

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020090447

STUDENT,

v.

CLEAR PASSAGE EDUCATIONAL CENTER.

DECISION

JANUARY 28, 2021

On September 11, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Clear Passage Educational Center. On October 26, 2020, OAH granted Clear Passage's request for a continuance. Administrative Law Judge Cararea Lucier heard this matter by videoconference on December 15, 16, and 17, 2020.

Attorney Nicole Hodge Amey represented Student and Parent, both of whom attended all hearing days on Student's behalf. Attorney Debbie K. Ferdman represented Clear Passage Educational Center. Viviana Trujillo, Executive Director of Clear Passage, attended all hearing days on Clear Passage's behalf.

At the parties' request, OAH continued the matter to January 11, 2021, for written closing briefs. The record was closed, and the matter was submitted on January 11, 2021.

ISSUE

1. Did Clear Passage deny Student a free appropriate public education, called FAPE, from October 3, 2018, through the end of the 2018-2019 school year, by:
 - a. failing to provide an appropriate behavior support plan;
 - b. failing to provide an individualized education program with appropriate services and supports, specifically in the areas of academics, one-to-one aide, and teacher support;
 - c. failing to provide individual transition services and planning; and
 - d. failing to create and update social emotional and behavior goals?

JURISDICTION

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 main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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 free appropriate public education, referred to as 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof in this matter. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 18 years old and resided within Long Beach Unified School District at all times relevant to this matter. Student attended Clear Passage Educational Center, a charter school, for most of the 2018-2019 school year. Student qualified for special education and related services under the eligibility category of autism.

ISSUE 1: DID CLEAR PASSAGE DENY STUDENT A FAPE, FROM OCTOBER 3, 2018, THROUGH THE END OF THE 2018-2019 SCHOOL YEAR, BY: (A) FAILING TO PROVIDE AN APPROPRIATE BEHAVIOR SUPPORT PLAN; (B) FAILING TO PROVIDE AN INDIVIDUALIZED EDUCATION PROGRAM WITH APPROPRIATE SERVICES AND SUPPORTS, SPECIFICALLY IN THE AREAS OF ACADEMICS, ONE TO ONE AIDE, AND TEACHER SUPPORT; (C) FAILING TO PROVIDE INDIVIDUAL TRANSITION SERVICES AND PLANNING; AND (D) FAILING TO CREATE AND UPDATE SOCIAL EMOTIONAL AND BEHAVIOR GOALS?

Student contends that Clear Passage had a duty to provide Student with a FAPE, in addition to any liability on behalf of its chartering agency, Long Beach Unified School District. Student contends that Student regressed academically and behaviorally during the 2018-2019 school year when Student attended Clear Passage. Student alleges that Clear Passage failed to provide sufficient support to help Student succeed in the independent study program and failed to implement Student's Individualized Education Program, referred to as IEP.

Clear Passage contends that Long Beach was solely responsible for providing Student a FAPE while he attended Clear Passage. Clear Passage asserts that Student's claims are barred by the settlement agreement dated June 26, 2020, between Long Beach, Parent, and Student, and that Student's issues are further barred by the doctrines of res judicata and collateral estoppel. Clear Passage further argues that Student did not meet his burden of proof on the substance of the legal issues.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

Students with disabilities and their families retain all rights under the IDEA when a student is attending a charter school, just as they would when attending traditional public schools. (34 C.F.R. § 300.209(a).) This also applies to online and virtual charter schools. (See *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).) Charter schools may not deny any student admission based upon a student's disability. (34 C.F.R. § 104.4(b)(1)(i); Ed. Code, § 47605.)

All California charter schools are public schools; however, some are also designated local educational agencies, referred to as LEAs. (34 C.F.R. § 300.7; 71 Fed. Reg. 46,548 (2006); Ed. Code, § 47641.) An LEA means a school district, a county office of education, a nonprofit charter school participating as a member of a special education local plan area, referred to as a SELPA, or a SELPA. (Ed. Code, § 56026.3.)

Not all charter schools are LEAs. (Ed. Code, § 47641.) Rather, the law allows charter schools and their chartering agency to choose between two options: (1) the charter school may be a school within the chartering LEA for the purpose of special education; or (2) the charter school may become its own LEA and join a SELPA, receive special education funds, and take responsibility for providing students special education and related services. (*Id.*; Ed. Code, § 47641.) This is a critical distinction in disputes under the IDEA, as LEAs bear the responsibility for providing students a FAPE and the consequent liability for any failure to provide a FAPE in a due process hearing.

When a charter school is designated a school of the LEA, the LEA is responsible for ensuring that attending students with disabilities receive a FAPE as required by the IDEA and California law. (Ed. Code, § 47641, subd. (a).) However, LEAs and charter schools are not precluded from entering into Memorandums of Understanding, referred to as MOUs, that grant charter schools more autonomy, responsibility, and funding to provide special education and related services. ("Enrollment of Students with Disabilities in Charter Schools," California Department of Education Official Letter, December 27, 2017.)

Student enrolled in 11th grade at Clear Passage on October 3, 2018. Prior to that, Student attended Poly High School, a traditional comprehensive high school within Long Beach Unified School District. Student had challenges at Poly High School, including failing grades and behavioral incidents. As described in Student's Behavior Support Plan dated June 12, 2018, Student exhibited self-injurious behaviors such as stabbing himself with syringes, in addition to disruptive behaviors such as kicking walls and trashcans.

Clear Passage was a charter school authorized by Long Beach. Established in 2015, Clear Passage was an independent study program primarily designed to serve

students in danger of dropping out of high school. Vivianna Trujillo, executive director of Clear Passage, described the charter school as a second chance program for students to earn a high school diploma.

Clear Passage did not provide students with direct instruction. Clear Passage offered a virtual school program with an opportunity for students to attend a learning lab in person two hours per weekday, under the supervision of a teacher. All curriculum was delivered online. Students generally took two classes at a time and worked at their own pace. For the 2018-2019 school year, Jeff Zeiler was Student's teacher at Clear Passage.

Long Beach and Clear Passage entered into an MOU clarifying special education and related services for students enrolled at the charter school. They designated Clear Passage a school within the district for the purposes of special education, with Long Beach responsible for providing all special education services. The MOU required the charter school to cooperate with Long Beach's provision of special education in compliance with the IDEA and California law.

Student had significant academic and behavioral problems while attending Clear Passage. Academically, he completed little work. From his enrollment on October 3, 2018, through the end of the 2018-2019 school year, Student earned 7.5 credits. This included 5 credits for one semester of 10th grade English, and 2.5 credits for a study skills class.

Behaviorally, Student engaged in disruptive behaviors on a regular basis. In October of 2018, Student broke a window with his hand, requiring stitches. He also broke computers on two occasions, and his phone. Student threw a syringe in the learning lab and stabbed himself with a syringe in the presence of a peer. Ms. Trujillo

estimated that he had disruptive behaviors that required her attention at least once per month. Parent recalled being called one or two times per week to pick him up due to behavioral incidents. Ms. Trujillo referred Student for community-based counseling, as a general education service they offered students who had challenges.

Both Parent and Ms. Trujillo agreed that Student needed more academic and behavioral support than offered in the independent study program at Clear Passage. On March 25, 2019, Clear Passage convened a student study team meeting to discuss his academic and behavioral challenges. The parties agreed that Long Beach's resource specialist program teacher should schedule an IEP team meeting to determine if an independent study program was appropriate for Student. On April 8, 2019, Long Beach sent Parent an invitation to an IEP team meeting.

On April 12, 2019, Long Beach convened an IEP team meeting for Student. Parent, Student, Ms. Trujillo, and Mr. Zeiler participated in the meeting. Long Beach staff organized the meeting, created the IEP document, and were responsible for offering Student a FAPE. Long Beach offered Student a change of placement to a Special Day Class for Emotionally Disturbed Students at Poly High School, with a one-on-one aide. Parent did not agree with the placement offer and told the team she would notify Long Beach's special education office of her dispute.

In addition to her disagreement with the April 12, 2019 IEP placement offer, Parent felt that Student regressed while attending Clear Passage. Parent believed Student was capable of completing work but not held accountable. She also felt he needed additional supports, such as educationally related mental health services, referred to as ERMHS, counseling.

On December 11, 2019, Parent, through her attorney, filed a request for a due process hearing with OAH, naming Long Beach. OAH designated the case number 2019120471. On June 26, 2020, Parent and Long Beach entered into a final settlement agreement resolving all disputes between the parties. Long Beach agreed to provide Student with a new placement, 60 hours of compensatory education, an independent educational evaluation in the area of transition, and attorneys' fees. Parent agreed to dismiss her complaint in OAH case number 2019120471, with prejudice. Student, who turned 18 years old during the pendency of the dispute, also signed the settlement agreement.

Clear Passage was neither a respondent in OAH case number 2019120471, nor a party to the June 26, 2020, settlement agreement. The settlement agreement did not include any language to extend the terms of the agreement to any other entities such as agents or third-party beneficiaries, but was rather strictly between Long Beach, Parent, and Student.

On September 11, 2020, Student, through his attorney, filed a request for a due process hearing in the current matter naming Clear Passage as respondent. However, the evidence overwhelming demonstrated that Long Beach was solely responsible for providing Student a FAPE during the 2018-2019 school year. Clear Passage was legally designated a school of Long Beach for the purposes of special education, and was not its own LEA. The MOU and facts surrounding Student's tenure at Clear Passage show that Long Beach was solely responsible for ensuring that Student received a FAPE while he attended the charter school.

Although the law allows a chartering agency and a charter school the option to delegate to charter schools more autonomy, responsibility, and funding to provide special education and related services, Long Beach and Clear Passage explicitly did not

do so in this case. Per the MOU, Clear Passage was only responsible for providing a general education program and cooperating with Long Beach's provision of special education to eligible students. Clear Passage was not authorized to schedule or convene IEP team meetings, assess students, fund independent educational evaluations, or initiate due process hearings. Clear Passage did not employ any special education teachers or provide any special education services. Both in concept and as implemented for the 2018-2019 school year, Long Beach provided all special education services for Clear Passage.

Long Beach was solely liable for ensuring that Student receive a FAPE as required by the IDEA and California law while he attended Clear Passage for the 2018-2019 school year. As such, Student has no viable claims against Clear Passages for a denial of FAPE as to any of Student's issues against Clear Passage.

CONCLUSIONS AND 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.

Issue 1: Clear Passage Educational Center was not an LEA, and therefore not liable for providing Student with a FAPE. As such, from October 3, 2018, through the end of the 2018-2019 school year, Clear Passage did not deny Student FAPE by: (a) failing to provide an appropriate behavior support plan; (b) failing to provide an individualized education program with appropriate services and supports, specifically in the areas of academics, one to one aide, and teacher support; (c) failing to provide individual transition services and planning; or (d) failing to create and update social emotional and behavior goals.

Clear Passage prevailed on each issue in this matter.

ORDER

1. All of Student's requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings