

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of the Dispute Between:

THE SAN DIEGO UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

Case No. SN 05-01660
OAH No. N 2005070047

DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 25, 27 and 28, 2005, in San Diego, California.

Patrick Frost, Legal Specialist, represented petitioner San Diego Unified School District. Phyllis Trombi, a District representative, was present throughout the hearing.

Patricia Ann Lewis, Attorney at Law, represented respondent Student, who did not appear. Mother, petitioner's mother and conservator, was present throughout the hearing.

On July 28, 2005, the matter was submitted.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is a special education student who attends Patrick Henry High School, a school within the San Diego Unified School District (the district).
2. On May 25, 2005, an Individualized Education Team (IEP) team met. At the conclusion of that meeting, the district offered the student an extended school

year program for 2005 and placement for the 2005-2006 school year. The district believed its offer constituted a free and appropriate education (FAPE). The student's mother did not agree and rejected the offer.

On June 21, 2005, the district filed a request for a due process hearing, which was assigned OAH Case No. N 2005070047. The original hearing date was continued at the parties' request. The student's subsequent motion to consolidate OAH Case No. N 2005070047 with another matter was denied.

On July 25, 2005, the record was opened. Issues to be decided were identified. Sworn testimony and documentary evidence was received on July 25, 27 and 28, 2005. On July 28, closing arguments were given, the record was closed and the matter was submitted.

ISSUES

3. The parties identified the following issues for purposes of the hearing:
 - Did the district offer the student a FAPE based upon the May 25, 2005 IEP?
 - If so, can the district implement the May 25, 2005 IEP over the student's parent's objection?

CONTENTIONS

4. The District claimed it offered the student a FAPE on May 25, 2005, that the FAPE was based on a careful consideration of the student's unique needs, which included the student's need to make a transition from high school to adult life. The district believed it was entitled to implement the May 25, 2005, FAPE (which included the student being off campus for a portion of the school day) without having the student's mother's consent.

The student's mother argued the FAPE that was offered was inappropriate because there was no need for the student to be away from campus at all in his senior year of high school, being off campus might cause the student to regress, there was no

need for the student to enroll in summer school, and several procedural violations of IDEA (including an asserted lack of notice, an unclear offer, the failure to consider a previous vocational assessment) prevented the student from receiving a FAPE.

PRELIMINARY MATTERS

5. The student was born on June 15, 1984. He is eligible for special education services as a result of a diagnosis of Fragile X Syndrome and a pervasive developmental disorder with autistic characteristics. The student does not adapt well to change. He has diminished cognitive, academic, self-help and social skills.

The student's unique needs include the need to broaden his social skills and to generalize these new skills to different environments, the need to continue increasing his post-high school employment skills, the need to increase his independence, the need to learn functional words for use in various environments within the community, the need to develop writing skills, basic counting skills and money skills, the need to learn how to initiate conversational topics, to maintain conversations and to use non-verbal language and appropriate voice volume.

In fall 1998, the student began attending Patrick Henry High School (**PHSS**) as a full- inclusion student in the integrated life skills program. He was placed in general education classes with a one-to-one aide. He received speech and language services once a week for 30 minutes per session.

When the student began high school, he was essentially non-verbal, unable to read and possessed poor social skills. The student made extraordinary progress in the following years. He became a manager of the basketball team, a manager of the football team and a member of the junior varsity swim team. He worked in the school cafeteria. According to the student's case manager, by the 2004-2005 school year the student was a "fantastic kid" who was "quite social."

The student's unquestioned progress at PHSS was not without some difficulty and conflict.

6. On May 17, 2005, the student, through his mother and conservator, filed a First Amended Complaint for Damages for Discrimination and Retaliation in the Superior Court of California, County of San Diego. The first amended complaint named the district and several district employees as defendants. It alleged, *inter alia*, the district prevented the student from receiving athletic awards at awards banquets, prevented the student from receiving an award at a pep rally, prevented the student from attending a scholar athlete breakfast, and excluded the student from participating as a basketball team manager in November and December 2004.

In May and June 2004, the mother filed complaints with the California Department of Education and the California Interscholastic Federation Ethics Commission.

On November 15, 2004, a request for a due process hearing was filed.

7. Following a contested hearing, Christian M. Knox (Hearing Officer Knox), Hearing Officer, California Special Education Office, concluded the district substantively denied the student a FAPE for the 2001-2002 and 2002-2003 school years by failing to provide the student with extracurricular sports awards in the same manner as other students and the district denied the student a FAPE for the 2004-2005 school year by failing to allow the student to participate as a basketball team manager. Hearing Officer Knox determined the student was entitled to hold the position of team manager for the basketball team and was entitled to participate as a member of the swim team for the remainder of the 2004-2005 school year.

Hearing Officer Knox issued an order (1) requiring the district to reinstate the student as basketball team manager for the 2004-2005 school year, (2) directing the district to allow the student to participate on the swim team for the 2004-2005 school year, (3) requiring the district to "convene an IEP meeting to create an IEP consistent with this Decision" and (4) directing the district to conduct Fragile X Syndrome training for some of the district employees who worked with the student.

THE MAY 25, 2005 IEP

8. On May 16, 2005, the district sent an IEP meeting notice to the student and his mother, advising them that an IEP meeting would take place on May 25, 2005, from 9:00 a.m. to noon, at PHSS. Two boxes were checked to indicate the purpose of the meeting was to develop or change the student's IEP, if appropriate, and to develop or change the student's transition plan, if appropriate.

The mother faxed a reply dated May 19, 2005, in which she indicated she would attend and tape record the meeting.

9. The IEP team members who met on May 25, 2005, included the mother, a district administrator, two general education teachers, a special education teacher, a school counselor, a speech therapist, a representative from the San Diego Regional Center, an integrated life skills support representative, a vice principal, a resource specialist program representative, and the attorney for the student's parent.

The May 25, 2005 IEP meeting proposed a transition program that had not been considered at previous IEP meetings. The proposed plan involved the student being off the PHHS campus for a portion of the school day and not participating in any academic classes.

Any inadequacies in the pre-meeting notice did not impede the parent's opportunity to participate in the IEP meeting or to help formulate the IEP. Many of the student's advocates - his mother, his regional center service coordinator, his French teacher, a prior case manager - appeared at the May 25 meeting and expressed views opposing the district's proposed IEP plan. The complaint was not that these opposing views were not expressed; rather, the complaint was that these views were not accepted.

10. *The District's Offer:* A plan was developed during the IEP meeting on May 25, 2005, that was offered to the mother. The district's offer included:

- a transition plan involving the provision of integrated life skills beginning September 6, 2005, and continuing through March 30, 2006 (the date set for

the next IEP), consisting of individualized services outside general education through the Transition Resources for Adult Community Education (TRACE) program, which would occur away from the PHSS school campus, but which would permit continuation of the student's work and athletic activities on campus;

- the continuation of the student's activities at PHSS including working in the cafeteria and serving as an athletic team manager and participating as a member of the swim team during the 2005-2006 school year;
- transportation for the 2005-2006 school year as needed to carry out the plan;
- an extended school year (ESY) program for 2005 [summer school] involving some summer school with paid employment;
- the provision of a one-to-one aide to support the student in the TRACE program and for the extended school year; and,
- the continuation of the existing speech and language program.

11. *IEP Considerations:* At the May 25, 2005 IEP meeting, the student's present levels of educational performance were carefully reviewed including his social/emotional/behavior skills, pre-vocational/vocational skills, self-help skills, academic/readiness skills and communication skills. Specific consideration was given to the student's social and emotional development as a result of serving as a team manager and working in the cafeteria.

Areas of specific need were identified. These areas included the student's need to continue broadening his social skills and to generalize these skills to different environments, the need to continue working towards increasing his post-high school employment skills, the need to increase his independence with job skills, the need to learn functional words for environments within the community, the need to develop writing skills, money skills and basic counting skills, the need to learn to initiate conversational topics and to maintain and close conversations, and the use non-verbal language and appropriate voice volume.

Within the general educational environment, it was recommended the student participate in "point of training through TRACE," a transitional program, but not participate in general academic classes due to the student's "need for transition services." Several supplemental aids, services and modifications were recommended.

The transition plan set forth in the IEP indicated the student wanted to have a job, wanted to continue living with his mother and wanted to earn wages to enable him to make personal purchases after completing high school. These goals were entirely consistent with the transition plan goals discussed in a March 30, 2005, IEP meeting and were not disputed.

The student's current education/training status included working in the cafeteria as an employee of PHSS, having completed cooking classes and two years of Tech Core, working as a camp counselor for four summers, and working at a parks and recreation facility in the summer of 2004.

The transition plan contained goals of mobility/transportation, financial and income services, personal management, maintenance of post-secondary agency linkages and self- advocacy. Three coordinated sets of activities were identified to move the student towards these goals: first, employment (for one year the student would maintain employment at PHSS); second, instruction (for one year the student would continue to improve his sight word vocabulary, learning new words in the community); and, third, community experience (for one year the student would participate in the TRACE program). Eight very specific, measurable annual goals were identified and set forth to measure progress and success.

12 Karen Farrell (Farrell), a special education teacher and the student's casemanager, Nancy Batinica (Batinica), a resource specialist, and Gayle Taresh (Taresh), an integrated life skills resource teacher, testified about the IEP meeting and each provided expert testimony establishing the offer constituted a FAPE.

According to Farrell, Batinica and Taresh, the student's age - 21 years old, going on 22 - made it obvious he would have to make the transition from public school to the

adult world following the 2005-2006 school year. Each believed the TRACE program would provide the student with educational benefit and valuable vocational skills he could take with him upon completion of high school.

Farrell acknowledged the student had difficulty with change, which was one reason why a gradual implementation of a transition program was imperative. The district's offer contemplated the student would be provided with a one-to-one aide when off campus, with necessary transportation, but would remain on campus to participate in his cafeteria work and after school athletic activities so the transition from high school would not be an abrupt one. Farrell said this was an individualized plan designed to meet the student's unique needs and skills.

Batinica believed the TRACE program was appropriate given the student's age and graduation status. Batinica, like Farrell, believed the district's proposed plan provided the student with some educational benefit.

Taresh, an independent living skills resource teacher, established that the TRACE program was designed for students 18 to 22 years of age who needed support in making the transition from high school to adult life. The TRACE program not only served persons who had exited from high school, but also served students who remained in high school. Taresh believed the TRACE program was the student's least restrictive environment because most of the student's chronologically aged peers were out of high school and were either working or were in college.

Cheryl Reagan (Reagan), a vice principal, testified the district's offer was a "gentle way to provide transition, especially in the last year." The offer of the TRACE program was not designed to get rid of the student and no evidence supported the suggestion made to that effect.

13. A vocational assessment performed by the district dated March 30, 2004, was *not* considered in connection with the drafting the May 25, 2005 IEP. No other vocational assessment was offered. Consideration of the March 30, 2004, vocational assessment would not have had any impact on the content of the May 25, 2005 IEP.

While the district's prior vocational assessment did not mention a specific transition program from high school to the job force, it did not exclude such a program and it could be interpreted to support such a program.

14. In her letter dated May 25, 2005, the student's parent wrote:

Please be advised that I do not agree to the ESY/05 proposed on 5/25/05, as well as I do not agree to the IEP/ITP dated 5/25/05.

Nothing in the letter indicated the student's parent was confused about the reason for the IEP meeting, was prevented from having others attend that meeting, was unable to provide information and ideas at that meeting, or was unclear about what the district had offered.

15. May 25, 2005 was not the first time the mother had refused to sign an IEP.

The mother did not sign the January 31, 2005 IEP because accommodation had not been made for the student to participate on the varsity football team, because approval had not been given for the student to score a ceremonial touchdown, and because the student had not been invited to a reception honoring high school scholars.

The mother did not sign the March 31, 2005 IEP when agreement could not be reached concerning the student's participation on the varsity football team for the 2005-2006 school year; indeed, she terminated that IEP meeting and indicated her attorney would get in touch when she did not get her way. While the mother testified she was in agreement with other IEP goals discussed at that meeting, there was no consensus or indication they would be implemented if the IEP was not signed.

The mother was appointed the student's conservator on June 20, 2002. She held enumerated rights including "Decisions concerning the education of the limited

conservatee." ¹She certainly had the right not to sign the IEPs, even if the result was to continue with a special education program that had been designed several years before, when she signed an IEP.

16. The mother expressed many reasons why she did not agree to the May 25, 2005 IEP plan. When reduced to their simplest terms, they included (1) her son was making tremendous progress under the existing IEP and there was no need to change it, (2) her son had certain expectations concerning his senior year at PHSS which could not be met if he were away from campus, (3) the district's plan came as a complete surprise and it was not what the mother had planned for her son for his senior year, and (4) the district's plan would likely result in the student's regression.

Until recently, the student's mother was very happy with the student's progress at PHSS, a high school from which she graduated and where she had worked for three years as the girl's field hockey coach. In the first seven years of high school, the student was in a full inclusion placement, i.e. he was in a traditional classroom with other nondisabled students with a one-to-one aide for support. A case manager made certain the academic curriculum was modified to an appropriate level to promote the student's education.

The student began working at the school cafeteria two years ago. He performs food preparation work and barbeques hamburgers. Co-employees provide him with supervision. The student also works over the summers at the Allied Garden Recreation Center, where he is an assistant day camp counselor. He provides "an extra set of eyes," helps with the equipment and cooks at barbeques. The student loves to work and he becomes upset when he cannot go to work.

¹ The mother's status as a conservator permits her to make educational decisions on behalf of the student. It does not provide her with the right to require the district to comply with all of her requests.

Early in high school, the student became extremely interested in sports. According to some, the student's life is sports. He became a manager of several athletic teams, a responsibility which the student very much enjoyed. He was a member of the swim team.

According to the mother, the student "developed in a huge way" during his stay at PHSS. His classmates accepted him and he was made to feel a part of the group. No student shunned him. He was not a behavior problem. No teacher or administrator ever complained about his conduct on campus.

The student did not receive athletic awards at the same time, place and manner as other students, which was determined in the prior hearing to constitute a denial of the student's right to a free and appropriate public education. The student's mother has since expressed her view that the district's refusal to permit the student the opportunity to suit up and be a member of the varsity football team constituted a denial of the student's right to a free and appropriate education.

According to the mother, the student believed his last year of high school (his eighth) would be a very important year in which he would have the opportunity to engage in such activities as the school prom, senior day, senior picnic, school dances, pep rallies, spirit week, homecoming, and other special events. The student planned on attending academic classes, such as French and Art, and remaining on campus with other high school seniors throughout the school day.

The mother believed that taking the student away from the high school campus to participate in the TRACE program would cause the student a great deal of anxiety and stress, even if he were to return to campus to work in the cafeteria and engage in athletic activities. She believed he would miss many, if not all, of the social activities associated with a senior year in high school.

The mother acknowledged the student could not attend high school forever and she knew he was not entitled to district services after reaching age 22. However,

because of all the unique, important events occurring in his senior year, she believed "It's not right to take [Student] out now" and "It's not what I have planned for my son."

The mother testified the student believes his best interests are served by remaining at PHHS. When the mother recently drove the student past PHHS, he reportedly said, "Henry, football." When the mother asked him if he would like to go on a bus and engage in new activities, he said, "No, Mommy, Henry."

The mother fears for the student's emotional safety. The mother had a recent, troubling experience in which she surreptitiously observed six young persons, whom she believed were involved in the TRACE program, being supervised by three aides at a grocery store. Two aides appeared wholly disinterested and one aide was so abusive to a charge the mother began crying. On the basis of this experience and two visits to TRACE within the last three years, the mother concluded the TRACE program was wholly inappropriate for her son.

In addition, and perhaps more importantly, the mother said she had carefully planned a transition program for the student with the assistance of the San Diego Regional Center. While she acknowledged the student might have difficulty with that program because it would involve changes, she preferred the student have just one major life change in the next few years rather than two.

17. Testimony was offered to corroborate the mother's testimony and to question the propriety of the district's proposal.

Mark Luciano (Luciano), a clinical psychologist and a regional center educational consultant, had served as the student's educational consultant for the past two years. In the past year, he had seen the student five or six times, but had spent less than an hour with the student. Luciano had not formally evaluated or assessed the student. Luciano testified the student had difficulties making transitions and did not do well in unfamiliar settings. Luciano was somewhat familiar with the TRACE program. Luciano recommend the student not be placed immediately in the TRACE program as that might result in regression, but recommended the student be

given a gradual introduction to the TRACE program. Luciano thought the TRACE program had vocational value.

Lynne Bird, M.D. (Dr. Bird), the student's dysmorphologist and clinical geneticist, testified Fragile X Syndrome is a hereditary condition whose primary features include mental retardation, a behavioral and neuropsychological profile, and mild physical differences. In addition to being diagnosed with Fragile X Syndrome, the student is mentally retarded and does not function at his chronological age level. The student presents with social anxiety, general anxiety and a mood disorder including depression. Dr. Bird believed the student could benefit from school, although she conceded educational placements were not within the scope of her practice. She believed the student needed a consistent routine because of his emotional condition. Dr. Bird testified if the student spent the first half of a school day away from campus, and then returned to campus for an afternoon for work and athletic activities, he might be anxious and difficult to manage, but such a program might work with a lot of support.

Richard Buchta, M.D. (Dr. Buchta), the student's pediatrician since 1997, has had two patients who have been diagnosed with the Fragile X Syndrome. Dr. Buchta and his medical associate have seen the student three times since November 2004. Dr. Buchta described the student as being friendly, well behaved and passive, a view echoed by all witnesses. Dr. Buchta, like the other witnesses, believed the student did not adapt well to change and was at his best in a structured environment. Dr. Buchta was not familiar with the TRACE program.

Tim Edgington (Edgington), a regional center service coordinator, had met with the student at least eight times in the past three years. Edgington described the student as being very happy and social on campus until the last couple of years, when he "stopped being the social butterfly." Edgington's observations and testimony concerning the student's emotional decline in the last two years was inconsistent with the testimony of others.

Edgington denied having worked out a comprehensive transition plan for the student; he said he had simply provided the family with some information and they were going to look into a transition plan more closely in the last six months of the student's senior year.

Edgington testified he had sharply disagreed with the district's proposal to take the student off campus for a transition program because "he is not emotionally or mentally ready for TRACE" and "needs some semblance of order." Edgington said he expressed this view at the May 25, 2005 IEP as did several others.

Jo McGlin (McGlin), a special education teacher, had taught the student in several classrooms and was previously his case manager. She said the TRACE program had not been seriously considered before the May 25, 2005 IEP meeting because the student's mother had always wanted to keep the student on campus. McGlin testified the student's work in the cafeteria and his athletic activities were very important. She questioned the district's proposal, testifying, "People want to take him out of a safety zone and place him in a situation where he will be uncomfortable and will not learn." McGlin, who arrived two hours late for the IEP meeting at issue, was unaware that the district's offer included the student's return to campus to work in the cafeteria and to continue participating in athletics.² She described the May 25, 2005 IEP as "merely being a paper review," although it was not clear how she reached that conclusion since she missed most of the meeting.

Mary Elizabeth Ekhaml (Ekhaml), a special education teacher, had previously served as the student's case manager. She last saw the student at school in November 2005, when he appeared very anxious about being an assistant manager after having

² McGlin testified in the previous hearing that the student's primary needs had to be met through socialization and vocation based programs because the student would most likely not progress academically.

been a manager. Ekhaml believed the TRACE program was inappropriate for the student and possessed no educational benefit. According to Ekhaml, "He needs the academics." Ekhaml testified it was not important for the student to have a high school transition plan because a transition could be provided and implemented after the student graduated from high school.

Tammy Dilloway, the student's one-to-one aide, testified the student was very social and happy until recently. His recent attendance at PHHS was poor because he became depressed and didn't want to be at school. At the end of the school year, the student stopped coming to school because he was not involved in spring football.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The Individuals with Disabilities Education Act (IDEA) provides federal funding to state and local educational agencies that must then provide educational opportunities for students with disabilities. The purpose of IDEA is "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 employment and independent living." 20 U.S.C. §1400(d).

The term "special education" in federal law means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including - (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education. 20 U.S.C. § 1401(29). Education Code section 56031 augments this definition to include "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of

the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."³

A free appropriate public education (FAPE) is one provided at public expense, under public supervision and direction, and in conformity with an individualized education program (IEP) which is developed for the child. Id. § 1401 (8). The obligation to provide a PAPE does not require a state to "maximize each child's potential." *Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S.176, 198; see also 20 U.S.C. § 1401(8)(D).

IDEA contains numerous procedural steps that a state must follow in order to properly design and implement an IEP. See 20 U.S.C. § 1414(d); *O'Toole v. Olathe District Schools Unified School District No. 233* (10th Cir. 1998) 144 F.3d 692,698.

The district is responsible for assembling an appropriate IEP team to draft and then implements a disabled student's IEP. 20 U.S.C. § 1414(d).

The IEP is the blueprint for successfully formulating and achieving the goal of IDEA. *Murray v. Montrose County School District* (10th Cir. 1995) 51 F.3d 921, 925; see also 20U.S.C.§1401(11). IEPs should provide a "basic floor of opportunity" consisting of

³Education Code section 56031 also provides "special education" is an integral part of California's total public education system and special education provides education in a manner that promotes maximum interaction between children or youth with disabilities and children or youth who are not disabled in a manner that is appropriate to the needs of both. Special education includes a full continuum of program options, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education, to meet the educational and service needs of individuals with exceptional needs in the least restrictive environment.

services that are "individually designed to provide educational benefit" to a child with a disability.*Rowley*, 458 U.S. at 201.

In California, Education Code section 56341.1 requires, among other matters, than the IEP team consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil.

IDEA also mandates several substantive requirements, including the requirement that students with disabilities be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); *Murray*, 51 F.3d at 925-26. The LRE component of providing a PAPE dictates that the state should integrate a disabled child with non-disabled children whenever possible.

Federal law requires:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5).

IDEA requires that when a student reaches age 16, and annually thereafter, the student's IEP must include a statement of transition services the student needs before leaving the school setting. 20 U.S.C.S. § 1401(a)(20). In California, these transition services are required under Education Code section 56354.1.⁴

⁴ Education Code section 56454.1 provides:

(a) Beginning at age 14, or younger, if determined by the individualized education program team pursuant to paragraph (1) of subsection (b) of Section 300.347 of Title 34 of the Code of Federal Regulations, a statement of the transition

service needs of the pupil shall be included in the pupil's individualized education program and shall be updated annually. The statement shall be included under applicable components of the pupil's placement courses or a vocational education program.

(b) Beginning at age 16 or younger, and annually thereafter, in accordance with Section 56462 and paragraph (30) of Section 1401 of Title 20 of the United States Code, a statement of needed transition services shall be included in the pupil's individualized education program, including, whenever appropriate, a statement of interagency responsibilities or any needed linkages.

(c) The term "transition services" means a coordinated set of activities for an individual with exceptional needs that does the following:

(1) Is designed within an outcome-oriented process that promotes movement from school to post school activities, including postsecondary education, vocational training, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation.

(2) Is based upon the individual pupil's needs, taking into account the pupil's preferences and interests.

(3) Includes instruction, related services, community experiences, the development of employment and other post school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(d) If a participating agency, other than the local educational agency, fails to provide the transition services described in the pupil's individualized education program in accordance with this section, the local educational agency shall reconvene the individualized education program team to identify alternative strategies to meet the transition service needs for the pupil set out in the program.

A parent of a child with a disability may contest any action by the school district that the parent believes deprives the child of a FAPE. 20 U.S.C. § 1415(b)(6). The educational agency must then provide the parent with an impartial due process hearing to evaluate the complaint. 20 U.S.C. § 1415(f).

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 (stating that the IDEA does not provide for an "education ... designed according to the parent's desires," citing *Rowley*, 458 U.S. 176, 207).

Technical deviations from procedural requirements in developing an IEP do not automatically lead to the conclusion that the IEP is invalid. *Urban v. Jefferson County School District R-1* (10th Cir. 1996) 89 F.3d 720, 726. Rather, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *O'Toole*, 144 F.3d at 707.

Not all procedural violations automatically constitute a denial of FAPE. Procedural violations which result in a "loss of educational opportunity" or which "seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE." *WG v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.

The parties agreed that in California the burden of proving the adequacy of the IEP at an administrative hearing is on the school district. See, *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398. ⁵

⁵IDEA is silent about which side bears the burden of proof in a state administrative proceeding brought by parents to challenge the adequacy of an IEP. There is a split of appellate opinion on this issue among federal appellate courts. This

DETERMINATION OF ISSUES

1. The district offered the student a FAPE based upon the May 25, 2005 IEP. No IEP meeting before May 25, 2005, specifically considered a transition plan in which the student would be off campus. The notice for the May 25, 2005 IEP did not mention a transition plan that would require the student to spend some time off campus. Nevertheless, no procedural inadequacy relating to the notice, if one existed, resulted in the student's loss of any educational opportunities or seriously infringed upon the parent's right to participate in the IEP process.

The composition of the IEP team was appropriate and complied with legal requirements. Information specific to the student was obtained and discussed at the May 25, 2005 meeting. The failure to consider the vocational assessment was not prejudicial. The student's mother and others were not prevented from participating in the IEP meeting in a meaningful fashion.

While it was not a model of clarity, the district's offer was communicated in writing to the student's parent and to her attorney. It was sufficiently specific to permit the parties to know what was being offered. There was no request to clarify the written offer before it was rejected. Under the circumstances, it is concluded the offer marginally met the standards expressed in *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519. The IEP team was not compelled to include minutes of the meeting or the arguments made in opposition to the IEP, as was suggested. See, *Warton v New Fairfield Board of Education* (2002, DC Conn) 217 F Supp 2d 261,271.

The IEP plan the district offered to the student was individualized and unique. The plan reasonably promoted efforts to broaden his social skills and to generalize and apply newly developed skills in different environments, to increase post-high school

issue is now before the United States Supreme Court in *Schaffer et al. v. Weast et al.* bearing Docket No. 04-0698. Oral argument will be held in the Supreme Court's 2005-2006 term.

vocational skills, to increase his independence, to help him to learn functional words for use in various settings within the community, to help him develop writing skills, basic counting skills and money skills, and to assist him in initiating conversational topics, maintaining conversations and using non-verbal language and appropriate voice volume. The IEP plan met the student's need for a gradual transition and concerns about the need for something other than an abrupt transition in which the student would no longer be on campus at all. The IEP plan provided the student with access to specialized instruction and related services individually designed to provide educational benefit. The educational placement recommended by the district was likely to produce progress. It squarely met the student's need for a gradual transition from high school to adult life. The district's proposal included appropriate objective criteria to measure progress. The district reviewed the options and reasonably concluded that a transition program involving some time off campus with chronologically aged peers constituted the least restrictive environment.

The district provided credible expert testimony to support its plan and its claim that the proposed program was reasonably calculated to provide the student with meaningful educational benefits, even though the mother and others disagreed and questioned the district's judgment. The evidence offered by petitioner did not establish any rational basis to conclude there were any procedural inadequacies that compromised the student's right to an appropriate education, or seriously hampered the parents' opportunity to participate in the IEP process, or caused a deprivation of educational benefits. Nor did the evidence offered by petitioner establish the district's offer was not reasonably designed to ensure the student had access to a free appropriate public education designed to meet his unique needs and to prepare him for employment and independent living after high school. The conflicting evidence merely established the existence of a disagreement, and disagreement is not uncommon when trying to predict the future.

2. The district may implement the May 25, 2005 IEP over the student's parent's objection if he remains in school.

The district argued it can implement the May 25, 2005 IEP without having the mother's consent. The district cited 34 Code of Federal Regulations§ 300.505, subsection (d).

The student argued that none of the law cited by the district concerning consent was applicable since the district failed to provide the student's parent with prior required written notice under 20 U.S.C. §1415(b)(3).

There is no question that the mother strenuously objected to the district's offer and rejected it. She had adequate notice.

Code of Federal Regulations, title 34, part 300, Appendix A provides:

9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the (1) child's needs and appropriate goals; (2) extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs(§§300.343(c)(iii) and 300.346(a)(l) and(b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing .

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B.

If the student is to continue to receive educational services from the district, he must accept the FAPE that was offered at the May 25, 2005 IEP meeting which is discussed in detail in this Decision. The mother may appeal this Decision. In the alternative, the mother may withdraw her adult son from high school and place him privately to receive educational, vocational and/or transitional services and supports; she is free to do so because he is an adult and she is his conservator. However, if she does so, then the mother should not expect the district to provide her with any kind of reimbursement because a FAPE was offered to the student on May 25, 2005.

PREVAILING PARTY

1. This District prevailed on Issue 1
2. The District prevailed on Issue 2.

ORDER

The District may implement the offer of FAPE arising out of the May 25, 2005 IEP over the objection of the student's mother and without her consent if the student remains enrolled in the district.

Dated: 8/11/05

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings