

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

In the Matter of:

STUDENT,

Petitioner,

vs.

CONEJO VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH Case No. N 2005080442

DECISION

The hearing in the above-captioned matter took place on September 27, 2005, at Thousand Oaks, California. Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings, presided. Petitioner was represented by his father. Respondent was represented by Janet Cosoro, Director of Special Education.

Evidence was received, and the matter argued, but the record held open so that Respondent could submit written briefing on one issue, the request for services to be provided after-school. That letter-brief is identified for the record as Exhibit 9.

This case presented two main issues: which of two high schools within the District should Petitioner attend, and whether the District should provide services after school for Petitioner. The parties were notified at the hearing that the ALJ would bifurcate the matter and issue two decisions, with the first issue resolved being the matter of which school Petitioner would attend. A decision on that part of the dispute was issued to the parties by electronic mail on October 24, 2005. This decision pertains to the request that the District provide an aide to assist Petitioner in participation in after-school activities.

ISSUE STATEMENT

The issue to be resolved in this decision is whether Petitioner, a student who suffers from seizures and is entitled to receive special education services, should receive services so that he can participate in extracurricular activities, after regular school hours.

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION:

1. Petitioner Student (Petitioner or Student) is a fourteen-year-old boy (born September 1, 1991) and a student in the District. He has been receiving special education services for a period of years, and continues to be eligible based upon a classification of "other health impaired due to his seizure disorder." (Ex. A-12, p. 8.)

2. Respondent Conejo Valley Unified School District (District) has been providing educational services to Petitioner, and is obligated to provide his high school education.

3. Petitioner's parents requested a due process hearing on August 10, 2005. The request for due process pertinent to this decision stated that the reason for the request was that Petitioner had revealed "unexpected athletic ability and interest" and that "an additional Aid (sic) for extracurricular activities" was desired so that Petitioner could have equal opportunities to develop physically, mentally, and socially. On August 25, 2005, the parties notified the Office of Administrative Hearings that they had attempted to resolve the case, had reached an impasse, and requested a hearing at the earliest date. (Ex. A-8.)

4. In its written argument (Ex. 9) the District asserts that this tribunal does not have jurisdiction to provide the requested remedy, and that if one lies at all, it is outside the laws that control the provision of special education services. Notwithstanding that contention, this tribunal has jurisdiction to determine its own jurisdiction, and if it has jurisdiction over this type of dispute, to resolve the matter.

PETITIONER'S BACKGROUND AND EDUCATIONAL NEEDS:

5. Petitioner suffered from infectious viral encephalitis when he was seven years old. He was not expected to survive that normally-lethal disease, and when it appeared he would survive, he was not expected to walk again. Notwithstanding those long odds he has made a substantial recovery, to the point that he can actively engage in sports and other age- appropriate activities. However, he has not been left unscarred by the disease.

6. Petitioner has a complex epilepsy diagnosis as a result of the infection. As stated by his doctor, the epilepsy is "only under variable control despite our best efforts." (Ex. C- 2.) The boy has exhibited cognitive deficits as a result of the seizures and the medication, and has exhibited attention, language, memory, and retention issues. (*Id.*) Petitioner continues to suffer from seizures, and has suffered from them at school. It should be noted, however, that the seizure activity has diminished somewhat; he suffered approximately 800 seizures in the first 7 years after he was infected, but has suffered approximately 40 seizures so far this year.

7. Given Petitioner's condition, he needs constant supervision. During non-school hours this is provided by his family. His mother operates a business from the family home, and his father works near Westlake High. Petitioner has an older sister, now 16, who also provides support to him; their relationship appears especially close. The District provides an aide as a safety net so that it can respond to any seizures and a seizure protocol has been developed. This includes providing Petitioner's aide with a portable radio so he or she can quickly summon help if Student suffers a seizure. Given Petitioner's circumstances, it is imperative that he can be reached by emergency medical services (EMS) during the school day.

THE REQUEST OF EXTRACURRICULAR SERVICES:

8. The Individualized Education Program (IEP) team developed a program for Petitioner, based on a Special Day Class (SDC), and the constant attendance of an aide. Petitioner's family has no quarrel with the educational aspect of the plan—Petitioner's father described the IEP team as "great"—they only disputed where the plan should be put into motion, and in connection with this decision, whether or not an aide should be provided so that Petitioner can participate in extracurricular activities.

9. As found above, Petitioner can participate in sports, but there are some limits. His physician has not cleared him for football, hockey, or other contact sports requiring padding. However, he is cleared for many sports if an aide is present, including soccer, basketball, lacrosse, volleyball, diving, baseball, and track. He could participate in non-sports activities such as a chess club, theatre, or band, if there is an aide or adult family member present. (See Ex. C-1a.)

10. It has not been established that participation in sports or other extracurricular activities is necessary for Petitioner to access his education in the traditional sense; that is, he need not play basketball or throw the javelin in order to learn math or pass his literature class. However, this finding does not resolve the issue. It is clear that Petitioner may not be able to safely participate in any of these activities without the assistance of an aide, and the District does not dispute that its high schools provide all eligible students access to various extra-curricular activities, such as organized competitive sports and other after school activities. However, in its defense the District argues that the issue of Petitioner's access to those activities is controlled by section 504 of the Rehabilitation Act of 1973, and outside the jurisdiction of this tribunal. (Ex. 9, pp. 4-6.)

LEGAL CONCLUSIONS

THE GENERAL PRINCIPLES OF IDEA:

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (20 U.S.C. § 1400(c).)

2. "Free and appropriate public education" means special education and related services that are provided at public expense, that meet the state educational agency's standards, and conform with the student's individualized education program. (20 U.S.C. § 1401(8)(A)-(D).) "Special education" is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)

3. The educational agency may be required to provide "related services", denominated as "designated instruction and services" in California. Such include developmental, corrective, and supportive services that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(22); Cal.Ed. Code § 56363; see Legal Conclusions 8 & 9, below.)

4. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities

with a "basic floor of opportunity." (458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit. As stated by the Second Circuit Court of Appeals:

Plainly, however, the door of public education must be opened for a disabled child in a "meaningful" way. *Board of Educ. v. Rowley*, 458 U.S. at 192. This is not done if an IEP affords the opportunity for only 'trivial advancement.' *Mrs. B. v. Milford Bd. of Educ.* 103 F.3d at 1121 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988)). An appropriate public education under IDEA is one that is 'likely to produce progress, not regression.' *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (3d Cir. 1997) (internal citation omitted), cert. denied, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998). (*Walczak v. Florida Union Free School Dist.* (2d. Cir. 1998) 142 F.3d 119, 130.)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

5. Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. It contains the following information:

- (A) A statement of the child's present levels of academic achievement and functional performance,
- (B) A statement of measurable annual goals,
- (C) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided,
- (D) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,
- (E) A statement of the program modifications or supports for school personnel that will be provided for the child,
- (F) An explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class,
- (G) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and
- (H) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

6. A child with disabilities is to be placed in the "least restrictive environment," that is, in a placement where he or she may be educated to "the maximum extent possible" with children who do not suffer from disabilities. In this regard, the school is obligated to attempt to place the child in regular classes with the use of supplementary aids and services. (20 U.S.C. §1414(B)(5); see Ed. Code §56342, subd.(b); see also Ed. Code §56031 [special education defined in part to provide for maximum interaction between disabled and non- disabled children].)

ON CREDIBILITY GENERALLY:

7. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence”, including a single expert witness. (*Kearl v. Board of Medical Quality Assurance, supra*, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. “The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.” (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) An expert’s credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. “On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a

face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meinerv. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

CONCLUSIONS SPECIFIC TO THE RESOLUTION OF THIS MATTER:

8. The requested services appear to fall into the category of related services or designated instruction and services (DIS). (See Legal Conclusion 3, above.) Education Code section 56363, subdivision (a), provides that DIS "as specified in the individualized education plan shall be available when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." The statute goes on to list a number of such services, such as adapted physical therapy, physical and occupational therapy, specialized driver training instruction, counseling or psychological services for the student or the parent, and readers, transcribers, and vision and hearing services. (See §56363, subd.(b).) To be sure, DIS are not limited to these (or the other) enumerated services, and it should be noted that "recreation services" are among the specifically identified services. (§56363, subd. (b)(15).)

9. Recreation services are defined at California Code of Regulations (CCR), title 5, section 3051.15 to include, but not be limited to, the following:

(a) Therapeutic recreation services which are those specialized instructional programs designed to assist pupils in becoming as independent as possible in leisure activities, and when possible and appropriate, facilitate the pupil's integration into regular recreation programs.

(b) Recreation programs in schools and the community which are those programs that emphasize the use of leisure activity in the teaching of academic, social, and daily living skills; and, the provision of nonacademic and extracurricular

leisure activities and the utilization of community recreation programs and facilities.

- (c) Leisure education programs which are those specific programs designed to prepare the pupil for optimum independent participation in appropriate leisure activities, including teaching social skills necessary to engage in leisure activities, and developing awareness of personal and community leisure resources.

10. (A) Petitioner may not receive the services of an after-school aide as DIS. The service requested does not appear to be necessary for him to access the instruction provided by the school district. And, the requested service does not fit within the definition of recreational services.

(B) While Petitioner's parents contend that Student should participate in the after-school activities so as to provide him with equal opportunities to develop physically, mentally, and socially, his IEP plan does not establish the need to improve his social opportunities, or his physical or mental abilities, at least beyond the need for instruction. As noted in Factual Finding 10, above, he need not run track or cross country in order to access his education; this is not the same as the case where a child must receive occupational therapy (a DIS) in order to learn to grasp a pencil and to write.

(C) The definitions of recreational services set forth above do not cover the strictly extra-curricular activities requested. Like other DIS functions, recreational services must be oriented toward providing access to education; here it can not be said that provision of an aide is a leisure education program, designed to teach maximum independence in leisure activities, nor do the requested services constitute an instructional program, a matter at the heart of CCR section 3051.15, subdivision (a).

(D) In conclusion, it has not been demonstrated that participation in sports or other extra-curricular activities is necessary for Petitioner to access his education.

11. While it has not been demonstrated that participation in extracurricular activities is necessary for Petitioner to obtain a FAPE, the District is obligated to provide

Petitioner the opportunity to participate to the same extent as non-disabled students. This flows from Federal law, found in the Federal regulations at 34 C.F.R. section 300.306. That regulation speaks to “nonacademic services,” as follows:

- (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
- (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

12. Federal cases on point were not found, but one state court has found that section 300.306 supports the provision of an aide in circumstances similar to this case. In *Lambert v. West Virginia Bd. of Ed.*, (1994) 191 W. Va 700, 705, 447 S.E.2d 901, 906, a school district was ordered to provide a deaf student with a signer so she could play varsity basketball; without the signer she could not understand her coach’s directions, and therefore could not play competitive basketball.

13. (A) While it appears that the Code of Federal Regulations provides a right to Petitioner, it also appears that the District is correct that this tribunal is not vested with the authority to vindicate that right and to order a remedy. Education Code section 56501, subdivision (a), sets forth the circumstances where this tribunal has authority to hear a special education dispute and thereby authority to craft a remedy. It states, in pertinent part:

“ . . . The parent or guardian and the public education agency may initiate the due process hearing procedures described by this chapter under any of the following circumstances:

- (1) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education [FAPE].”
- “(2) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education.
- (3) The parent or guardian refuses to consent to an assessment of the child.”
- (4) There is a disagreement between a parent or guardian and a district . . . regarding the availability of a program appropriate for the child, including the issue of financial responsibility, . . .

Essentially, OAH has the authority to hear disputes regarding identification, assessment, placements, the provision of FAPE, or the availability of a given program. The dispute here does not fit into those categories. As set forth in Legal Conclusions 8 through 10 the services requested are not necessary for Petitioner to receive a FAPE, and clearly this is not a matter of assessment.

(B) It also appears that based on all the foregoing, the rights conferred by section 300.306 must be vindicated in another tribunal. As suggested by the District through its citation to *Wyner v. Manhattan Beach Unified School Dist.*, (9th Cir. 2000) 223 F.3d 1026, this matter may have to be resolved through a compliance complaint filed with the California Department of Education. Likewise, the state or Federal Courts may also have jurisdiction to enforce the obligation placed on the District by the regulation, or by the Rehabilitation Act, which was also cited by the District. But, in the circumstances of this case, the undersigned may not exceed the jurisdiction of this Office, even if that would be likely to minimize the use of the parties’ resources, and those of some other tribunal.¹

¹ Simply put, the District never really denied that the services would be necessary for Petitioner to participate in sports and other activities; it simply argued that Petitioner

ORDER

The Petitioner's request for an order requiring the Conejo Valley Unified School District to provide him with an aide when he participates in extra-curricular activities is hereby denied.

November 30, 2005

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

must follow the rule in *Wyner v. Manhattan Beach*, supra, and file a compliance complaint, or otherwise proceed under the Rehabilitation Act. That this position could lead to litigation over the same issue twice along with exposure to liability in another tribunal, a seeming waste of resources, does not seem to have crept into the analysis behind an otherwise well-crafted brief.