

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015060035

DECISION

Parent on behalf of Student filed a due process hearing request (complaint)¹ with the Office of Administrative Hearings, State of California, on May 19, 2015, naming Tehachapi Unified School District. The matter was continued for good cause on June 25, 2015.

Administrative Law Judge Chris Butchko heard this matter in Tehachapi, California, on November 17 through 19 and December 1 and 2, 2015. Attorneys Andréa Marcus and Kelly Kaiser represented Student at the hearing, and were joined by legal assistant Lindsay DiMaggio on November 19, 2015. Student's mother attended all days of the hearing.

Attorney Kathleen LaMay represented District, and attorney Darren Bogie

¹ This matter had been consolidated with Case No. 2015061178, a District-filed action, on July 16, 2015. That matter was settled between the parties on December 1, 2015, and is no longer part of this case.

attended the first day of the hearing. Program specialist Kathleen Siciliani attended the hearing on behalf of District. Assistant to the Chief Administrator of Instructional Services Melissa Kielpinske attended the hearing on behalf of District during Ms. Siciliani's testimony on November 19, 2015. Director of Programs Heather Richter attended on behalf of District during Ms. Siciliani's continued testimony on December 1, 2015. Ms. Kielpinske and Chief Administrator Regina Green attended during Ms. Siciliani's rebuttal testimony on December 2, 2015.

Testimony completed on December 2, 2015. On December 4, 2015, the ALJ issued an order directing that the record would remain open and case continued until December 16, 2015, to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments, the record closed and the matter submitted for decision.

ISSUES

1. Did District deny Student a free and appropriate public education by failing to offer home hospital instruction when Student was home recuperating from surgeries from a) October 10, 2013, through December 5, 2013, and b) September 10, 2014, through January 10, 2014?

2. Did District deny Student a FAPE by failing to provide appropriate accommodations and supports in Student's 2013-2014 and 2014-2015 individual education plans for his mobility needs regarding: (i) campus access; (ii) changing table access; (iii) time accommodation and appropriate staff support for school bus access; (iv) classroom access; and (v) playground access?

SUMMARY OF DECISION

Student was entitled to home hospital instruction during his periods of isolation and post-surgical recovery. District did not establish that it made a proper offer of home instructional service during Student's incapacitation when he could not attend school.

That procedural violation denied Student of a FAPE because it deprived him of the educational services he was entitled to under his IEP for a substantial period of time. Student did not establish that his IEP's failed to address his mobility support needs.

Student is entitled to compensatory education for the failure to offer home instructional service.

FACTUAL FINDINGS

1. Student is a 6-year-old male who resided in District at all relevant times, and is eligible for special education under the category of orthopedic impairment. Student has average to above-average cognitive functioning.

2. Student has spina bifida, hydrocephalus, Arnold–Chiari malformation, and bilateral club foot. He has a ventriculo-peritoneal shunt to relieve fluid pressure on his brain. Student uses foot orthoses, derotational straps, and a posterior posture (“reverse”) walker to ambulate. Student’s impairments deprive him of the ability to anticipate his toileting needs.

ENTRY INTO DISTRICT

3. Student transferred into District from New York in the late summer of 2012. He had an individualized educational program from the Hilton Central School District. He was placed into a special day pre-kindergarten class taught by Ms. Amandina Vidal.

4. Ms. Vidal was student’s case carrier for his IEP. Student’s first District IEP was created on November 12, 2012, and signed on December 14, 2012. Student was placed in a special day class and qualified for an extended school year because he was likely to suffer regression of skills over the break.

5. Student had age appropriate fine motor skills, but received twice-weekly physical therapy service from District to address lower body motor skills. Because of

Student's mobility difficulties, he had direct access to an aide during the school day. Student's prescribed adaptations included the use of a changing table for assistance with toileting needs.

6. A behavior support plan was executed at a meeting on April 11, 2013. A social-emotional goal in the IEP was to improve Student's transitioning between activities by reducing tantrum behavior. At the meeting, Mother expressed concerns about the lack of consistency in Student's aide services. The team agreed that there should be an aide consistently available to take him to the classroom, to occupational therapy and physical therapy services, and to his parent after school. However, there were at least two occasions when no aide or substitute was available for Student.

STUDENT'S SURGERY AND THE 2013-2014 IEP

7. At an IEP team meeting on September 26, 2013, Mother raised concerns over Student's academic progress, but the team reported that Student was functioning above average for his grade level. School psychologist Sharon Owen raised concerns regarding student's behavior and mental health.

8. The meeting summary noted that Student would be "having surgery on October 10th on his feet. He will have mobility issues. Mrs. Doue and Mr. Cramer [the physical therapist] talked to [Mother] regarding specific therapy to help [Student] with his mobility." The school psychologist knew at this meeting that Student would be absent at least six weeks due to this surgery. There was no record of any discussion at this meeting of continued instruction or therapy during Student's absence for surgery. District did not inform Mother of the availability of home instruction or the services provided thereby. District did not ask Mother for a physician's note regarding the absence.

9. Mother prepared a one-page single-spaced attachment to the IEP that included her corrections and comments on a number of issues, including Student's

behavior issues, his academic goals, and Mother's communications problems with District. Mother did not raise Student's mobility needs other than to note that she agreed with District's plan to introduce arm band crutches as a physical therapy goal for Student.

10. Mother took Student out of school on October 10, 2013. His doctor required him to be absent from school in advance of the surgery for additional appointments and to reduce the possibility that he would contract an illness or infection from other students that might delay or complicate the operation.

11. On October 28, 2013, Mother sent a letter to the school psychologist apologizing for being unable to attend an IEP team meeting scheduled for October 17th. She wrote that Student had just gotten home from the surgery on October 14th. She was overwhelmed because the surgery and recovery went differently than expected and "ended up not being what I expected it to be."

12. The annual review IEP team meeting took place on October 31, 2013. Student again qualified for extended school year services because of risk of regression, along with a new qualification that Student's interfering behaviors had deprived him of educational benefit over the past year and were likely to deprive him of educational benefit if there was any interruption in his educational program.

HOME INSTRUCTION - FALL 2013

13. The meeting was brief, as the IEP team was awaiting the completion of assessments that were expected in early December. Ms. Vidal recalls Mother saying at the meeting that Student's return to school was imminent. She recalled the school psychologist raising the offer of home instruction at the meeting. Ms. Vidal had not expected Student to miss more than a few days of school and had never had a student go on home instruction. Ms. Vidal believed that a student must miss a month of school before home instruction needed to be offered.

14. The testimony at hearing conflicted as to the IEP team's discussion of home instructional services. The school psychologist testified that the responsibility to make an offer of home instruction fell to Ms. Vidal as the case carrier. She has told Ms. Vidal that it was necessary to do everything in writing because "if you say it, it doesn't count. It never happened." She knew that it was not necessary to have a doctor's note regarding the absence before home instruction could be offered. Her understanding was that home instruction needed to be offered if a student was going to miss "more than a week or two."

15. At the time of the October 31st IEP team meeting, Student had been out of school for three weeks.

16. The school psychologist could not say that home instruction was offered at the IEP team meeting, but she believed that it had been discussed. She recalled Mother saying at the meeting that Student would be back in school soon, so home instruction was not needed. She was surprised that the discussion of home instruction was not written into the IEP. She reported that home instruction for academic purposes consists of one hour of instruction from a teacher per lost day of school.

17. Ms. Siciliani, who was at that time the director of special education for the District, initially could not remember a discussion of home hospital instruction at any IEP team meeting. With prompting, she recalled that it was discussed at the October 31st meeting and recalled later being told by Ms. Vidal that she had made an offer of home hospital instruction. Her testimony lacked conviction and supporting detail.

18. In the Least Restrictive Environment section of the IEP report, there is a space to mark off each program option discussed at the meeting. Six program options are marked as having been discussed at the meeting. Although there is a box to record discussion of home/hospital instruction, it was not marked.

SUBSEQUENT 2013 CONTACT BETWEEN DISTRICT AND MOTHER

19. Notes kept by Ms. Siciliani report that she made a call on November 15, 2013, to Mother. One note reads: "Called; re: Setting up the I.E.P and when [Student] will return. Home Hospital Ins. ISES assessment". Ms. Siciliani was unable to recall any details of the call at hearing, but believed that the notes record that she made an offer of home instruction to mother.

20. Ms. Vidal sent Mother an e-mail on November 19, 2013, telling her that if Student was not cleared to return to school "it would be helpful if we talked about ways that [Student] may access appropriate/necessary services while he is at home."

21. Mother responded to the email on November 23, 2013, advising District that Student would be back in school following Thanksgiving, which was November 28th. Student returned to school on Thursday, December 5, 2013, the first week following the Thanksgiving holiday. Student had missed eight weeks of school.

22. District did not make a written offer of home instruction services at any time in 2013, and did not make such an offer orally at or prior to the October 31, 2013 IEP team meeting. District, through Ms. Vidal, vaguely referenced the topic in her email of November 19, 2013, but did not offer home instruction or explain its terms. No other discussion was had.

STUDENT'S MOBILITY ISSUES IN 2013-2014 PRE-KINDERGARTEN

23. Student's physical therapy goals for the 2013-2014 school year included negotiating playground equipment and ambulation with his walker on uneven surfaces and campus ramps. Part of his general education plan included that he should participate in general education activities such as playground time with the assistance of a paraprofessional. Student's functional academic goals again included reduction in tantrum behavior during transitioning.

24. The IEP team met again on February 27, 2014. The physical therapist noted that Student's ankle "was starting to turn" and that Mother should inform Student's doctor. District was providing Student with physical therapy because he was unable to access all areas of the school. Student needed more work in the area of occupational therapy before he was able to use a tricycle.

25. The IEP team reviewed a physical therapy assessment dated February 25, 2014, which noted that Student was "more comfortable" crawling than ambulating and preferred to crawl. Student could raise himself to a standing position without assistance using his walker. Student's then-current maximum distance using his Lofstrand crutches was 16 feet. Student's mobility equipment included his walker, crutches, and stroller.

26. Under this IEP, executed by District staff on February 27, 2014, and signed by Mother on March 6, 2014, Student was to receive 90 minutes per week of physical therapy, 160 minutes per month of counseling services, 40 minutes per month of social work services, 45 minutes per month of parent counseling, and 60 minutes per week of behavior services.

27. Student's February 27, 2014 behavior intervention plan reported that he still had difficulty with transitions. Student would yell loudly for between one and 45 minutes and he would hit, kick, head-butt, spit, and use profanity when required to transition between activities or classrooms.

28. In pre-kindergarten, Student had frequent difficulty accepting the need to transition out of preferred activities or to his therapy sessions. Sometimes he would have tantrums, which would disrupt class or interfere with a therapist's ability to work with the next scheduled child.

29. Ms. Vidal came up with the idea of using a collapsible stroller to take Student to or from his therapy sessions when he refused to go. At hearing, Mother was adamant that she and Student considered being transported in that matter demeaning

and punitive. Mother admitted that, after the time period of this action, she had taken Student to a school board meeting by means of a stroller.

30. District staff was allowed to have Student wash up first at the end of the school day and leave early so that he had time to catch his bus. However, Student was frequently unwilling to stop work on a project when it was time to leave school. At such times, staff would transport him to the bus in the stroller so he would not miss his ride. Later in the year, staff adjusted the class schedule so that the final class activity was recess play, which obviated the need to work around Student's desires to finish his craft activities. Student never missed his bus. The bus driver would lift Student into the bus.

31. District met Student's toileting needs in his pre-kindergarten class through the use of a changing table. Staff would lift Student onto the table and change him. Mother and District staff disagreed over whether there was a privacy screen in use in the bathroom during changing. Other students in the class were also changed on the changing table in this way.

32. Student was able to access all parts of the pre-kindergarten classroom, but did need help getting into his seat for class. Learning how to access the school's campus and the play yard was an element of student's physical therapy, as was ambulating to the physical therapy sessions themselves. There were no tricycles at Student's school that were specially adapted to be usable by someone with his handicaps. Not all typically developing children student's age can ride a tricycle.

33. Some areas of the play yard, such as the climbing wall, were surrounded with synthetic wood chips which were difficult for Student to traverse with his walker. Negotiating such obstacles was part of Student's physical therapy curriculum, although Student generally chose to simply crawl through the wood chips.

IEP PLAN FOR THE 2013-2014 SCHOOL YEAR

34. District held a transitional IEP team meeting on May 5, 2014, to prepare for

Student's entry into a general education transitional kindergarten class. Student again qualified for extended school year services. The team found that Student had difficulty when returning to school following a long school holiday or an absence due to surgery. Student still needed an aide to safely access the school environment and required physical therapy services to develop his mobility.

35. At the meeting, Mother expressed concerns about Student's mobility needs. District staff represented that the classroom would be arranged so that Student would be able to access the room. Mother wanted Student to have frequent access to a sink because he would work on or move around on the ground, and his hands would get dirty. District staff informed her that an aide would help him to wash his hands.

36. District offered the same services as in the prior IEP, although Mother declined parent counseling. Student was again provided with extended school year services, but, according to the checked box, solely on the grounds of the severity of his disability. However, the meeting summary reported that ISES services were required to "prevent decompensation" during the summer break. Mother signed the IEP on May 5, 2014.

37. Student attended the transitional kindergarten class starting on August 13, 2014. After the first three days, Student began having severe behavior difficulties. Following Student's suspension on August 22, 2014, an IEP team meeting was held on August 28, 2014 to review the behavior plan and Student's placement.

38. Student's behavior had become increasingly disruptive, affecting his own ability to learn and that of his classmates. Student was disobeying adults, hitting adults, yelling, and beginning self-injurious behaviors such as knocking the back of his head into the wall and repeatedly slapping his forehead with his open palm. Previously-used reinforcers for good behavior had lost their effectiveness.

39. Mother, the teacher, and the school psychologist were trying to resolve

Student's difficulties in the classroom. The general education class lacked the flexibility of the special day class, and Student was having trouble coping with the schedule and the academics. The meeting notes reported that Mother suggested that Student be physically removed from the classroom when his behavior became a problem, and also stated that Mother "verbally agree[d] to using a stroller" to take Student out of the classroom if he is being disruptive. Mother requested time to review the meeting notes and signed the IEP on August 29, 2014, for attendance only. Mother did not append a statement, as she had done previously, disputing her agreement or objecting to the use of a stroller.

40. Following a disturbance in the classroom, Student was again suspended on September 11, 2014. Student had attended the transitional kindergarten class for a total of fifteen days. Student did not return to school that year.

HOME INSTRUCTION - FALL 2014

41. Student was scheduled to undergo another surgery on his feet, which was a more serious procedure than he had previously undergone. Student's doctor again required him to be out of school for two or three weeks before the surgery so as not to risk pre-operative illness before this more complicated procedure. Mother kept Student out of school from the date of his suspension. Student subsequently underwent the surgery on October 8, 2014, and was medically unable to return to school for 12 weeks.

42. Around this time, Ms. Vidal suffered a heart attack and was hospitalized. She was not involved in following events, but she was not replaced as Student's case carrier.

43. Following Student's second suspension, Mother sought to complete or reopen the August 28, 2014 IEP. She sent an email on September 18, 2014, to Ms. Siciliani asking about a new date to continue the IEP team meeting and seeking additional information regarding what had happened the week that Student was

suspended.

44. During that time, Mother had been receiving automated calls from the District's attendance line. On September 23, 2014, Mother called the secretary at Student's school to ask District to stop the truancy calls. Mother told the school's secretary that she was taking Student out of school because he was going to have surgery and that Student was not required to attend transitional kindergarten.

45. As a result of that conversation, the school's secretary informed the school's psychologist that Student would no longer be attending school and that Mother wished to withdraw Student from school. The school psychologist then sent an email on September 24, 2014, to the school's secretary and Ms. Siciliani, among others, suggesting that it was necessary to get written confirmation that Mother wished to withdraw Student and decline services.

46. Because of her poor memory, Ms. Siciliani had the habit of immediately reading and responding to important emails. She considered emails concerning Student to be important. However, she testified that she did not read or respond to the September 24th email prior to September 30th because September 24th was her son's birthday and she was busy with family activities.

47. On September 25, 2014, Mother sent a lengthy email to Ms. Siciliani setting out her frustration in trying to reconvene the IEP team meeting and her unhappiness with Student's placement and services. Mother stated that she would be holding Student out of the class until the District could provide appropriate education in a non-hostile environment. Ms. Siciliani responded the next day, stating that she would send Mother a letter with proposed dates and times for the IEP team meeting. Ms. Siciliani gave no explanation at hearing why she was able to promptly respond to the September 25, 2014 email but not read or reply to the September 24, 2014 email.

48. On September 30, 2014, Ms. Siciliani responded to another email from the

school psychologist regarding the IEP by asking "Did [Mother] withdraw him from school?" Ms. Siciliani sent a letter by registered mail on October 3, 2014, to Mother stating that she had been told that Mother had withdrawn Student from school. The letter concluded by asking Mother to inform the District when Mother decided to re-enroll Student so that an IEP team meeting could be called.

49. Mother replied by email to Ms. Siciliani on October 5, 2014. In it, she stated that she had not withdrawn Student from school but was holding him out because of his surgery and her dissatisfaction with his placement. She again requested a date on which to continue the IEP team meeting.

50. At hearing, Ms. Siciliani introduced a letter to Mother that she had drafted on October 7, 2014, but decided not to send. In the draft letter, Ms. Siciliani acknowledged that Mother wanted Student to be in school. Ms. Siciliani also suggested having the Kern County Superintendent of Schools attend the IEP team meeting.

51. On October 18, 2014, District sent Mother a letter proposing scheduling Student's annual IEP team meeting.

52. Ms. Siciliani eventually responded to Mother's October 5, 2014 email on November 18, 2014. Her letter reported that the District had dis-enrolled Student pursuant to Mother's phone call to the school secretary, but noted that Mother now wanted to re-enroll Student. The letter invited Mother to complete a re-enrollment packet.

53. District did not make any offer of home instruction services in 2014.

STUDENT'S MOBILITY ISSUES IN 2014- 2015 TRANSITIONAL KINDERGARTEN

54. Although a changing table had been ordered for the transitional kindergarten classroom, none was present when Student began class. Student had to go to the pre-kindergarten class or the nurse's office to be changed. No changing table arrived before Student stopped attending school in the 2014-2015 school year.

55. The transitional kindergarten had a constructed play kitchen, which would be recessed or folded until needed, whereupon it could be drawn out and set up for children's play. Student had difficulty accessing the kitchen with his walker, and sometimes would have to crawl to enter the kitchen. In addition, he could not bring himself to a standing position in the kitchen without his walker or other aid.

56. Although buses with rising platforms were available and Mother had requested that they be used for Student's transportation, they were inconsistently provided by District.

CREDIBILITY OF WITNESSES

57. The school psychologist, student's pre-kindergarten teacher, Mother, Ms. Siciliani, the physical therapist, and the school's secretary testified at hearing. With the exception of Ms. Siciliani, all of the witnesses were competent and reasonably credible. Ms. Owens, no longer employed by the District as a school psychologist, was particularly credible. Mother's testimony regarding her expression of opposition to the use of a stroller to transport Student was less credible than the rest of her testimony.

58. Ms. Siciliani testified that her memory for dates and events was not good, and she became confused a number of times about events, dates, and persons. She recognized that her ability to recall was poor, and explained that she could only testify with confidence if she was looking at a supporting document. She stated that it was her practice to keep extensive notes to compensate for her poor memory. Accordingly, her testimony lacked credibility.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

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)³ 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 a FAPE 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); See 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 individualized education program. (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 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) [In California, related services are also called

² Unless otherwise indicated, the legal citations in the 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 version.

designated instruction and 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 that describes 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)(1)(A); Ed. Code, §§ 56032, 56345, 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 [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. 951, 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) & (f); 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, 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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Burden of Proof

5. Student is the party petitioning for relief and has the burden of proving the essential elements of his claim. (*Schaffer, supra*, 546 U.S. 49, at p. 62.)

ISSUE 1: HOME INSTRUCTION

6. Student contends that District failed to offer him home hospital instruction while he was recuperating from medical procedures in the fall of 2013 and fall of 2014. District contends that made a proper offer of home instruction in 2013 and that since Mother dis-enrolled Student from school in the fall of 2014 it had no obligation to offer home hospital instruction.

Offer of Home Instruction

7. Title 5, California Code of Regulations, section 3051.4 describes the circumstances under which a child should be offered home/hospital instruction by a

school district. Generally, home/hospital instruction is limited to pupils with exceptional needs resulting from a medical condition related to surgery, accidents, short-term illness, or medical treatment required for a chronic illness.

8. General education students may receive individual instruction in their home, a hospital or other health facility when a temporary disability that makes attendance in a regular program impossible or inadvisable. (Ed. Code, § 48206.3.) This service is different from individualized in-home placement and instruction under the IDEA for purposes of providing a FAPE to a child with disabilities. (34 C.F.R. 300.115(b)(1); California Code of Regulations, title 5, § 3051.4(d).) Both types of in-home placements are commonly referred to as “home hospital instruction” when due to a temporary medical condition, but an in-home placement for a disabled child under the IDEA must continue to provide a FAPE.

9. When a pupil with exceptional needs experiences an acute health problem which results in non-attendance at school for more than five consecutive days, the school district shall inform the holder of the educational rights of the availability of individual instruction to be delivered in the pupil’s home, in a hospital, or in other residential health facilities, other than a state hospital. The school district shall assure that an IEP team meeting is convened to determine appropriate educational services. (Ed. Code, § 48206.3; Cal. Code Regs., title 5, section 3051.17, subd. (c).)

Procedural Violations

10. Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

ISSUE 1(A): FALL 2013 HOME INSTRUCTION

10. Student established that his absence from school in fall 2013 due to medical needs qualified him to receive home instruction from District. District's failure to comply with the procedural requirements regarding offering home instruction services to students with exceptional needs denied Student a FAPE. To rebut Student's claim that he was thereby denied a FAPE, District argued that student did not inform District of his absences and that he was notified of his right to home instruction, but had declined the offer. District's arguments are not persuasive.

11. Student was a pupil with exceptional needs from October 10, 2013, through December 5, 2013.

12. District was aware from at least the September 26, 2013 IEP team meeting that Student would be absent from school due to medical needs beginning on or about October 10, 2013, and would miss more than five consecutive days. Student left school on October 10, 2013, and was out five days by October 17, 2013. Student was unable to attend school during that time period because he underwent surgery on his feet. The periods of isolation, incapacitation, and recovery attendant to that surgery qualified as a medical condition making attendance in his regular program impossible or inadvisable.

13. Student has carried his burden of proof to establish that District had an obligation to inform Student of the availability of home hospital instruction. District argues that Student did not present a certifying physician's note as required under California Code of Regulations, title 5, section 3051.4, subdivision (d), District was barred from providing home hospital instruction to him. The argument is irrelevant. District's duty to inform Student of the option of home instruction precedes the need for a doctor's certification, and that fact was known by District staff. Student did not fail to produce a physician's note following District's request: District never asked for such a note or informed Student that one was needed. The evidence established that District

did not make a written offer of or inform Parent of the right to home instruction services.

14. District contends that it made a verbal offer of home hospital instruction at the October 31, 2013 IEP team meeting, which was declined by Mother because Student's return to class was imminent. District's evidence in support of this argument was not sufficient or credible. First, Student missed more than a month of school after that date. Secondly, Mother had sent a letter to District staff only three days before this meeting reporting that the surgery and recovery had gone poorly. The assertion that Mother told District at the October 31, 2013 meeting that Student would soon return to school is not credible. Finally, that IEP offer needs to be in writing. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526, cert. denied, 513 U.S. 965.)

15. District's argument that it simply failed to document its offer of home instruction is further undercut by the fact that it failed to include any statement referencing the issue or its discussion in the meeting summary or simply check a box to that effect on the IEP form. Ms. Owens clearly understood and communicated the need to document the making of an offer of home instruction. Given the circumstances, it is not reasonably possible that the offer was made but simply not documented.

16. District presented additional evidence to mitigate its failure or reduce the period of its liability. Ms. Siciliani presented notes regarding a November 15, 2013 phone call that reported or depicted an intention to conduct a discussion of home hospital services. As the notes were insufficient in themselves, Ms. Siciliani's lack of recall of the conversation failed to establish that an offer was made. Likewise, District presented an email sent by Ms. Vidal on November 19, 2013, which noted that it might be helpful to discuss ways that student could access his services. At best, the email offered to begin a discussion. It did not prove that a discussion or offer of home instruction services was made.

17. District committed a procedural violation of the IDEA by failing to explain home/hospital instruction to Mother and to offer services to Student. Accordingly, Student is entitled to relief if he can show that the violation resulted in him being deprived of educational benefit.

18. District returns to the argument that Student could not get home instruction as relief here because he did not provide a physician's note. Student responds that he was not asked to do so. If an argument can be made that Student's operation did not constitute an incapacitating medical condition, it has not been made. It is clear that Student could have gotten proper certification from his doctor if requested to so do. Because he was left without any of the required services under his IEP from October 10, 2013 through December 5, 2013, Student was substantively deprived of a free and appropriate public education by District. Student's remedy is discussed below.

ISSUE 1(B): FALL 2014 HOME INSTRUCTION

19. Student established that his absence from school in fall 2014 due to medical needs qualified him to receive home instruction from District. District's failure to comply with the procedural requirements regarding offering home instruction services to students with exceptional needs denied Student a FAPE. To rebut Student's claim that he was thereby denied a FAPE, District argued that student had dis-enrolled from the District and thus disqualified himself from receiving services. These arguments are not persuasive.

20. Student was a pupil with exceptional needs from September 17, 2014, through December 26, 2014.

21. District was aware from at least Mother's phone call on September 23, 2014, that Student would be out due to medical needs and would miss more than five consecutive days of school. Student was unable to attend school during that time period

because he again underwent surgery on his feet. The periods of isolation, incapacitation, and recovery attendant to that surgery qualified as a medical condition making attendance in his regular program impossible or inadvisable.

22. Student has carried his burden of proof to establish that District had an obligation to inform Student of the availability of home hospital instruction. District does not claim that it attempted to meet this obligation.

23. District's contention is that it was relieved of this obligation because Mother dis-enrolled Student from school. District asserts that it accepted Mother's verbal request to withdraw Student, and that Mother declined District's offer to process her request to reenroll Student. Accordingly, since Student voluntarily relinquished his claim to services, District asserts that it had no obligation to offer any services.

24. That contention is not persuasive. In support, District relies solely on the school secretary's recapitulation of a phone conversation held between her and Mother. There is no writing by Mother requesting withdrawal and no assertion that there was any confirmation by her of that request. District made no effort to verify or obtain documentation of Student's withdrawal from school.

25. Instead, the record shows that Mother consistently pursued the completion of the August 28th, 2014 IEP, following up with an email chain to Ms. Siciliani beginning on September 26th. When informed on October 3, 2014, of District's position that she had withdrawn Student from school, Mother replied on October 5, 2014, stating that she had not done so, still wanted to complete the IEP, and that Student would return to school once her issues were resolved.

26. If District innocently misconstrued Mother's September 23rd phone call as a notice that Student was withdrawing from school, it would have been quickly disabused of that notion. The school psychologist was immediately dubious that the withdrawal reported in the school secretary's email was intended or proper, as shown by

her September 24, 2014 email advising that District contact Mother for written confirmation of her intent.

27. Although a recipient of that email, Ms. Siciliani said that family activities kept her from reading that email for nearly a week, although she did read and respond to an email on September 25th in which Mother said that she was going to keep Student out of school until he received a suitable placement. In response, Ms. Siciliani said on September 26th that she was going to propose dates for the completion of the IEP.

28. Had Ms. Siciliani received and read the school psychologist's email when it was sent, she could not credibly ask in response to the September 30, 2014 email whether Mother had dis-enrolled Student, as her communications with Mother clearly established that Mother considered him enrolled at District.

29. Again, if District were confused about Mother's wishes, they could easily receive clarification. Mother's October 5, 2014, email made clear that she intended to return Student to school following his surgery. Ms. Siciliani's unsent draft letter shows that she understood on October 7, 2014, that Mother had no intention of dis-enrolling Student. The letter she did send over a month later still claimed that Mother had withdrawn Student. That is not a credible position, and renders District's position unworthy of belief.

30. District committed a procedural violation of the IDEA by failing to explain home/hospital instruction to Mother and to offer services to Student. Accordingly, Student is entitled to relief if he can show that the violation resulted in him being deprived of educational benefit.

31. As noted in the discussion of issue 1a), above, Student was left without any of the required services under his IEP from September 17, 2014 through December 26,

2014,⁴ Student was deprived of a free and appropriate public education due to District's procedural violation of the IDEA. Student's remedy is discussed below.

ISSUE 2: STUDENT'S MOBILITY AND ACCESS NEEDS

32. Student contends that his IEP's for the 2012-2013 and 2013-2014 school years District failed to meet his mobility needs, specifically changing table access, campus access, school bus access, classroom access, and playground access. This Decision only addresses Student's contentions as they apply to his ability to access his education under the IDEA.

'Snapshot Rule'

33. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time.

34. Based upon the information known to the IEP team at the time the IEP's were developed, District appropriately addressed Student's unique mobility needs to

⁴ Although Mother took Student out of school prior to September 17, 2014, testimony established that he was only required to miss at most three weeks of school due to medical necessity prior to his surgery. That date is three weeks prior to the October 8, 2014 date of surgery. Student was medically eligible to return to school 12 weeks later, although he did not do so.

ensure that Student could access his educational program in the 2012-2013 and 2013-2014 school years. Student did not meet his burden on this issue.

Toileting

35. Given Student's mobility issues and his lack of excretory control, Student could not meet his own toileting needs. Accordingly, the 2012-2013 IEP provided him with assistance, supplying an aide and a changing table. Mother has objected that there was insufficient privacy in the pre-kindergarten class during changing and diapering. Although that matter is disputed, it is uncontradicted that Student received no less privacy than the other students in the class who required changing, and no proof, other than the privacy contention, that District failed to properly toilet Student. Student's mobility needs had no impact upon his treatment in regard to toileting issues and did not negatively affect his access to his educational program. District met its obligation.

36. Similarly, Student required toileting assistance during his 2013-2014 transitional kindergarten class. His IEP similarly provided a changing table and staff support. However, the table was on order and had not yet arrived before Student left on medical leave in September 2014. Student was sent to the pre-kindergarten classroom or the nurse's office to be changed. Although District did not specifically implement the IEP accommodation in Student's classroom, it did make the accommodation available to Student, despite some minimal loss of class time. The IEP team properly addressed the issue presented to them.

Campus, Schoolroom, and Playground Access

37. Student's campus access needs were the same in school years 2012-2013 and 2013-2014 and met primarily by the provision of an aide and physical therapy. Issues concerning Student's ability to access the school grounds resolved at hearing into complaints about the transitional kindergarten's play kitchen, the wood chip ground

cover used on the playground, and the lack of adapted playground equipment.

38. Student could not enter the play kitchen in the transitional kindergarten with his walker, and he could not rise to a standing position if he crawled into the kitchen without his walker. He contends that he did not have full access to this classroom asset. Student did not establish that Parent raised this issue as a concern at the IEP team meeting affecting his access to his education, or that the IEP team could have anticipated that Student would have difficulty with this piece of equipment in the transitional kindergarten classroom before he went on medical leave.

39. Student had difficulty using his walker to cross areas covered with wood chips. He contended that the wood chips should have been replaced by something easier for him to navigate. According to the statement of goals in his IEP and the physical therapy assessment, Student needed to practice navigating the wood chips to learn how to traverse uneven ground. Student did not establish that the IEP team was ever presented with the issue of his ability to cross the wood chips as anything other than a therapeutic goal.

40. Student contended that District had no specially adapted tricycles, which he could power by use of his hands and arms, rather than his legs. Learning to use an ordinary tricycle was a physical therapy goal for Student. Student did not establish that he required a specially adapted tricycle to access his education.

41. Student argues that the services and accommodations he receives are undignified and demeaning. Mother is particularly sensitive to the use of a stroller to transport Student during his emotional outbursts. To her, transporting him in that manner reinforces the physical limitations that set him apart. While transporting an adult or an older child in a stroller would be demeaning or incongruous, doing so for a preschooler is not offensive. Mother acknowledged having used a stroller herself to transport Student. Student's accommodations are not so objectionable as to negatively

affect his access to educational program.

Bus Access

42. Student was provided adult assistance in getting on and off the bus. Student was given priority in accessing the restroom to wash up after class and a head start to leave for the bus. After some time in the pre-kindergarten class, District adjusted his schedule so that the class ended the day in the play yard, adjacent to the buses. Student did not need to abruptly stop working on a project to go to the bus. Although District did not specify these accommodations in his IEP, Mother did not raise these needs at the time of the IEP and the IEP team did not know about these needs when it developed the IEP.

43. Student did not establish that the IEP team failed to address Student's unique needs as to mobility and access to ensure Student could access his education. Student did not prevail on Issue 2.

REMEDIES

1. Student prevailed on both parts of Issue 1 and is entitled to equitable relief. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* 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, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-

specific and 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.” (*Reid ex rel. Reid*, 401 F.3d at 524.) In fashioning relief, we must look at present needs and the degree to which those needs can be rectified by current services.

2. Student missed a significant amount of class time in the fall of 2014 because of the dispute between Mother and District, including the remainder of the 2014-2015 school year. For purposes of assessing remedy under the relevant facts, only the eight weeks between October 10, 2013, through December 5, 2013, and the 15 weeks between September 17, 2014, through December 26, 2014, are material. At issue are 23 weeks of lost instructional time.

3. Student offered no evidence regarding relief other than entitlement to academic instruction. There was no testimony regarding Student’s current physical abilities or skills, nor regarding Student’s emotional regulation that Student lost.

4. District’s obligation to offer home instruction did not arise until Student had missed five days of class time. Accordingly, one week is deducted from each period of missed schooling. Because student should have but did not receive home instruction for 21 weeks, student is entitled to 105 hours of compensatory education, based upon five hours per week for 21 weeks. As home instruction is itself compensatory for missed class time, it is appropriate to grant compensatory education on the same scale.

5. District shall provide tutoring by a special education teacher hired by District, or a non-public agency provider if a District employee is not available. If District elects to provide the service through a non-public agency, District shall reimburse Parent the cost of round-trip mileage at the then-current federal rate.

6. Student offered no evidence to support any other specific relief.

ORDER

As compensatory education, District shall provide 105 hours of academic tutoring to be provided by either a District special education teacher or by a certified non-public agency of Mother's choosing. If available, Student may use the services when school is not in session. Unused services shall expire on June 23, 2017. District shall reimburse Mother for round-trip mileage at the then-current federal rate of reimbursement if District elects to provide the service through a non-public agency.

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 on issues 1(a) and 1(b), and District was the prevailing party on issue 2.

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: January 19, 2016

/s/_____

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings