

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

KERN COUNTY SUPERINTENDENT OF
SCHOOLS.

OAH Case No. 2017110316

DECISION

Parent on Student's behalf filed a due process hearing request with the Office of Administrative Hearings, State of California, on November 7, 2017, naming Kern County Superintendent of Schools. OAH continued the matter for good cause on December 6, 2017. Administrative Law Judge Adrienne L. Krikorian heard this matter in Bakersfield, California, on February 13 and 14, 2018.

Attorney Andr a Marcus represented Student. Student's father attended the hearing and testified. Attorneys Stephanie Gutcher and Darin Bog  represented Kern County. Deanna Downs, Director of Valley Oaks Charter School, attended the hearing on behalf of Kern County and testified.

At the parties' request, the ALJ granted a continuance for Student to file one additional exhibit and written closing arguments on or before March 14, 2018. The record remained open until March 14, 2018. Upon timely receipt of the exhibit and written closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES¹

Did Kern County deny Student a free appropriate public education by failing to implement Student's October 10, 2017 individualized education program, and specifically the provision of the IEP which required Kern County to provide a stipend for the residential component of Student's placement at a non-public school?

SUMMARY OF DECISION

This case involves a 19-year-old girl eligible for special education as emotionally disturbed. Her parents live in Tehachapi, California. Her educational placement was at a residential treatment center, San Diego Children's Center in San Diego, California, where she lived until the end of the 2016-2017 school year. In July 2017, Father consented to an IEP for continued educational placement and services at Children's Center, which Kern County implemented when school resumed in September 2017. The July 2017 IEP addressed only the educational component of the Children's Center program. On October 10, 2017, Kern County offered Parents, through an IEP, the option of either paying for housing for Student and one parent in San Diego, or a \$5,000 monthly stipend. Father did not consent to this offer. Instead, he returned Kern County's written offer with his signature and modified the offer by adding a material condition to the payment of the stipend. Kern County IEP team members did not agree to Father's modification.

¹ For purposes of clarity, this Decision refers to Respondent as Kern County instead of "District." The issue statement was changed from the prehearing conference order only to reflect that reference. Student's due process complaint as originally pled contained an additional issue, which was found insufficient by OAH Order dated November 21, 2017. Only the remaining issue is addressed here.

Student did not prove that, on or before November 7, 2017, Kern County failed to implement the provision of the October 10, 2017 IEP requiring Kern County to provide a stipend for the residential component of Student's placement because Father did not unconditionally consent to either option for residential funding Kern County offered in the October 10, 2017 IEP. All relief is denied.

FACTUAL FINDINGS

1. Student was a 19-year-old female whose parents resided in Tehachapi, California. Parents held Student's educational rights. Student attended Valley Oaks Charter School – Tehachapi until she was placed in a residential treatment center in 2016. Valley Oaks Charter was part of the Kern County Special Education Local Plan Area, which was served by Kern County Office of Education. Kern County Superintendent of Schools was part of Kern County Office of Education. Kern County Office of Education was Student's district of residence and district of service. Kern County Superintendent of Schools was properly named as the respondent here as Student's local educational agency. Valley Oaks and Kern County participated collectively in Student's IEP team meetings on each other's behalf and will be referred to collectively in this Decision as "the Kern County members of the IEP team."

2. Student resided during relevant time periods between Parents' home in Tehachapi and in San Diego, where she was enrolled in Children's Center as her educational placement. She was eligible for special education under the category of emotional disturbance.

3. Student lived at Children's Center as part of its residential educational treatment program until the end of the 2016-2017 school year. In July 2017, she was no longer eligible to live at Children's Center. However, she was eligible to attend Children's Center's educational and therapeutic programs on a daily basis.

4. Student's IEP team met on July 7, 2017. In addition to representatives of

Children's Center and Kern County, Valley Oaks Charter School Director Deanna Downs and Special Education Principal Shirin Prince attended the IEP meeting on behalf of the educational entities. Ms. Downs' duties as director included coordinating funding and reimbursement requests with the Charter School business office. Mr. Prince forwarded all such requests for reimbursement relating to the Tehachapi location to Ms. Downs. He was not directly responsible for the business transactions. Ms. Downs, Mr. Price and Kern County all spoke on behalf of the entities that were responsible to offer Student a FAPE.

5. The Kern County members of the IEP team offered to place Student at Children's Center for her educational program for the 2017-2018 school year. Father consented to the offer of placement and services at Children's Center for the regular school year and declined extended school year services.

6. The Kern County members of the IEP team agreed that they and Father would research options to allow Parents to transport Student from her home in Tehachapi to San Diego and live with one Parent during the week in San Diego. The IEP team met again in August 2017. The IEP team did not reach an agreement regarding the funding of the residential portion of the placement.

7. The 2017-2018 school year began on September 5, 2017. The IEP team reconvened on September 13, 2017.² The IEP team discussed paying Parents \$4,000 a month to help cover lodging, food and transportation. Father understood from this conversation that Kern County would write him a check each month for \$4,000. The IEP team did not reach an agreement as to housing at the meeting and adjourned to allow

² The ALJ sustained Kern County's objection to admission of the transcript of the September 13, 2017 IEP in an Order dated March 29, 2018. However, the ALJ gave due weight to the credibility of all witnesses who testified regarding the September 13, 2017 IEP team meeting, including based on the admitted evidence presented during hearing.

Kern County and Father time to continue researching residential options. Father did not sign an IEP from that meeting.

8. The IEP team reconvened on October 10, 2017. Father, representatives of Children's Center, Kern County, Mr. Prince and Ms. Downs attended the meeting. Father declined the \$4,000 allowance offered in September. Father's research of monthly hotel costs, and per diem costs for meals and transportation based on the Federal rate schedule, totaled approximately \$5,500 a month. Kern County estimated the costs to be slightly less than \$5,000.

9. At the time of the October 10, 2017 IEP team meeting, Student had missed almost four weeks of school because of Parents' inability to advance funds for housing, food and transportation costs in San Diego. The Kern County members of the IEP team were concerned about returning Student to school. Kern County discussed other placement options but concluded, with Father's input, that Student should remain at Children's Center with special education services.

10. Mr. Prince and Ms. Downs explained at the October 10, 2017 IEP meeting that Kern County could not deposit money into Parents' bank account on a direct reimbursement model as Father requested, without receipts for expenses, because its funding resource was public funds which required a paper trail and financial accountability to the Charter School Board of Directors. Mr. Prince explained to Father that he had learned that the SELPA could not provide Parents with money "up front," as Mr. Prince had suggested at the September 13, 2017 IEP meeting. Father expressed concerns about the family's need for advance payment of funds. Addressing Father's concerns, the Kern County members of the IEP team offered to directly pay for Extended Stay in Hotel Circle, San Diego, for one or two months so Student could return to school and to give Parents time to find alternative housing. Mr. Prince and Ms. Downs confirmed that, once Parents decided on more permanent housing for the remainder of

the school year, after payment arrangements for out of pocket expenses were made with the Valley Oaks business office, the business office would contract directly with the housing entity chosen by Parents.

11. The Kern County members of the IEP team summarized the discussion regarding funding of the residential component in the IEP notes. The Kern County members of the IEP team had authority to offer a \$5,000 monthly stipend for food, lodging and transportation, subject to receipts for expenses paid directly by Parents.

12. The notes offered "either the Extended Stay in Hotel Circle or a \$5,000 a month stipend." The IEP Services page was silent as to the residential component of the offer. Father declined the Extended Stay option and said he would accept the \$5,000 monthly stipend. However, he verbally requested funds in advance, despite Mr. Prince's explanation that Kern County could not provide funds in advance. The Kern County members of the IEP team offered instead to fund another hotel so Student could return to school until Parents found a permanent housing alternative. At the conclusion of the meeting, the Kern County members of the IEP team did not reach an agreement with Father concerning the manner in which the \$5,000 stipend would be paid: Kern County team members explained that Kern County could not offer funds "up front," and Father requested funds in advance.

13. Mr. Prince printed and provided the IEP notes to Father, who signed the IEP for attendance only. Father took the notes home to review along with the rest of the IEP. Father returned the IEP the same day, initialing consent to placement and services, and signing the IEP. He added two typed sentences to the notes: "Parent's Notes: In order to ensure continued attendance and residency, Parent will need to receive funding on or before the 1st of the month. Beginning with November 1st, 2017." Father never raised, and the IEP team members never discussed, Father's additional condition to his acceptance of the IEP offer at the October 10, 2017 meeting.

14. Father's testimony at hearing regarding his understanding of Mr. Prince's September 13, 2017 statement regarding payment of a \$4,000 stipend by check was credible. However, Mr. Prince and Ms. Downs' also credibly testified that Mr. Prince was mistaken at the September 13, 2017 IEP team meeting, and they discussed the misunderstanding with Father at the October 10, 2017 IEP team meeting. Father continued to request advance funding at the October 10, 2017 meeting due to financial hardship. Father's testimony as to whether or not he would have signed the IEP without his added language was inconsistent. On the one hand, when questioned by Kern County's counsel, he denied that he would have consented to Kern County's offer without his added language. When questioned later by his attorney, he changed his answer, stating he would have signed without his added language. The inconsistency in this testimony affected his credibility as to whether the parties reached full agreement on the terms of the IEP offer relating to funding of the residential component as of October 10, 2017.

15. Kern County directly funded lodging for Parents for three weeks after the October 10, 2017 IEP team meeting. Ms. Downs requested receipts for expenses for September and October from Parents three to five times in October. Father did not provide receipts for actual expenses paid before the complaint was filed. Father exchanged email correspondence regarding funding with Ms. Downs and Mr. Prince after the meeting. Father provided documentation of estimated housing and per diem rate food expenses, along with estimated expenses for mileage based on the Federal rate schedule. His estimates were not receipts for actual expenses incurred.

16. Father declined to respond to Ms. Downs' offer to reserve and pay for a hotel for the last week of October into the first week of November, so Student could continue to attend school. Instead, concerned about funding for food and transportation, Parents removed Student from school on October 27, 2017.

17. After the October 10, 2017 IEP team meeting, Ms. Downs sent at least two emails to Father inviting him to attend an IEP team meeting to discuss funding options and Father's modification to the IEP offer. Father declined to attend an IEP team meeting unless he knew exactly what would be discussed. Ms. Downs responded in an email clarifying that the IEP team would be discussing funding for lodging, including Father's additional language, at the meeting. After consulting with his attorney, Father again declined to attend an IEP meeting. His attorney also corresponded with District's attorney before November 7, 2017, indicating that she saw no purpose for an IEP team meeting, requesting instead that Kern County comply with the October 10, 2017 IEP and provide the monthly \$5,000 stipend in advance of each month.

18. On or about December 1, 2017, Kern County reimbursed Parents \$5,452.61 for travel, lodging and food expenses incurred by Parents in September and October 2017, based upon receipts and agreed upon per diem amounts, and on the number of days Student attended school and travel days. Student attended a total of 17 days of school from September 5, 2017 through October 27, 2017. She did not return to school until early December 2017.

LEGAL AUTHORITIES AND CONCLUSIONS

ISSUE: IMPLEMENTATION OF OCTOBER 10, 2017 IEP FUNDING COMPONENT

1. Student contends Kern County did not abide by the terms of the October 10, 2017 IEP because Kern County did not, before the complaint was filed, reimburse Parents for their out of pocket expenses incurred in September and October 2017, or deposit \$5,000 into Parents' checking account by November 1, 2017 for expenses in November. Student contends Father consented to the October 10, 2017 IEP when he signed and initialed the signature page, notwithstanding that he added a material term to the notes page. Student argues the notes page encompasses the IEP offer. Father was

forced to remove Student from school based on his concerns that funding for the residential component of the offer was not secured, allegedly resulting in a denial of FAPE.

2. Kern County contends Parents never consented to the October 10, 2017 IEP offer as presented to Father at the meeting. Kern County contends it was not obligated to fully implement the October 10, 2017 IEP as unilaterally amended by Father absent consent by all parties. The IEP team had not yet considered Father's additional conditions to the offer requiring that the monthly stipend be provided to Parent before the first of each month. Kern County was not permitted to pay Parents \$5,000 a month without receipts for expenses, unless other arrangements were made through the Valley Oaks business office, because its funding resource was public funds which required financial accountability. Kern County also contends that it funded housing for three weeks in October until Father withdrew Student from school.

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

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

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

4. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (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 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); Ed. Code, § 56032.)

5. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that

is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

6. In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____[137 S. Ct. 988, 1000-1001] (*Endrew*)). The Supreme Court in *Endrew* stated that school districts needed to “offer a cogent and responsive explanation for their decisions” and articulated FAPE as that which is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstance.” *Id.*

7. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

8. 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student was the filing party and carried the burden of proof.

LEGAL AUTHORITY - IEP TEAM AND CONSENT

9. The IEP team, which must include the parent of a special needs child, must meet to develop, review or revise an IEP. (Ed. Code § 56341). Generally, parents must consent to an IEP before it can be implemented. (20 U.S.C. § 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b); Ed. Code, § 56346, subd. (a).) Parents may consent to changes in an IEP either by agreeing to a new IEP or by executing an addendum to the existing IEP. (20 U.S.C. § 1414(d)(3)(D), (F); 34 C.F.R. § 300.324(a)(4)(i), (a)(6); Ed. Code, § 56380.1, subds. (a), (b).)

10. A school district responsible for the provision of special education to a disabled child shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child. (20 U.S.C. § 1414(a)(1)(D)(i)(II); Ed. Code, § 56346, subd. (a).) If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code § 56346 subd. (e).)

ANALYSIS

11. The threshold issue, and a necessary element, in determining whether District failed to implement the October 10, 2017 IEP between October 10, 2017 and November 7, 2017, is whether Father consented to the October 10, 2017 IEP offer as presented by the IEP team and/or whether his added language constituted a mutually agreed upon addendum to the IEP offer. Student argued in her closing brief that District is estopped from raising the affirmative defense of lack of consent for the first time at hearing because District did not raise the defense in District's response to the complaint

or in its prior written notice. The issue of consent is critical to the analysis of whether District could implement the IEP. Consent cannot be ignored, regardless of whether or not District raised consent as an affirmative defense. Therefore, Student's argument is not persuasive.

12. The parties agree Father consented to the October 10, 2017 offer of placement and services, which remained the same as the placement and services in the July 2017 IEP. There was no dispute that Father informed the IEP team, before the team made the October 10, 2017 IEP offer, that Parents did not have the resources to advance funds for food, lodging and incidentals associated with Student's educational placement at Children's Center. Father requested funds in advance at the meeting, which Kern County declined to offer because it needed expense receipts. There was no dispute Kern County was prepared to fund a \$5,000 monthly stipend toward lodging, food and transportation. However, how that stipend would be funded, and whether it would be paid to Parents, or on Parents' behalf, regardless of whether Parents spent the full amount each month, was not determined at the time Kern County made its October 10, 2017 IEP offer.

13. When District provided Father with the written IEP offer, which included notes from the meeting, Father unilaterally amended the notes by adding his own language, placing a new material condition to his acceptance of the offer. He specifically required payment of the \$5,000 monthly stipend by the first of each month. By doing so, he left open for discussion whether Kern County agreed to the new term. Ms. Downs credibly testified that Kern County did not agree to the new term at any time before Student filed her complaint on November 7, 2017. Notwithstanding that Mr. Prince told Father in September that Kern County could provide him a check for \$4,000 towards lodging, food and transportation, the Kern County IEP team members informed Father on October 10, 2017, and Mr. Prince admitted at hearing, that Mr. Prince was mistaken

at the September 13, 2017 IEP meeting. Kern County could not implement Father's unilateral addendum at the time Father wrote it because Kern County could not advance funds without receipts for reimbursement, absent other approved arrangements for payment of the monthly stipend.

14. Student did not prove that Father consented to the October 10, 2017 IEP offer presented by the IEP team. She did not prove that the IEP team agreed upon an addendum to the IEP based on Father's additional language. This is not a situation in which Father partially consented to implement certain terms of the offer while disagreeing with and not consenting to Kern County implementing other terms, which is a type of partial and conditional consent that the law specifically envisions. Rather, the Kern County members of the IEP team did not agree to the terms Father added to the IEP and now seeks to enforce. The IEP team never met or discussed Father's proposed addendum that required advance payment of \$5,000 by the first of each month. Father declined to attend any IEP meetings after October 10, 2017, and before this complaint was filed to discuss his proposed amendment. He also did not credibly establish that he would have consented to the IEP as offered without his added language. He was not clear regarding to what part of the original IEP offer, other than placement and services, he consented when he returned his signature on the IEP.

15. Student did not prove that Kern County denied Student a FAPE by failing to implement the \$5,000 monthly residential stipend provision of the October 10, 2017 IEP offer. The evidence unequivocally established a lack of meeting of the minds on an essential term of the original IEP offer, specifically under what conditions Kern County would pay the \$5,000 monthly stipend. Father's added language prevented Kern County from fully implementing the IEP, as amended by Father, absent mutual consent to the addendum. Kern County was prepared to, and did, implement the placement and services, and agreed to, and did, pay for a hotel where Student could stay with a Parent

while attending school. Kern County also asked for receipts, so it could reimburse Parents for their out of pocket expenses. During the relevant statutory period, Father rejected Kern County's repeated offers to continue directly funding housing in San Diego, and to reimburse food and transportation based on receipts, until other arrangements could be made. Father voluntarily withdrew Student from school due to concerns about funding for food and transportation. Father and his attorney rejected Kern County's requests that Father attend another IEP team meeting to resolve the funding issue, instead insisting that Kern County should implement Father's added condition to the IEP offer to enable Student to return to school. After Student's complaint was filed, Kern County reimbursed Parents \$5,452.61, based on receipts and a per diem agreement, for September and October 2017, and based on the number of days Student attended school and travel days.

16. In summary, no meeting of the minds existed as to all terms of the October 10, 2017 IEP before November 7, 2017. District did not deny Student a FAPE before November 7, 2017 by failing to implement the October 10, 2017 IEP, as offered by Kern County, and specifically the provision of the IEP which required Kern County to provide a \$5,000 monthly stipend for food, lodging and transportation related to Student's placement at a non-public school.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Kern County was the prevailing party.

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: April 4, 2018

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings