

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014040723

DECISION

Parents on behalf of Student (Student) filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 14, 2014, naming the Capistrano Unified School District (Capistrano).

Administrative Law Judge Paul H. Kamoroff heard this matter in Capistrano, California, on June 10, 2014.

David M. Grey, Attorney at Law, appeared on behalf of Student. Student's mother (Mother) attended the hearing. Student did not attend the hearing.

Alefia Mithaiwala, Attorney at Law, and Sydney Blaauw, Attorney at Law, appeared on behalf of Capistrano. Sara M. Young, Director of Informal Dispute Resolution for Capistrano, attended the hearing.

The ALJ granted a continuance for the parties to file written closing briefs and the record remained open until June 27, 2014. Upon timely receipt of the written closing briefs, the ALJ closed the record and the matter was submitted for decision on that date.

ISSUE

Whether Capistrano denied Student a free appropriate public education (FAPE), as of October 2013, by failing to provide him independent educational evaluations in the areas of psycho-educational and speech and language/auditory verbal therapy?¹

SUMMARY OF DECISION

The case presents a question of statutory interpretation. The parties do not dispute that Student requested independent educational evaluations that Capistrano refused to fund, or that Capistrano failed to file for due process to show that its assessments were appropriate. Capistrano avers that it was not obligated to fund or file, because accompanied with Student's request for independent educational evaluations was a notice that he revoked consent to his individualized education program (IEP). Capistrano asserts that the IEP revocation should be interpreted as a blanket revocation of all of Student's special education rights and protections, including his right to publicly funded independent educational evaluations. Student complains that Capistrano misconstrued, too broadly, the IEP revocation.

For the following reasons, this Decision finds that Capistrano misinterpreted the nature and scope of the IEP revocation, and that Student is entitled to publicly funded independent educational evaluations.

¹ Student's motion to dismiss, without prejudice, his claim that Capistrano denied him a FAPE by failing to provide him an independent educational evaluation in the area of occupational therapy was granted at the commencement of the hearing.

FACTUAL FINDINGS

THE STUDENT

1. Student was a three-years-and-10-month-old male who, at the time of the hearing, attended the Pacific Preschool, a private school. Student has been and continues to be eligible for special education under the primary eligibility category of hard-of-hearing. During the applicable time frame, Student resided with his family within Capistrano's boundaries.

2. Student was born with congenital, profound hearing loss in both ears. At two-years of age, Student successfully underwent surgery for bilateral cochlear implants.² As a result, Student's primary mode of communication is spoken English.

3. Student has certain unique needs caused by his hearing impairment. He has below average receptive and expressive language and is easily distracted by background noise, which can result in behavioral or attention deficits.

THE INITIAL ASSESSMENTS AND IEP

4. On September 3, 4, and 10, 2013, Capistrano conducted its first evaluations of Student, which included a speech and language assessment and a psycho-educational assessment.³

² A cochlear implant is a medical device designed to assist individuals with severe to profound hearing loss to interpret speech and sounds. It has external and internal components. The external components include a microphone, a speech processor and a transmitting coil. The internal components include a receiver/stimulator that is implanted in the cochlea, which emits electrical charges to stimulate the auditory nerve fibers.

³ In California, the term "assessment" is used interchangeably with "evaluation."

5. Capistrano reviewed these assessments with Student's parents (Parents) at an IEP team meeting held on September 12, 2013, which was Student's first IEP team meeting.⁴ Student was two days shy of his third birthday.

6. At the September 12, 2013 IEP team meeting, Capistrano found Student eligible for special education and related services as a child with a hard-of-hearing disability. The IEP team developed 11 goals in the areas of social emotional, expressive language, receptive language, auditory comprehension, and play development. The IEP offered Student daily specialized academic instruction, weekly group and individual speech and language services, and annual audiological services. The educational placement and services were offered at Crown Valley Elementary School, a Capistrano school. Parents consented to the IEP.

CONDUCT FOLLOWING THE SEPTEMBER IEP

7. Student had a difficult time adjusting to the Capistrano program. Within the first two days of school, Student frequently got upset, had difficulty transitioning between classes and services, bit a teacher's aide five times, and threw part of his cochlear implants.

8. In various emails on September 13, 16, and 18, 2013, Capistrano deaf and hard-of-hearing teacher Colleen Kotel, along with Capistrano speech and language pathologist Laura Hohla, informed Mother that Student was having behavioral problems at school and difficulty transitioning into the school program.

9. In a September 18, 2013 email, Mother informed Ms. Kotel that Student had not manifested behavioral difficulty prior to his attendance in the Capistrano

⁴ An IEP is a written document, prepared annually, that outlines the educational plan for the disabled student. (20 U.S.C. § 1414(d).)

program. Mother attributed the conduct to Student being overstimulated by the amount of people, lights, and noise imbedded in the placement.

10. In a September 19, 2013 email, Mother informed Ms. Kotel and Ms. Hohla that she would not send Student back to school until his IEP was amended. Mother believed that, under the current IEP, Student's welfare and safety was at risk while at school.

THE OCTOBER 8, 2013 IEP

11. Capistrano held an addendum IEP team meeting for Student on October 8, 2013. Student had recently turned three years old. The primary purpose of the meeting was to discuss Student's difficulty transitioning into the school program, with an emphasis on planning how to address his behaviors. The IEP team recommended a functional analysis assessment to develop a behavior intervention plan, including a method for safely restraining Student. Mother refused to consent to the functional analysis assessment or behavior intervention plan. Rather, Mother believed Student's behaviors were the result of an inappropriate IEP and IEP team, and would only be remediated through the inclusion of appropriate staff and services, not through a behavior plan.

12. The addendum IEP offered Student the same educational placement and services which were offered in the September 12, 2013 IEP. Parents did not consent to the IEP addendum.

THE OCTOBER 31, 2013 LETTER

13. On October 31, 2013, Parents sent a letter to Capistrano's Director of Informal Dispute Resolution, Sara Young. The letter had three paragraphs, each of which conveyed a distinct legal purpose. First, the letter stated "We are formally revoking our consent to the IEP for our son, [Student]." Second, the letter stated that Parents

disagreed with Capistrano's assessments and requested independent educational evaluations in the areas of psycho-educational, speech and language/auditory verbal therapy, and occupational therapy.⁵ Third, Parents notified Capistrano that they would be providing Student with "appropriate placement and services and will seek reimbursement for all costs through Formal Due Process [sic]." Capistrano received the letter on November 12, 2013.

THE PRIOR WRITTEN NOTICE LETTER

14. On November 20, 2013, Capistrano legal specialist Kimberly Gaither sent Parents a prior written notice letter. The letter stated that Capistrano had interpreted the October 31, 2013 letter as a revocation of Parents' consent to Student's special education eligibility. Therefore, Capistrano now considered Student a general education pupil. Ms. Gaither pointed out that, as a consequence of being considered a general education pupil, Student "will no longer have the right to receive any of the protections offered by the Federal IDEA and corresponding California law, therefore he is not entitled to publicly funded IEEs [sic]."

KIMBERLY GAITHER'S TESTIMONY

15. Ms. Gaither has worked for Capistrano for 17 years. Her title was legal specialist, and she was responsible for interpreting and applying special education related law for Capistrano and its students.

16. Ms. Gaither was responsible for reviewing and responding to the October 31, 2013 letter. She found the letter to be contradictory and confusing. On the one hand, the letter revoked Parents' consent to Student's IEP. Ms. Gaither interpreted this

⁵ Auditory-verbal therapy is a methodology that teaches a hearing-impaired child how to use a hearing aid or cochlear implant to understand speech and learn to talk.

as a parental revocation of Student's disability eligibility because the IEP being revoked was Student's first IEP. Ms. Gaither was not familiar with a scenario in which parents could challenge the appropriateness of an initial IEP by refusing or withdrawing consent to the IEP, where the student could still exercise his or her special education rights and protections. Consequently, Ms. Gaither construed the letter as an attempt by Parents to revoke all of Student's special education rights and protections.

17. However, on the other hand, Ms. Gaither understood that the same letter demonstrated an attempt by Parents to exercise Student's special education right to publicly funded independent educational evaluations. The letter also stated that Parents intended to seek reimbursement for outside placement and services via a due process hearing, which she recognized as another exercise of Student's special education rights. After considering the different aspects of the letter, Ms. Gaither determined that terminating all of Student's special education rights and protections was the correct legal interpretation of the letter. As a result of this interpretation of the letter, she made the decision to refuse Parents' request for independent educational evaluations, and believed it was unnecessary to file for due process to show that Capistrano's assessments were appropriate.

MOTHER'S TESTIMONY

18. Mother was initially pleased with the September 12, 2013 IEP offer. However, she quickly became concerned that student was having emotional and behavior difficulty adjusting to his new school placement.

19. Mother had not observed Student have the same intensity of behavioral problems prior to his attendance at Crown Valley Elementary School. As a result, Mother complained that Student's behaviors were the result of an inappropriate school program. She asserted that the school placement was too loud, had too many people, and overstimulated Student, which was the root of his behavioral difficulty. She also

postulated that school staff was inexperienced in working with pupils who, like Student, were hard-of-hearing with cochlear implants. Finally, Mother feared that Student might inadvertently injure himself, or be injured by school staff, during a behavioral outburst. For these reasons, soon after consenting to Student's first IEP, Parents no longer believed that the IEP was appropriate to meet Student's unique needs, and revoked their consent to the IEP.

20. Parents did not intend to revoke Student's special education eligibility, or rights and protections. Rather, the purpose of their October 31, 2013 letter was to inform Capistrano of a FAPE dispute pertaining to Student's IEP, and to request independent educational evaluations by individuals with experience assessing pupils with cochlear implants. Parents believed that information obtained through the independent educational evaluations would assist them in forming an appropriate IEP.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT⁶

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (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: (1) to ensure that 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 employment and independent living, and (2) to ensure that the rights of children

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)⁷

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 (*Schaffer*) [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is a preponderance of the evidence].) In this case, Student is the petitioning party and therefore had the burden of persuasion.

4. There are two principal considerations in claims brought pursuant to the IDEA: substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-

⁷ References to the Code of Federal Regulations are to the 2006 version unless otherwise indicated.

making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

DETERMINATION OF ISSUE: WHETHER CAPISTRANO DENIED STUDENT A FAPE BY FAILING TO PROVIDE HIM INDEPENDENT EDUCATIONAL EVALUATIONS?

5. Student complains that Capistrano ignored Parents requests for independent educational evaluations in the areas of areas of psycho-educational and speech and language/auditory verbal therapy.

6. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

7. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or

she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).)

8. If an independent educational evaluation is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

9. Whether a school district files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 U.S. Dist. LEXIS 90840, 47 IDELR 12), the court determined that the school district unnecessarily delayed filing its due process request. The school district waited three months after the pupil first requested an IEE at public expense to file its request. (*Id.* at pgs. 5-6, 8-9.) The court held that the school district had thereby waived its right to contest the independent educational evaluation by showing its assessment was appropriate.

10. In another case, the court held that a school district's 10-week delay in filing a due process request was not a per se violation. (*L.S. v. Abington Sch. Dist.* (E.D. Pa., Sept. 28, 2007) 48 IDELR 244.) In addition, assuming there was a procedural violation due to the delay, the court found it did not result in a denial of a FAPE to justify ordering the school district to pay for an independent educational evaluation.

11. Here, Capistrano's failure in either funding the independent educational evaluation, or filing its request for a due process hearing for over five months, after Parents requested the independent educational evaluations constituted an

unreasonable and unnecessary delay. Therefore, Capistrano has waived its right to contest the independent educational evaluations by showing that its assessments were appropriate.

12. Capistrano does not dispute that it failed to fund the independent educational evaluations or to file for due process to show that its assessments were appropriate. Rather, Capistrano argues that under the implementing regulations to the IDEA, specifically title 34 Code of Federal Regulations part 300.300(b)(4)(2008), a school district may cease providing special education and related services after receiving written notice by a parent revoking consent to special education. Therefore, Capistrano asserts that it was under no statutory obligation to fund the independent educational evaluations, or to initiate a due process hearing to show that its assessments were appropriate. Capistrano errs on its reliance on the regulation cited above. Title 34 Code of Federal Regulations part 300.300(b) provides:

- (4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency--
 - (i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services;

(34 C.F.R. § 300.300(b)(4)(2008).)

The regulation relied on by Capistrano concerns the situation where a parent has, after initially consenting to special education services, completely withdraws consent for special education. It is under that circumstance that a school district would be required to provide prior written notice prior to terminating all services. Here, the regulation on

its face does not apply because the facts showed Parents never withdrew consent for the provision of special education services. Instead, the plain language of the revocation pertained exclusively to “the IEP.” It was error on the part of Capistrano to interpret the revocation to subsume all of Student’s special education rights and protections, including his right to publicly funded independent educational evaluations.

13. The October 31, 2013 letter, whereby Parents revoked consent to the IEP, also notified Capistrano that Parents would be providing Student with an appropriate placement and services, and would seek reimbursement for such costs through a due process hearing. This notification sufficiently informed Capistrano that the basis of Parents’ revocation of the IEP was not to withdraw Student’s special education eligibility, but that a FAPE dispute existed regarding the IEP. Capistrano’s argument that revocation of the IEP is tantamount to revocation of special education eligibility, if accepted, would prevent parents from ever challenging the appropriateness of a pupil’s first IEP. Parents would be forced to place their child in a knowingly inappropriate placement, until a second IEP is offered, or longer if the subsequent IEP is unacceptable to Parents, for fear of losing all special education rights and protections. This interpretation is inequitable and inconsistent with state and federal disability law.

14. Courts have emphasized the importance of parents’ right to publicly funded independent educational evaluations. The Supreme Court stressed that parents can use an independent educational evaluation to overcome the school district’s “natural advantage” when there is a dispute regarding a student’s educational program. (*Schaffer*, 546 U.S. at pp. 60-61.) The *Schaffer* court stated in pertinent part:

[P]arents have the right to review all records that the school possesses in relation to their child. They also have the right to an “independent educational evaluation of the[ir] child.” The regulations clarify this entitlement by providing that a

“parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.” IDEA thus ensures parents’ access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

(Ibid. at 60–61.)

The *Schaffer* court placed great emphasis on parents’ right to an independent educational evaluation, not just to challenge the appropriateness of a school district’s assessment, but to ensure the appropriateness of the school district’s educational program. It was parents’ right to an independent educational evaluation which formed the basis of the *Schaffer* court’s determination to place the burden of proof on parent(s) when they are the petitioning party. Parents’ right to the independent educational evaluation is an IDEA procedural protection that exists to “ensure that the school bears no unique informational advantage.” (*Id.* at 61.) Consequently, Capistrano denied Student a significant educational benefit when it refused Parents’ requests for independent educational evaluations.

15. In summation, Capistrano committed a per se violation and a procedural error when it denied Parents’ request for independent educational evaluations in psycho-educational and speech and language/auditory verbal therapy, and failed to timely file for a due process hearing to show that its assessments were appropriate. The

procedural error denied Student a significant educational benefit, which thereby denied him a FAPE.

REMEDIES

1. ALJs 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 (*Puyallup*)). In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

2. Pursuant to Legal Conclusions 1-15, Capistrano denied Student a FAPE by failing to fund independent educational evaluations in psycho-educational and speech and language/auditory verbal therapy, or to timely file for a due process hearing to show that its assessments were appropriate. Student requested independent educational evaluations in the areas of psycho-educational and speech and language/auditory verbal therapy by assessors who have experience working with and assessing hard-of-hearing students with cochlear implants. This remedy accords with the procedural violation at hand and is granted.

ORDER

1. Capistrano shall fund an independent educational evaluation for Student in the area of psycho-educational, by an assessor who has experience working with and assessing hard-of-hearing pupils with cochlear implants.

2. Capistrano shall fund an independent educational evaluation for Student in the area of speech and language/auditory verbal therapy, by an assessor who has experience working with and assessing hard-of-hearing pupils with cochlear implants.

3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. Here, Student prevailed on all issues heard and decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 10, 2014

_____/s/_____

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings