BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. FREMONT UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2018090670

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on September 18, 2018, naming Fremont Union School District.

Administrative Law Judge Tiffany Gilmartin heard this matter in Cupertino, California, on November 27, 2018.

Father represented Student. Mother was present until the lunch break. Student did not attend. Attorneys Melanie Larzul and Joanna Powell represented Fremont. Nancy Sullivan, Director of Education and Special Services attended the hearing on behalf of the District.

Fremont requested a continuance to allow for written closing briefs, which was granted until December 10, 2018. Parties timely submitted their closing briefs at which time the record was closed and the matter was submitted for decision.

ISSUE

1. Did Fremont Union High School District deny Student a free appropriate public education by failing to implement the curb-to-curb transportation as offered in the individual education program dated February 12, 2018 from August 17, 2018 through the date of the hearing.

SUMMARY OF DECISION

Student proved by the preponderance of the evidence that Fremont failed to implement the curb-to-curb transportation services of the February 12, 2018 IEP by failing to enter the gated community where Student lived and pick-up Student at the curb closest to his home and that the failure was material and resulted in a denial of FAPE.

FACTUAL FINDINGS

1. Student is a 16-year-old male who resided in the District at all relevant times, and was eligible for special education under the category of autism. He is non-verbal and suffers from uncontrolled seizures.

2. The individual education program team met on February 12, 2018 to discuss Student's annual IEP. At the conclusion of the IEP team meeting, Fremont offered Student placement at the Creative Learning Center, a non-public school, along with the following services: specialized academic instruction, intensive individualized services, individual and group speech and language, individual and group occupational therapy, and curb-to-curb transportation for the 2018-2019 school year to include extended school year. Parents consented to the IEP.

3. The family resides in a gated apartment complex within Fremont's district boundaries. Father understood Fremont's curb-to-curb offer pick-up location to be inside the family's gated apartment community. In previous years when Student

received curb-to-curb transportation from Fremont, Father provided the driver with a key fob to allow the driver to open the gate to the apartment complex remotely. The driver would then open the gate and drive into the apartment complex where Student would be delivered to the curb near the family's apartment within the complex. In the event that the driver did not have the key fob on a particular day, the driver could ring the family from the call box at the gate for access to be granted. On Student's return from school, Parent would meet Student at the curb and escort Student into the home.

4. Fremont is a member of the Silicon Valley Joint Powers Transportation Agency. This agency, which includes other school districts within the area, promulgates policies and procedures to manage and provide transportation for member schools. An agency-wide policy and procedures manual was last revised on December 7, 2016. On page 134 of this manual, a single sentence states busses are prohibited from entering gated communities.

5. The Transportation Agency created, a second, more specific handbook to address the unique circumstances of providing students curb-to-curb transportation services. There is no dispute the family was provided a copy of the Transportation Agency's second handbook, the Curb to Curb Transportation Procedure Handbook. This eight-page handbook detailed the policies and procedures relevant for a family receiving curb-to-curb transportation services. It was provided to parents annually when parents completed their Transportation Agency emergency contact forms. The handbook covered requirements for receiving transportation; route designations; waiting requirements for students; canceling pick-ups, absences; behavior; and privacy policies. The handbook is silent to any areas where school bus transit may be limited such as restricted access roads, private driveways, or gated communities.

6. On August 16, 2018, at the start of the 2018-2019 school year, a bus driver from Fremont arrived at the family's gated apartment complex. The bus driver called the

family and notified them the driver was waiting outside of the apartment complex gates for Student. Like in previous years, Father met the driver at the gate and presented a remote key fob to allow the driver to enter the gated community. The driver refused to take the key fob from Father.

7. The gated apartment complex where the family resides is large. The family's apartment is located at the southwest corner of the complex. One main security gate, located at the far northeast corner of the apartment complex, functions as primary ingress and egress point for the complex. Each building is connected to the other via walking paths and a driveway. A parking lot surrounds the complex on three sides. From the Parents' home, it is approximately a half mile to the front gate.

8. When the school bus returned for the afternoon drop-off, the bus stopped at the driveway in front of the apartment complex. Mother met the bus. At that time, Student refused to get off the bus. Mother needed to call Father for assistance in removing Student from the bus. Father met Student and Mother on the school bus and together Parents were able to coax Student off the school bus into the waiting family car to drive Student to their home.

9. At times in the recent past, removing Student from the bus was difficult. Student takes numerous medications to assist in the control of his seizures and behavior. The side effects of these medications can include drowsiness and dizziness. In the past, when Student has been unable to leave the bus as a result of his medication or behavior, Father has enlisted neighbors for assistance. Student is currently 5 feet, 9 inches and169 pounds makes it difficult for Father to assist Student alone. Such assistance is not required on a daily basis, but was not infrequent. In prior years the proximity of help from available neighbors was crucial and more readily available when Student was transported to and from the curb adjacent the family's apartment.

10. Fremont's transportation policy requires students receiving curb-to-curb

transportation services from the District to be met by an authorized adult unless Parents provide permission for a student to be dropped off without supervision. Student required an adult to meet the bus at each end of his transportation journey. As a result, due to Student's medical and developmental needs, a stop in close proximity to Student's home was necessary. Thus, for this particular student, which curb is designated as his stop is material.

11. After Student's difficult first day of bus transportation on August 16, 2018, Father contacted Nancy Sullivan, the director of educational and special services, at Fremont to request the bus driver adjust the route to a curb location nearest his home. Ms. Sullivan, who testified at this hearing, was not aware Student resided in a gated apartment complex until that day. Ms. Sullivan responded to Father, it was policy of the Transportation Agency to prohibit district vehicles from entering gated communities. Ms. Sullivan then provided a copy of page 134 from the Transportation Agency's policies and procedures handbook that delineated Fremont's position on gated communities.

12. Father also contacted Katharine Tovar, an employee of the Santa Clara Unified School District, who is the transportation coordinator for the Transportation Authority. Ms. Tovar, who did not testify at the hearing, manages all transportation routing for the Transportation Agency. It was here that the Transportation Agency and Fremont learned Student lived in a gated community, and unbeknownst to Fremont, the previous bus driver had passed through the security gates using the key fob Father provided to pick-up and drop-off Student at the curb nearest his home.

13. One of the reasons Ms. Sullivan identified for Fremont's inability to enter Student's gated apartment community was that the transportation company's insurance coverage prohibited their school busses from entering private property. Prior to commencing school year 2018-2019, Fremont entered into a new transportation

contract with two transportation companies. As a result, Ms. Sullivan informed Parents that due to one of the transportation company's insurance restrictions, for Student to receive district transportation, Parents would need to deliver Student to the curb outside the apartment complex gate. Fremont established evidence there were other transportation options available.

14. Father asked Ms. Sullivan to reconsider Fremont's decision. After the incident on the first day of school, the family provided all of Student's transportation to school. On September 1, 2018, Ms. Sullivan informed Father no change could be made to Fremont's decision regarding the curb location outside the apartment complex gate. Ms. Sullivan then provided Father a mileage reimbursement form to cover Father's cost of transporting Student to school. Prior to filing Student's due process complaint, Father and Fremont engaged in informal discussions in an attempt to remedy the situation.

15. Father filed for due process on September 18, 2018. Ms. Sullivan also attempted to schedule an IEP team meeting with Parents to discuss the transportation issue. Creative Learning Center sent Father an email with an attached notice of meeting to Father on October 4, 2018 to convene an IEP team meeting on October 5, 2018. Father responded via email that he was unavailable to meet on October 5, 2018 and to reschedule the IEP team meeting. When Fremont and Creative Learning Center were able to provided additional dates for an IEP team meeting, Father refused all of them believing the IEP process to be futile.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[1]

1. 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)[2] 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).)

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

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

[2] All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) The *Rowley* standard was recently reaffirmed in a unanimous decision by the U.S. Supreme Court in *Endrew F. ex rel Joseph F. v. Douglas County School Dist. RE-1,* (2017) 580 U.S. __, 137 S.Ct. 988 [197 L.Ed.2d 335] noting that the IEP,

which the court acknowledged included its related services, must aim to provide "progress appropriate in light of a child's circumstances." (*Endrew F. supra,* 137 Sup. Ct. at p.999.)

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 persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).)

SUBSTANTIVE REQUIREMENT OF COMPLIANCE WITH IEP PROVISIONS

5. 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).) 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*. (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."

6. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7) ; Ed. Code, § 56345, subd. (a)(7).)

7. An IEP, like a contract, may not be changed unilaterally. *(M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1197, cert. denied (2017) 138 S.Ct. 556) It embodies binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. (*Ibid.*) If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify [Parent] and seek her consent for any amendment. (*Ibid.*)

8. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.*, *supra,* 502 F.3d at p. 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that 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, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

Implementation of Student's 2018-2019 curb-to-curb transportation services

9. Transportation is a nonacademic service that may be required by an IEP. (34 C.F.R. § 300.107(b).) A disabled child's special education program may require "related services" which include transportation and such developmental, corrective and other supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a)(2006).) In California, "related services" are called "designated instruction and services." (Ed. Code, § 56363, subd. (a).)

10. As a related service, "transportation" means (1) travel to and from school and between schools, (2) travel in and around school buildings, and (3) 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)(i)-(iii)(2006).) Transportation as a related service was not explicitly defined in the IDEA. Instead, decisions regarding the child's needs were left to the discretion of the IEP team. As a result, if the IEP team "determines that supports or modifications are needed in order for the child to be transported so that the child can receive FAPE, the child must receive the necessary transportation and supports at no cost to the parents." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006.)

11. Father contends Fremont denied Student a free appropriate public education when it failed to implement the curb-to-curb transportation offered in the IEP dated February 12, 2018 from August 17, 2018 through the date of the hearing. Fremont contends it implemented Student's IEP in a manner that comports with the IEP as providing transportation to the "nearest accessible curb—namely, the curb at the security gate."

12. Here there is no dispute that the February 12, 2018 IEP offered curb-to-curb services for Student. The IEP document is unambiguous in designating curb-to-

curb transportation to meet Student's needs. What is in dispute is what constitutes curb-to-curb pick up for this particular Student.

13. Fremont has the discretion to establish school bus stops and routes for its transportation services for students not receiving curb-to-curb transportation services. The IDEA does not mandate a student be picked up from their home. The IDEA has left the discretion of student pick locations to the wisdom of the IEP team. In this case, the IEP team determined Student required curb-to-curb transportation like it had provided since Student matriculated into the District. There was no evidence presented that Fremont informed Parents that a material change in the provision of transportation services was anticipated. Fremont is obligated to provide the service the IEP team determined at no cost to Parents.

14. Fremont argues when it made its offer on February 12, 2018 it intended its offer to conform to the Transportation Agency's policies and procedures that define curb-to-curb transportation and prohibit entry into gated communities. This is unpersuasive. Fremont's contention the offer of FAPE is contingent upon the policies of a transportation company Fremont contracted with is inconsistent with the law. Policies promulgated by the Transportation Agency do not override Fremont's obligation to implement the IEP. That the Transportation Agency that Fremont contracted with was unable to deliver this particular Student to the curb adjacent to his home does not relieve Fremont from its obligation to implement the IEP as the law requires. Fremont established evidence that other transportation options were available. If the contracted transportation company was unable to provide the offered transportation service, it is incumbent on Fremont to arrange transportation services that comport with Student's IEP.

15. Fremont's argument is further misplaced because the law does not turn on what the district intended or the policy of the transportation agency who Fremont

contracted with to provide services, but rather what the IEP team determined the student needs. Here, the IEP team determined Student needed curb-to-curb transportation. The IEP notes are silent the IEP team contemplated any alternative pick up location beyond the curb adjacent to Student's home. Father understood the pick-up location to be at the curb adjacent to his home. Fremont's only witness, Ms. Sullivan, was not at the IEP team meeting in question, so she was unable to testify as to what District representatives understood their curb-to-curb offer.

16. Fremont also argues Father unilaterally changed the IEP by providing the driver with a key fob to enable the driver to enter Student's gated community. This is also unpersuasive. Father did not change the address for Student's pick up. He did not add an after-the-fact interpretation to "curb-to-curb transportation." He simply provided the bus driver a key fob to facilitate gate access as he understood Student's IEP offer to be curb-to-curb transportation.

17. For this particular Student, changing his pick-up location to outside the complex gates was a material failure to implement the transportation services of his IEP. Unilaterally changing Student's pick up location resulted in an approximately half mile commute for Student to meet the bus. Such a commute was never contemplated by his IEP team. Moreover, due to Student's medical and developmental issues the change was not simply a discrepancy about the curbs surrounding Student's apartment complex. When Fremont unilaterally changed the pick-up location to outside of the complex gates, Parents were denied the benefit of the transportation service the IEP team offered and the vital community support of available neighbors to assist Parents when Student's medical or behavior issues interfered with him leaving the bus.

18. Student established by the preponderance of the evidence that Fremont failed to implement Student's curb-to-curb transportation services during the 2018-2019 school year. This failure was material and resulted in a denial of FAPE to Student.

The denial is from August 17, 2018 through the date of hearing.

ORDER

1. Fremont Union High School District is to provide Student with a round-trip curb-to-curb transportation from the curb adjacent to Student's home.

2. Fremont to reimburse Father for mileage from Student's home to school, to two round trips per school day, at the current rate for mileage reimbursement allowed by the internal revenue service from August 17, 2018 through the date of hearing. Father will provide Fremont with the mileage for two round trips per school day Student attended within 30 days of this Decision. Fremont will issue the reimbursement within 45 days of Father's submission.

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, Father prevailed on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: December 14, 2018

/s/

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings