

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

In the Matter of:

STUDENT,

Petitioner,

vs.

BERKELEY UNIFIED SCHOOL

Respondent.

OAH No. N2005070046

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Berkeley on July 27 and in Oakland, California, on September 7, 8, 9 and 20, 2005.

Jennifer E. Torbohn, Attorney at Law, represented Petitioner Student (Student), who was not present. Student's mother, Mother, was present. In addition, Sally Coghlan McDonald, Attorney at Law, was present on Student's behalf for portions of the hearing.

Christine D. Lovely, Attorney at Law, represented Respondent Berkeley Unified School District. Also present was Elaine Eger, District Manager of Special Education.

The Parties offered a joint list of exhibits and stipulated that the exhibits, marked A through G, be admitted into evidence.

The record remained open to receive written briefs, which were timely received and marked for identification. Student's brief is Exhibit H and District's brief is Exhibit I.

The record closed on October 21, 2005.

STIPULATIONS

1. District stipulated that it did not provide Student with a free and appropriate public education (FAPE) from March 14, 2003, through July 15, 2005.
2. District stipulated that it did not provide Student with an appropriate placement at the May 27, 2005, individual educational plan (2005 IEP) meeting.
3. District agreed to reimburse Student's mother \$5,580.45 for school and services transportation expenses incurred from March 14, 2003, through July 15, 2005.
4. District agreed to deliver medical records concerning Student, including a 1996 "Do Not Resuscitate Order" that has been rescinded, to Student's mother, should such records be located.

ISSUES

1. Whether Student's 2005 IEP should be implemented.
2. Whether, given District's failure to provide Student a FAPE from March 14, 2003, through July 15, 2005, compensatory education should be awarded.

SUMMARY OF CONTENTIONS AND PROPOSED SOLUTIONS

1. Student requests an order that Student's 2005 IEP be implemented immediately.

District contends that, the 2005 IEP notwithstanding, there exists insufficient information about Student's disabilities to determine what would constitute an appropriate educational program or services for him at this time.¹ District requests

¹ In its closing brief, District appears to argue that the 2005 IEP is legally insufficient. District had not previously identified this allegation as an issue in the due process hearing. Nor did District either object to the admission of the 2005 IEP into

that OAH retain jurisdiction and order that Student be assessed in all areas of perceived need.

2. Student requests an order of compensatory education in the form of "day-for-day" compensation for the education and services District failed to provide. Student requests that District be ordered to place \$1,000,000 in an account controlled by Student's mother, who could draw on the funds for a two-and-one-half year period to pay for education and services as she determines necessary.

District does not dispute Student's entitlement, in general, to compensatory education. District contends, however, that there exists insufficient information about Student's needs to craft a program of compensatory education for him at this time. District requests that OAH retain jurisdiction and order that Student be assessed in all areas of perceived need.

FACTUAL FINDINGS

1. Student (Student), born March 14, 1996, is currently nine and one-half years of age and lives with his mother within the District. He qualifies for special education under the classification of "deaf-blind." Student is cortically blind and cortically deaf; in other words, he has periods where he has limited vision and limited hearing. He is medically fragile, and suffers from conditions including cerebral palsy, fluctuating muscle tone, poor head control and problems with temperature regulation.

MARCH 14, 2003-MARCH 31, 2004

2. An IEP dated October 28, 2002, contains the placement and services District was required to provide for Student during the period March 14, 2003

evidence (a joint list of exhibits were admitted by stipulation) or present evidence on this issue. Hence, District's claim that the 2005 IEP is deficient will not be further addressed.

through March 31, 2004. It also provides that Student shall receive "make up" alternative and augmentative communications (AAC) and occupational therapy (OT) services. Student was to be placed in a classroom with an aide for five days each week for five hours and 45 minutes each day. An interim placement in a deaf/hard-of-hearing special day class was planned; however, the IEP team acknowledged that this was an inappropriate placement - it was a temporary measure. The IEP provides that "District is committed to developing [a] primary program for student with multiple needs including augmented communication." The augmented communication program was to be developed for Student during the 2002/2003 school year. In addition, District agreed to provide Student with education and services during the extended school year in 2003.

3. Student was physically in a classroom for only ten days during this period, which included a total of 212 possible days (1219 hours) of instruction. An aide was provided for only eight of the days. The IEP also provided for the following additional services: physical therapy; swimming; speech/language; vision; deaf/hard of hearing; orientation and mobility; adaptive physical education and occupational therapy. These services totaled twelve hours and seven minutes per week. However, all that Student received was one hour of physical therapy each week.

MARCH 31, 2004-JULY 15, 2005

4. An IEP dated March 31, 2004, contains the placement and services that District was required to provide Student during the period March 31, 2004, through July 15, 2005. It provided for placement in an appropriate special day class five days each week. Because there was no class yet available, the IEP provided for one week of "diagnostic placement" in a second grade general education class "in the interest of returning Student to school as soon as possible." Again, this was a temporary measure. IEP notes dated April 23, 2004, reflect a change of placement

to a special day class for the vision impaired/multi- handicapped at Montclair School in the Oakland Unified School District.

5. Classroom attendance for Student during this period was 83 days out of a possible 274. Services in the same areas as listed in the previous IEP were to be provided, with the total time increased somewhat to twelve hours and twenty minutes. However, the only services provided were aquatic therapy and one hour of physical therapy each week.

6. On October 12, 2004, Student began receiving AAC services. He received 25 hours of direct AAC service as well as consultation services.

7. The record is not entirely clear, but it appears that Student has not attended school since January 29, 2005.

2005 IEP

8. An annual IEP team meeting was convened on May 27, 2005. Attendees included: Student's mother and several other family members and friends; Student's adaptive physical education teacher, augmentative communication specialist and nurse; a District principal, a District teacher and Alan Joy, District's Program Supervisor for Special Education. Some participants were not in attendance for the entire meeting. Extensive discussion was held regarding an appropriate educational placement and services. As to placement, the entire IEP team concluded that Student should be placed in a "classroom specifically designed for AAC, medically fragile and deaf-blindness." Joy then left the room, called District officials, and reported back that District's offer was for placement in a general education class "blended with" a special day class. This was not the educational placement unanimously agreed to by the IEP team and the team members did not agree that District's offer constituted an appropriate placement for Student.

The IEP team discussed goals for each service, but some goals were purposely left to be determined until information could be obtained from others.

For example, the IEP notes state “deaf hard of hearing to advise on goal,” and that the academic goals be “run past” Deaf-Blind Services “to make sure they are appropriate.” It is noteworthy that the type of placement and services agreed upon at this IEP do not differ significantly from the conclusions reached at prior meetings. Although the levels of service appear to have increased somewhat, the ultimate findings are substantially similar.

EVIDENCE REGARDING STUDENT'S NEEDS

9. Three witnesses testified regarding their knowledge of Student and his needs: David Brown, Ebru Toruner and Heidi H.

10. David Brown is an educational specialist with California Deaf-Blind Services, a federally-funded agency, based in San Francisco, which provides services to deaf and blind individuals from birth to age 21, to their families, and to schools and other agencies who serve them. The services, which are provided at no cost, include training and education. There are currently approximately 950 deaf-blind young people in California. Due to staffing constraints, the services are provided mainly by telephone. Face-to-face meetings, outside of trainings, are currently limited to new referrals.

11. Brown was educated in England and began work in the deaf-blind field in 1992. Brown described the population he serves as both diverse and “sprinkled throughout the state.” In most communities, there is no existing program, so one “has to be cobbled together” and “getting it right” is an ongoing process.

Brown stressed the importance of communication and language for the population he serves. The goal is always to move the student towards language in some form - ideally, English or America Sign Language (ASL), but that remains only a goal for many. The abilities of the deaf-blind vary tremendously. Few are completely blind and deaf; some see better at a certain light level, or in the

mornings. Regardless, the students need a broad range of services with the specialists all working together.

Brown described himself as a "hands-off" worker in that he does not have time to build relationships with individual children. Instead, he observes, makes notes, writes and consults regarding appropriate programs and services.

12. Brown first met Student and his family in 2000, when he conducted a lengthy in-home visit. Since then, Brown has made seven additional in-home visits, observed Student in class, provided training to educators at the two school placements that were attempted, written reports for IEP meetings, consulted with Student's mother and in general shared information he has gained about Student over the years. On April 30, 2002, he authored a general report regarding Student's educational needs as of that date. Brown last saw Student at a picnic in the summer of 2005.

Brown states that at first, it appears that Student's disabilities are profound. After a time, however, Brown found that Student shows considerable awareness. He will demonstrate remarkable visual skills in the right environment. Because of his orthopedic difficulties, Student needs time to take in information and plan his response. Pacing of activities, therefore, is very important. Student demonstrates more auditory attention when children, as opposed to adults, speak to him.

Although communication will always be Student's biggest challenge, he does communicate in a whole range of ways. For example, when Brown yelled or banged on something, Student did the same. Brown has played "turn taking" games with Student when Student is having a good day medically.

13. In terms of educational placement, Brown emphasized that, wherever it is, the classroom must be adapted for him and Student must be welcome there.²

²On one occasion, just before he began a training session, school staff bluntly told Brown that they did not want Student in their program. Brown last observed Student in a class in February 2003. The teacher told him of the class's hostility

Brown describes Student as a child who has never really started school; therefore, not too much is known about his stamina. There is no obvious reason, however, that he could not participate in a full school day. Student himself should “determine the curriculum” with a bias towards use of augmented communication devices, such as switch technology.

14. According to Brown, Student has missed a great deal in the last two years by not receiving education in a classroom environment. The two primary areas of loss are socialization and subjects that are taught using inter-disciplinary methods. What type of compensatory education should be provided is not possible to know at this time. Attention levels and other factors would determine the benefit of, for example, doing extra work after school. Brown would be better able to make a recommendation about compensatory education after Student has participated in an educational program for awhile.

15. Although Brown has not worked directly with Student in over two years, he has specialized knowledge regarding deaf-blind children generally and personal experience with Student. Brown confidently described his observations and opined regarding the education and services Student could benefit from. Brown’s opinions were persuasive.

16. Ebru Kilicarslan Toruner is a registered nurse. Beginning in 2004, she was one of two nurses employed to work with Student during the time that he was enrolled in school. She rode with him on the bus to Montclair School and stayed with him during the six-hour school day. Toruner described a classroom environment that offered only minimal educational opportunity. There was a lack of discernable curriculum and little attention from the teacher or his aide. The classroom lacked the physical equipment necessary to teach Student. According to

towards Student before Brown arrived and Brown observed the hostile atmosphere in the classroom.

Toruner, Student stopped attending because "they didn't teach him anything there," and because of medical issues. Student is medically fragile, and apparently there was concern that sick children were allowed to remain in the classroom, presenting an unacceptable risk to Student's health.

17. Since Student's last day of school in January 2005, his family has put together an educational program for him. Heidi H., Student's aunt, is one of the family members who works with Student. She has attended numerous workshops and seminars in order to educate herself in ways to help her nephew. Heidi estimates she has spent thousands of hours with him since March 2003. Toruner also works with Student on his educational goals.

Subjects Student is taught include ASL and math. The computer is used to read about different cultures and geography. "There is a computer program that allows Student, with assistance, to write stories. As regards communication, Heidi estimates that Student now understands and uses about 15 tactile signs. The family created and maintained a document they call "[Student's] book" to record his progress in all areas. This was provided for the team at the 2005 IEP meeting.

18. Heidi was one of the family members who attended the 2005 IEP meeting. She stated that the family attended "out of desperation - we felt it was a crisis." They feel that Student is suffering both physical and emotional harm as a result of the lack of formal education, contact with other children, and services.

LEGAL CONCLUSIONS

1. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) is to ensure a FAPE to children with disabilities. The United States Supreme Court, in the case of *Hendrick Hudson Central Sch. Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 203, held that IDEA does not require the best possible education or that the maximum potential of each child be realized. Rather, the IDEA requires that the unique needs of the disabled child be considered and

that he or she receive "some educational benefit" from the program and services provided.

ISSUE NO. 1: IMPLEMENTATION OF 2005 IEP

2. In May 2005, an IEP team met and produced an IEP that provided for a specific placement and services for Student. District offered a different placement, which it now acknowledges was not a FAPE. Although Student's mother (and the entire IEP team) rejected the placement, District did not request a due process hearing, nor did it cross-file when Student filed his request. Nonetheless, further delay is requested by District, while assessments are completed. District also argues that, pending assessment, Student should "remain in the last agreed upon placement, i.e., his March 2004 IEP placement. . . while OAH retains jurisdiction."

District's position is untenable. This now nine and one-half-year-old child has received virtually no formal education. The law simply requires that District provide Student with an educational program based on his needs that provides him some benefit- there is no requirement that every possible piece of information be assembled before a child's education can begin. Such a rigid position as District advances is not supported by the IDEA and could not have been Congress's intent. Requiring a "gold standard" of information before providing a program to a child with so many needs is an unsupportable position.

3. The situation is straightforward. Waiting for the completion of assessments has not been shown to be necessary and will cause unnecessary delay, further impeding Student's educational progress. A valid and fairly recent IEP exists and its implementation will, at a minimum, prevent further unnecessary educational loss. Consequently, Student should be immediately placed in an educational setting consistent with his 2005 IEP: in a classroom specifically designed for a medically fragile, deaf-blind child who needs AAC.

ISSUE NO. 2: COMPENSATORY EDUCATION AND SERVICES

4. It is well-settled that granting an award of compensatory education is within a court's inherent power. (*Student W. v. Puyallup School District* (1994) 31 F.3d 1489, 1496.) It is an equitable remedy, that is, a tool that courts may employ to craft "appropriate relief" for a party. Appropriate relief in this instance is "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at pg. 1497.) Given the lack of education and services provided to Student, Student is entitled to education and services designed to compensate for his lost opportunities. However, more information is required in order to determine the nature and extent of the compensatory education.

Student has requested an order that compensatory services be provided on a one-for-one basis. This formulaic approach, however, has been specifically disallowed. In *Reid v. District of Columbia* (2005) 401 F.3d 516, 524, the Court confirmed the status of compensatory education awards as equitable remedies, not damages. It rejected the "one-for-one" formula the parents advocated and held that designing the remedy requires "a fact-specific exercise of discretion by either the district court or a hearing officer." The result should be an award that is "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." (*Id.* at pg. 523.)

5. Information necessary to craft the remedy in this matter is lacking in at least two categories: Student's inherent abilities and his ability to perform in an educational setting once provided with an appropriate classroom environment and supplementary services. Therefore, in order to acquire the information necessary to determine the appropriate award of compensatory education, it is essential that District assess Student in all areas of suspected disability, including but not limited to: communication, cognition, vision, academics, self-help, gross and fine motor ability, orientation and mobility. The assessments in all areas must include the

written observations by all assessors of Student in his classroom environment. When the assessments are completed and reports generated, after conferring with Student regarding a meeting date and time, District will convene and complete an IEP team meeting. District will invite Student's attorney to attend. The purpose of the meeting will be to review the assessments, including the classroom observations, and to develop an agreed-upon award of compensatory education services. Time is of the essence. Accordingly, the foregoing must be completed expeditiously, in accordance with the timetable set forth in the Order, below.

6. If the parties cannot agree at the IEP meeting described above to an award of compensatory services, the hearing will be reconvened for the purpose of resolving Issue No. 2.³

PREVAILING PARTY

7. Student prevailed regarding Issue No. 1. (Ed. Code, § 56507, subd. (d).)⁴

8. Student prevailed regarding Issue No. 2. (Ed. Code, § 56507, subd. (d).)

ORDER

1. If it has not already done so, District shall immediately pay Student's mother \$5,580.45 as provided in Stipulation 3.

³ Given the conclusion regarding Issue No. 2., Student's suggestion that an account be established from which his mother could draw to pay for compensatory education and services is not addressed at this time.

⁴ The fact that District stipulated to a denial of FAPE does not prevent a determination that Student prevailed. (See *Oxby v. Oxnard Union HS* (C.D.Cal. 2002) 209 F.Supp.2d 1035.)

ISSUE NO. 1

2. District shall immediately provide the educational placement and services for Student provided for in the May 27, 2005 IEP, including, but not limited to, placement in a classroom designed for AAC and to accommodate a medically fragile, deaf-blind child.

ISSUE NO. 2

3. The Office of Administrative Hearings retains jurisdiction for the sole purpose of deciding Issue No. 2, should resolution of that issue be necessary.

4. District shall immediately initiate assessments of Student as specified in Legal Conclusion 5. The assessments shall be completed and reports generated no later than April 28, 2006. The assessment reports shall be provided to Student's mother and attorney no later than May 5, 2006.

5. No later than May 19, 2006, District shall convene an IEP team meeting to develop an agreed-upon award of compensatory compensation services. District shall confer with Student regarding a date and time for the meeting. District shall invite Student's attorney to attend.

6. No later than May 26, 2006, the parties shall notify OAH regarding the status of the matter so that further hearing dates may be calendared if necessary.

DATED: December 14, 2005

MARY-MARGARET ANDERSON
Administrative Law Judge Office
of Administrative Hearings

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this Decision to a state court of competent jurisdiction. Or, a party may bring a civil action in United States District Court. An appeal must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)