception to the general rules, and was not immediately communicated to District staff.

13. On September 30, 2014, Student's grandmother attempted to walk Student to the classroom, but was stopped by Ms. Yang. Grandmother does not speak English and Ms. Yang does not speak Spanish. Ms. Yang directed Grandmother to the office, pursuant to regular procedures. Grandmother got visibly upset, and Student got upset. At hearing, Grandmother was exceedingly emotional as she described Ms. Yang,

pulling Student from her, to take a crying Student to class.

14. When Grandmother picked Student up from school on September 30, 2014, she noted Student was covered in hives. She took him directly to his doctor. Jennifer L. Shih, M.D., examined Student and wrote two "Excuse for School" notes. One note indicated Student was under Dr. Shih's care from October 6, 2014, through October 10, 2014, and could return to school on October 13, 2014. The other note indicated Student was under Dr. Shih's care October 1, 2014, through October 3, 2014, and could return to school on October 3, 2014. The return to school dates on the notes did not coincide, however both notes were signed and dated September 30, 2014. Dr. Shih's notes did not contain a medical diagnosis or anticipate an extended absence from school. Dr. Shih did not request or recommend home-hospital services.

15. On October 1, 2014, Grandmother asked an English-speaking friend to take the "Excuse for School" notes to the school office at Northrop. Grandmother did not accompany the friend into the office when the notes were delivered. However copies were made and returned to Grandmother. Mother called the school later to confirm receipt of the notes, but her call was not returned.

16. Ms. Colman-Hsu described the protocol related to medical excuses for attendance at school. First, a note goes to the school registrar to clear a student's attendance record. Second, the note then goes to the school nurse. Finally, the note is given to the Principal. Further, if a student's absence is expected to be short-lived, the child's assignments are merely sent home for completion. Home-hospital services, on the other hand, are designed for longer absences and are determined on a case by case basis. Home-hospital consideration requires a written request and medical diagnosis necessitating such services. Ms. Colman-Hsu had no recollection of receiving Dr. Shih's notes or a request from Mother for home-hospital services.

17. September 30, 2014, constituted Student's last day of attendance at

Northrop. As of September 30, 2014, no one from Northrop ever contacted Mother again. Mother, however, did not disenroll Student from Northrop. Mother unilaterally withdrew Student from Northrup without further notice to Northrop or Alhambra. Although Student was absent from his class at Northrup for an entire month, no one in Alhambra, notified Garvey.

18. Witness testimony regarding September and October 2014, was generally vague as to time frames and specific dates. Mother, Ms. Colman-Hsu, and Mr. Laahs, in particular, were uncertain when they spoke to each other, and the specific content of their discussions. Further, while Mother testified she contacted both Alhambra and District throughout September, there is no record of her calls, phone logs or messages. With the exception of the few emails in September 2014, and Dr. Shih's medical excuses, all communication between the parties was oral.

19. On October 28, 2014, Jacqueline E. Silk, Ph.D., prepared a letter regarding Student, which was addressed to District. Dr. Silk, a psychologist, had been seeing Student since October 4, 2014. Her letter indicated Student was exhibiting symptoms of post traumatic stress disorder. She recommended to Parent that Student not return to Ms. Yang's classroom, or in the alternative, Student be home schooled until a suitable educational placement could be found for Student.

20. Alma Guerrero oversees special education for District and is District's liaison with its special education local plan agency. October 31, 2014, was her first day of work with District. Her predecessor, Barbara Rasso had left District several weeks earlier. Mother insists she provided Ms. Rasso with a copy of Dr. Silk's letter, however this letter was written after Ms. Rasso had retired from District. Ms. Rasso left memos for Ms. Guerrero regarding case summaries, follow-ups needed and other "loose ends" needing attention. Student was not mentioned in any notes, nor was Dr. Silk's letter referenced.

21. Ms. Guerrero's first knowledge of Student came on October 31, 2014,



when Student filed this complaint naming District. Student's file contained only the October 28, 2014 letter from Dr. Shih. There was nothing else in the file; no records from Alhambra; no notice or record of disenrollment from Alhambra; no record of any contact from Mother or anyone at Alhambra.

22. Once aware of Student's needs, Ms. Guerrero requested Student's records from Alhambra, and set a resolution session with Mother for November 17, 2014. On that date, Mother consented to an interim IEP, and Student returned to District on December 4, 2014. Student's return to school was delayed 17 days from the resolution session and interim IEP due to the time necessary to obtain additional aide support for Student, as well as the intervening Thanksgiving holiday break.

## LEGAL CONCLUSIONS

### INTRODUCTION : LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This 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 (2006)<sup>5</sup> et seq.; Ed. Code, § 56000 et seq.; 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 an appropriate public education that emphasizes special education and related services designed to meet their unique needs and 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);

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All citations to Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

see Ed. Code, § 56000, subd. (a).)

2. A free appropriate public education means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and which conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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 that are 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).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [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*, 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 (*Mercer Island*) [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 and 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); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; 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 to expansion of the issues. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint 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 administrative hearing decision is preponderance of the evidence].) Here, Student has the burden of persuasion.

#### ISSUE 1: DISTRICT’S RESPONSIBILITY TO PROVIDE STUDENT A FAPE FROM OCTOBER 1, 2014, THROUGH OCTOBER 29, 2014.

5. The IDEA does not determine residency for special education, but instead relies on state law to do so. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525, fn. 1.)

California requires that each person subject to compulsory full-time education and...not exempted under the provisions of chapter 3 (commencing with Section 48400) shall attend the public full-time day school...in which the residency of either the parent or legal guardian is located. (Ed. Code, § 48200.) However, the governing boards of two or more

school districts may enter into an agreement, for a term not to exceed five school years, for the interdistrict attendance of pupils who are residents of the districts. The agreement may provide for the admission to a district other than the district of residence of a pupil.

(Ed. Code, § 46600 (a)(1).)

6. The California Education Code defines a local educational agency as a school district, a county office of education, a non-profit charter school participating as a member of a special education local plan area or a special education local plan area. (Ed. Code, § 56026.3.) The “responsible local agency” is the school district....designated in the local plan as the administrative entity of the duties of which shall include, but are not limited to, receiving and distributing regionalized service funds, providing administrative support, and coordinating the implementation of the plan. (Ed. Code, § 56030.)

7. In this matter there is no dispute that Student resided in the Garvey School District, but attended the autism special day class in Alhambra. Pursuant to the March 31, 2014 IEP, which provided Student’s placement for the 2014-2015 year, the parties intended Student’s placement to remain in Alhambra, and all implementation of goals and services would be provided by Alhambra, in Alhambra. Parent consented to the March 31, 2014 IEP, and Student began the 2014-2015 school year at Northrup. Alhambra initially constituted Student’s local education agency for purposes of this decision.

8. Dr. Shih provided two medical notes requesting Student be temporarily excused from attending class in the Alhambra autism class, for the combined dates of October 1, 2014, through October 13, 2014. The medical notes were taken to Northrup by Grandmother on October 1, 2014. The discussion of an October 10, 2014 IEP meeting

supports a finding that Northrup remained Student's school of attendance, and Alhambra remained responsible for Student through October 2014. There is no evidence to suggest any attendance information was provided to District prior to October 31, 2014, when requested by Ms. Guerrero. Mother did not disenroll Student from Northrup nor did she notify Alhambra or District of her unilateral withdrawal of Student. Mother's unsubstantiated testimony regarding telephone calls to District is not sufficient to establish notice to District of her intent to disenroll Student from Northrup. Most tellingly, Student's complaint itself alleges that, as of date of filing on October 31, 2014, Student "*currently attends* school in an autism special day class within the Alhambra Unified School District."<sup>6</sup> The evidence does not support Student's contention that District was aware of Mother's decision to withdraw Student from the autism special day class at Northrup or that Ms. Yang's class at Northrup might no longer be an appropriate placement for Student for the period of October 1, 2014, through October 31, 2014.

ISSUE 2: WHETHER DISTRICT DENIED STUDENT A FREE APPROPRIATE PUBLIC EDUCATION BY FAILING TO PROVIDE HOME-HOSPITAL INSTRUCTION FROM OCTOBER 1, 2014, THROUGH DECEMBER 4, 2014.

9. Each special education local plan area shall ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA. (Ed. Code, § 56360.) The continuum shall include regular education programs, a resource specialist program, designated instruction and services, special classes, non-public, nonsectarian school services, state special schools, instructions in settings other than classrooms where specially designed instruction may occur, itinerant instruction, instruction using

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<sup>6</sup> Complaint, page 3, line 10-11.

telecommunication, and instruction in the home, in hospitals and in other institutions. (Ed. Code, § 65361.)

10. Special education and related services provided in the home or hospital are limited to those pupils who have been identified as individuals with exceptional needs... and for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, §3051.4, subd. (a).) For those individuals with exceptional needs with a medical condition, such as those related to surgery, accidents, short-term illness, or medical treatment for a chronic illness, the IEP team shall review, and revise, if appropriate, the IEP whenever there is a significant change in the pupil's current medical condition. (Cal. Code Regs., tit. 5 § 3051.4, subd. (c).) When recommending placement for home instruction, the IEP team shall have the assessment information, a medical report from the attending physician or the report of the psychologist, as appropriate, 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).)

11. Student asserts he met all the requirements under California law for the provision of home-hospital instruction. The facts do not support this contention. First, Dr. Shih's medical excuses provided to Alhambra on October 1, 2014, were not termed as a request for home-hospital services. They were simply medical excuses for a short period of time. The excuses provide no diagnosis whatsoever, and provided no information to substantiate the severity of a condition which would prevent Student from attending his usual placement in the autistic special day class. As stated by Ms. Colman-Hsu, a note of this nature, for a period of only seven school days, would not necessarily trigger an IEP meeting. Regardless, the obligation, if any, as of October 1, 2014, rested with Alhambra, not District.

12. Assuming Dr. Silk's letter of October 28, 2014, was delivered to District on that date, it would, at best, suggest a need for further investigation by District. District was unaware that Mother had unilaterally removed Student from Alhambra, ending his attendance there. Alhambra had not notified District of Student's month long absence from school. Dr. Silk's letter also falls short of fulfilling the requirements for home-hospital consideration. While the letter indicates Student was exhibiting symptoms of post traumatic stress disorder resulting from attending Ms. Yang's class, it made only a recommendation that Student not be returned to *that specific classroom*. Dr. Silk provided no further information as to why home-hospital instruction was necessary or how Student's anxiety would prevent either Alhambra or District from implementing Student's IEP in another special day class or other school setting. Further, Dr. Silk only recommended home schooling until a suitable educational placement could be found. Dr. Silk's recommendation did not require a medical or therapeutic setting for Student, for any period of time.

13. While Dr. Silk's letter should have raised flags, District was only obligated to call an IEP meeting when it became aware Student was no longer attending class in his Alhambra placement. Mother had not sought to re-enroll Student in District. District became aware of Student's return to District as his school district of residence on October 31, 2014. Ms. Guerrero immediately set a resolution session for November 17, 2014, and an interim IEP was prepared, and accepted by Parent, for Student's return to a special day class setting; home-hospital was not necessary, as the alleged antecedent for his anxiety (Ms. Yang) was removed once Student returned to District. District did not deny Student a free appropriate public education by failing to offer Student home-hospital instruction as sufficient information did not exist that Student required such instruction.

## ORDER

Student's requested relief is 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. District prevailed on the two issues presented.

## 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: August 5, 2015

A handwritten signature in black ink, reading "Judith L. Pasewark", written over a horizontal line.

JUDITH L. PASEWARK

Administrative Law Judge