

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WEST CONTRA COSTA UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015090002

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 27, 2015, naming West Contra Costa Unified School District. Student's amended complaint was filed on October 23, 2015, thereby starting over the applicable timeline, and the matter was continued for good cause on December 7, 2015, and January 8, 2016.

Administrative Law Judge Lisa Lunsford heard this matter in San Pablo, California, on March 22, 23, 24 and 25, 2016. ALJ Cheryl Carlson observed the due process hearing.

LaJoyce Porter, Attorney at Law, represented Student. Ms. Porter was assisted by Attorney Betsy Brazy on March 22 and 24, 2016, and Sally Kirk on March 23, 2016. Student attended the first day of hearing, and Mother and Sister attended each day of hearing. The hearing was translated from English to Spanish and Spanish to English by interpreters provided by OAH.

Shawn Olson Brown, Attorney at Law, represented West Contra Costa Unified School District. Stephen Collins, West Contra Costa's Special Education Local Plan Area

director, attended the hearing on behalf of West Contra Costa, and Patricia Evans, special education administrator, attended for part of the day on March 22, 2016.

At the conclusion of the hearing, the matter was continued to April 11, 2016, at the parties' request, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs, and the matter was submitted for decision.

ISSUES

1. For the 2013-2014 school year, beginning August 28, 2013, and including extended school year, did West Contra Costa fail to provide Student a free appropriate public education by failing to:

- a. reimburse Parents and/or Student for round trip mileage to and from Bayhill High School at the Internal Revenue Service rate through March 5, 2014;¹
- b. provide District transportation following Parent and Student's March 5, 2014 request; and
- c. provide a psycho-educational independent educational evaluation, a speech and language independent educational evaluation, and an occupational therapy independent educational evaluation per Student's attorney's request on March 5, 2014?

¹ Issues 1(a), 1(b) and 2 originally referenced May 5, 2014, not March 5, 2014. The date has been corrected in all three issues because evidence at hearing established that May 5, 2014, was a scrivener's error and that Student was referring to an IEP team meeting held on March 5, 2014. 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.)

2. Did West Contra Costa fail to provide Student a FAPE for the 2014-2015 school year by failing to provide District transportation per Parent's March 5, 2014 request, or by failing to reimburse Parents and/or Student for two round-trips to and from Bayhill High School at the Internal Revenue Service rate?

SUMMARY OF DECISION

This Decision finds that OAH does not have jurisdiction over the issue of whether West Contra Costa denied Student a FAPE by failing to reimburse Student for mileage for one round trip to and from Bayhill High School at the I.R.S. rate from August 28, 2013, through March 5, 2014. This reimbursement was required by a settlement agreement, and OAH does not have jurisdiction to enforce settlement agreements. Even if OAH had jurisdiction, the issue is moot because on March 23, 2016, Student received reimbursement for one round trip for this time period.

Student established that West Contra Costa denied her a FAPE beginning on March 5, 2014, when her request for district transportation was denied at the IEP team meeting held on that date. After the IEP team discussed modes of transportation, West Contra Costa's offer of transportation reimbursement was an acknowledgment that Student required transportation. West Contra Costa denied Student a FAPE by compelling Student's family to provide transportation rather than providing it directly or through a private carrier. West Contra Costa also denied Student a FAPE by inadequately reimbursing Student for only one round trip rather than the two round trips per school day that Student's family was required to make. The denial of FAPE pursuant to West Contra Costa's denial of district transportation and inadequate transportation reimbursement continued for the duration of the 2013-2014 school year, including extended school year, and throughout the 2014-2015 regular school year.

Student did not establish she was denied a FAPE based on West Contra Costa's failure to provide independent educational evaluations. After West Contra Costa

granted Student's request for independent evaluations, Student failed to pursue the evaluations.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 21-year-old female who became 18 years old in 2012. She resides with her family within West Contra Costa's jurisdictional boundaries and has lived at the same address since at least November 2013. She is bilingual and speaks both Spanish and English.

2. Student was eligible for special education and related services as a student with a specific learning disability as a primary eligibility category and speech and language impairment as a secondary category. Student began 11th grade at Bayhill High School on August 26, 2013, and graduated with a regular diploma on June 4, 2015.

NOVEMBER 18, 2013 SETTLEMENT AGREEMENT AND RELATED INDIVIDUALIZED EDUCATION PROGRAM TEAM MEETINGS

3. On November 18, 2013, the parties executed a settlement agreement that resolved earlier claims Student raised against West Contra Costa.² The agreement provided, among other things, that Student would be placed at Bayhill High School, a certified nonpublic school in Oakland, California, and provided transportation reimbursement for one round trip per day of attendance at the I.R.S. rate. Student was

² In her closing brief, Student requests that the Court take judicial notice of Student's stay put motion and corresponding order granting the motion from the previous OAH matter between the parties. Student does not clearly articulate any connection between those documents and the issues here. The request is denied on the basis that the documents are not relevant.

required to submit mileage reimbursement claims on a monthly basis, and reimbursement would be provided "within 30 days of the District's receipt of properly completed mileage reimbursement form(s)." The agreement also provided that West Contra Costa would conduct three assessments and convene an IEP team meeting to review assessment results within 60 days of receiving Student's consent.

4. The settlement agreement further provided that West Contra Costa would convene an additional IEP team meeting on or before December 15, 2013, to memorialize the terms of the agreement. At this meeting, any changes to Student's program would require mutual agreement of the IEP team. The settlement agreement did not bind the parties beyond the December IEP team meeting, and the agreement did not purport to provide a FAPE to the Student for a future time period, stating that the services and reimbursements provided by the district "do not constitute, and shall not be construed as, an admission of what is FAPE for Student."

5. The settlement agreement included a release of all claims against West Contra Costa through December 15, 2013, with the exceptions of proceedings to enforce the agreement and injuries constituting violations of the California Penal Code. Therefore, all claims filed with OAH by Student against West Contra Costa related to the time period prior to December 16, 2013, are barred. Student did not offer any evidence to the contrary.

6. On December 12, 2013, the IEP team met to memorialize the placement and services pursuant to the settlement agreement. The team did not memorialize the transportation reimbursement in Student's IEP, and neither party addressed why this particular settlement agreement term was not memorialized. However, the settlement agreement was unartfully written regarding the time period beyond December 15, 2013. Although the express waiver of claims only covered the time period up through December 15, 2013, the clear intention of the settlement agreement was that the

December IEP would simply memorialize the terms of the agreement, as to placement and related services. Because there was no provision for what should happen beyond the December IEP, these terms, including Student's reimbursement for one round trip per school day and the caveat that the services are not an admission of FAPE, would remain in place until another IEP offer was made. In this case, the next IEP was March 5, 2014.

7. On February 3, 2014, the IEP team met to review the three new assessments. No changes to Student's placement or services were made.

MARCH 5, 2014 ANNUAL IEP TEAM MEETING AND RELATED NOTICES

8. On March 5, 2014, Student's annual IEP team meeting was held. The IEP developed offered extended school year services for the summer following the 2013-2014 school year and to continue placement at Bayhill for the 2014-2015 school year.

9. Bayhill staff and Student's counsel requested educational therapy be added to the IEP as a related service. Student's counsel also requested three independent educational evaluations. West Contra Costa denied the request for educational therapy and indicated that it would respond in writing to the request for independent evaluations.

10. Student's counsel requested that West Contra Costa provide transportation for Student to and from Bayhill based on the family's inability to continue providing it. Student's family was missing work in order to transport Student, which was causing an economic hardship. The team then discussed potential transportation options for Student, specifically public transportation and carpooling, and both were, in effect, ruled out. Although John Banister, special education program administrator for West Contra Costa who attended the meeting, testified that he believed Student could take public transportation because of her age, neither he nor any other team member expressed this opinion during the meeting, and public transportation was not offered to

Student. Instead, West Contra Costa offered to continue providing mileage reimbursement for one round trip.

11. West Contra Costa's offer to provide transportation reimbursement was an acknowledgment of Student's need for transportation. Although during the meeting West Contra Costa's counsel presented the offer as an agreed upon term consistent with the settlement agreement, the request was made in the context of a subsequent IEP team meeting which the settlement agreement no longer controlled. Indeed, Student's counsel explicitly requested that transportation be considered by the team as part of Student's ongoing needs with regard to receiving a FAPE and provided as part of Student's IEP. The team's discussion consisted solely of transportation options for Student, which indicates the team presumed she had a need for transportation. No team member expressed the opinion that Student did not need transportation, nor was there any question or doubt raised as to whether she needed transportation. Although the IEP document contains a check mark next to "No" for special education transportation, the IEP notes and audio recording reveal that transportation was discussed and reimbursement was expressly offered. Under these circumstances, West Contra Costa's reimbursement offer constituted an acknowledgment of Student's need for transportation as a related service.

12. Subsequent to the meeting, on March 21, 2014, West Contra Costa sent a prior written notice to Student and Parents denying the request for educational therapy. On March 27, 2014, West Contra Costa sent a letter to Student and Parents approving the request for independent evaluations. The letter requested that Student confirm with West Contra Costa the individual selected to perform the independent evaluation, and the district's independent evaluation policy was enclosed. West Contra Costa did not hear back from Parents or Student regarding the independent evaluations at any time prior to Student's graduation from Bayhill in June 2015.

MARCH 9, 2015 ANNUAL IEP TEAM MEETING

13. On March 9, 2015, Student's IEP team met during her 12th grade year for the last time. The IEP document reflects that both Student and Mother held educational rights, and Mr. Banister's testimony confirmed that Student and Parents were sharing educational rights as of the previous, March 5, 2014 IEP team meeting. Student was making progress, having met many goals, and was on track to graduate. She was actively working on transition plan tasks, such as researching cosmetology programs, and postsecondary exit forms were reviewed and discussed. Services were continued through June 5, 2015, with the exception of summer school. Although a check mark was again placed next to "No" for transportation, the phrase "mileage reimbursement" was written, indicating that mileage reimbursement was continuing as well. That transportation reimbursement continued to be offered and was documented on the IEP establishes that Student had an ongoing need for transportation.

STUDENT'S TRANSPORTATION TO AND FROM BAYHILL

14. Mother and Sister drove Student to and from Bayhill during the 2013-2014 and 2014-2015 school years. Because public transportation had been ruled out and not offered, transportation by family members was required. Student did not have a driver's license, so she could not drive herself to school. Mother and Sister often drove together so that they could take the carpool lane during heavy traffic. They made one round trip in the morning to drop Student off at Bayhill and a second round trip in the afternoon to pick her up when the school day ended at 3:10 p.m., or at about 4:15 p.m. on the days Student participated in an after school homework club. The distance for one round trip between Student's home and Bayhill was 34.21 miles, so Student's family drove 68.42 miles each day Student attended school. After the March 5, 2014 IEP team meeting, Student attended Bayhill for 161 days in 2014 and 96 days in 2015. West

Contra Costa did not dispute the number of miles or days of attendance.

STUDENT'S RECEIPT OF TRANSPORTATION REIMBURSEMENT

15. Student did not submit "properly completed mileage reimbursement forms" on a monthly basis, as required by the settlement agreement. Student submitted a request for reimbursement for both school years in summer 2015.³ The request forms Student submitted were created by Student's counsel and consisted of monthly charts listing the dates on which Student's family provided transportation and calculating totals based on the mileage for one round trip between Student's home and Bayhill at the I.R.S. mileage rate. The request was not processed because it was not on West Contra Costa's forms.

16. Sister filled out West Contra Costa's Parent Mileage Reimbursement Request forms covering August 27, 2013, through June 3, 2015, at a resolution session held with West Contra Costa on September 8, 2015. Because Mother did not attend the resolution session and her signature on the forms was required, Mother and Sister visited Rosa Moreno in the West Contra Costa transportation office on October 9, 2015, at which time Mother signed the forms.

17. On December 15, 2015, West Contra Costa issued a check payable to Mother in the amount of \$7,435.53. This check represented full reimbursement for one round trip per day of attendance from August 27, 2013, through June 3, 2015, inclusive of the 2013-2014 extended school year.

18. On December 17, 2015, Mother and Sister visited Ms. Moreno to inquire

³ Although there was conflicting testimony about whether Student's transportation reimbursement request paperwork was initially submitted to West Contra Costa around April 2014, it is not necessary to resolve the conflict because, as discussed below, the fact that payment has been received renders this conflict moot.

about the status of the mileage reimbursement. Ms. Moreno emailed her contact in the fiscal department and received a reply that the check had been sent on December 16, 2015. Ms. Moreno called the family and left a voicemail in Spanish that the check was on its way.

19. Although the envelope containing the check was correctly addressed, it was returned to West Contra Costa, having been marked on December 27, 2015, by the post office as “not deliverable as addressed.” The check was returned to the fiscal department, and the office of Stephen Collins, West Contra Costa’s SELPA director, was notified. Mr. Collins asked Ms. Moreno to call the family about it, and she left a voicemail for Student’s family in January, notifying them in Spanish that the check was ready and requesting they call her. Student’s argument that this voicemail was left the Friday before hearing was not persuasive. That Mother did not receive the voicemail until then does not establish when the voicemail was actually left, nor did the voicemail itself include a date. Mother’s memory was imperfect on multiple issues, and upon listening to the voicemail during the hearing, she initially stated that it was not the same voicemail she heard at her home. The voicemail recording in fact supports Ms. Moreno’s testimony that she indeed left such a message.

20. Student and her family did not follow up with Ms. Moreno or any other West Contra Costa staff regarding the whereabouts of their check. Mother received the check during this due process hearing on March 23, 2016. Mr. Collins brought the check to the hearing after obtaining special permission to have the check released to him, because the fiscal department requires the parent to show identification and sign for the check.

STUDENT’S FAILURE TO PURSUE INDEPENDENT EDUCATIONAL EVALUATIONS

21. West Contra Costa granted Student’s request for independent evaluations. West Contra Costa mailed a letter to Student and Parents on March 27, 2014, approving

the independent evaluations. John Banister, special education program administrator for West Contra Costa, had attended the March 2014 IEP team meeting at which the request for independent evaluations had been made and presented the request to Mr. Collins shortly after the meeting. Mr. Collins drafted and signed the letter granting the request, and Sherry Alford, a special education secretary whom Mr. Collins supervises, mailed the letter. Mr. Banister was also provided with a copy of the letter; he received his copy of the letter and knew the independent evaluations were approved. The letter contained Student's and Parents' correct address and was not returned by the post office.

22. Sister could not remember whether she had seen the letter granting the request for independent evaluations. Sister's testimony that no response to the request was received from West Contra Costa was not credible. The testimony of Ms. Alford, Mr. Banister and Mr. Collins was consistent and supported by documentation and thus given more weight. Student attempted to impeach the testimony of Mr. Banister with a recording of the March 2015 IEP team meeting to show that his memory from the meeting, that Student was excited about traveling to Mexico, was false, because no one stated she was "excited." Statements made during the meeting indicated Student "wants" and is "hoping" to go to Mexico. To the extent this represents a discrepancy about Student's level of interest in going to Mexico, the discrepancy is not persuasive for impeaching Mr. Banister's credibility. Mr. Banister was a credible witness overall whose memory regarding the events at issue was much stronger than both Mother's and Sister's memories. In comparison with Mother and Sister, he was able to provide more information about past events and communications and had a greater ability to answer open ended questions. His demeanor was direct and earnest, and his testimony was consistent overall with the testimony of other witnesses and the documentary evidence in the case. Sister's testimony, in contrast, was at times inconsistent and

demonstrated that she had difficulty remembering details about past events and correspondence. For instance, Sister first stated that the prior written notice denying educational therapy had been received by the family. She then stated that it had not and ultimately stated that she did not remember and that it did not look familiar. The evidence supports the conclusion that the letter from Mr. Collins granting the request for independent evaluations was correctly addressed and properly mailed to Student and Parents.

23. Mother could not remember whether she had seen the letter granting the independent evaluations or the prior written notice denying educational therapy, which were both sent around the same time. Mother explained, however, that she could not recognize the letter denying educational therapy because she does not read English. Mother's testimony that West Contra Costa told her they would not grant the independent evaluations because they did not have anyone to conduct them in Spanish was not credible. Mother admitted that she could not remember this well, and she could not identify who told her or when. Mother's testimony was inconsistent with Sister's testimony on this issue as well as others. For instance, Sister said Student went to Mexico and took cosmetology classes there, but Mother said that Student did not move to Mexico for any period of time. Mother's ability generally to recollect past events, dates, and communications was impaired. For instance, Mother could not remember whether the settlement agreement included transportation reimbursement or if she was in Mexico in the fall of 2015. Mother's testimony is therefore given less weight.

24. Neither Student nor her family ever contacted anyone at West Contra Costa to inform West Contra Costa of their choice of assessors, ask for assistance in arranging the independent evaluations, or otherwise follow up on the request. Student, her family and her counsel could have initiated communication with West Contra Costa at any time to follow up on their independent evaluation request and did not do so.

Student, Mother, Sister and Student's attorney attended the March 9, 2015 IEP team meeting and did not ask about the independent evaluations. Student and Parents were sent a graduation notice informing them that Student was on track to graduate, and still they did not contact West Contra Costa about the independent evaluations.

25. A finding that Student and her family received the letter granting the request for independent evaluations and did not follow up on it is consistent with their overall lack of follow through with regard to the transportation reimbursement issues in this matter. They failed to file monthly requests for transportation reimbursement despite having been directly involved in the settlement agreement. They did not follow up on reimbursement forms they claimed to have submitted around April 2014 until summer 2015, or inquire as to the whereabouts of their reimbursement check after being told it was in the mail.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. Jurisdiction over this matter arises 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)⁵ 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

⁴ Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

and prepare them for further education, employment and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; and (3) to assist States, localities, educational service agencies and Federal agencies in providing for the education of all children with disabilities. (20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1; 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 IEP. (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(a); Ed. Code, § 56363, subd. (a) [In California, related services are also called 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] (hereafter *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).) 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, subd. (l).) At the hearing, the party filing the complaint has the burden of proof 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].)

5. 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. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education placement and services to constitute a FAPE, the offer must be reasonably calculated to provide the student with educational benefits. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

EDUCATIONAL RIGHTS HOLDER

6. West Contra Costa argues in its closing brief that Student did not meet her burden of proof in this matter because she was an adult during the two relevant school years and failed to introduce documentation showing she assigned her educational rights to Mother. However, Student did not need to assign her educational rights because she is directly represented by Ms. Porter in this matter, as indicated during appearances for the due process hearing and in the complaint and October 23, 2015 Declaration of LaJoyce L. Porter. Student's interests were thus represented, and she was not required to attend all days of hearing. While Ms. Porter's representation of Student is sufficient by itself, the evidence further established that educational rights were shared by Student and Mother as far back as March 5, 2014. There was no evidence to the contrary and no evidence the sharing of Student's educational rights was not valid or had been revoked.

TRANSPORTATION REIMBURSEMENT FROM AUGUST 28, 2013, TO THE MARCH 5,

2014 IEP TEAM MEETING

7. Student contends she was denied a FAPE because West Contra Costa failed to provide mileage reimbursement for one round trip to and from Bayhill for the time period of August 28, 2013, through March 5, 2014. West Contra Costa maintains that it reimbursed Student for round trip mileage to and from Bayhill for this time period.

Failure to Reimburse Within 30 Days

8. Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act (IDEA). (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [hereafter *Wyner*].)

9. This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement. (*Id.* at p. 1030.) In *Wyner*, during the course of a due process hearing the parties reached a settlement agreement in which the district agreed to provide certain services. The hearing officer ordered the parties to abide by the terms of the agreement. Two years later, the student initiated another due process hearing, and raised, inter alia, six issues as to the school district's alleged failure to comply with the earlier settlement agreement. The California Special Education Hearing Office (SEHO), OAH's predecessor in hearing IDEA due process cases, found that the issues pertaining to compliance with the earlier order were beyond its jurisdiction. This ruling was upheld on appeal. The *Wyner* court held that "the proper avenue to enforce SEHO orders" was the California Department of Education's compliance complaint procedure (Cal. Code Regs., tit. 5, § 4600, et. seq.), and that "a

subsequent due process hearing was not available to address . . . alleged noncompliance with the settlement agreement and SEHO order in a prior due process hearing.” (*Wyner, supra*, 223 F.3d at p. 1030.)

10. In *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal., Mar. 27, 2007, No. C 05-04977) 2007 WL 949603, pp. 4-5 (hereafter *Pedraza*), the United States District Court for the Northern District of California recognized OAH’s jurisdiction to adjudicate claims alleging denial of a FAPE as a result of a violation of a mediated settlement agreement, as opposed to “merely a breach” of the mediated settlement agreement that should be addressed by the California Department of Education’s compliance complaint procedure. In that case, the settlement agreement intended that the placement set forth in the terms of the agreement would provide Student with a FAPE. (*Id.* at p. 4.)

11. The terms of the settlement agreement call for West Contra Costa to provide Student with mileage reimbursement for one round trip within 30 days of receiving properly completed mileage reimbursement forms. Issue 1(a) claims that West Contra Costa failed to provide this reimbursement to Student. Issue 1(a) directly challenges West Contra Costa’s performance of the settlement agreement’s terms and is therefore an attempt to enforce the settlement agreement. OAH does not have jurisdiction to entertain this issue.

12. In addition, the limited *Pedraza* exception, conferring jurisdiction when there is a denial of FAPE, does not apply here. Although Student alleges a denial of FAPE resulted from West Contra Costa’s failure to provide transportation reimbursement, Student fails to establish that the terms of the agreement were specifically required to provide Student a FAPE. The evidence does not show that the intent of the settlement agreement was to offer a FAPE to Student prospectively. Unlike in *Pedraza*, where the parties acknowledged in the settlement agreement that the services the district agreed to provide constituted a FAPE for the school year, Student and West Contra Costa

agreed that the reimbursement and services do not constitute, and shall not be construed as, an admission of what is a FAPE for Student. Although the parties agreed to memorialize the settlement terms in a December IEP, there was no agreement as to the length of time these particular IEP terms must remain in effect. Furthermore, that Student did not waive FAPE claims beyond the December IEP shows that Student did not agree that the settlement terms represented a FAPE for a future time period. Accordingly, OAH does not have jurisdiction to review whether West Contra Costa failed to reimburse Student in violation of the settlement agreement.

Issue Mootness

13. Under the doctrine of mootness, a court may refuse to hear a case because it does not present an existing controversy by the time of decision. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) However, mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 460.) A case becomes moot when the court cannot provide the parties with any effectual relief. (*Knox v. Service Employees Intern. Union, Local 1000* (2012) 132 S.Ct. 2277, 2287.) An exception to the mootness doctrine is made if a case presents a potentially recurring issue of public importance. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.)

14. Even assuming OAH has jurisdiction to determine whether West Contra Costa failed to reimburse Student for one round trip of mileage from August 28, 2013, to March 5, 2014, the issue is moot. The settlement agreement governed the mileage reimbursement offer to Student for this time period and required reimbursement for only one round trip. West Contra Costa reimbursed Student on March 23, 2016, when it delivered the check to Mother for \$7,435.53. That payment provided mileage reimbursement for one round trip for the time period from August 27, 2013, through June 3, 2015. Student thus failed to establish a denial of FAPE from August 28, 2013,

through March 5, 2014, because Student was in fact reimbursed, consistent with the settlement agreement and agreement to memorialize the reimbursement in the December IEP, and the issue is now moot.

DENIAL OF DISTRICT TRANSPORTATION FROM THE MARCH 5, 2014 IEP TEAM MEETING THROUGH THE END OF THE 2013-2014 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

15. Student contends that she was denied a FAPE when West Contra Costa denied her request for district transportation at the March 5, 2014 IEP team meeting. West Contra Costa maintains that Student did not require transportation in order to receive a FAPE.

16. When a student is placed at a private school as the result of a mutual agreement between the parent and the school district, the legal standards for the provision of special education and related services are the same as if the student remained directly in the public school system. (20 U.S.C. § 1412(a)(10)(B); 34 C.F.R. § 300.146.)

17. Transportation is a related service and must be provided without charge if a student with a disability requires it to benefit from special education. (20 U.S.C. §§ 1401(9)(A), 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a); *Letter to Smith* (OSEP July 12, 1995) 23 IDELR 344 [23 LRP 3398].) The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).)

18. Districts must determine each student's need for transportation on a case-by-case basis. (*Letter to Smith* (OSEP July 12, 1995) 23 IDELR 344 [23 LRP 3398]; *Letter to Anonymous* (OSEP April 19, 2002) 38 IDELR 42 [102 LRP 34094]; *Letter to Dunstan* (OSEP

April 2, 1983) 211 IDELR 303 [211 LRP 7800].) The IEP team makes the decision about whether a disabled child requires transportation as a related service. (Ed. Code, § 56342, subd. (a); *Letter to Nevelndine* (OSEP Apr. 17, 1996) 24 IDELR 1042 [24 LRP 3821]; Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (Aug. 14, 2006).)

19. "If the IEP team determines that transportation is a necessary related service in order to ensure that a child is receiving FAPE, the public agency, and not the parents, must provide the transportation." (*Letter to Nevelndine, supra*, 24 IDELR 1042.) A school district may discharge its duties to transport a student with a disability by reimbursing parents for their expenses in providing transportation, so long as the arrangement is mutually agreeable to the parents and the district. (*Fort Sage Unified Sch. Dist. and Lassen County Office of Education* (Cal. SEA 1995) 23 IDELR 1078 [23 LRP 3587]; *Student v. Garden Grove Unified School Dist.* (Cal. SEA 2009) 53 IDELR 278 [109 LRP 76221; Cal.Ofc.Admin.Hrngs. Case No. 2009081095] [finding a denial of FAPE when district failed to provide transportation upon parents' notification they could no longer provide transportation].) If the parents agree to provide transportation, the district must properly reimburse the parents for their transportation costs. An inadequate reimbursement policy or practice may result in a denial of FAPE. (*Washoe County School District* (OCR 2010) 55 IDELR 234 [110 LRP 67436] [finding a denial of FAPE where the district's reimbursement rate and restriction to one round trip per day was insufficient to adequately compensate parents for their transportation-related expenses].)

West Contra Costa's Acknowledgment of Student's Need For Transportation

20. Student is a publicly placed student in a non-public school, having been placed at Bayhill through mutual agreement of the parties. Therefore, the legal standards for the provision of transportation are the same as if she was attending a

West Contra Costa school.

21. At the March 5, 2014 IEP team meeting, Student's counsel requested that West Contra Costa provide transportation for Student. The team discussed the feasibility of public transportation and carpooling, and ultimately West Contra Costa offered to continue reimbursing Student for one round trip per day. Given the IEP team's discussion of transportation, West Contra Costa's offer and provision of transportation reimbursement constitute an admission of Student's need for transportation. West Contra Costa's argument that Student did not need transportation is not consistent with what occurred at the IEP team meeting, where Student's need for transportation was not in dispute, and is therefore not persuasive.

22. West Contra Costa also maintains that although transportation was not required for Student, it continued to offer reimbursement for one round trip pursuant to the commitment it made in the settlement agreement. This argument is also not persuasive, because the commitment made in the settlement agreement only extended to the December 12, 2013 IEP and not for any IEP held thereafter.

23. West Contra Costa's decision to offer transportation reimbursement for one round trip appears to have been based on either a mistaken belief that it could continue to rely on the terms of the settlement agreement or on a misinterpretation of the agreement's language. The agreement required memorialization of its terms in a December 2013 IEP team meeting and mutual agreement for any changes made at that meeting but was silent as to future IEP team meetings. Thus, the plain language of the settlement agreement, combined with the ongoing requirements of the IEP process, showed that its terms were not binding on the parties at future IEP team meetings.

(A.D.L. by and through Lisa Lindstrom v. Cinnaminson Township Board of Education (D.N.J. 2013) 975 F.Supp.2d 459, 466 [hereafter *Cinnaminson Township*] [where the plain language of a consent order, combined with the IDEA's annual IEP review requirement,

demonstrated that the agreement was limited to the 2010-2011 school year, the school district violated the IDEA by relying on the transportation reimbursement amount set forth in the consent order to limit future transportation reimbursement[.] As in *Cinnaminson Township*, both parties were represented by counsel in the drafting and signing of the settlement agreement. (*Ibid.*) If West Contra Costa wished to lock in the transportation reimbursement provision for a particular period of time, it should have either insisted on language in the settlement agreement to represent that intention, or it should not have agreed to the existing language. (*Ibid.*)

Inadequacy of West Contra Costa's Offer

24. At the March 5, 2014 IEP team meeting, West Contra Costa denied Student's request for district transportation. The IEP team should have offered and provided district transportation upon Student's request. Prior to March 5, 2014, it was appropriate for West Contra Costa to discharge its transportation duties by reimbursing Student for mileage. However, when it became clear at the IEP team meeting that the reimbursement arrangement was no longer mutually agreeable, West Contra Costa became obligated to provide transportation either directly or through a private carrier for the remainder of the school year and extended school year.

25. West Contra Costa states that no explanation was provided as to why Student and Mother changed their opinion regarding transporting Student themselves between IEP team meetings, yet Student's counsel explained at the meeting that the request was based on the economic hardship to Student's family. It is not unreasonable that a family who wished to provide transportation realizes that it is unfeasible after doing so for a time.

26. Although Mother and Sister continued to provide transportation through Student's graduation, they did so because they were given no alternative. That they did so does not obviate the conclusion that they endured a hardship and financial cost.

When transportation is necessary for a student with a disability, parents must not be compelled to provide it, yet that is what occurred here. Accordingly, West Contra Costa's failure to offer and provide district transportation did not meet Student's unique needs, resulting in a denial of FAPE from March 5, 2014, through the end of the 2013-2014 school year, including extended school year.

27. West Contra Costa's offer of mileage reimbursement for one round trip was inadequate. It was not reasonable for Student's family to make one round trip per day, which would have required them to wait for Student until the school day ended at 3:10 or until after 4:00 on the days Student participated in an after school homework club. Student's family was therefore making two round trips, driving 68.42 miles each day, and only getting reimbursed for one round trip, or half of those miles. The amount West Contra Costa reimbursed Mother for driving one round trip for two school years was over \$7,000, so the cost to Student's family was significant. Transportation must be provided to students without charge, and here Student was no longer receiving a *free* appropriate public education. Because the reimbursement offer was insufficient to adequately compensate Student's family, Student was denied a FAPE from March 5, 2014, through the end of the 2013-2014 school year, including extended school year.

LACK OF DISTRICT TRANSPORTATION AND INADEQUATE TRANSPORTATION REIMBURSEMENT IN THE 2014-2015 SCHOOL YEAR

28. Student contends that, pursuant to the request for district transportation made at the March 5, 2014 IEP team meeting, she continued to be eligible for district transportation as a related service during the 2014-2015 school year. West Contra Costa maintains that Student did not require special education transportation during the 2014-2015 school year.

29. During the 2014-2015 school year, there was no evidence Student's needs had changed, so West Contra Costa had a continuing obligation to provide district

transportation to Student. The March 9, 2015 IEP's notation that mileage reimbursement would continue provides further affirmation of West Contra Costa's acknowledgment of Student's ongoing need for transportation. Mother and Sister continued to provide transportation throughout the school year by making two round trips per day. Thus, for all of the reasons set forth above, Student was denied a FAPE for the duration of the 2014-2015 school year.

30. From March 5, 2014, through the end of the 2014-2015 school year, Student was denied a FAPE when West Contra Costa failed to provide Student transportation and then offered to reimburse Student for only one round trip per day, instead of two.

INDEPENDENT EDUCATIONAL EVALUATIONS

31. Student contends that West Contra Costa failed to provide independent evaluations pursuant to the request by Student's counsel at the March 5, 2014 IEP team meeting. West Contra Costa maintains that it granted the request and that it was Student's failure to pursue the independent evaluations that resulted in the lack of provision of those evaluations.

32. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (34 C.F.R. §§ 300.502(b)(1), (b)(2).)

33. When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); see *Letter to Bluhm* (OSEP July 2, 1980) 211 IDELR 227A [211 LRP 7086].)

34. West Contra Costa acted timely in responding to the March 5, 2014 request for independent evaluations and provided the required information to Student. The March 27, 2014 letter granting Student's independent evaluation request was correctly addressed and properly mailed and is therefore presumed to have been received. (Evid. Code, § 641.) Student did not rebut this presumption. As described above, more weight was given to the consistent, supported testimony of Mr. Banister, Mr. Collins and Ms. Alford than to the inconsistent, limited recollections of Mother and Sister.

35. West Contra Costa was not obliged to file for a due process hearing. Student's citation to *Pajaro Valley Unified School District v. J.S.*, N.D.Cal. 2006, 2006 WL 3734289, for the proposition that West Contra Costa should be ordered to fund the independent evaluations based on its failure to timely file a due process complaint to defend the appropriateness of its assessments, is misplaced. *Pajaro Valley* is inapplicable, because Pajaro Valley refused to fund an independent evaluation and was therefore required to file a due process hearing request to show that its assessment was appropriate. (*Id.* at p. 3.) West Contra Costa, however, agreed to fund the independent evaluations. There was therefore no obligation to show that its assessments were appropriate by filing a due process hearing request.

36. Although not required to file a due process hearing request, West Contra Costa was required to ensure that the independent evaluations were provided. However, in this case, it reasonably appeared that Student abandoned her request for independent evaluations. Neither Student, nor Mother, nor Student's counsel made any attempt to follow up on the independent evaluations after the initial request. Student appears to be re-raising the issue for the first time, one year and seven months later, in her amended complaint for this due process hearing. Student argues in her closing brief that even if Mother received the letter granting the independent evaluations, she could not understand it as it was not in her native language. However, Student, who was over 18 years old, sharing her educational rights with Mother, and living with Mother, is an English speaker. Student provides no authority to show that under these circumstances the notice sent to Student was insufficient. Student and Mother had opportunities to ask about the independent evaluations at any time and, specifically, at the March 9, 2015 IEP team meeting or upon receiving Student's graduation notice and did not do so. Student was represented by counsel, who made the request for independent evaluations, attended the subsequent IEP team meeting, and also did not inquire about the evaluations. Additional relevant circumstances include that Student and her family had a history of not pursuing their requests, such as requests for transportation reimbursement and educational therapy. Finally, Student was over 18 years old, making progress, close to graduating, and her placement and services, with the exception of transportation, were resolved through graduation. In light of all of these factors, Student abandoned the independent evaluations.

37. West Contra Costa's argument that its legal obligation ended once the letter approving the independent evaluations was sent is incorrect. Districts, not students, have a legal duty to "ensure" that independent evaluations are provided. In this case, if there had been *any* indication that Student was not abandoning, or still

wanted, the independent evaluations, West Contra Costa would have been obligated to take additional, affirmative action to ensure the evaluations were provided. Under the narrow circumstances here, however, West Contra Costa's legal duties were properly discharged because Student abandoned the independent evaluations. Accordingly, Student failed to meet her burden of establishing that West Contra Costa denied her a FAPE by failing to provide the independent evaluations.

REMEDIES

1. Student prevailed as to Issues 1(b) and 2. As a remedy, Student requests mileage reimbursement for two round trips to and from Bayhill from March 5, 2014, through the 2014-2015 school year at the I.R.S. rate or at a rate commensurate with what West Contra Costa would have to pay transportation providers.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Com. of the Town of Burlington, Mass. v. Department of Education of the Commonwealth of Mass.* (1985) 471 U.S. 359 at pp. 369, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1496.)

3. School districts may be ordered to provide compensatory education to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) Compensatory education is an equitable remedy that courts may employ to craft "appropriate relief" for a party. (*Id.* at p. 1497.) In addition, parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (*Burlington, supra*, 471 U.S. at pp. 369-71.)

4. It was determined herein that West Contra Costa denied Student a FAPE from March 5, 2014, through the end of the 2014-2015 school year, inclusive of the 2013-2014 extended school year, by failing to provide district transportation. As a result of this failure, Student's family incurred the cost of making two round trips per day in order to transport Student to and from Bayhill. Because Student has already been reimbursed for one round trip for this time period, West Contra Costa shall reimburse Student for one additional round trip per day of Student's attendance at Bayhill from March 6, 2014, through June 3, 2015, inclusive of the 2013-2014 extended school year, at the I.R.S. mileage rate. Student's alternative request for reimbursement at a rate commensurate with what West Contra Costa would have to pay transportation providers is denied. Student provided no authority to support such a remedy, and mileage reimbursement is more appropriate here.

5. The total amount West Contra Costa owes Student for one round trip from March 6, 2014, through June 3, 2015, is \$4,972.76. This calculation is based on mileage of 34.21 miles per day of attendance and I.R.S. mileage rates of 56 cents per mile in 2014 and 57.5 cents per mile in 2015. Student attended Bayhill for the following number of days in 2014: 17 in March starting on March 6; 17 in April; 21 in May; 15 in June; 13 in July; 4 in August; 21 in September; 23 in October; 15 in November; and 15 in December. Student attended Bayhill for the following number of days in 2015: 19 in January; 19 in February; 22 in March; 17 in April; 16 in May; and 3 in June.

6. Documents submitted in this hearing constitute adequate proof of Student's family's transportation costs in taking Student to and from Bayhill. No further documentation will be required to substantiate the amounts.

ORDER

1. Within 45 days of the date of this Decision, West Contra Costa shall reimburse Student \$4,972.76, representing mileage from March 6, 2014, through June 3,

2015, for the additional round trip per day of attendance at Bayhill that was not included in the reimbursement check delivered to Mother on March 23, 2016.

2. Student's 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 prevailed on Issues 1(b) and 2, and West Contra Costa prevailed on Issues 1(a) and 1(c).

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: May 5, 2016

_____/s/_____
LISA LUNSFORD
Administrative Law Judge
Office of Administrative Hearings