

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019120715

PARENT ON BEHALF OF STUDENT,

v.

ABC UNIFIED SCHOOL DISTRICT AND LOS ANGELES UNIFIED
SCHOOL DISTRICT.

DECISION

JULY 21, 2020

On December 18, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming ABC Unified School District and Los Angeles Unified School District. Administrative Law Judge Clifford H. Woosley heard this matter at a videoconference hearing on May 27 and 28, 2020.

Attorneys Suzanne Snowden and Edith Madrid represented Student. Parent and attorney Edith Jasper attended all hearing days.

Attorney Adam J. Newman represented ABC Unified School District. Dr. William Gee, Director of the ABC Unified Special Education Local Plan Area, appeared on ABC's behalf. Attorney Lee Rideout represented Los Angeles Unified School District. Special education specialists Ernie Campos and Shari Robertson each appeared for one day on Los Angeles Unified School District's behalf.

The parties agreed the matter was continued until June 22, 2020, for submission of written closing briefs, at which time the briefs were filed, the record closed, and the matter submitted for decision.

ISSUE

A free appropriate public education is referred to as a FAPE. An individualized education program is referred to as an IEP. Los Angeles Unified School District is referred to as LAUSD.

1. Did ABC deny Student a FAPE at the November 7, 2019 IEP by failing to consider any placement, including but not limited to a residential treatment center placement, for educational purposes?
2. Did ABC deny Student a FAPE by predetermining Student's placement and not coming to the November 7, 2019 IEP with an open mind, willing to discuss various placement options?
3. Did LAUSD deny Student a FAPE by failing to make a substantive offer of placement, including but not limited to a residential treatment center placement for educational purposes?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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 further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, as the filing party, Student had the burden of proof by a preponderance of the evidence in this matter. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

At the time of hearing, Student was a 17-year-old patient in the Developmentally Delayed Mental Illness Unit at College Hospital Cerritos, a psychiatric hospital, receiving special education services from ABC Unified School District. Parents resided within LAUSD's boundaries during Student's College admission and at the time of hearing. Student was eligible for special education as a student with an emotional disturbance.

ISSUE 1: DID ABC DENY STUDENT A FAPE AT THE NOVEMBER 7, 2019 IEP BY FAILING TO CONSIDER ANY PLACEMENT, INCLUDING BUT NOT LIMITED TO A RESIDENTIAL TREATMENT CENTER PLACEMENT FOR EDUCATIONAL PURPOSES?

Student contended that ABC was required to consider an educational placement, including a residential treatment center, upon Student's medical discharge from College Hospital, at Student's November 2019 IEP. ABC contended it was statutorily deemed the supplier of Student's special education services while in College Hospital and was not responsible for Student's special education placement and services after his hospital discharge. Therefore, ABC was not required to consider or offer an educational placement for Student after such discharge.

This Decision addresses the parties' respective obligations, if any, to evaluate and offer educational placement to be implemented upon Student's discharge from College Hospital. The parties acknowledged that the issues raised in this due process proceeding do not include a determination of what educational placement would be appropriate to provide Student with a FAPE after his discharge.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or

guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*))

An annual IEP must contain a statement of the child's present levels of academic achievement and functional performance, including the manner in which the child's disability affects involvement and progress in the general education curriculum. (34 C.F.R. 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(a).) An IEP must contain a statement of the special education, related services, supplementary aids and services, and program modifications, accommodations, or supports to be provided to the student. It must also specify the frequency, duration, and location of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300,320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).) It must contain an explanation of the extent to which the student will not participate with nondisabled children in the regular class. (20 U.S.C. 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(5); Ed. Code, § 56345, subd. (a)(5).) An IEP must state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).)

An IEP team must document its rationale for placement in other than the pupil's school and classroom they would otherwise attend if not disabled. (34 C.F.R. § 300.116; 71 Fed. Reg. 46, 588 (August 14, 2006); Cal. Code Regs., tit. 5, § 3042.) The IEP must indicate why the student's disability prevents the student's needs from being met in a less restrictive environment even with the use of supplementary aides and services. (*Ibid.*)

The IEP document must fulfill the IDEA's explicit requirement of written prior notice to parents when a school district proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R § 300.503(a).)

The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*)

ABC WAS THE LOCAL EDUCATIONAL AGENCY RESPONSIBLE FOR STUDENT'S EDUCATIONAL PROGRAM IN NOVEMBER 2019

Student had a long history of serious social-emotional issues and multiple psychiatric hospitalizations. Student first qualified for special education in June 2005. His primary eligibility was found to be emotional disturbance in 2009. He was hospitalized in January 2011 for being a danger to himself and others. He was admitted to College Hospital in May 2016. Student was readmitted in November 30, 2017, where he remained a patient, except for one week in February 2018, until the time of the

hearing. Student's admission to College Hospital was a medically necessary placement for psychiatric treatment and not an educational placement made by his IEP team.

Student's behaviors included:

- impaired impulse control and judgment;
- poor insight; aggression and assaultive behavior;
- running away;
- destruction of property;
- vocal disruption, consisting of cursing, threatening others, and making loud demands; and
- inappropriate boundaries.

Student was diagnosed with bipolar disorder with history of psychosis, autism spectrum disorder, and mild intellectual disability, with a history of pseudo seizures. As of April 2018, Student took psychiatric medications for mood instability, illogical thoughts, depression, impulsive behaviors, and anxiety.

Under IDEA, the local educational agency, called an LEA, is generally responsible for providing a FAPE to students with disabilities within its jurisdiction. (20 U.S.C. § 1414(d)(2)(A).) An LEA includes a school district and a special education local plan area, called a SELPA. (Educ. Code § 56026.3.) The general rule is that the school district responsible for the education of a child between the ages of six and 18 is the district in which the child's parent or legal guardian resides. (Educ. Code § 48200; *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 Cal.App.4th 47.)

Student had an IEP and ABC became Student's LEA when Student was admitted in November 2017 and while he remained a patient at College Hospital. Education Code section 56167 provided:

- (a) Individuals with exceptional needs who are placed in a public hospital, state licensed children's hospital, psychiatric hospital, proprietary hospital, or a health facility for medical purposes are the educational responsibility of the local educational agency in which the hospital or facility is located, as determined in local written agreements pursuant to subdivision (e) of Section 56195.7.

The plain language of the statute establishes that ABC's status as the LEA was based solely upon Student being a patient at College Hospital. Further, Student's patient status at College Hospital could not be construed to be an educational residential placement for which ABC, as the LEA, would be deemed financially responsible. (Educ. Code § 56167.5.)

As the LEA, ABC remained responsible for providing Student a FAPE in the least restrictive environment. Nothing in the wording of Education Code section 56167 or its statutory history indicated a legislative intent that ABC would be responsible for providing or funding Student's special educational placement and services after Student was discharged from College Hospital unless ABC remained Student's LEA based upon his residency.

AS STUDENT'S LEA, ABC WAS OBLIGATED TO MAKE A LEGALLY COMPLIANT IEP OFFER THAT INCLUDED AN EDUCATIONAL PLACEMENT

In 2016, the Los Angeles County Superior Court's mental health division appointed attorney Kimberly McReynolds Bell to assist Mother in Student's educational planning and conservatorship. McReynolds Bell represented Mother in obtaining a mental health conservatorship over Student and accompanied Mother to Student's IEP team meetings. McReynolds Bell represented Father to have him appointed conservator when Mother died in February 2020. Father held Student's educational rights at the time of hearing.

In 2016, Los Angeles County Juvenile Dependency Court attorney Leah Cohen-Mays represented Student in dependency related matters and concerns. She was involved with Los Angeles County's Department of Children and Family Services' efforts on Student's behalf. Student was also a client of South Central Los Angeles Regional Center. Cohen-Mays attended three of Student's IEP team meetings that ABC convened at College Hospital. Both attorneys McReynolds Bell and Cohen-Mays were well aware of Student's educational, legal and mental health issues because of their professional relationships with Parents and Student. Both believed that Student's November 2017 admission was temporary and were surprised he remained in College Hospital for more than two years.

During the two and a half years of Student's admission at College Hospital, ABC convened many IEP team meetings and conducted numerous evaluations of Student. ABC convened a December 14, 2017, 30-day IEP team meeting to review Student's July 13, 2017 IEP from LAUSD. ABC conducted full psychoeducational and speech and language assessments and convened Student's triennial IEP team meeting on

April 12, 2018. The IEP team confirmed Student's eligibility as emotional disturbance and developed goals for mathematics, reading, writing, and task completion. ABC included four speech and language goals in Student's IEP. The IEP provided two 45-minute blocks of specialized academic instruction a day and three 20-minute speech and language group therapy sessions a week. The IEP did not offer counseling or other mental health services because Student was receiving psychiatric therapy and other services as a College Hospital patient. The IEP provided for extended school year.

College Hospital developed a Hospital Behavior Intervention Plan to address Student's increasing unpredictable and assaultive behaviors, poor impulse control, and self-neglect. At Parents' urging, ABC conducted a functional behavior assessment in October 2018 to determine if Student required a behavior intervention plan as part of his IEP in order to benefit from his special education. ABC found that the development of a behavior intervention plan as part of Student's IEP was appropriate. At an October 2018 meeting, Student's IEP team reviewed the functional behavior assessment report and developed a behavior intervention plan in an amendment IEP team meeting. The IEP team also added two behavior goals.

ABC conducted an Educationally Related Intensive Emotional Behavioral Services AB114 Assessment. The assessment report was dated November 8, 2018. The assessment indicated that, upon discharge from College, Student would require educationally related intensive social emotional and behavioral services in order to benefit from special education. Student's IEP team reviewed the report at a December 2018 meeting but made no changes to Student's IEP. ABC refused to make recommendations for placement and services for Student after Student's hospital discharge.

ABC convened Student's annual IEP meeting on April 11, 2019. All requisite IEP team members attended, including Mother, McReynolds Bell, a Department of Children and Family Service's representative, the regional center service coordinator, and Student (via telephone). Mary Kay Heenan was ABC's special education specialist at College and provided Student with his specialized academic instruction. She reported that Student did not achieve any of his academic goals from the April 2018 IEP. Student's lack of progress was related to his very poor attendance of 32 percent. Student's speech pathologist, Ashley Escalante, similarly reported that Student was refusing to attend speech therapy, even though she offered varied times for Student to attend during the two days a week she was at College Hospital. Heenan and Escalante reported their efforts to encourage Student's attendance. The team reviewed Student's new IEP goals, which remained the same except for one speech goal Student had met. The FAPE offer of services were unchanged.

Student remained a patient at College Hospital at the start of the 2019-2020 academic year. He was 17 years old and in the twelfth grade. In Fall 2019, attorney Snowden asked ABC for an IEP team meeting to discuss whether an educational placement at a residential treatment center was appropriate. ABC convened an amendment IEP team meeting on November 7, 2019. All IEP team members were present, including Mother, Student, Snowden, McReynolds Bell, Cohen-Mays, children and family service's representative Juan Ruelas, the psychiatric hospital tracker and the service coordinator from the regional center, Dr. Gee, and the College Hospital discharge coordinator Christina Choi.

Dr. Gee encouraged the team members to discuss and make a record regarding Mother's request for a residential treatment center educational placement. Mother explained that Student had run away from the various nonpublic school placements in

California. Mother sought a placement in a secure, out-of-state, residential treatment center from which Student could not escape. The team discussed that Student was not educationally benefitting from the special education program at College Hospital. He attended less than a third of his special education classes, was lethargic, gained a lot of weight, and was not motivated. Various strategies that were discussed at the April 2019 IEP meeting to encourage Student to attend class and speech therapy had proved unsuccessful. Cohen-Mays told the IEP team that Student had regressed educationally and was not using previously developed skills to grow while at College Hospital. The attorney believed that two 45-minute sessions of special academic instruction a day for two years were inadequate for Student to make educational progress. Cohen-May also made efforts to persuade Student to attend class, but Student remained unmotivated and depressed. Student did not want to be at College Hospital any longer.

ABC did not discuss, recommend, or offer any educational placement, including residential treatment center. Dr. Gee explained that ABC did not make IEP recommendations or offers of services and placements for students at College Hospital after their discharge and, therefore, would not be considering a residential placement. Residential treatment center placement had previously been discussed in earlier IEP team meetings, at which ABC took the same position. None of Student's IEP's developed with ABC while at College Hospital contained an offer of educational placement.

Dr. Gee was Director of the ABC Unified School District SELPA, since 2016. ABC was a large school district and was its own SELPA. Dr. Gee was previously ABC's supervisor of special education for two years. He also held positions as a director of compliance support services with the Los Angeles County Office of Education, and a principal, SELPA director, and program specialist at Orange Unified School District. He

knew Student and had attended Student's IEP team meetings at College Hospital. He testified at the hearing.

Dr. Gee explained to the IEP team that ABC was legally obligated to provide special education services and supports while Student was a patient in College Hospital. ABC was not obligated to provide, fund, or offer special education services and placement for Student upon his medical discharge from College Hospital. Therefore, ABC would only make placement and service recommendations for Student while he was in the hospital. ABC would not consider making an offer of a residential treatment center.

No one at the meeting discussed whether College Hospital was recommending that Student was ready to be discharged from his medical placement. However, the IEP team generally acknowledged that Student was not making educational progress and benefiting from his special education program at College Hospital and that a residential placement center was a likely appropriate educational placement. The IEP team meeting ended with no changes to Student's IEP.

In addition to Education Code section 56167, ABC also cited Government Code section 7579.1 in support of its policy of not recommending or offering placement or services after Student's discharge. This section established the process of transferring the LEA of a disabled child with an IEP upon discharge from a medical placement at a hospital. At least 10 days prior to the discharge of the disabled child, the hospital within which the child was a patient shall give notice of the upcoming discharge to the receiving SELPA or LEA. (Gov. Code § 7579.1, subs. (a)(1).) The hospital will also provide the receiving LEA with the child's IEP and other relevant information useful in implementing the child's IEP. (Gov. Code § 7579.1, subs. (a)(2).) Once the disabled child

had been discharged, the responsibility of the receiving LEA, which was typically the school district of parents' residence, was responsible to ensure that the disabled child or youth receives an appropriate educational placement. (Gov. Code § 7579.1, subs. (b).)

ABC asserted that Educational Code section 56167 and Government Code section 7579.1 supported its policy of not evaluating or offering any placement or services for Student after he leaves College Hospital because, upon Student's discharge, responsibility for the provision of special education rested with the school district of residence of Student's Parents. Here, that district was LAUSD. This Decision refers to LAUSD as Student's district of residence, while recognizing that Student's district of residence will be finally determined at the time of his discharge from College Hospital.

Dr. Madeline Valencerina was Student's psychiatrist at College Hospital since his admission in November 2017. She testified at the hearing. Dr. Valencerina said that Student was "at baseline and ready for discharge." Student had been at baseline for some time. However, Student's baseline status had shifted over time. For example, he had some problems when his Mother passed away. Notably, Dr. Valencerina would not set a discharge date until there was an appropriately safe placement for Student upon discharge. In other words, until she knew where Student will be placed when discharged, Dr. Valencerina would not schedule Student's discharge. Student's discharge had to be coordinated with the LEA in charge of Student's placement after discharge.

ABC's refusal to evaluate and consider educational placement violated Student's rights under the IDEA. In a recent decision affirmed by the Ninth Circuit, the United States District Court, Central District, California, found that a school district had an independent obligation under the IDEA to consider educational placement options

apart from an existing noneducationally related placement, such as a licensed children's institution. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. Jan. 9, 2019) No. 215CV05819CASM/RW, 2019 WL 334564; *aff'd sub nom. M. S. by & through R.H. v. Los Angeles Unified School Dist.* (9th Cir. 2019) 913 F.3d 1119, 1121.) Similarly, here, ABC was independently required to consider educational placement as the LEA, especially when asked by Parents, and their attorneys.

ABC asserted that *M.S.* was not applicable to Student's situation. *M.S.* did not consider a medical placement in a hospital as outlined in section 56167 and section 7579.1. These sections, ABC argued, clearly delineated ABC's LEA status to when Student was a patient at College Hospital. Therefore, ABC argued, that it was not obligated to consider an educational placement when Student was discharged from because, by operation of law, ABC would no longer be Student's LEA at the moment of discharge. This argument is unpersuasive.

An IEP team was required to develop an IEP that includes educational placement. (Ed. Code §§ 56342, 56343(d); also see Cal. Code Regs., tit. 5, § 3042(a).) Making placement recommendations and offers was a central function of an IEP team meeting. The language and legislative history of section 56167 did not relieve ABC of this duty. The purpose of section 56167 and Government Code section 7579.1 was to assure that students with an IEP would receive a FAPE without interruption when medically placed in a hospital and when subsequently discharged by specifying the responsible local educational agencies. If ABC was permitted to refuse to consider an educational placement, Student and Parents would have fewer procedural and substantive rights under the IDEA merely because Student was medically placed in the hospital. The statutes were designed to assure the opposite. Student was entitled to the full protections and benefit of IDEA while in a hospital medical placement.

ABC WOULD NOT BE REQUIRED TO IMPLEMENT OR FUND STUDENT'S
EDUCATIONAL PLACEMENT AFTER STUDENT'S DISCHARGE FROM COLLEGE
HOSPITAL

ABC argued that it could not offer a residential treatment center placement because it would be required to implement and fund the placement after Student's discharge, which was statutorily prohibited.

CASE LAW DID NOT DETERMINE THAT ABC WOULD BE REQUIRED TO
FUND ABC'S PLACEMENT OFFER OF A RESIDENTIAL TREATMENT CENTER

In support, Student cites to *N.G. v. ABC Unified School. Dist.*, No. CV 13-06929-DMG RZX, 2014 WL 4678967 (C.D. Cal. Sept. 19, 2014), *aff'd*, (9th Cir. 2016) 670 *Fed.App'x* 540. In *N.G.*, the student was medically placed at College Hospital and ABC was N.G.'s LEA during the medical placement. Though N.G.'s IEP team at College Hospital generally agreed that N.G. should be placed in a residential treatment center upon discharge, ABC would not offer N.G. the placement. N.G.'s parent subsequently declined a residential placement offer by the department of children and family services and unilaterally placed N.G. at a residential treatment center in Texas. The costs of the residential placement were eventually covered by settlement agreements with other school districts and by N.G.'s school district of residence through her IEP. However, N.G. filed a due process request with OAH, claiming that ABC's refusal to offer a residential treatment center denied N.G. a FAPE and, therefore, N.G. was entitled to costs, including attorney fees, that were not otherwise paid. The ALJ ruled in favor of ABC in N.G.'s due process hearing. N.G. appealed to the District court.

The *N.G.* District court stated that an offer of a residential treatment center placement was equivalent to funding the placement. The *N.G.* court said Section 56167

and Government Code section 7579.1 indicated “an intent by the legislature not to require the LEA where the hospital is located to provide an education to the student upon discharge, unless the parent or guardian resides within the jurisdiction of that LEA.” The District court therefore ruled that ABC was not required to offer a residential treatment center placement because ABC’s funding of the placement after N.G.’s discharge from College was contrary to the statutory structure’s legislative intent.

The difficulty with *N.G.* was that the court did not cite or analyze law that indicated that ABC would be required to fund the residential placement offer. The District court acknowledged this, stating that “N.G. conceded in oral argument that an offer of [residential treatment center] placement is tantamount to funding the placement.” Thereafter, the *N.G.* court used this concession as the lynchpin in concluding ABC could not make the placement offer because the statutes forbade its payment and implementation of services and placement after N.G.’s discharge from College Hospital.

Here, Student made no claim that ABC would be required to fund any placement or services after Student was discharged. Student contended that ABC was the LEA charged with convening the IEP team meetings, which included an obligation by ABC to participate in evaluating and offering educational placement for Student. However, by operation of law, when Student is discharged from College Hospital, the responsibility for the provision of special education shall rest with Student’s school district of residence, which must ensure “an appropriate educational placement that commences without delay upon his or her discharge.” (Gov. Code § 7579.1(b).) Therefore, ABC would not have been responsible for the cost of implementing a residential treatment center placement because, to implement the placement, Student must be discharged

from College Hospital. And the moment College Hospital's authorized representative signs Student's discharge, ABC is relieved of its LEA role.

THE APPLICABLE STATUTES DO NOT REQUIRE ABC TO FUND AN
OFFERED EDUCATIONAL PLACEMENT AT A RESIDENTIAL TREATMENT
CENTER

ABC also asserted that Education Code, section 56325, subsection (c) required it to fund the residential treatment center placement. Section 56325 addresses transfer of a special education student to another school district, generally outlining how the new school district assumes responsibility for implementing the transferring student's IEP. ABC argued that subsection (c) required the SELPA, which contained the school district that made a residential treatment center placement, to continue to fund the residential placement, including related services, for the remainder of the school year. Here, though, the subsection does not apply.

Subsection (c) begins by conditioning its application: "If whenever a pupil described in subsection (a) [a student with an IEP transferring from another SELPA] was placed and residing in a residential...school, prior to transferring..." to another school district. The retention of the funding obligation by the district that made the placement was predicated upon Student having already been placed and residing in the residential placement before transferring. Here, when College Hospital discharges Student, Student is immediately transferred to his school district of residence as a matter of law. Therefore, Student would not have been placed and residing in residential treatment before transfer. Student's school district of residence would immediately be obligated to transport Student to the residential treatment center and fund the placement.

If LAUSD remained Student's district of residence at the time of Student's discharge from College Hospital, LAUSD would be responsible for implementing Student's IEP. Veronica Cagigas-Espinoza was a specialist with LAUSD whose responsibilities included implementation of IEP's of students, who have LAUSD as their district of residence, following discharge from medical placement at hospitals outside LAUSD's geographical boundaries. LAUSD typically did not attend IEP's of such students at the hospital because LAUSD was not the LEA during the hospitalization. If a student required a residential treatment center when discharged from the hospital pursuant to an IEP decision, LAUSD would find an appropriate placement when the Student was released.

However, Government Code section 7579.1 outlines a process that is intended to assure the receiving district of residence was prepared to immediately implement Student's IEP at the time of discharge. Here, LAUSD would be notified of Student's impending discharge at least 10 days prior to the discharge (Gov. Code § 7579.1, subs. (a)(1)). LAUSD would be provided a copy of Student's IEP and other relevant information that would be useful to LAUSD in preparing to implement the IEP (Gov.Code § 7579.1, subs. (a)(2)). Upon discharge from the hospital, LAUSD would be responsible for Student's educational placement that "commences without delay upon his or her discharge from the hospital" (Gov. Code § 7579.1, subs. (b)).

This statutory scheme imposes a more stringent and time sensitive process upon Student's receiving school district of residence than that set forth in Education Code section 56325, subsection (a), alone. Subsection (a) permits the new school district of residence to do nothing until the transferring student enrolls and provides a copy of the current IEP. The new district reviews the IEP, implements services comparable to those in the IEP if school was in session or when school begins, and convenes an IEP team

meeting within 30 days to adopt the previous current IEP or develop and implement a new IEP. However, Government Code section 7579.1 would require LAUSD to prepare before it becomes Student's LEA and to implement Student's IEP the moment his discharge papers are signed. If Student's IEP provided for a residential treatment center placement, including transportation to and from the placement, LAUSD must immediately implement Student's IEP. ABC's concerns that it would be required to implement and fund Student's services and placement upon discharge were unfounded.

ABC'S FAILURE TO MAKE AN OFFER OF EDUCATIONAL PLACEMENT WAS A PROCEDURAL ERROR THAT DENIED STUDENT A FAPE.

ABC was uniquely positioned to participate in and contribute to IEP team meetings regarding Student's educational placement and services after discharge. Student's last IEP before his College Hospital admission was from LAUSD in July 2017, almost two and a half years before the November 2019 IEP team meeting. During Student's College Hospital admission, ABC conducted multiple assessments, implemented an educational behavior intervention plan, and convened numerous IEP team meetings. ABC's refusal to consider educational placement at IEP team meetings denied Student the benefit of ABC's knowledge and expertise to which he was entitled to receive from the LEA responsible for his special education.

ABC noted that, as of the November 2019 IEP meeting, Student's doctor had not issued any writing saying Student was ready to be discharged from the medical placement at College Hospital. Therefore, the IEP team had no reason to consider a residential treatment center at the November 2019 IEP team meeting. ABC's argument is disingenuous. Whether Student's doctor was ready to schedule discharge to a proper

placement as of November 2019 was not a real issue. ABC's policy indicated it would not have considered or offered a residential placement center, regardless.

As long as College Hospital refused to consider and offer an educational placement, including a residential treatment center, Student's educational needs remained unaddressed. Student's doctor would not set a discharge date until the psychiatrist knew where Student would be placed upon discharge, based upon well-documented concerns for Student's and others' safety. Without a discharge date, Student's school of residence, LAUSD, would not be involved. This created a classic state of limbo, where Student became a nonperson under IDEA, continuing in a medical placement that may no longer be necessary, until an appropriate educational placement was offered. Unless ABC was willing to participate with the IEP team in offering an appropriate educational placement, Student remained in College Hospital. Such a situation was inconsistent with statutory intent.

In *Orange County Dept. of Educ. v. California Dept. of Educ.* (9th Cir. 2011) 668 F.3d 1052, the Ninth Circuit examined an array of California statutes and case law in determining the school district responsible for funding a residential treatment center placement for a child who was a dependent of the juvenile court and in foster care. In ruling, the Ninth Circuit found that confusing or conflicting statutory language must be interpreted and applied in a manner consistent with the likely overarching legislative intent, noting a statute should not be construed in a manner that would defeat the statute's evident purpose. (*Id.*, at 1059; quoting the California Supreme Court, *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1224.) Here, ABC's obligation to consider and provide Student with an educational placement was consistent with a careful reading of the applicable statutes in light of their legislative purpose.

The plain language of the applicable Education and Government Code sections reflect an intent that a student with an IEP would continue to receive a FAPE when medically admitted to a hospital and, when discharged, shall continue to receive a FAPE without delay. While in the hospital, Student was entitled to the same benefits and protections under IDEA as any other student with a disability. This included his IEP team evaluating, recommending, and offering an educational placement as part of a legally compliant IEP. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).) Nothing in the statutory language relieved ABC of this fundamental duty. ABC's failure was a procedural violation of its duties as Student's LEA to participate in Student's IEP team meeting to develop an IEP that clearly stated the offered services and educational placement.

Procedural violations that do not result in a loss of educational opportunity or which do not constitute a significant infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).) A due process hearing decision cannot be based solely upon a nonsubstantive procedural error unless it is also found that the error resulted in the loss of educational opportunity to the pupil or interfered with the opportunity of the parent to participate in the formulation process of the IEP. (Ed. Code § 56505(j).)

Here, absent a clear IEP offer that included educational placement, Student could not be scheduled for discharge from his medical placement, thus causing Student a loss of educational opportunity. Also, ABC's refusal to discuss, evaluate and, if necessary, offer residential placement interfered with Parent's opportunity to knowledgeably

participate in the IEP formulation process. Consequently, ABC's procedural violation denied Student a FAPE. Student met his burden of proof and prevailed on Issue 1.

ISSUE 2: DID ABC DENY STUDENT A FAPE BY PREDETERMINING STUDENT'S PLACEMENT AND NOT COMING TO THE NOVEMBER 7, 2019 IEP WITH AN OPEN MIND, WILLING TO DISCUSS VARIOUS PLACEMENT OPTIONS?

Student contended that ABC predetermined Student's placement when ABC refused to consider an educational placement, including a residential treatment center, at Student's November 2019 IEP. ABC contends it was not legally obligated to consider or offer an educational placement after Student's discharge from College Hospital and, therefore, cannot be said to have predetermined Student's placement.

In the Ninth Circuit, "[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement." (*K.D. ex rel. C.L. v. Dep't of Educ., Hawaii* (9th Cir. 2011). 665 F.3d 1110, 1123 (*K.D.*). Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344; see also, *S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.)

Here, ABC consistently asserted that it had no legal obligation to offer a residential treatment center placement for Student upon his discharge from a medical

placement at College Hospital. However, this Decision finds that ABC had an independent duty to evaluate an educational placement in developing Student's IEP. ABC was obligated to consider a continuum of alternative educational placements and a residential treatment center was part of that continuum (34 C.F.R. § 300.115(a) and (b)(1)).

ABC cannot reasonably deny it predetermined Student's educational placement in advance of the November 2019 IEP team meeting. The development of Student's November 2019 IEP, at least with respect to the question of whether residential placement was necessary for educational purposes, was effectively predetermined by ABC's refusal to consider or offer an educational placement. This finding of predetermination cannot be defeated by simply allowing Student's representatives to attend and speak at the November 2019 IEP (*M.S. supra*, No. 215CV05819CASMRW, 2019 WL 334564, at p.12). Such "[p]redetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa." (*K.D. supra*, 665 F.3d at p. 1123). ABC did not come to the November 2019 IEP team meeting with an open mind. A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.). ABC's predetermination infringed on Parent's participation and was a procedural violation that denied Student a FAPE. Student met his burden of proof and prevailed on Issue 2.

ISSUE 3: DID LAUSD DENY STUDENT A FAPE BY FAILING TO MAKE A SUBSTANTIVE OFFER OF PLACEMENT, INCLUDING BUT NOT LIMITED TO A RESIDENTIAL TREATMENT CENTER PLACEMENT FOR EDUCATIONAL PURPOSES?

Student asserted that LAUSD denied Student a FAPE by failing to make a substantive offer of educational placement, including a residential treatment center, at any time after Student's November 2017 hospital admission. LAUSD stated that it was not required to make any educational placement offer because LAUSD was not, and continued not to be, Student's LEA.

The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school district cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

ABC scheduled an IEP team meeting for November 7, 2019. ABC served the November 2019 IEP meeting notice on Snowden, Mother, ABC team members, College Hospital's social worker, the department of children and family services and the regional center. LAUSD was not notified of the November 7, 2019 IEP meeting and no one from LAUSD attended.

Dr. Valencerina recommended Student be placed in a residential treatment center at time of discharge, in a February 2020 letter. On March 26, 2020, ABC scheduled an IEP team meeting for April 2020, which Dr. Gee explained was for purposes of including

LAUSD in a discussion about Student's request for educational placement at a residential treatment center. He invited LAUSD and sent them the IEP notice. The IEP team met April 20, 2020, but adjourned with no offers of educational placement. LAUSD did not attend. Though this meeting occurred after the filing of this due process, it demonstrated LAUSD's policy. Under existing law, LAUSD was not Student's LEA at that time and was not legally required to attend or participate in Student's IEP team meetings.

ABC was Student's LEA responsible for Student's FAPE, while Student remained a patient at College Hospital. (Ed. Code § 56167.) Government Code section 7579.1 imposed upon LAUSD a requirement to prepare to receive Student, before LAUSD became Student's LEA upon discharge. As the receiving LEA upon discharge, LAUSD would be legally required to immediately transfer Student to the residential center and fund the placement, if the Student's IEP designated a residential treatment center as Student's educational placement. (Gov. Code § 7579.1, subs. (b).)

The 10-day notice of Student's impending discharge under Government Code section 7579.1(a)(1) would have legally triggered LAUSD's responsibility, as the receiving LEA, to prepare for implementing the IEP upon discharge. Here, College Hospital never scheduled a discharge date. As a result, LAUSD was not given notice of discharge. LAUSD had no legal duty to become involved in the preparation, creation or implementation of Student's IEP during the relevant time period. Student failed to meet his burden of proof and LAUSD prevailed on Issue 3.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

1. ABC denied Student a FAPE at the November 7, 2019 IEP by failing to consider any placement, including but not limited to a residential treatment center placement, for educational purposes. Student met his burden of proof and prevailed on Issue 1.
2. ABC denied Student a FAPE by predetermining Student's placement and not coming to the November 7, 2019 IEP with an open mind, willing to discuss various placement options. Student met his burden of proof and prevailed on Issue 2.
3. LAUSD did not deny Student a FAPE by failing to make a substantive offer of placement, including but not limited to a residential treatment center placement for educational purposes. Student failed to meet his burden of proof and LAUSD prevailed on Issue 3.

ORDER

ABC shall convene an IEP team meeting within 30 days of the date of this Decision. The IEP team shall consider a full continuum of placement options, including a residential treatment center, and shall offer Student an appropriate educational placement, including goals and related services consistent with the placement offer.

RIGHT TO APPEAL

This is a 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).)

/s/

Clifford Woosley

Administrative Law Judge

Office of Administrative Hearings