

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

SAN JUAN UNIFIED SCHOOL DISTRICT.

CASE NO. 2023030673

DECISION

JULY 10, 2023

On March 20, 2023, Parent, on behalf of Student, filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming San Juan Unified School District as respondent. The case was continued for good cause on May 1, 2023. Administrative Law Judge Penelope Pahl heard this matter via videoconference on May 23, 24, 25, 30, and 31, 2023.

Attorney Sheila Bayne represented Student. Parent attended all days of hearing on Student's behalf. Attorneys Dee Anna Hassanpour and Matejka Handley represented San Juan Unified School District. Robert Morgan, San Juan's Assistant Director of Special Education, attended all hearing days San Juan's behalf.

At the parties' request the matter was continued to June 16, 2023, for written closing briefs. The record was closed, and the matter was submitted, on June 16, 2023.

ISSUES

On the first day of hearing, with the parties' agreement, the issues were rearranged to address procedural issues first.

1. Did San Juan Unified School District deny Student a free appropriate public education, or FAPE by failing to have a general education teacher present at the January 31, 2023 individualized education program, or IEP, team meeting?
2. Did San Juan predetermine the offer at the January 31, 2023 IEP?
3. Did San Juan deny Student a FAPE, in the January 31, 2023 IEP by offering goals:
 - A. That were not based on accurate or sufficiently reported progress from the prior year's goals?
 - B. That did not change from the prior year's goals?
 - C. By offering no goals in the areas of need of handwriting and fine motor skills?
4. Did San Juan deny Student a FAPE, in the January 31, 2023 IEP, team meeting by failing to offer special education services needed to enable Student to receive educational benefit, in the area of need of occupational therapy?
5. Did San Juan deny Student a FAPE, in the January 31, 2023 IEP, by failing to offer special education services needed to enable Student to receive educational benefit, in the area of need of speech and language?

6. Did San Juan deny Student a FAPE, in the January 31, 2023 IEP by failing to offer sufficient intensive individual services in the form of a one-to-one aide?
7. Did San Juan deny Student a FAPE in the January 31, 2023 IEP by failing to offer appropriate services to address his regression following breaks in school?
8. Did San Juan deny Student a FAPE in the January 31, 2023 IEP by failing to offer parent training in speech & language?
9. Did San Juan deny Student a FAPE in the January 31, 2023 IEP by failing to offer placement with neuro-typically developing peers to the maximum extent possible?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, also called the IDEA, 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 IDEA are to ensure:

- all children with disabilities have available to them a FAPE 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 has the burden of proof by a preponderance of the evidence and 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); *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 filed this case, and has 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 11 years old and in sixth grade at the time of hearing. Student resided within San Juan's geographic boundaries at all relevant times. Student was eligible for special education under the category of intellectual disability.

STATUTORY FRAMEWORK

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 [*Rowley*]; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S. Ct. 988, 1000].)

ISSUE 1: DID SAN JUAN DENY STUDENT A FAPE BY FAILING TO HAVE A GENERAL EDUCATION TEACHER PRESENT AT THE JANUARY 31, 2023 IEP TEAM MEETING?

Student asserts that San Juan denied him a FAPE by failing to include a general education teacher at the January 31, 2023 IEP team meeting. San Juan argues that the general education teacher was not required to be there because the parties agreed Student was not appropriately placed in a general education class.

An IEP team must include not less than one regular education teacher of the child, if the child is, or may be, participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321 (a)(2); Ed Code § 56341, subd. (b)(2); Ed. Code § 56341.1 subd. (e).) A member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of the child with a disability and the local educational agency agree, in writing, that the attendance of such member is not

necessary because the member's area of the curriculum or related services is not being modified or discussed in that meeting. (Ed. Code § 56341, subd. (f).) However, if the child is, or may be, included in general education classes, a general education teacher's IEP team participation is required. (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321 (a)(2); Ed Code § 56341, subd. (b)(2); Ed. Code § 56341.1 subd. (e).)

NO SIGNED DOCUMENT EXCUSING THE GENERAL EDUCATION TEACHER

In this case, notes from the January 31, 2023 IEP stated that the general education teacher was excused because all parties agreed general education was not an appropriate placement for the Student. Parent did not recall whether or not he signed an excusal for the general education teacher.

Neither party submitted the required written evidence. No excusal, signed by Parent, stating that the general education teacher's IEP participation was unnecessary because the entire IEP team agreed Student was not appropriately placed in any general education classes, was placed into evidence at hearing.

Both state and federal statutes require that the excusal of a required IEP team member, due to the lack of need for their participation, be in writing and signed by the Parent. (20 U.S.C. (d)(1)(C)(iii); Ed. Code § 56341, subd. (f).) It would be expected that San Juan would offer a signed copy of an agreement to excuse the teacher, if it existed. While Student had the burden of proof overall in this case, San Juan had the burden of proof to establish its own defenses. (Evid. Code § 500. [Except as otherwise provided by law, a party has the burden of proof as to the existence or nonexistence of each fact essential to the claim for relief or defense being asserted.]) The absence of the general education teacher was not legally excused.

GENERAL EDUCATION TEACHER A REQUIRED PARTICIPANT

San Juan staff confirmed at hearing that a general education teacher did not attend the January 31, 2023 IEP. San Juan argues the teacher was not a necessary participant. This argument is not persuasive. The general education teacher was a necessary IEP team participant because general education participation was already part of Student's placement. Student's continued level of general education placement was required to be discussed as part of the continuum of placement options, even if ultimately the decision was to maintain Student's current levels of general education participation. While it is true that the January 31, 2023 IEP did not change Student's placement, it would be circular to rely on that fact as a reason for not requiring the general education teacher's perspective on the topic of general education participation.

A required member of the IEP Team may be excused from attending an IEP meeting, in whole or in part,

- when the meeting involves a modification to, or discussion of, the member's area of the curriculum or related services,
- if the parent and the local educational agency consent to the excusal; and
- the member submits in writing to the parent, and the IEP team, input into the development of the IEP prior to the meeting.

A parent's agreement that a required IEP team member may be excused shall be in writing. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii); 34 C.F.R. § 300.321 (e)(2); Ed Code § 56341, subds. (g) and (h).)

STUDENT'S GENERAL EDUCATION PARTICIPATION

Prior to the IEP team meeting, Student's participation in the general education environment occurred during the breakfast period, when students first arrived at school; during breaks and lunch; and during his adapted physical education class, which integrated with the general education physical education class. During those times, although Student was accompanied by the paraeducators from the independent living skills class or the adapted physical education teacher, Student was in the regular education environment. An IEP team discussion was necessary to determine whether Student was able to continue to participate in the general education environment during the operative period of the IEP being developed.

Additionally, this was Student's annual IEP which would, necessarily, include a discussion of placement options, as well as the appropriate amount of general education for Student. The input of a general education teacher was required. Participation in either of the special day classes being considered could involve participation in one or more general education classes. Brendan Kearney, the mild-moderate disabilities special day class teacher, explained that general education participation was one of the elements that often set his class apart from the class for students with moderate to severe disabilities, also called the independent living skills class. However, there was also a possibility that a student in the independent living skills class could participate in one or more general education classes if the IEP team determined a student could be successful doing so. In middle school, the team needed to consider whether Student could successfully work towards his goals in general education elective classes, or in general education academic classes. (*D.R. v. Redondo Beach Unif. Sch. Dist.*, (9th Cir. 2022) 56 F. 4th, 636, 645-646.)

The general education teacher's perspective was a required part of the team discussion to evaluate educational benefits of placement in a general education class; the non-academic benefits of such placement; the effect Student would have on the teacher and children in the general education class; and the costs of mainstreaming the student. The IEP team also needed to consider the nature or severity of Student's disability, and whether education in regular classes with the use of supplementary aids and services could be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); *Sacramento City Unified v. Rachel H. by and through Holland* (9th Cir. 1994) 14 F. 3d 1398, 1403 (Rachel H.). The general education teacher was also required to participate in the discussion of any issues regarding behavior supports, supplementary aids and services, and program modifications. The general education teacher would also contribute to the discussion of any necessary supports for school personnel that would be provided for Student, to allow Student to advance toward attaining his annual goals and to be educated and participate with other Students, both with disabilities and without. (20 U.S.C. § 1414 (d)(1)((A)(IV) and (d)(3)(C); Ed. Code § 56341(b)(2).) The evidence established that a general education teacher was a necessary IEP team participant on January 31, 2023.

NO GENERAL EDUCATION TEACHER EXCUSAL OR REQUIRED GENERAL EDUCATION TEACHER WRITTEN INPUT TO THE IEP TEAM SHOWN

No written excusal, signed by Parent, for the required General Education teacher's IEP team participation in the January 31, 2023 IEP team meeting was placed into evidence. A written agreement from the parent, excusing a required general education teacher's IEP team attendance, is required by both state and federal law. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii); 34 C.F.R. § 300.321 (e)(2); Ed Code § 56341, subds. (g) and (h).) Even if a written

excusal existed, without written input from a general education teacher, failing to include the general education teacher at Student's January 31, 2023 IEP team meeting was a procedural violation. It is true that this student had no general education teachers. He participated in the general education environment with special education supervision, and there was a possibility of additional general education participation. The plain language of the statute states that the requirement for the general education teacher applies if the child may be participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321 (a)(2); Ed Code § 56341, subd. (b)(2); Ed. Code § 56341.1 subd. (e).)

As a required IEP team participant, any excusal without a general education teacher's written input into the development of the IEP, delivered to each IEP team member prior to the meeting, would have been invalid. (20 U.S.C. §1414(d)(1)(C)(ii)(II); 34 C.F.R. § 300.321 (e)(2)(ii); Ed Code § 56341(g).) There was no evidence that any general education teacher submitted information in writing to the parent and the IEP Team, regarding the development of the IEP, prior to the meeting as required. Therefore, the failure to include the general education teacher in the IEP team meeting was a procedural violation.

A procedural violation results in a denial of a FAPE only if the violation results in the loss of educational benefits, or seriously infringes on the parent's opportunity to participate in the IEP development process. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.) In this case, Parent's opportunity to participate in the IEP development process was seriously infringed by his lack of access to the general education teacher's perspective as to Student's placement options.

Congress placed every bit as much emphasis on compliance with procedures as it did on the resulting substantive IEP. (*Rowley, supra*, 458 U.S. at pp. 205-206; 102 S. Ct. 3034, 73 L. Ed. 2d 690.) Courts have repeatedly noted that procedural compliance would, in most cases, assure much, if not all, of what Congress wished in the way of substantive content in an IEP. (*R.B. v. Napa Valley, supra*, at p. 938, citing *Rowley, supra*.)

It is impossible to know the impact of information that was not provided. However, Parent had second thoughts about Student's placement in the independent living skills class after consenting to the January 31, 2023 IEP, as evidenced by this request for due process hearing. Those concerns might have been eliminated – or possibly supported – by a general education teacher. The IDEA contemplates a robust discussion that includes all necessary perspectives so adequate information is exchanged prior to decisions being made. (see, *M.L. v. Fed. Way Sch. Dist.*, (9th Cir. 2005) 394 F.3d 634, 648.) Parent did not have the benefit of a discussion that included all required participants. His opportunity to participate in the IEP development process was seriously infringed as a result.

If procedural inadequacies are found to result in the loss of educational opportunity, seriously infringe the parents' opportunity to participate in the IEP formulation process, or caused a deprivation of educational benefits, the court need not reach the question of substantive compliance. (*Ms. S. ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir.2003) 337 F.3d 1115, 1129 (*Ms. S.*); *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)). Here, the lack of a general education teacher's participation was a denial of FAPE, and invalidated the January 31, 2023 IEP. As all other issues raised assert various denials of FAPE related to the January 31, 2023 IEP offer, it is unnecessary to address the remaining issues raised by this complaint.

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.

San Juan denied Student a FAPE by failing to have a general education teacher present at the January 31, 2023 IEP. Student prevailed on issue number 1.

As discussed previously, no other issues were reached, as the failure to include a general education teacher in the IEP team meeting of January 31, 2023 was a fundamental flaw in the IEP development process, invalidating the January 31, 2023 IEP.

REMEDIES

For all issues pled, a precursor to a finding of a denial of FAPE resulting in a compensatory education obligation, is proof of a denial of educational benefit. It is only with a loss of educational benefit that Student is owed a compensatory remedy. Student failed to prove loss of educational benefit for the time period at issue.

TWO MONTHS AT ISSUE

Student failed to prove deprivation of educational benefit as to any issue pled for the time frame at issue of January 31, 2023, and the date the complaint was filed of March 20, 2023. Nor did Student offer any evidence of compensatory education services necessary to remedy any asserted denial of FAPE. Administrative Law Judges have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.

Ct. 1996, 85 L. Ed. 2d 385 (*Burlington*)); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) However, to exercise that broad discretion in fashioning a compensatory education remedy, there must be showing of the loss for which Student should be compensated. That did not occur in this case as to any of the issues pled.

Student offered only one witness who gave evidence regarding a recommended remedy. Jandee Goodis is an occupational therapist who had never treated Student or met him in person. Her knowledge of Student was limited to a 90 minute “Facetime” call with Student and Parent two or three days prior to her testimony. She could not recall exactly which day she was on the call.

During the Facetime call, Goodis both interviewed Parent and observed Student. Goodis acknowledged during testimony that the interaction did not constitute an assessment, and provided her with limited information. She spoke to none of Student’s current or former teachers. Goodis stated that discussing Student with his teacher would not have assisted her in her evaluation of student’s abilities, which she was gleaning from her Facetime observation.

Goodis reviewed only two documents: the January 31, 2023 IEP and the September 22, 2021 IEP. She also reviewed a few work samples selected by Parent. However, none of the samples considered were offered into evidence. There was no evidence regarding how the samples were selected, or what they were supposed to represent. Goodis testified that, based on her limited observation of Student while Parent held his cell phone so she could watch, her short interview with Parent, and the

limited document review, she could “glean 75 percent to 95 percent of the information she needs to make an assessment and recommendations.” She deemed this percentage of necessary information adequate to form a professional opinion.

Based on the minimal interactions with Student and his Parent, and the limited documents reviewed, Goodis opined Student required 30 minutes of school based occupational therapy twice a week. She offered no explanation of how she determined the recommended level of service.

Goodis also offered opinions as to occupational therapy goals that should have been in Student’s IEP, specifically, holding a writing implement correctly, “fastening,” and properly cleaning himself after using the toilet. However, Student failed to prove that Goodis had adequate information to make those recommendations. Goodis observed Student being able to button and unbutton the small buttons he was wearing during her observation. It is unclear what kind of a “fastening” goal she had in mind.

Goodis confirmed that Student’s handwriting goal was appropriate as written. Goodis admitted she did not know what kind of instruction Student was receiving in class regarding holding a writing implement. Goodis stated she did not need to speak to San Juan staff or observe the independent living skills classroom because she “knows what type of curriculum is taught.” Goodis believed Student would be unable to get help with occupational therapy needs from a classroom teacher “with 10-20 students” but did not know the number of students or the student to adult ratio in Student’s class.

Finally, Goodis focused on toileting difficulties, based solely on Parent’s information of a recent accident at school that occurred after the January 31, 2023 IEP. An IEP is evaluated in light of information available 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, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir.1993) 993 F.2d 1031, 1041.)

Goodis did not discuss Student's toileting capabilities at school with any of his teachers, or San Juan staff. Goodis admitted she did not know if Student's classroom staff assisted him with toileting needs. Goodis implied that her concerns regarding Student's toileting occupational therapy needs were based on her understanding that Student had recurring toileting difficulties at school. However, Student presented no evidence of continual toileting issues at school. Parent stated Student's toileting goal was removed in fourth grade, and he told Cook Student had "occasional accidents" at school. There was no evidence presented that he requested a new toileting goal at the January 31, 2023 IEP, or that San Juan had notice that a new toileting goal was needed at the time of the January 31, 2023 IEP.

Goodis also offered the opinion that Student would be properly placed in the "mild-moderate" classroom. Goodis has been an occupational therapist for 43 years. However, she has neither worked in an educational setting nor conducted an educational occupational therapy assessment since 2011. She does not have, and never has had, a special education teaching credential or other teaching credential. The fact that she would base such a sweeping opinion, or frankly any of the opinions offered, on the minimal information she considered prior to the hearing, resulted in her opinions lacking any credibility. Her testimony was given no weight.

Student presented no evidence of being deprived educational benefit. Nor did he prove any basis on which a remedy should be awarded. No witness, expert or otherwise, testified to any loss of educational opportunity resulting from any of the asserted claims. Nor was any evidence establishing the need for compensatory

education, or recommending any type of compensatory education to remedy any possible deprivation of educational benefit, offered during the hearing, except by Goodis. Student failed to prove that he was entitled to compensatory education or any reimbursements for any of the issues presented.

Student also alleged a failure to offer Parent training, but failed to prove a remedy was due. Special education related services include

- Parent counseling and training that assist parents in understanding the special needs of their child;
- providing parents with information about child development; and
- helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP. (20 U.S.C. § 1401(26)(A); 34 C.F.R § 300.84 (c)(8).)

A special education student's related services, including parent training, must be stated on the child's IEP. (20 U.S.C. § 1414(d)(1)(A)(i)(IV).)

No evidence of a need for Parent training from January 31, 2023 to March 20, 2023 was offered. There was no evidence that San Juan had notice of a Parent need for training regarding Student's "speech and language" for Student to receive a FAPE. Parent did not request training at the January 31, 2023 IEP. Parent could not identify training that he needed when questioned during hearing. Finally, no expert or other evidence was offered regarding the type of training San Juan might offer Parent regarding Student's speech and language needs that was necessary for Student to receive FAPE.

As no basis for awarding any compensatory remedy was proven, further analysis of any of the other issues pled was unnecessary, given the dispositive nature of the procedural violation found. (*Ms. S.*, *supra*, 337 F.3d at p. 1129; *Amanda J.* *supra*, 267 F.3d at p, 892).

Here, a serious infringement on the Parent's right to participate in the development of the IEP of January 31, 2023 was demonstrated due to the failure to include a general education teacher on the IEP team. Student is entitled to a new IEP team meeting to develop Student's IEP with the benefit of the perspectives of a properly constituted team. San Juan will be ordered to complete training to avoid this IDEA violation in the future.

ORDER

1. San Juan is ordered to convene an IEP team meeting that includes all statutorily required participants, within 10 school days of the beginning of the 2023-2024 school year, to develop an IEP that considers the input of all team members. The IEP is ordered convened within 10 days school days of the beginning of the school year to avoid further delay in completing Student's IEP, which has been delayed due to the improperly convened IEP.
2. San Juan is also ordered to provide one hour of group training, either in-person or virtual, regarding the requirements for IEP team meetings. This training must include all persons who participated in Student's January 31, 2023 IEP development in any capacity. The training shall specifically include the rules regarding who is required to participate on an IEP team; the circumstances under which a usually necessary participant is not

required to participate on an IEP team; the proper method, and timing, of excusing a necessary participant; and the further reporting obligations of a necessary IEP team participant to the remaining IEP team members upon being excused. This training shall not be provided by a member of San Juan Unified School District's staff. The training shall be completed no later than October 31, 2023.

3. All other 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.

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings