

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060347

PARENT ON BEHALF OF STUDENT

v.

MILLER CREEK SCHOOL DISTRICT

DECISION

SEPTEMBER 6, 2022

Parent, on behalf of Student, filed a due process hearing request, called a complaint, with the Office of Administrative Hearings, State of California, on June 13, 2022, naming Miller Creek School District. The Office of Administrative Hearings is called OAH. The complaint contained expedited and non-expedited issues. OAH set the expedited and non-expedited matters for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) A decision was issued on July 21, 2022.

On August 16, 2022, Administrative Law Judge Brian H. Krikorian heard the non-expedited due process matter. Attorney Donald J. Farber represented Student. Attorney Jan Tomsy represented Miller Creek. A representative of Miller Creek attended on Miller Creek's behalf.

The matter was continued to September 2, 2022, for the parties to submit closing briefs. Closing briefs were received on September 2, 2022, the record was closed, and the matter was submitted for decision.

ISSUE

1. Did Miller Creek deny Student a FAPE by removing him from Anova Learning Center without Parent's permission and without an IEP meeting prior to change of placement?

Student filed an objection to the issue as phrased in the Prehearing Conference Order. At the commencement of the hearing, the parties stipulated to delete the phrase "and by denying Parent her right to participate in Student's subsequent educational placement" from the end of the issue as previously stated. The above language was agreed to by all parties at the hearing.

JURISDICTION

An Individualized Education Program, shall be referred to as an IEP. A free appropriate public education shall be referred to as a FAPE.

The ALJ held the hearing 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 (2006) et seq.; 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 FAPE 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, and 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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this consolidated hearing, each party has the burden of proving the issues raised by the complaints they filed. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).) The factual statements included in this decision constitute the findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eleven years and seven months and in fifth grade at the time of hearing. Student resided within the Miller Creek boundaries. Student was eligible for special education under autism and speech and language impairment.

ISSUE: DID MILLER CREEK DENY STUDENT A FAPE BY REMOVING HIM FROM ANOVA LEARNING CENTER WITHOUT PARENT'S PERMISSION AND WITHOUT AN IEP MEETING PRIOR TO CHANGE OF PLACEMENT?

Student was placed by his IEP at Anova Center for Education, referred to as Anova, pursuant to an independent contract with Miller Creek. Anova terminated its contract for Student's placement with Miller Creek on February 4, 2022. On July 21, 2022, OAH issued an expedited decision that the termination by Anova and Miller Creek did not violate Section 1415(k) of the IDEA.

At the due process hearing, Student contended that when Anova terminated its contract with Miller Creek, and declined to continue educating Student, Miller Creek should have first held an IEP meeting to obtain Parent's input and consent to the termination. Student argued that Miller Creek's failure to do so constituted an improper change of placement and a denial of FAPE. Miller Creek argued that this was not a denial of FAPE, that Anova's termination was not within its control, and that it constituted a change in location only. Miller Creek asserted that as soon as Anova provided notice of termination, Miller Creek found a suitable nonpublic school as a replacement.

Student did not prove by a preponderance of the evidence that Miller Creek denied Student a FAPE when Anova terminated its contract with Miller Creek.

THE JUNE 22, 2021 IEP

The IEP team held an annual IEP meeting on June 22, 2021. Parent and Student's attorney attended the meeting. Also in attendance were Student's therapists; Heidi Adler, the Director of Anova; and Chloe Mach, the Program Manager for the Marin County Self Education Local Plan Area, referred to as SELPA.

Beginning in mid-March 2020, Student was receiving education services through Miller Creek and Anova virtually. Miller Creek and Anova entered into an Individual Service Agreement, referred to as an ISA, for Student effective July 1, 2021. This ISA also served as the contract between Miller Creek and Anova for Student's placement. Pursuant to Student's prior IEP and the June 22, 2021 IEP, Student was to be placed at a "nonpublic School" under contract with either the SELPA or the district for the 2021 to 2022 school year.

At the June 22, 2021 IEP team meeting, Heidi Adler, the Director of Anova, indicated that Anova was not going to conduct distance learning in the 2021-2022 school year, and that all students would be returning to campus. At the time of the IEP meeting Student's attorney, who was also his grandfather, wanted Student to return to physical attendance at school. Student's mother, however, was concerned about Student physically returning to school due to Parent's own health concerns. Adler and the Miller Creek representatives told Parent that neither Miller Creek nor Anova planned to provide any distance learning programs beginning in the fall of 2021, and that Student could either attend in person, disenroll from the district, or go on independent study.

Adler also raised concerns at the meeting and in subsequent emails that Anova may not be able to serve Student in an educational capacity much longer. Anova's students were generally younger than Student, and Adler believed that Anova's curriculum no longer suited Student who, in her words, was "aging out".

TERMINATION OF SERVICES AT ANOVA

Student did not attend Anova for in-person learning in the fall of 2021, and instead Anova provided him "virtual" independent study courses and therapy sessions. The evidence established that Anova agreed to the temporary virtual attendance for Student, but that Anova was only willing to make this accommodation for Student as a bridge to get Student back to in person learning. Miller Creek held a follow up IEP meeting on December 15, 2021, and Parent attended. At this meeting representatives of Miller Creek and Anova indicated Student was still being offered individual in-person placement at Anova. The parties agreed to transition Student back to in-person learning at Anova in February of 2022.

On December 16, 2021, Student's occupational therapist reported an incident during a virtual session where Student was throwing a tantrum, and that it involved cussing and swearing between Parent and Student. Adler provided this information to Phillipa Rosenblatt, the Superintendent of Miller Creek at the time. On January 11, 2022, and January 25, 2022, specialists of Anova again reported examples of Student's outbursts, including conflicts with Parent, cussing, and swearing, and some screaming. Again, these emails were exchanged between Adler and Rosenblatt.

On January 25, 2022, Adler emailed Rosenblatt and indicated that Student was not making progress and spent most of the time yelling and swearing at staff. Adler concluded that due to Student's lack of continued progress and his age, Anova could no

longer meet Student's special education needs at its campus. After conferring with Rosenblatt over several days, on February 4, 2022, Anova sent a 20-Day Written Notice terminating the ISA, with the last day of service to be February 25, 2022. The contract termination had nothing to do with Student violating a school code of conduct, but instead reflected Anova's determination that it was unable to continue serving Student's educational needs.

On February 8, 2022, a representative of the Marin County SELPA emailed Parent requesting an IEP meeting be held on February 16, 2022, to discuss the contract termination and placement of Student at a new nonpublic school. On February 14, 2022, Rosenblatt emailed Parent and her attorney indicating that Student was not expelled from Anova, nor was Student being disciplined for code of conduct violations. Rosenblatt indicated that under both the Master Contract and California law, either party (Anova or Miller Creek) could terminate the agreement on 20 days written notice. Rosenblatt indicated that to comply with Student's IEP placement at a nonpublic school, she had secured a space for him at another California Department of Education certified nonpublic school identified as Irene M. Hunt School in San Anselmo, California. Parent rejected that placement.

A follow up IEP meeting was held on March 16, 2022. Parent, Student's attorney, and Rosenblatt were in attendance. At the meeting Parent voiced concerns that Student should not have been removed from Anova. Student's attorney asserted that Anova had wrongfully expelled Student. Miller Creek's position at the meeting was that Anova contractually terminated the agreement, which was permissible under law, and that Adler had voiced repeated concerns that Anova could no longer meet Student's educational needs. The team discussed at length an appropriate placement for Student moving forward. Both Parent and Student's attorney expressed reservations of

continuing with a nonpublic school. Both had no confidence that a different nonpublic school could meet Student's needs. The team agreed to research whether the Marin County of Education would have a suitable program. Rosenblatt testified that after investigation, the County of Education did not have a suitable program, and that the IEP team continued to believe that Student's placement in a least restrictive environment remained a nonpublic school.

A subsequent meeting was held on May 27, 2022. Student's attorney voiced concerns that Student was not receiving the same due process rights at the nonpublic school as he would receive if he was placed at a public-school campus. Rosenblatt again reiterated that the IEP team's consensus that the best placement for Student, at that time, was a nonpublic school.

The Master Contract between Anova and Miller Creek provided that the agreement may be terminated with or without cause by either party and that, pursuant to California Education Code section 56366(a)(4), either party could terminate the agreement after giving 20-day written notice of the termination. That section provides that a master contract or individual services agreement may be terminated for cause. To terminate the contract either party shall give 20 days' notice. The evidence established that Anova's decision to terminate the agreement was not related to Student's behavior, but rather Anova was more concerned that Student would not physically return to the program in February 2022 as promised, and that its substantive education program was no longer meeting Student's IEP needs due to his age and his virtual attendance. Student offered no credible evidence that contradicted Adler's opinion in that portion of this case. As such, the ALJ found that Miller Creek did not violate the Section 1415(k) of the IDEA.

Because Anova terminated the agreement and would no longer educate Student under the terms of the IEP, Miller Creek was not able to continue placement at Anova. However, prior to the termination occurring, Miller Creek located another contracted nonpublic school that could carry out Student's IEP. While Student, his Parent and grandparent were understandably upset that Anova terminated abruptly without their knowledge or consent, by law, neither Student nor Miller Creek had any control over the termination. There was no evidence presented that prior input from Parent or Student would have changed Anova's decision. When it received notice of that termination, Miller Creek acted swiftly to find a suitable replacement, and offered an immediate IEP meeting to discuss the options.

The evidence establishes that Miller Creek met its obligations under the IDEA and did not deny a Student a FAPE. Anova was acting within California law when it sent the 20-day termination notice. Miller Creek convened an IEP within the 20 days and made another placement offer. Student offered no legal authority which would have required Miller Creek or Anova to consult with Parent prior to the issuance of the 20-day termination. Student also offered no legal authority which would have required an IEP team meeting prior to the issuance of the 20-day termination notice.

No other issues regarding the nature of Student's placement were raised, and the ALJ did not reach any other conclusions about Miller Creek's future placement options.

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.

ISSUE:

Miller Creek did not deny Student a FAPE by removing him from Anova without Parent's permission and without an IEP meeting prior to change of placement. Miller Creek prevailed on the due process issue.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings