BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JOHN SWETT UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018050384

DECISION

John Swett Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on May 8, 2018, naming Student.

Administrative Law Judge Tiffany Gilmartin heard this matter in Rodeo, California, on June 5 and June 6, 2018.

Leah Smith and Faatima Seedat, Attorneys at Law, represented District. Barbara Walker, Director of Special Education and Curriculum attended the hearing on behalf of District.

On June 5, 2018, Mother and Student did not appear. The matter proceeded to hearing after attempts to reach Mother by OAH staff were unsuccessful. Mother appeared on June 6, 2018, and represented Student. Student attended the hearing on June 6, 2018.

Sworn testimony and documentary evidence were received at the hearing. At District's request, OAH continued the matter until June 25, 2018, at 3:00 p.m. to allow for

the filing of written closing briefs. Mother did not file a written closing brief. District timely filed its written closing brief on June 25, 2018, at which time the record was closed and the matter was submitted for decision.

ISSUE

Does District's individualized education program offer dated February 13, 2018, constitute a free appropriate public education in the least restrictive environment such that it can be implemented without parental consent.

SUMMARY OF DECISION

District failed to establish that it complied with the procedural protections of the IDEA by convening an IEP without parental participation on March 2, 2018 and failing to establish it afforded Mother a meaningful opportunity to participate. This decision finds District failed to meet its burden of proof that the IEP February 13, 2018 offered Student a FAPE in the least restrictive environment, and therefore, District's requested remedy is denied.

FACTUAL FINDINGS

1. Student is an 11-year-old boy who resided in the District at all relevant times, and was eligible for special education under the categories of other health impairment and emotional disturbance. Student enrolled as a kindergartener in District in 2011. Student was originally made eligible for special education services in 2014 at the age of seven. He was found eligible under the category of other health impairment due to his diagnosis of attention deficit hyper activity disorder and Tourette syndrome in 2014. In 2014, when Student was in the third grade, Student transitioned from District's counseling-enhanced classroom, via a consented to IEP, to a non-public school placement at Spectrum Center.

2. Kristin Bastey, District's school psychologist, who testified at this hearing, conducted Student's triennial assessment in March 2017. Ms. Bastey met Student when he started at District in 2011. Ms. Bastey assessed Student using the Weschsler Intelligence Scale for Children, Fifth Edition; the Wide Range Assessment of Memory and Learning, Second Edition; the Behavior Assessment System for Children, Third Edition; the Conners, Third Edition; and the Scales for Assessing Emotional Disturbance, Second Edition. Student was focused and able to complete all testing tasks. Ms. Bastey recommended the IEP team continue Student's eligibility in either other health impairment or emotional disturbance category.

3. At Student's annual IEP meeting that began in March 2017 and concluded in May 2017, the IEP team discussed the progress Student made at Spectrum Center and how he was no longer in need of such a restrictive program. Student's team recommended placement at Carquinez; however, kept Spectrum listed as the placement until Mother had an opportunity to visit Carquinez. Once Mother visited the program, the team amended its offer to Carquinez in August 2017. Mother did not consent to the offer, but enrolled Student in the offered counseling-enriched program at Carquinez taught by Lauren Ryan.

4. Ms. Ryan, who testified at this hearing, is a credentialed mild-to-moderate special education teacher. Ms. Ryan determined Student handled the transition to a comprehensive public school "really well." Student was polite. Student had friends in the class. He readily performed his school work, often finished early; he made good grades, and exhibited no defiance. Student's behavior was tracked for each class period during the school day in five categories: safety, the use of safe words and actions; respect, using school-appropriate language; responsibility, arriving on time and being prepared; cooperation, following staff directions; and a personal goal of no distractions.

5. Mother requested an IEP team meeting be convened on October 18, 2017.

The purpose of the meeting was to discuss pressing safety issues for Student. Mother had obtained a restraining order against Father. Mother told the IEP team she was concerned Father may kidnap Student. Mother told District she was in the process of obtaining an inter-district transfer to San Francisco. In anticipation of the move, Mother requested Student be homeschooled. Barbara Walker, the director of special education, provided Mother with the information to allow her to enroll Student in a homeschool program. The IEP team, out of an abundance of caution for Student's safety, agreed to temporarily place Student on independent study for a short-period of time. Mother consented to the IEP amendment on October 18, 2017 of temporary independent study where Student would receive one hour per week of instruction with a special education teacher and one hour per week of individual counseling. The IEP team agreed to reconvene by December 1, 2017 should Student remain enrolled in District. Neither party disputes that the independent study placement was to be more than temporary or intended as stay put.

6. There were delays in securing an independent study teacher and as a result District increased its independent study support to two hours per week. The team reconvened on January 9, 2018. At this meeting, Student remained enrolled in District and had not completed the inter-district transfer as expected. Mother reported Student was displaying difficult behavior at home. Student was defiant and Mother wanted a one-to-one aide for home since he was not completing his assignments. At this meeting, Mother requested Student be reassessed, specifically for oppositional defiance disorder. Mother also requested Student be placed in a non-public school similar to Spectrum. No resolution came from the January meeting and the team agreed to reconvene. In the interim, the team agreed Student would remain on independent study for two hours per week.

7. In preparation for the February 13, 2018 IEP team meeting, Ms. Walker

texted and emailed Mother to confirm her presence at the meeting on February 8, 2018. The IEP team reconvened on February 13, 2018. The purpose of the meeting was to conduct Student's annual review. Present at the meeting was Mother, Student, Ms. Ryan, and Barbara Walker, the director of special education, and Student's District-provided counselor, Trena Nashir, who also testified at this hearing. The general education teacher, Marilou Bibat was excused by Mother and District. Student's independent study teacher, Jennifer Creed was not present, but provided written input. Mother was provided a copy of the procedural safeguards.

8. Mother emailed District personnel often. Her tone was accusatory and she demonstrated a general unpleasantness in how she corresponded with District personnel.

9. During the February 13, 2018 meeting, Mother renewed her request that Student be placed at a non-public school similar to Spectrum or in the alternative be assigned a one-to-one aide as part of his independent study . The District members of Student's IEP team reminded Mother that the independent study program had been a temporary offer due to safety concerns and that Student did not require such a restrictive placement. This stalemate upset Mother who left the February 13, 2018 meeting without signing the meeting notice or the parental consent page.

10. Mother sent another email request to have Student homeschooled on February 19, 2018. In response, Ms. Walker sent Mother a prior written notice on February 28, 2018 outlining District's position for refusing Mother's request for placement at a non-public school or providing her with a one-to-one aide for independent study. District reiterated its belief that independent study was not an appropriate placement for Student. The family safety crisis that necessitated Student's temporary independent study placement was no longer a factor.

11. Ms. Ryan and Ms. Walker testified that an additional IEP team meeting to complete Student's annual IEP was scheduled for March 2, 2018. They testified to the

numerous scheduling attempts they made with Mother. The meeting notes from the IEP team meeting held on March 2, 2018 state Mother was contacted via telephone, email, and mail. However, despite testifying to their efforts, District provided no evidence of phone logs, copies of emails, certified mailing receipts, or meeting notices in support of its attempt to schedule the March 2, 2018 IEP team meeting with mother. On March 2, 2018, the IEP team convened part two of Student's IEP team meeting without Mother. No evidence reflects the efforts the District team made on March 2, 2018 to contact Mother. The District members of Student's IEP team proceeded in her absence.

12. The March 2, 2018 IEP team meeting covered substantive issues such as needs, goals, placement, and accommodations. Present on behalf of District was Ms. Ryan, Kristi Kaufenberg, vice principal of Carquinez, and Ms. Nashir. The IEP developed in the meeting on March 2, 2018, remained dated February 13, 2018. The IEP offered five new goals, placement at Carquinez in the counseling enhanced classroom setting for 1,307 minutes weekly, and 30 minute weekly individual counseling support.

13. District provided Mother a copy of the IEP. Mother did not consent to the IEP. On May 8, 2018, District filed for Due Process.

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.

[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

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 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

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version.

Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The Supreme Court recently decided the case of *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ___ [137 S. Ct. 988] (*Endrew F.*) and clarified the *Rowley* standard*. Endrew F.* provides that an IEP must be reasonably calculated to enable "progress appropriate in light of the child's circumstances." (137 S.Ct. at 999.) The Court recognized that this required crafting an IEP that required a prospective judgment, and that judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Ibid.*) Additionally, the Court stated, "for a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, 'be reasonably calculated to enable the child to achieve passing

marks and advance from grade to grade.' " (Id. at 999 [citing *Rowley, supra*, 458 U.S. at 203-204.].)

5. 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) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District is the petitioning party, and therefore it has the burden of persuasion.

ISSUE: DID THE FEBRUARY 13, 2018 IEP OFFER A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

General Requirements for IEPs

6. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid*.) An IEP is evaluated in light of

information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

Parental Participation in the Development of Student's IEP

7. 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.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

8. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann, supra,* 993 F.2d at pp. 1036.)

9. The regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. A school district is mandated to ensure a

parent has an opportunity to participate at a mutually agreeable time and place. (30 C.F.R. § 300.321(a).) This includes notifying the parent in enough time to allow them to be present. (30 C.F.R. § 300.321(a)(1). Convening an IEP without a parent can only happen if the school district keeps accurate and complete records of telephone calls made or attempted, copies of correspondence sent to the parent and any responses received, and detailed records of visits made to parent's house or place of employment. (30 C.F.R. § 300.322(d) 1-3.)

10. District provided evidence of notifying Mother on February 1, 2018 of its intent to hold part one of the IEP team meeting on February 13, 2018. Further, District provided evidence of on-going correspondence with Mother in anticipation of the February 13, 2018 IEP meeting, including a follow-up text and email message from Ms. Walker the special education director. The IEP team was unable to complete the IEP on February 13, 2018. No continuation date was established prior to concluding the February 13, 2018 IEP team meeting.

11. On February 28, 2018, Ms. Walker also sent a prior written notice to Mother reaffirming District's position rejecting her request for a home school placement and offering placement at Carquinez. The prior written notice was silent as to the date and time of part two of the IEP team meeting. Ms. Ryan testified she emailed mother on February 22, called Mother on February 20, 21, 22, and 23, and mailed meeting notices on February 22 and 23 in an attempt to schedule part two of the IEP team meeting. District provided no record of any of the calls Ms. Ryan made other than in the notes page of the IEP. No copies of Ms. Ryan's email to Mother notifying her of the March 2, 2018 IEP and any response from Mother was proffered at hearing. Despite the IEP notes page stating two meeting notices were mailed to Mother on February 22 and 23, District provided no evidence of the meeting notice for any IEP team meeting after February 13, 2018. District provided no evidence the notice of meeting was generated or mailed to

Mother for the March 2, 2018 IEP team meeting. District's failure to document its methods to ensure Mother's participation at the March 2, 2018 IEP team meeting results in its inability to sustain its burden in this case.

12. District was obligated to ensure Mother was given an opportunity to participate in the March 2, 2018 IEP team meeting. District's decision to convene an IEP meeting to substantively discuss Student's goals, placement, and related services violated the procedural safeguards in place to ensure parental participation. Despite testimony that Mother was sent emails and two meeting notices District failed to provide detailed records of telephone calls made or attempted, copies of correspondence sent to Mother and any responses received, and details of any attempts to contact Mother at home or her place of work prior to convening the March 2, 2018 IEP as required by title 30 C.F.R section 300.322, subdivision (d)(1)-(3).

13. Moreover, even had District established that it sent emails and a meeting notice to Mother; it proceeded with the March 2, 2018, meeting without ever confirming she received the notices. On March 2, 2018, no one called Mother to find out whether she intended to participate. A school district may proceed without a parent only in the event they are "unable to convince the parent they should attend." (*Doug C. v Hawaii Dep't of Education*, (9th Cir. 2013) 720 F.3d 1038, 1044.)

14. District failed to establish it complied with the procedural protections of the IDEA when it proceeded with the March 2, 2018, IEP team meeting without parental participation. As District failed to establish it complied with the procedural requirements of the IEP, the issue of whether it was substantively appropriate is not reached.

ORDER

1. District's IEP dated February 13, 2018, is not deemed to offer Student a free appropriate public education in the least restrictive environment. It may not be implemented without parental consent.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on 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: July 6, 2018

/s/

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings