

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BENICIA UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016041016

DECISION

Student filed a request for due process hearing on April 18, 2016, naming the Benicia Unified School District. Administrative Law Judge Charles Marson heard the matter in Benicia, California, on February 14 and 15, 2017.

Tania L. Whiteleather, Attorney at Law, represented Student throughout the hearing. Student's Mother attended the hearing. Student was not present.

Jan E. Tomsy, Attorney at Law, represented Benicia throughout the hearing. Dr. Carolyn Patton, Benicia's Director of Special Services, attended the hearing on its behalf.

On February 15, 2017, the matter was continued to March 8, 2017, for the filing of written closing arguments. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES

1. Did Benicia deny Student a free appropriate public education in the school year 2015-2016 when it:

- a) unilaterally changed his individualized education program from certificate of completion track to diploma track;

- b) terminated his enrollment in the Benicia Bridge program; and
- c) awarded or purported to award him a high school diploma?

2. Is Benicia required to provide Student independent educational evaluations in the areas of psycho educational status, speech and language, and occupational therapy?¹

SUMMARY OF DECISION

This Decision holds that Benicia procedurally denied Student a free appropriate public education at an IEP team meeting in January 2016 when it moved him from certificate of completion track to diploma track, immediately graduated him with a regular high school diploma, terminated his eligibility for special education, and denied his pending requests for independent educational assessments. It did so without providing Student adequate notice in the notice of the meeting that these subjects would be addressed, and without providing him prior written notice of the reasons for those decisions within a reasonable time before they were implemented.

The Decision also holds that Benicia substantively denied Student a FAPE at that meeting by moving him from certificate of completion track to diploma track, immediately graduating him with a regular high school diploma, terminating his eligibility for special education, and denying his pending requests for independent educational assessments, in breach of a provision in his last agreed-upon and implemented IEP that placed him on a certificate of completion track.

The Decision also compensates Mother for private assessments obtained at her expense.

¹ Student earlier sought a mental health assessment but abandoned that claim at hearing.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 20-year-old male who resides with Mother within Benicia's boundaries and has been receiving special education and related services in the category of other health impaired. He had macrocephaly (an unusually large head) at birth, and now has an asymptomatic arachnoid cyst that affects his cognition, processing speed, fine motor skills, attention and visual perception. He was diagnosed in 2012 with autism by the North Bay Regional Center. His cognitive level is low average. He is outgoing, cheerful, hard-working and well-liked by peers and adults.

2. Since 2014, Student's IEP has placed him on track to receive a certificate of completion rather than a regular high school diploma. He has participated since then in the Benicia Bridge Adult Program, a program of community-based instruction operated by the Solano County Office of Education. In June 2015, at the end of his 12th grade year, he received a certificate of completion from Benicia but continued attending the Benicia Bridge program pursuant to his IEP.

3. On January 8, 2016, Benicia discovered that Student had completed sufficient high school credits to graduate with a diploma. At an IEP team meeting three days later, it graduated Student over his objection, terminated his eligibility for special education, and denied his pending requests for independent educational evaluations because he was no longer eligible to receive them. It terminated his education in the Benicia Bridge Program the next day. Student then filed this request for due process hearing, and is attending the Benicia Bridge program pursuant to a stay put order.

THE CHANGE FROM DIPLOMA TRACK TO CERTIFICATE OF COMPLETION TRACK

4. Before October 2014, all of Student's IEP's placed him on track to receive a regular high school diploma. As his education progressed, Mother became concerned

that he was having increasing difficulty with regular courses and began to consider post-graduation training for him. She raised these concerns at an IEP team meeting in October 2013, at which Ray Darwin, a county transition teacher, described available county transition programs. According to the meeting notes, Mr. Darwin “spoke of another program where the diploma can be deferred or not picked up by the student so as to have more community transition services.” Mr. Darwin added that “this was an option in several other districts.”

5. Shortly after that meeting, Mother telephoned Dr. Carolyn Patton, Benicia’s Director of Special Services, to inquire about the option Mr. Darwin described.² Dr. Patton told Mother that no such deferred diploma program existed at Benicia, and that the receipt of a regular education diploma would terminate Student’s special education eligibility. According to Dr. Patton, the two agreed that the subject would be “an IEP team discussion.” Mother was not satisfied with this answer, and continued to hope that an arrangement could be made under which Student would eventually receive a regular high school diploma but only after receiving extensive adult special education services.

6. In October 2014, in the fall of Student’s 12th grade year and in preparation for Student’s triennial review, Benicia school psychologist Lisa Johnson completed a “Triennial Assessment Report.” The report described the assessment as “multidisciplinary” and one in which “all areas of suspected disability were evaluated.” It addressed all areas of concern for Student’s needs, ranging from his social emotional condition to academic achievement, and touched on the possibility of autism. It noted

² At hearing, Dr. Patton did not clearly remember when this call occurred. It might have occurred in connection with two IEP team meetings in October 2014 rather than in October 2013. The timing makes no difference.

his early speech and language delays and included several tests for verbal reasoning and verbal expression. It also touched briefly on occupational therapy concerns including visual perception, fine motor control, and "significant challenges when it comes to paper/pencil tasks."

7. On October 22, 2014, Benicia held Student's triennial review. Mother and Student (who was 18 years old by the time of the meeting) expressed concern about post-graduation learning. The IEP document memorializing the meeting stated in two places that Student would no longer be on a diploma track but would in the future be on track to receive a certificate of completion in June 2015. Student signed his agreement to the IEP except for "items not resolved noted in notes." The meeting notes stated that whether Student would be on a diploma or certificate of completion track was not resolved, and that a continuation meeting would be scheduled.

8. At a continuation meeting on October 27, 2014, Student and Benicia agreed that Student "will be moved from the diploma track to the certificate of completion track." An amendment to the October 22, 2014 triennial IEP memorializing that agreement was signed by Student and by Ms. Johnson. The change was promptly implemented; Student began to receive, during part of his school day, community-based instruction of the type commonly provided to special education students who do not graduate with diplomas.

9. On May 27, 2015, a few days before Student's 12th grade class graduated, the parties again amended the October 2014 triennial IEP to refine Student's program for the upcoming year. They agreed that Student would receive a hybrid program of some classes, some work experiences, and community-based instruction in the county's Benicia Bridge Adult Program three days a week. Student, Mother, and Benicia signed their agreement to the amendment, which began: "[Student] is on a certificate of

completion.” At the time, all involved assumed Student did not have the credits to graduate with a regular education diploma.

STUDENT’S CONTINUING EDUCATION BEYOND 12TH GRADE

10. On or about June 6, 2015, Benicia awarded Student a Certificate of Completion from Benicia High School. Throughout the summer and fall, he continued attending the Benicia Bridge Program according to the hybrid schedule set forth in the May 27, 2015 amendment to his triennial IEP.

11. At an October 2015 annual meeting, Benicia proposed another IEP that would have continued Student on a certificate of completion track in the Benicia Bridge program. Student did not agree to it, leaving in effect the triennial IEP of October 22, 2014, as amended on October 22, 2014, and May 27, 2015, placing him on certificate of completion track and in the Benicia Bridge program.

STUDENT’S DEMAND TO BE RETURNED TO DIPLOMA TRACK

12. In late November 2015, Mother retained educational advocate Linda Geller to assist her in dealings with Benicia. On December 1, 2015, Student executed a power of attorney empowering Mother to exercise his educational rights.³ On December 13, 2015, Ms. Geller wrote a lengthy letter to Benicia on Student’s behalf identifying many alleged shortcomings in Benicia’s handling of Student’s education. The principal allegation was that Benicia had “dropped [Student] from the diploma track” in his 2014 triennial IEP with inadequate notice to the family and without their informed consent. The central point of the letter was: “The [family] did not give informed consent to this

³ On June 6, 2014, Student’s 18th birthday, he acquired his own educational rights. Since that time both he and Mother have been involved in IEP-related decisions. The December 2015 power of attorney made Mother’s authority clear.

decision and are rescinding it!" The letter also stated that Mother disagreed with the District's 2014 triennial assessments and requested independent educational evaluations "in the areas of speech and language, vocational, occupational therapy and psycho education" at district expense.⁴

13. Ms. Geller's letter also discussed the prospect that Student could receive a regular high school diploma on a delayed schedule, and in the meantime continue to receive adult education and special education services. It referred to Mr. Darwin's 2013 statement that there could be a deferred diploma option, and complained that this option was never pursued. Testimony at hearing showed that, when the letter was written, both Mother and Ms. Gellar believed that such an option was at least possible, and were interested in pursuing it with Benicia.

14. Benicia responded to Ms. Geller's letter within a few days, stating that it would review her requests and act on them after the winter break. Dr. Patton asked Justin Keppel, a school counselor, to check on Student's credits to determine how many he needed to graduate. At the time, no one involved in these events believed Student had enough credits to graduate.

15. At a meeting on January 7, 2016, concerning another child, Dr. Patton, Mother and Ms. Geller agreed on January 11 as the date for an IEP team meeting for Student to address the matters in Ms. Geller's December letter. On January 8, Benicia sent to Mother a notice of that meeting, announcing its purpose as considering "change of placement/services."

16. On Friday, January 8, 2016, Mr. Keppel informed Dr. Patton that Student had already earned sufficient credits to graduate with a diploma, which surprised both

⁴ Student has not pursued his claim for a vocational assessment.

Mr. Keppel and Dr. Patton. Benicia did not immediately inform Student, Mother, or Ms. Geller of this fact.⁵

THE IEP TEAM MEETING ON JANUARY 11, 2016

17. Mother, Ms. Geller, and Student arrived at the Monday, January 11, 2016 IEP team meeting expecting to argue for returning Student to diploma track but deferring the receipt of his diploma for several months at least, so he could continue to receive adult education and services in the meantime. This expectation may have been unreasonable, but the evidence showed it was their expectation. Mother brought a behaviorist from the North Bay Regional Center to the meeting to help discuss possible program changes. Mother and Ms. Geller were eager to obtain the results of independent assessments in order to refine Student's future program. Neither Student nor anyone accompanying him expected that he might graduate immediately or soon, or lose his eligibility for special education.

18. At the outset of the IEP team meeting, Dr. Patton did not immediately reveal to Student and his allies her new knowledge that he already had sufficient credits to graduate. Instead, she carefully structured the discussion so that all team members – district and Student representatives alike – began the meeting by agreeing that Student

⁵ In a carefully letter written to OAH on February 10, 2016, Dr. Patton identified Friday, January 8, 2016, as the day she learned that Student had all the credits he needed to graduate. At hearing, more than a year later, she testified tentatively that she believed she learned of it Sunday night before the Monday IEP team meeting. Dr. Patton's earlier and more formally presented recollection, expressed closer to the event, is more likely to be accurate.

should be on a diploma track. She even went around the room individually, making sure that everyone was committed to that agreement.

19. Only then, when Dr. Patton had obtained the firm commitment of everyone present to returning Student to diploma track, did she turn to Mr. Keppel, who announced that the district had discovered Student had enough credits to graduate immediately. Dr. Patton then added that the consequence of the agreement just reached to put Student back on diploma track would be his immediate graduation; and that as a result his eligibility for special education would also end immediately, thereby providing the grounds for denying his pending requests for independent educational evaluations. She announced that Student had graduated; that he would receive a diploma backdated to June 2016; that he was no longer enrolled in the Benicia Bridge program or any other educational activity supported by the District; that he was no longer eligible for special education and related services; and that therefore his pending requests for independent educational evaluations were denied. The IEP document presented to Mother and Ms. Geller toward the end of the meeting confirmed these decisions.

20. As soon as Student and his representatives realized the consequences of his return to the diploma track, the consensus at the meeting fell apart. Mother and Ms. Geller complained that they had not been given adequate notice of these developments; they had arrived expecting to discuss arrangements for a deferral of his diploma until he received extensive additional adult education and services. Ms. Geller stated that the family still had goals they wanted to discuss, but Benicia did not respond to that statement. Mother and Ms. Geller protested the outcome of the meeting and refused to consent to any IEP that reached that result. They wrote a statement on the IEP document confirming those protests, and Mother appended to it and signed the statement: "I disagree with everything discussed."

STUDENT'S EXCLUSION FROM THE BENICIA BRIDGE PROGRAM UNTIL THE STAY PUT ORDER

21. Student attended the Benicia Bridge program the next day, but Benicia excluded him from the program after that day on the grounds that he had graduated and was no longer eligible for special education. Ms. Geller filed on Student's behalf a due process complaint and a motion for a stay put order, which was denied for failure to make an adequate showing. Mother then withdrew that complaint and obtained her present attorney, who filed this action and made a motion for stay put with an adequate showing. On May 31, 2016, OAH issued a stay put order requiring Benicia to maintain Student in the Benicia Bridge program until this matter is resolved. Benicia complied with the order, and Student has been back in the program since that time. Benicia did not take further action on the requests for independent educational assessments.

22. At hearing Mother proved that she had obtained three independent assessments on her own. They were a psycho educational assessment by Dr. Carina Grandison, a neuropsychologist, for which the bill was \$6,300; a speech and language assessment by Deborah Burns-McCloskey, a speech and language pathologist, for which the bill was \$2,875; and an occupational therapy assessment by occupational therapist Elizabeth Isono, for which the bill was \$2,150.

CONCLUSIONS OF LAW

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);⁷ 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 further education, 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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services 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 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 specifies 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).)

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

3. 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.) 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].) By this standard, Student, as the filing party, had the burden of proof on all issues.

4. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see 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 NO. 1: DID BENICIA DENY STUDENT A FAPE IN THE SCHOOL YEAR 2015-2016 WHEN IT:

- a) unilaterally changed his IEP from certificate of completion track to diploma track;*
- b) terminated his enrollment in the Benicia Bridge Program; and*
- c) awarded or purported to award him a high school diploma?*

Requirement of Parental Involvement

5. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904].) Protection of parental participation is "[a]mong the most important procedural

safeguards” in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

6. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

Procedural Requirements for Graduation

7. Graduation from high school with a regular high school diploma constitutes a change in placement. (34 C.F.R. § 300.102(a)(3)(iii).) A district must ensure that parents are members of any group that makes decisions on the educational placement of their child. (34 C.F.R. § 300.327.) An IEP team that includes parents must therefore be convened “at an appropriate time before the child receives a diploma to assure that graduation requirements will be met, and that the goals and objectives in the IEP will be completed.” (*Letter to Richards* (OSEP 1990) 17 IDELR 288.) As with any IEP team meeting, the district must notify parents of the purpose of the meeting, who will be in attendance, and the right of parents to bring to the meeting those who have knowledge or special expertise about their child. (34 C.F.R. §§ 300.322(b)(1); see 34 C.F.R. § 321(a)(6), (c); Ed. Code, §56341.5, subd. (c).)

8. Since graduation with a regular high school diploma is a change of placement and terminates special education eligibility (34 C.F.R. § 300.102(a)(3)), a district must also give parents prior written notice of it. (34 C.F.R. § 300.102(a)(3)(iii).) The notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency made the decision; (3) a description of each

evaluation procedure, assessment, record, or report on which the decision was based; (4) a reminder of parents' procedural safeguards; (5) sources for assistance; (6) the options considered and the reasons for rejecting the others; and (7) a description of other factors relevant to the decision. (34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b); see also Ed. Code, § 56500.5 [requiring "reasonable written prior notice" that a student "will be graduating from high school with a regular high school diploma . . ."].) The notice is required even if the change is being proposed by the parent. (*Letter to Lieberman* (OSEP 2008) 52 IDELR 18.)

9. The purpose of the prior written notice requirement is to ensure that parents receive sufficient information about the proposed placement change to reach an informed conclusion about whether it will provide an appropriate education. (*Smith v. Squillacote* (D.D.C. 1992) 800 F.Supp. 993, 998.) In some cases it may be acceptable to use the IEP itself to provide prior written notice of a placement change, but only if the document contains all of the notice elements required by 34 C.F.R. § 300.503(b). (*G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d 942, 949.) In any event, the notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*Letter to Chandler* (OSEP 2012) 59 IDELR 110.) Verbal notice may not be substituted for written notice. (*Union Sch. Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

10. Benicia failed to give Student adequate advance notice of the purpose of the January 11, 2016 IEP team meeting in its notice of the meeting, and in doing so significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. The notice of meeting, which described the purpose of the meeting as a discussion of "change of placement/services,"

did not adequately apprise her of the purpose of the meeting. Benicia knew that Student, Mother, and Ms. Geller were all unaware that he had enough credits to graduate immediately or that Benicia believed he did. In retrospect Mother has been able to identify many reasons (advanced at hearing) why Student, in her view, did not in fact earn sufficient credits to graduate with a regular high school diploma. But she and Ms. Geller were wholly unprepared to discuss those reasons on January 11, 2016, or invite anyone to the meeting to advance those reasons, because they did not know Benicia would claim he already had the required credits. Dr. Patton had acquired that information three days earlier, and sometime between then and the meeting must have formed the intent to graduate Student immediately (judging from her careful orchestration of the meeting), but did not advise Student and his supporters of that intent in advance.

11. In addition, since Student, Mother and Ms. Geller were not notified that immediate graduation and loss of special education eligibility would be discussed at the meeting, they were therefore unprepared to discuss the wisdom of those actions. They had no fair notice of a discussion intended “to assure that graduation requirements will be met, and that the goals and objectives in the IEP will be completed.” (*Letter to Richards, supra*, 17 IDELR 288.) Benicia knew they assumed Student did not have enough credits to graduate and knew they hoped to discuss a deferred diploma arrangement. They invited a behaviorist from the Regional Center to the meeting to discuss what such a program might involve. They attempted to discuss Student’s goals, but Benicia was unresponsive to that attempt. Benicia withheld from them the critical fact that Student already had enough credits to graduate until after the meeting began and after they had agreed to place Student back on diploma track, operating under assumptions Benicia knew were incorrect.

12. Benicia also failed to give Student adequate prior written notice of his graduation, his loss of special education eligibility, and his consequent loss of entitlement to independent assessments. Prior written notice can sometimes be found in the IEP document itself, but the IEP document from January 11, 2016, did not contain most of the seven elements that are required for such notice.(34 C.F.R. § 300.503(b).)At best it contained items one, two and four (set forth above); the others were absent. And while prior written notice need not be given before the making of the decision to which it pertains, it must be given “a reasonable time before” the district actually implements that decision. (34 C.F.R. § 300.503(a).) Benicia violated that requirement by graduating Student and ending his eligibility for special education at the January 11, 2016 meeting, and barring him from school after his attendance the next day.

13. The absence of adequate prior written notice deprived Student of educational benefits and impeded his right to a FAPE. One reason for the requirement that prior written notice be given a reasonable time before the actual implementation of a change of placement such as graduation is to enable the parents to take advantage of IDEA's stay-put provision. (*P.N. v. Greco* (D.N.J. 2003) 282 F.Supp.2d 221, 235 [failure to provide prior written notice of graduation].) Had Benicia given Student adequate prior written notice before it actually implemented its decisions, he could have filed a request for due process hearing in time to benefit from the automatic stay put relief such a filing provides, therefore obtaining the continuity of educational program that is the purpose of the stay put provision and avoiding the four-and-a-half month gap in his education caused by the fact that he had to seek legal relief in retrospect.

14. For the reasons above, Benicia procedurally denied Student a FAPE by failing to give him adequate notice of the purpose of the IEP team meeting of January 11, 2016 in the notice of meeting, and failing to give him adequate prior written notice

of his graduation, loss of special education eligibility, and consequent loss of entitlement to independent assessments.

Substantive Requirement of Compliance with IEP Provisions

15. The IDEA's definition of a "free appropriate public education" includes "special education and related services that ... are provided in conformity with the individualized education program required under section 1414(d) of this title." (20 U.S.C. § 1401(8).) As soon as an IEP is agreed upon by parents and a district, special education and related services must be made available to the student "in accordance with the child's IEP." (34 C.F.R. § 300.323(c)(2).) A district must continually ensure that a placement "[i]s based on the child's IEP." (34 C.F.R. § 300.116(b)(2).) The Supreme Court has confirmed that the provision of special education in conformity with the IEP is an essential element of a FAPE: "[T]he definition [of FAPE] also requires that such instruction and services ... comport with the child's IEP." (*Rowley, supra*, 458 U.S. at p. 189.)

16. A district commits a substantive violation of the IDEA when it departs from a provision of an agreed-upon IEP, except when the deviation can be characterized as only a minor variation from the IEP. In *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 826, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE when "there is more than a minor discrepancy between the services provided to a disabled child and those required by the child's IEP." In the course of its opinion the *Van Duyn* majority cautioned:

[N]othing in this opinion weakens schools' obligation to provide services "in conformity with" children's IEPs. § 1401(9). IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material

changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. See §§ 1414(d)(3)(F), 1415(b)(3)

(*Van Duyn, supra*, 502 F.3d at p. 822.) The dissenting judge would have held that any deviation from an IEP provision automatically denied the student a FAPE. (*Id.*, 502 F.3d at pp. 826-827 [Ferguson, J., dissenting].)

17. Student's October 2014 triennial IEP, as amended on October 27, 2014, and May 27, 2015, specifically moved him from diploma track to certificate of completion track. That provision of his IEP was important to the parties, was bargained for, was agreed upon, and was implemented. Benicia breached that IEP provision by graduating Student, ending his eligibility for special education, and ending his eligibility for independent assessments without his consent.

18. Benicia's deviation from Student's IEP was plainly more than a minor discrepancy, and therefore denied Student a FAPE. (*Van Duyn, supra*, 502 F.3d at p. 826.) It terminated his special education and related services, and operated to deny his pending requests for independent assessments. Benicia does not argue that the deviation was minor.

19. Benicia argues that its noncompliance with the provision in Student's IEP placing him on a certificate of completion track and in the Benicia Bridge program was nonetheless lawful for several reasons, none of which is persuasive. First, Benicia cites numerous authorities for the propositions that the IDEA does not regulate a disabled student's entitlement to a diploma or a certificate of completion, and that instead the standards for graduation with a diploma or a certificate are left entirely to states. While that appears correct as a general proposition, it does not justify breaching a provision of an agreed-upon and implemented IEP. Federal law may not regulate graduation

standards, but it does regulate fidelity to IEP provisions. (20 U.S.C. § 1401(8); *Rowley*, *supra*, 458 U.S. at p. 189; *Van Duyn*, *supra*, 502 F.3d at p. 826.)

20. Second, Benicia points out that there is no specific legal requirement that a path toward a diploma or a certificate of completion be set forth in an IEP. (See 34 C.F.R. §§ 300.320; Ed. Code, § 56345.) Assuming (without deciding) that is correct, it does not explain why an IEP provision that does contain such a path is not binding. Parents and districts agree on many things in IEP's that the law does not require them to include, but that does not mean those agreements are unenforceable. For example, an IEP need not contain a statement of a particular educational methodology to be used in instruction. (*J.L. v. Mercer Island Sch. Dist.* (9th Cir. 2010) 592 F.3d 938, 952.) However, if parents and a district choose to specify such a methodology in an IEP, the district is bound by the agreement and denies the student a FAPE if it significantly breaches that agreement. (See, e.g., *Sumter County Sch. Dist. 17 v. Heffernan* (4th Cir. 2011) 642 F.3d 478, 481, 485-486 [IEP specified use of Applied Behavioral Analysis; district denied FAPE by material breach of IEP provision by failing to provide it].) A significant breach of an agreed-upon IEP provision denies FAPE, and there is no exception to that rule for provisions that are optional rather than required.

21. Next, Benicia relies on decisions holding that receipt of a regular high school diploma does not require parental consent. Again that may be true as a general proposition, as long as the subject matter is not addressed in a student's IEP, but it does not explain or justify breaching a provision that is in an IEP. Absent an IEP provision, Benicia may have had unilateral authority to choose Student's path to graduation or certificate of completion. However, Benicia voluntarily bargained away that unilateral authority (if it existed) in the October 2014 IEP. It could not reclaim that authority at will without breaching its responsibility to deliver services in conformity with the IEP.

Graduation itself may not require consent, but material alteration of an IEP provision does. (Ed. Code, § 56346.)

22. Benicia argues further that it was authorized, if not compelled, to graduate Student pursuant to the following state regulation:

When an individual with exceptional needs meets public education agency requirements for completion of prescribed course of study designated in the pupil's IEP, the public education agency which developed the IEP shall award the diploma.

(Cal. Code Regs., tit. 5, § 3070.) However, in this case the “prescribed course of study designated in the pupil’s IEP” was a certificate of completion track, so the regulation has no application here.

23. Benicia does not identify a single judicial decision authorizing a district to breach an IEP provision simply because the subject matter of the provision concerns graduation, a diploma, or a certificate of completion. It cites only *Chuhuran v. Walled Lake Consolidates Schools* (E.D.Mich. 1993) 839 F.Supp. 465, *affd.* (6th Cir. 1995) 51 F.3d 271, for the proposition that a district may agree to extend a student’s special education services after graduation, but may end those services and graduate him at will as long as he has met graduation requirements. However, the IEP’s of the student in *Chuhuran* had consistently placed him on track to graduate with a diploma (see *id.*, 839 F.Supp. at pp. 468 [description of 1987 and 1988 IEP’s]; 473 [“Chuhuran followed a regular education curriculum leading to a high school diploma.”].) The case did not involve any allegation of breach of an IEP provision.

24. Nor does Benicia cite any previous OAH decision authorizing breach of an IEP providing for a certificate of completion. The closest one Benicia cites is *Student v.*

Newport-Mesa Unified Sch. Dist. (OAH, Dec. 9, 2010, No. 2010060770), in which a parent argued that a district's announcement of its intention to graduate a student denied him a FAPE. His IEP called for a certificate of completion. The dispute revolved around the then-recently-repealed requirement that a student pass the high school exit exam (CAHSEE) before graduating with a diploma. ALJ Judith Pasewark held that the District did not deny the student a FAPE by announcing its intention. Since the district had not yet graduated the student, no issue was presented about breaching the IEP. Student did not argue that the IEP provision for a certificate of completion had been violated, and Judge Pasewark did not address that issue. "It is axiomatic . . . that a decision does not stand for a proposition not considered" in it. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.)⁸

25. Whether a student will receive a diploma or a certificate of completion is commonly addressed in IEP's, and Benicia seeks to explain this by arguing that such a provision merely serves the function of providing the legally required notice of a district's intention to graduate a student. Benicia does not explain how this observation affects this case, in which any notice given by Student's IEP's notified him he would receive a certificate of completion until the IEP document of January 11, 2016, handed to him after the decision to graduate him was made, said otherwise. The failure of that document to provide adequate notice is addressed above.

26. In its essence, Benicia's argument is that a district has the unilateral right to award a special education student a diploma if he has earned it, without regard to

⁸ Benicia also relies on *Student v. Calaveras Unified Sch. Dist.* (OAH, Oct. 1, 2012, No. 2012060827), in which the ALJ held a student had failed to prove that he did not receive adequate prior written notice of his graduation. However, that student's IEP's all placed him on a diploma track, so the decision has no application here.

what his IEP provides. There is no law supporting that argument. Benicia agreed to an IEP providing for a certificate of completion, breached that agreement with significant consequences, and therefore denied Student a FAPE.

ISSUE NO. 2. IS BENICIA REQUIRED TO PROVIDE STUDENT INDEPENDENT EDUCATIONAL EVALUATIONS IN THE AREAS OF PSYCHOEDUCATIONAL STATUS, SPEECH AND LANGUAGE, AND OCCUPATIONAL THERAPY?

27. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE 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 IEE].)⁹ To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

28. When a student requests an IEE, 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 IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) If it fails to do either, the student is entitled to the IEE whether the district's assessment was appropriate or not. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993; *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380) 2006 WL 3734289.)

29. Benicia's argument that Student is not entitled to any independent assessments depends on the legality of its termination of his special educational

⁹ All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

eligibility on January 11, 2016. As set forth above, that termination was unlawful. Benicia is therefore responsible for providing the independent assessments because it neither funded the assessments nor sought in due process to defend its own assessment without unnecessary delay. (34 C.F.R. § 300.502(b)(2); *J.P. v. Ripon Unified Sch. Dist.*, *supra*; *Pajaro Valley Unified Sch. Dist.*, *supra*.)

30. Benicia argues that Lisa Johnson's evaluation was only "psycho educational" and that therefore Student had no speech and language or occupational therapy assessment with which he could disagree. However, Ms. Johnson's evaluation was not just psycho educational. Her report was entitled "Triennial Assessment Report." It was "multidisciplinary" and touched on all areas of suspected disability. It addressed speech and language concerns and occupational therapy matters as well. It was, and purported to be, a fully comprehensive triennial review. Student's disagreement with Ms. Johnson's report therefore included disagreement with its speech and language and occupational therapy conclusions as well as its psycho educational elements.

RELIEF

31. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) 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." (*Ibid.*) If necessary, relief may be accorded beyond a student's special

education eligibility to accomplish that purpose. (*Pihl v. Massachusetts Dept. of Educ.* (1st Cir. 1993) 9 F.3d 184, 189-190; *Lester H. v. Gilhool* (3d Cir. 1990) 916 F.2d 865, 872-873.)

32. From January 13, 2016, to May 31, 2016, Student continued some of the activities called for in his IEP; he held a job and volunteered in a transitional kindergarten. He was excluded from his daily participation in the Benicia Bridge program, which had both classroom and community-based components. It is both equitable and practical to require Benicia to provide him the hours of classroom and community-based instruction at the Bridge program that he missed during that period.

33. In lieu of receiving independent assessments provided by Benicia, Mother obtained psycho educational, speech and language, and occupational therapy assessments at a total expense of \$11,325. Benicia does not argue that these assessments were flawed in any way or unduly expensive, so Mother will be awarded their costs.

ORDER

1. Benicia shall not take any action based on decisions made at the January 11, 2016 IEP team meeting, including but not limited to graduating Student without his consent.

2. Benicia shall provide Student all of the hours of classroom and community-based instruction and services at the Benicia Bridge program that he missed between January 13 and May 31, 2016, as the result of Benicia's actions at the January 11, 2016, IEP team meeting. That instruction and services shall be provided without interruption of his present program and in addition to, not in substitution for, the instruction and services he receives pursuant to his governing IEP.

3. Benicia shall provide the relief set forth in paragraph 2, above, starting as soon as practicable after this Order and shall provide it, if necessary, for no more than

six months past Student's 22d birthday or graduation with a regular high school diploma, whichever comes first.

4. Within 60 days of this Order, Benicia shall compensate Mother for independent assessments in the amount of \$11,325.00.

5. 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. Student prevailed on Issues 1 and 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: March 28, 2017

_____/s/_____
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings