

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL DISTRICT.

CASE NO. 2023080865

DECISION

December 22, 2023

On August 25, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Los Alamitos Unified School District as respondent. On October 2, 2023, OAH continued the hearing to accommodate the parties' attorneys' scheduling conflicts in other OAH cases. Administrative Law Judge Claire Yazigi heard this matter virtually on November 14, 2023.

Damian Fragoso represented Student. Parents attended the hearing on Student's behalf. Tracy Petznick Johnson represented Los Alamitos. Grace Delk, Director of Special Education and Mental Health Services, attended the hearing on Los Alamitos's behalf.

The matter was continued to December 4, 2023, for written closing briefs. The record was closed, and the matter was submitted on December 4, 2023.

## ISSUE

Did Los Alamitos deny Student a free, appropriate, public education by failing to implement the last agreed-upon offer of extended school year services from an individualized education program amendment dated June 8, 2022, for extended school year 2023?

The November 3, 2023, Order Following Prehearing Conference included a second issue for hearing. At the beginning of hearing, Student asked that the second issue be removed. Student's request was granted and the matter proceeded on the sole remaining issue.

## 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:

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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, and 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).) As the filing party, Student bears the burden of proof. 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 12 years old and in sixth grade at the time of hearing. Student resided within Los Alamitos's geographic boundaries at all relevant times. Student was eligible for special education under specific learning disability and speech or language impairment.

## ISSUE 1: LOS ALAMITOS HAD NO OBLIGATION TO IMPLEMENT THE JUNE 8, 2022, EXTENDED SCHOOL YEAR OFFER FOR EXTENDED SCHOOL YEAR 2023.

Student contends that Los Alamitos's June 8, 2022, amended IEP offer of extended school year, or ESY, at The Prentice School was the last agreed-upon and implemented IEP offer for ESY and should have been implemented for ESY 2023 as well. Specifically, Student contends that, although Student was privately placed at a nonpublic school, Los Alamitos made an IEP offer on June 8, 2022, to which Parents partially consented. When Parents did not consent to Los Alamitos's new IEP offer in May 2023, Student contends that Los Alamitos had an obligation to continue to implement the portion of the June 8, 2022, IEP that Parents had consented to, namely, nonpublic ESY at Prentice. Student also contends that Los Alamitos should be equitably estopped from asserting that it did not owe Student a FAPE as a parentally placed private school student, since Los Alamitos made an IEP offer on June 8, 2022, when Los Alamitos knew that Student would be privately placed for the upcoming school year.

Los Alamitos contends that Student was privately placed and was not entitled to implementation of a prior IEP, including ESY. Student contends that services like ESY are meant to support an offered placement as part of a total package of FAPE, and are not severable from that. Further, Los Alamitos contends that, under the current iteration of

California Education Code section 56346, a district is not obligated to automatically continue implementation of a last agreed upon IEP offer in the event a parent does not consent to a new offer.

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 individualized education program, referred to as 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. §§ 300.320, 300.321, and 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. 386, 399 [137 S.Ct. 988, 1000].)

Extended school year means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP. (34 C.F.R. § 300.106 (b).) Extended year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd.(c).) Each public agency must ensure that these services are available as necessary to provide FAPE. (Ed. Code, § 56345, subd. (b)(3); 34 C.F.R. § 300.106(a)(2006).) The IEP determines on an individual basis whether extended school year services are necessary for the provision of FAPE.

(34 C.F.R. §300.106 (a)(2).) Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) An extended year program shall be provided for a minimum of 20 instructional days, including holidays. (Cal. Code Regs., tit.5, § 3043, subd.(d).)

A FAPE requires services to be provided "in conformity with" a child's IEP. (20 U.S.C. § 1401(9)(D).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was material. A material failure to implement an IEP means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.)

Student had been privately placed at The Prentice School, a nonpublic school, in her fourth grade year in 2021-2022. The IEP team developed Student's 2022 IEP offer over the course of two meetings held on April 29 and May 13, 2022. On May 24, 2022, Parents, through their attorney, sent Los Alamitos a 10-day notice of intent to unilaterally place Student. Specifically, Parents notified Los Alamitos that, after 10 business days from the date of the letter, Parents would enroll Student at Prentice for the 2022-2023

school year because they did not believe that the IEP offered Student a program that sufficiently addressed Student's learning disability in the areas of reading, thereby denying Student a FAPE.

On June 8, 2022, Grace Delk, Los Alamitos's director of special education, responded to Parents' 10-day notice by amending Los Alamitos's IEP offer to include ESY for the summer of 2022. Specifically, Los Alamitos offered ESY at a nonpublic day school at 210 minutes a day from July 11, 2022, to July 29, 2022. The nonpublic school specified in the amended offer was Prentice.

Parents consented to implementation of the ESY portion of the IEP offer, but did not agree to the remainder of Los Alamitos's offer. Thus, Student attended ESY 2022 pursuant to the June 8, 2022, IEP, at Prentice during the summer after Student's fourth grade year. On June 24, 2022, Parents filed a due process complaint with OAH challenging one component of the 2022 IEP, namely, that the 2022 IEP denied Student a FAPE by failing to offer structured literacy instruction and evidence-based practices for dyslexia. A due process hearing on Student's issue was held and a decision issued finding that Los Alamitos's April 29 and May 13, 2022, IEP offer of structured literacy instruction and evidence-based practices for dyslexia were appropriate. Thereafter, Student attended Prentice as a parentally placed private student for the 2022-2023 school year for the fifth grade.

Parents then requested an IEP for the 2023-2024 school year, and Los Alamitos made an IEP offer in May 2023. Among other things, Los Alamitos offered Student district-provided, instead of nonpublic, ESY for the summer of 2023. Parents did not consent to the May 2023 offer.

Parents contend that Los Alamitos should have continued to implement its June 8, 2022, offer of ESY at Prentice for the summer of 2023 because the June 8, 2022, offer was the last agreed-upon IEP between the parties. This argument is not persuasive. Los Alamitos did not have an obligation to continue to implement its ESY 2022 offer for ESY 2023 because Student was privately placed for the 2022-2023 school year.

Education Code section 56346 (e) states that if the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. Parent argues that the IEP offer Los Alamitos made on June 8, 2022, to provide a nonpublic school placement for ESY 2022 should continue for subsequent summers as well, until Parent either withdraws consent to the offer, consents to a new ESY offer, or when Los Alamitos prevails in a due process hearing that determines the June 8, 2022, IEP offer of ESY is not required for FAPE.

A parentally placed private school child with a disability does not have an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. (34 C.F.R. § 300.137(a).) The IDEA contains provisions and governing regulations regarding parentally placed private school students with a disability. The special education and related services available to students who are unilaterally and parentally placed in private schools are commonly called "equitable participation." (20 U.S.C. § 1412(a)(10)(A); Ed. Code, § 56174.5.) These obligations are distinct from the obligation to offer a student who is enrolled within a district an IEP that offers FAPE.



In its February 2022, "Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools", the Office of Special Education and Rehabilitative Services answered the question of whether a local educational agency, or LEA, where a private school is located has an obligation to make an offer of FAPE. It said:

The LEA where a child attends private school is responsible for ensuring equitable participation in programs assisted or carried out under IDEA Part B. If a parentally-placed private school child with a disability also resides in the LEA where the private school is located, then that LEA would also be responsible for making FAPE available to the child, *unless the parent makes clear his or her intent to keep the child enrolled in a private elementary or secondary school located in that LEA ...*

If a determination is made through the child find process by the LEA where the private school is located that a child has a disability under 34 C.F.R. § 300.8 and needs special education and related services, and a parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in that LEA, then the LEA where the child resides is not required to make FAPE available to the child. On the other hand, if the parent chooses to accept the

offer of FAPE *and enroll the child in a public school* in the LEA where the child resides, then the LEA where the child resides is obligated to make FAPE available to the child” (emphasis added). (Office of Special Education and Rehabilitative Services “Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools”, Question A-5. (Feb. 2022).)

By not re-enrolling Student in a Los Alamitos public school for the 2022-2023 school year and privately placing Student at Prentice, Parents effectively severed Student’s connection to the June 8, 2022, IEP offer. Student did not have a continuing entitlement to the 2022 ESY offer after the end of the 2022 ESY term.

When a child has been enrolled in private school by her parents, the district only needs to prepare a new IEP if the parents ask for one. (*Capistrano Unified School Dist. v. S.W.*, 21 F.4th 1125, 1138 (2021.); 20 U.S.C. § 1412(a)(10).) Here, Parents privately placed Student at Prentice after ESY 2022 concluded. Parent’s request for an IEP for the 2023-2024 school year only entitled Student to a new offer. Los Alamitos made a new IEP offer in May 2023, that Parents did not accept.

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Parents are entitled to reimbursement for their unilateral private placement of a child without the consent of the school district if a court concludes both

1. that the public placement violated IDEA and
2. that the private school placement was proper under the IDEA. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 15 (quoting *School Comm. of Burlington v. Dept. of Educ. of Mass.* (1985) 471 U.S. 359, 373-374); see *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1487.)

These questions, however, are not at issue in the present case. Student did not challenge the substantive appropriateness of the May 2023 IEP, including the offer of district-provided ESY. Rather, Student only alleged there was a failure to implement the 2022 IEP ESY offer in ESY 2023. As the appropriateness of the May 2023 offer is not at issue in the present case, no findings are made regarding any of its components, including ESY.

After accepting Los Alamitos's offer of nonpublic ESY in 2022, Student returned to being a privately placed student for the 2022-2023 school year. As such, Los Alamitos had no obligation to implement the June 8, 2022 ESY offer for 2023.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Los Alamitos did not deny Student a FAPE by failing to implement the last agreed-upon offer of ESY from an IEP amendment dated June 8, 2022, for extended school year 2023. Los Alamitos prevailed on the sole issue adjudicated.

## 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.

Claire Yazigi

Administrative Law Judge

Office of Administrative Hearings