

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENT ON BEHALF OF STUDENT
v.
ALTA LOMA SCHOOL DISTRICT.
OAH CASE NUMBER 2017120979

DECISION AFTER PARTIAL REMAND

Student filed his due process complaint with the Office of Administrative Hearings on December 26, 2017 naming Alta Loma School District. The Office of Administrative Hearings will be referred to as OAH. Alta Loma School District will be referred to as Alta Loma. After a due process hearing in May 2018 before Administrative Law Judge Sabrina Kong, OAH issued a Decision on June 18, 2018. Administrative Law Judge will be referred to as ALJ.

On July 18, 2019, the United States District Court partially reversed the OAH Decision and remanded the case to OAH. The District Court's July 18, 2019 Findings of Facts, Conclusions of Law, and Judgment resulted in a partial remand to make a "limited determination" of whether Alta Loma's "unnecessary delay" in filing its due process complaint between September 12, 2017 and December 5, 2017 "affected Plaintiff's or his parents' substantive rights under the IDEA, and if so, what is the appropriate remedy for Plaintiff's due process claim." (*L.C. v. Alta Loma School Dist.* (July 18, 2019, Case No.: 5:18-CV-01535-SVW-SHK), 2019 WL 3246505, * 21.)

On July 23 2018, OAH set a trial setting conference for August 19, 2019. At Student's request, OAH continued the trial setting conference to September 6, 2019. The parties submitted trial setting conference briefs for the September 6, 2019 trial setting conference. At the trial setting conference, OAH ordered Student to file his trial brief by

September 13, 2019, and Alta Loma to file its response trial brief by September 19, 2019, briefing OAH on the remand issues, and whether further evidentiary proceedings would be required to address the District Court's July 28, 2019 partial remand.

The parties timely filed their trial briefs. After reviewing the trial briefs, the ALJ determined that Student did not establish that further evidentiary proceedings are required to address the District Court's July 18, 2019 partial remand. Student did not meet his burden of demonstrating why his failure to introduce evidence regarding a substantive violation and remedies in the underlying administrative hearing required the ALJ to reopen further evidentiary proceedings that Student could have introduced in the original hearing and on appeal.

On September 27, 2019, the ALJ ordered the parties to file trial briefs addressing the sole issue of remedies and cite to all instances in OAH's and the District's Court's records where Student requested a specific remedy other than his request for an independent educational evaluation that Student already received. The parties timely filed their remedies trial brief on October 18, 2019. The matters for remand were submitted for decision on October 18, 2019.

ISSUE ON REMAND

Did Alta Loma's procedural violation in unnecessarily delaying its due process filing between September 12, 2017 and December 5, 2017, for eighty-four days, result in a substantive FAPE denial?

If so, what is the appropriate remedy for a substantive FAPE denial from September 12, 2017 to December 5, 2017?

FINDINGS OF FACT AFTER REMAND

Student had never been evaluated in the area of visual processing. On August 10, 2017, Student e-mailed Alta Loma requesting a visual processing independent

evaluation, along with other independent evaluations not at issue in the OAH hearing.

On August 31, 2017 Alta Loma sent a prior written notice in response to Parent's August 10, 2017 request agreeing to independent evaluations, including the visual processing independent evaluation. The West End Special Education Local Plan Area will be referred to as SELPA. Alta Loma included copies of the SELPA's independent educational evaluation policy, a list of independent evaluators, and Parent Rights and Procedural Safeguards along with its letter. Alta Loma also informed Parent that once she selected the independent evaluators who met the SELPA's criteria, it would contact the assessors directly to arrange for funding.

On September 12, 2017, Parent informed Alta Loma that it selected Doug Stephey as the visual processing independent evaluator. On September 26, 2017, Alta Loma requested Mr. Stephey's curriculum vitae and rate for conducting a visual processing assessment from Parent. Parent testified in the underlying OAH hearing that she personally provided information about Mr. Stephey's qualifications and rates to Alta Loma's special education director, Lori Thompson. Mr. Stephey also provided his rate to Alta Loma at Parent's request. Mr. Stephey's rate did not state a flat fee. He informed Alta Loma that he would charge an amount not to exceed two-thousand five hundred dollars for a visual processing assessment and attendance at an individual education program team meeting. Individual education program will be referred to as IEP. Alta Loma calculated the individual services required for a visual processing evaluation from Mr. Stephey's rate schedule and estimated the amount to be around two thousand four hundred dollars.

The SELPA's cost criteria did not state a flat fee and included three separate components for a visual processing assessment. The visual motor integration component was three hundred dollars. The visual acuity component was three hundred fifty dollars. The visual perception component was two hundred and fifty dollars. The

SELPA's total cost for a visual processing assessment was nine hundred dollars.

Based on the difference between the SELPA's cost criteria of nine hundred dollars for visual processing, and Mr. Stephey's rate of two thousand and four hundred dollars, Alta Loma determined that Mr. Stephey's rate was well over the SELPA's nine hundred dollar criteria. Therefore, it concluded that Mr. Stephey's rate did not meet the SELPA's cost criteria.

On October 13, 2017, Alta Loma informed Parent that Mr. Stephey's rate did not meet the SELPA's cost criteria for visual processing independent evaluators. It requested that Parent provide a written justification of the unique circumstances warranting Alta Loma's approval for an assessor that did not meet the SELPA's cost criteria in compliance with the SELPA's policy. Alta Loma included another copy of the SELPA's independent evaluation policy to Parent with its letter. Despite multiple requests, the Parent did not provide an explanation of unique circumstances to Alta Loma.

Alta Loma filed for due process on December 5, 2017.

Parent's non-attorney, advocate Peter Attwood testified in the OAH hearing that he did not know Mr. Stephey's rate until he read Alta Loma's due process complaint.

The District Court found that September 12, 2017 was the first date of Alta Loma's unnecessary delay because it should have contacted Mr. Stephey directly after Parent selected Mr. Stephey, and should not have requested his qualification and rate information from Parent. The District Court also found that Alta Loma should not have unnecessarily delayed two weeks from September 12, 2017 to September 26, 2017 before asking Parent for Mr. Stephey's information. The District Court further found that Alta Loma withheld information about how Mr. Stephey's rate exceeded the SELPA cost criteria to Parent by not informing Parent the difference of the amount between Mr. Stephey's rate and the SELPA cost cap. The District Court concluded Alta Loma's withholding of this crucial information amounted to the unnecessary delay in filing for

due process filing in December 5, 2017. Therefore, the District Court determined that Alta Loma committed a procedural violation between September 12, 2017 to December 5, 2017, resulting in an eighty-four-day delay in filing for due process.

However, the District Court determined that Alta Loma was capable of responding to Parent's request for independent assessment appropriately. It found that Alta Loma appropriately contacted Dr. Robin Morris, the neuropsychological evaluator Parent selected, directly to discuss his rate. The District Court was befuddled as to why Alta Loma did not do the same with Mr. Stephey.

Before Alta Loma agreed to pay for the visual processing assessment, Parent paid Mr. Stephey who completed the assessment around March 2018 for Parent to obtain information about Student's visual processing deficits. Mr. Stephey did not testify at the May 2018 hearing as to the visual processing assessment.

LEGAL CONCLUSIONS

INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education 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).)

A free appropriate public education, often called 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, commonly called an IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective or 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 that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) & (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39; Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 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.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “Every child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “this standard is markedly more demanding than the ‘merely more than de minimis’ test. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) The Court noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, 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).)

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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student requested the hearing in the underlying OAH case, and therefore Student has the burden of proof on the issue for hearing after remand.

ISSUE: IS THERE A SUBSTANTIVE FAPE DENIAL; IF SO WHAT IS THE APPROPRIATE REMEDY

Student argues that the District Court's finding of a procedural violation and delayed filing for due process between September 12, 2017 and December 5, 2017 requires an automatic finding of a substantive FAPE violation because the delay significantly impeded parental participation in the IEP process. Alta Loma argues that even though the District Court found a procedural violation, Student did not present any evidence in OAH's case that the procedural violation resulted in a substantive violation, or denied Student a FAPE.

A procedural violation 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; 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 *superseded by statute on other grounds, as stated in R.B. v. Napa Valley*

Unified School Dist. (9th Cir.2007) 496 F.3d 932, 939.)

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119 (*Timothy O.*)). The Ninth Circuit Court of Appeals in *Timothy O.* held a school district's failure to assess a child for autism using standardized tests and relying on informal staff observation during its initial evaluation of the child resulted in substantially hindering parents' ability to participate in the child's educational program, and seriously depriving the parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. (*Id.*)

To the extent that student lost an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period because of a school district's failure to initiate due process, the school district can be held responsible for denying student a FAPE for that unreasonably prolonged period. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2016) 805 F.3d 1164 (*I.R.*)). In *I.R.*, the District Court concluded that the school district's failure to timely file for due process was both a procedural and substantive violation because the failure to promptly adjudicate the differences with parent with a due process filing resulted in the student remaining longer in an inappropriate placement. (*Id.*)

A student may be entitled to an independent educational evaluation if a parent disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); 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 independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

The District Court determined that Alta Loma committed a procedural violation between September 12, 2017 and December 5, 2017, and delayed eighty-four days before filing for due process. Despite Alta Loma having provided the SELPA cost criteria to Parent, and Parent's knowledge of Mr. Stephey's rate, as she provided this information to Alta Loma, the District Court concluded that Alta Loma should have specified the amount differential to Parent. The District Court stated that Alta Loma's failure to provide Parent with the amount Mr. Stephey's rate exceeded the SELPA rate for a visual processing evaluation was an unacceptable withholding of information. The District Court also did not find relevant Parent's non-response to Alta Loma's request for unique circumstances justifying Mr. Stephey's higher rate because Alta Loma failed to specify to Parent the amount Mr. Stephey's rate differed from the SELPA cost criteria.

Because the District Court found a procedural violation of eighty-four days by Alta Loma to be an "unnecessary delay", it would be unreasonable to conclude that such a lengthy delay did not result in a substantive FAPE violation under the District Court's factual findings. This procedural violation resulted in a substantive FAPE denial because Alta Loma's "unnecessary delay" in timely filing for due process significantly deprived parental participation in the IEP decision making process as it delayed OAH's determination of Student's right to a visual processing evaluation. Consistent with the *I.R.* court's holding, Alta Loma's "unnecessary delay" in due process filing resulted in substantially hindering Parent's ability to participate in the IEP process by leaving Parent uncertain about Student's right to a visual processing evaluation and his resulting educational needs. (*See, I.R., supra*, 805 F.3d at 1166.) This "unnecessary delay" was

especially significant since Student had never been evaluated in the area of visual processing.

The *Timothy O.* court specifically articulated that absent evaluations, parents would be substantially hindered in their ability to participate in developing an IEP with appropriate supports and services because they did not have the necessary information. (See, *Timothy O.*, *supra*, 822 F.3d at 1119.) Like the Student in *Timothy O.*, this was an initial evaluation for Student in the area of visual processing. Therefore, consistent with *I.R.* and *Timothy O.*, Alta Loma's failure to promptly adjudicate the differences with Parent with a prompt due process filing deprived Parent and the IEP team timely access to complete and necessary information for developing an appropriate IEP for Student. Therefore, the District Court's finding that Alta Loma committed a procedural violation in unnecessarily delaying its due process filing between September 12, 2017 to December 5, 2017 required a finding of a substantive FAPE denial.

REMEDY

The only remedy Student requested in the underlying OAH hearing was an independent visual processing assessment. Upon remand Student requested that OAH order training for Alta Loma's personnel in responding to parental requests for independent assessments, and payment of Student's attorneys' fees. Alta Loma contends Student already received an independent visual processing assessment and that OAH should not order any other remedy.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due

process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*).)

In remedying a denial of a FAPE, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.)

Training school district personnel can be an appropriate compensatory remedy. (See *Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034.)

An award of reasonable attorney’s fees to the prevailing parent, guardian, or pupil may only be made either with the agreement of the parties following the conclusion of the administrative hearing process or by a court of competent jurisdiction. (See 20 U.S.C. 1415(i)(3); Ed. Code, §56507, subd. (b).) OAH is not a court of competent jurisdiction within the meaning of Education Code section 56507, subdivision (b).

Independent Evaluation and Training

An independent visual processing evaluation was the only remedy Student requested at the OAH hearing. Here, Student already received an independent visual processing evaluation from Alta Loma. Student did not request training for Alta Loma’s personnel as a remedy from OAH, but added it after the District Court’ partial remand. Further, Student did not show Alta Loma needed staff training to handle parental requests for independent evaluations in the underlying OAH hearing, in the District Court’s record, or in the trial briefs to OAH on the remand issues. Finally, at the May 2018 underlying OAH hearing and before the District Court, Student did not present findings from Mr. Stephey’s assessment as to Student’s visual processing deficits and

educational benefits Student may have lost from Alta Loma's delay in filing for due process.

Nonetheless, the ALJ considered whether training was an appropriate remedy and determined that the evidence did not support that Alta Loma required training to handle parental requests for independent evaluations. The OAH record showed that Alta Loma responded appropriately to Parent's other requests for independent evaluations. Alta Loma responded in writing within ten days to Parent's requests for independent evaluations, and provided Parent with a copy of Parent Rights and Procedural Safeguards, the SELPA independent evaluation policy guidelines, and its independent evaluators lists with specific instructions on the next step in the process. Although the other independent evaluations were not issues in the underlying OAH case, the facts supported that Alta Loma knew how to appropriately respond to parental requests for independent evaluations. Likewise, based on the same facts, the District Court found that Alta Loma was capable of responding appropriately to Parent's other requests for independent evaluation. The District Court remarked that Alta Loma appropriately contacted Dr. Morris directly and discussed rates when that neuropsychological assessor's rate exceeded the SELPA's cost criteria, but for whatever reason did not do so as to Mr. Stephey.

The evidence did not support that Alta Loma needed training to follow the District Court's simple findings that with respect to Parent's selection of Mr. Stephey, Alta Loma should have acted in the same manner it had with Dr. Morris. Specifically:

1. Alta Loma must contact the independent assessor directly for information upon parent's communication of independent assessor selection.
2. Alta Loma must then perform simple math and inform parents the amount the independent assessor's fee differed from the SELPA's cost criteria.

The evidence did not support that Alta Loma required any training to understand

and apply the District Court's findings. Neither the facts of this case, nor trial briefing following the District Court's partial remand supported that training was an appropriate remedy.

Attorneys' Fees

As to Student's request for attorneys' fees, OAH has no jurisdiction to award attorneys' fees. (*See* 20 U.S.C. 1415(i)(3); Ed. Code, §56507, subd. (b).)

Even though the ALJ found that Alta Loma committed a substantive FAPE denial for the period of September 12, 2017 to December 5, 2017 based on the District Court's finding of a procedural violation during the same period, the evidence did not support the award of any other remedy within OAH's jurisdiction. Student already received the sole remedy he requested in the OAH hearing, an independent visual processing evaluation.

ORDER

1. The District Court's finding that Alta Loma committed a procedural violation in unnecessarily delaying its due process filing between September 12, 2017 to December 5, 2017 resulted in a substantive FAPE denial. Student already received the only remedy it requested in OAH's hearing, an independent visual processing evaluation. All other relief sought by Student is therefore denied.

2. Consistent with the District Court's findings, within ten days of this decision, Alta Loma shall circulate a memorandum to its special education department informing individuals responding to parental independent evaluations requests to obtain information regarding the independent assessor's rates and qualifications directly from the independent assessor, and not parents. After obtaining the independent assessor's rate, Alta Loma shall calculate the difference between the SELPA cost criteria and the independent assessor's rate and inform parents the amount of the difference.

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, based on the District Court's determination that Alta Loma committed a procedural violation in unnecessarily delaying its due process filing during the period from September 12, 2017 to December 5, 2017, OAH found that this procedural violation resulted in a substantive FAPE denial of significantly impeding parental participation in the IEP process. Therefore, Student was the prevailing party on this one issue of this Decision After Remand.

RIGHT TO APPEAL THIS DECISION

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: November 8, 2019

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings