

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

In the Matter of the Dispute Between:

STUDENT,

Petitioner,

and

SAN DIEGO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH No. N 2005070222

DECISION

Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 20 and August 24, 2005, in San Diego, California.

Student N., Petitioner, was present and represented by her mother Francisca S. on July 20, 2005. No appearance by either Petitioner or her mother was made on August 24, 2005.

Amy Bozone, Assistant General Counsel, represented petitioner San Diego Unified School District. Phyllis Trombi, a District representative, was present throughout the hearing.

This matter was continued during the presentation of the evidence on July 20, 2005 in order to take the testimony of additional witnesses. Although petitioner had been on notice that these witnesses would not be available on July 20, 2005, she chose not to subpoena them. However, the matter was put over until August 24, 2005 for the taking of additional testimony.

On August 24, 2005, the record was opened at the District Office. No appearance was made by or on behalf of petitioner at the District Office. The District had produced Christy McCabe, one of the student's teachers and she was available to testify. This is one of

the witnesses that the student's mother had identified as important to the presentation of her evidence.

On August 24, 2005 the Administrative Law Judge checked his phone messages and had received a phone message from student's mother ten minutes before the time of the scheduled hearing indicating that she was not going to attend the hearing. A teleconference was conducted and recorded with the mother, Amy Bozone and the Administrative Law Judge participating.

Student's mother, Francisca S., indicated she did not feel physically well enough to participate although she offered no specifics to justify her absence. She also felt that she was prejudiced by a lack of an attorney. She concluded by stating that she preferred to withdraw her Due Process Hearing Request because she had a pending compliance complaint against the school district.

The District strenuously objected to a continuance or to the matter being withdrawn unilaterally based upon the current posture of the case.

The Administrative Law Judge took the matter under submission to consider the arguments of the parties. To the extent that petitioner's request to not go forward on August 24, 2005 can be construed as a request for continuance, such request is denied. No good cause was established. To the extent that petitioner's request represented a motion to withdraw the request for a due process hearing, said request is denied.

What petitioner's conduct represented on August 24, 2005 was an utter and complete lack of respect for this administrative law court, the parties and witnesses and the process itself. This was and is found to be a transparent effort to frustrate the due process hearing procedure.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student N. (A.N. or the student) is a special education student who attends Dana Middle School, a school within the San Diego Unified School District (the district).
2. On July 20, 2005, the record was opened. Issues to be decided were identified. Sworn testimony and documentary evidence was received on July 20, 2005. The matter was continued for the taking of additional testimony on August 24, 2005. Petitioner failed to appear in person although she participated briefly by telephone. A witness was present and available to testify. Petitioner's mother alternatively discussed not feeling well enough to participate, continuing the matter and also withdrawing her due process hearing request since she already had a compliance complaint pending against the Department. The District objected to a continuance and to a unilateral withdrawal of the Due Process hearing in the

middle of the hearing. After due consideration, the request for continuance and withdrawal are both denied.

Issue

3. The parties identified the following issue for purposes of the hearing:
 - Did the district offer the student a free and appropriate public education (FAPE) based upon the evolving condition of the student during the school year? The District ignored the family's pleas throughout the year, that any IEP done was done superficially and in violation of the student's rights and that the family was harassed and discriminated against by the District. Student's mother also requested money damages against the District for emotional distress. At the outset, of the hearing the Administrative Law Judge ruled that the request for monetary relief was beyond the scope of the issues that would be considered in the hearing.

Contentions

4. The student's mother argued that FAPE was not offered for the 2004-2005 school year. The specific contentions evolved and changed before and during the Due Process Hearing. To the extent that actual specific failures were alleged, they related to IEPs that were done during the school year. However, the tenor of parent's complaints was to the effect that the District was unfeeling, uncaring and committed to blaming the mother for the District's failures in providing her daughter with a plan and program to meet her educational needs. The student's mother claimed that the District filed false and malicious reports with the Department of Social Services and that the District was discriminating against her and her family due to their disabilities. No credible evidence was offered to support these contentions.

Preliminary Matters

5. The student is twelve years old. She is a delightful albeit shy young lady. She is very bright and did quite well academically until the last school year. She lives with her mother who is devoted to her wellbeing and with a brother who has emotional challenges that present difficult hurdles to stability and emotional safety at home. Part of the challenge for all involved is the family dynamics in the home. This is not said in an effort to blame the mother. Far from it, she seeks nothing but what is best for her family. Her son is currently suffering from emotional problems that require mental health intervention and have had, no doubt, a profound impact on the student. The documentary evidence presented establishes that the student has been the object of her brother's outbursts. Her psychiatrist wrote on August 18, 2004: "Brother still symptomatic and stressing family."

6. The student had been a very good student throughout her school experience until the 2004-2005 school year. She started at a new school, Dana Middle School, and this was a big transition for her.

7. On or about October 8, 2004 a referral for special education was made for Student. The reasons for the referral were problems with math and emotional/behavior. Following an assessment, special education services were not recommended. The student's mother attended an IEP meeting on December 14, 2004 and voiced her disagreement that her child was found not eligible for special education services.

8. Parent next requested an Independent Education Evaluation (IEE). This was performed in February and March 2005 by Jill Weckerly, Ph.D. Weckerly testified regarding her findings and was an impressive and persuasive witness. After reviewing Weckerly's report, the District reconsidered and determined that Student was indeed entitled to special education services.

9. Dr. Weckerly's report contained recommendations as follows:

Ensure that Student is placed in a classroom location with the least amount of distraction (usually in the front of the room away from visual and auditory sources of clutter). Minimize environmental stimuli (especially visual and tactile).

-Allow extended time on tests (1.5x) where there are substantial organizational and/or recall demands, including standardized tests. Slow processing speed and difficulties with encoding and retrieval may make it necessary to modify some classroom assignments for Student.

-Work with a tutor to help Student with math, organization, and problem-solving is recommended. Develop strategies that emphasize awareness of her own cognitive processes or reflective problem-solving activities, self-monitoring of results, and searching for alternative procedures.

Francisca S. and Student may wish to share these results with Student's psychiatrist and consider whether pharmacological intervention could help with some of Student's symptoms of inattention and distractibility."

10. An IEP meeting was scheduled for May 10, 2005. Unfortunately, the District erred in notifying all concerned of the time and place so that it was not an adequate IEP meeting. Dr. Weckerly received erroneous information and showed up at the wrong time. The District took immediate steps to reschedule and did so for May 31, 2005. This IEP convened and although student's mother had said she would not attend, she changed her mind and was present. Goals were identified and they were appropriately based on the recommendations made by Dr. Weckerly.

11. Unfortunately, May 2005 was a time of crisis for the student and her family. She was refusing to go to school. Student had an incident at the school where she refused to get out of the car and a school nurse came to assist. This, coupled with her declining attendance and her emotional withdrawal, led the school counseling office to make a referral to Child Protective Services. There is nothing in this record, save the mother's suspicion, that is suggestive of any ulterior motive on the part of the District. By early June 2005,

Student had 43 absences and was tardy 4 times. The District was very concerned about this and made a referral to SARB (School Attendance Review Board). Although the District was taking this action appropriately, the mother construed this as just another effort to harass and discriminate against her family.

12. June 2005 was tumultuous for Student and the family as well. She was hospitalized at Mesa Vista Hospital for psychiatric difficulties for a full week. Her medications were changed and she showed improvement. Although there have been numerous diagnoses given of her condition, the most recent, according to the mother is bipolar disorder. Dr. Weckerly found, in her evaluation, that Student suffered from:

ADHD, inattentive subtype
Learning Disorder NOS, visual memory
Mathematics Disorder
Major Depressive Disorder, in partial remission
Panic Disorder, in remission, by history

13. Following the May 31, 2005, IEP the District asked to convene another IEP to address issues surrounding an AB 2726 referral to County Mental Health. Student's mother was uncertain of her course of action at that time; however, she was certain that she wished to proceed to the Due Process Hearing.

14. Dr. Weckerly testified and established that she did a thorough evaluation of Student and shared her thoughts and impressions with the appropriate members of the IEP team on May 31, 2005. She shed considerable light on the issues that came to a head relatively rapidly for all concerned. She did the assessment because Student was having problems at school with math. She was looking for a neuropsychological explanation for why Student's grades were declining. She found that Student had many features of the inattentive subtype of ADHD. This was a new diagnosis for Student. Although Student had difficulty with math, Dr. Wakerly was not comfortable calling it a learning disability. At the time of the evaluation, Dr. Wakerly did not find that Student fit the diagnosis of a current emotional disturbance. She felt that Student suffered from dysthymia, defined as low grade sadness. Dr. Weckerly felt that a good start for Student in accommodating her challenges was a resource specialist. When asked what was appropriate if a student received a new diagnosis of bipolar disorder, Dr. Wekerly opined that referral to County Mental Health was needed.

15. It was Dr. Wekerly's impression that the District did indeed consider her recommendations in seeking to determine Student's needs. It was also her impression from attendance at the IEP of May 31, 2005, that the District took into account and considered the concerns of Student's mother. Dr. Wekerly's testimony was clear and persuasive. At the time of the IEP on May 31, 2005 an appropriate set of goals had been identified for Student.

16. The overwhelming weight of the evidence in this case establishes that the District took reasonable and appropriate steps to address the concerns and needs of this

student and her family. Districts' are charged with a set of duties and responsibilities by virtue of the Individuals with Disabilities Education Act (IDEA). The initial assessment conducted by the District concluded that Student did not qualify for special education services. That was the reasonable and appropriate conclusion at that time. Subsequent events led to further actions including the development of a 504 Plan written for Student by the District in January 2005. Later another assessment was done and this revealed information that formed the basis for Dr. Weckerly's opinions and a finding that Student indeed qualified for special education services. Thereafter, reasonable steps were taken and an IEP team meeting was convened on May 31, 2005. A reasonable plan was developed based upon Dr. Weckerly's recommendations. Unfortunately, the events of May and June 2005 prevented the planning and implementing process from going forward. This is neither the District's fault or legal responsibility nor is it the fault of the parent or student.

17. The sad but inescapable fact is that much happened in a short time including a new and very serious psychiatric diagnosis as well as a hospitalization that took precedence. In the final analysis, a referral to County Mental Health, as the District recommended, was appropriate based on the new diagnosis of bipolar disorder.

LEGAL CONCLUSIONS

Applicable Law

1. The Individuals with Disabilities Education Act (IDEA) provides federal funding to state and local educational agencies that must then provide educational opportunities for students with disabilities. The purpose of IDEA is "to ensure that 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 employment and independent living." (20 U.S.C. § 1400(d).)

2. The term "special education" in federal law means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including - (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education. (20 U.S.C. § 1401(29).) Education Code section 56031 augments this definition to mandate "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."¹

¹ Education Code section 56031 also provides "special education" is an integral part of California's total public education system and special education provides education in a manner that promotes maximum interaction between children or youth with disabilities and children or youth who are not disabled in a manner that is appropriate to the needs of both. Special education includes a full continuum of program options, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

3. A free appropriate public education (FAPE) is one provided at public expense, under public supervision and direction, and in conformity with an individualized education program (IEP) which is developed for the child. *Id.*, § 1401(8). The obligation to provide a FAPE does not require a state to “maximize each child’s potential.” *Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 198; see also 20 U.S.C. § 1401(8)(D).

4. IDEA contains numerous procedural steps that a state must follow in order to properly design and implement an IEP. See 20 U.S.C. § 1414(d); *O’Toole v. Olathe District Schools Unified School District No. 233* (10th Cir. 1998) 144 F.3d 692, 698.

The district is responsible for assembling an appropriate IEP team to draft and then implements a disabled student’s IEP. (20 U.S.C. § 1414(d).)

The IEP is the blueprint for successfully formulating and achieving the goal of IDEA. *Murray v. Montrose County School District* (10th Cir. 1995) 51 F.3d 921, 925; see also 20 U.S.C. § 1401(11). IEPs should provide a “basic floor of opportunity” consisting of services that are “individually designed to provide educational benefit” to a child with a disability. *Rowley*, 458 U.S. at 201.

In California, Education Code section 56341.1 requires, among other matters, than the IEP team consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil.

5. IDEA also mandates several substantive requirements, including the requirement that students with disabilities be educated in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5); *Murray*, 51 F.3d at 925-26.) The LRE component of providing a FAPE dictates that the state should integrate a disabled child with non-disabled children whenever possible.

Federal law requires:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5).

instruction in physical education, to meet the educational and service needs of individuals with exceptional needs in the least restrictive environment.

6. A parent of a child with a disability may contest any action by the school district that the parent believes deprives the child of a FAPE. 20 U.S.C. § 1415(b)(6). The educational agency must then provide the parent with an impartial due process hearing to evaluate the complaint. 20 U.S.C. § 1415(f).

7. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 (stating that the IDEA does not provide for an "education . . . designed according to the parent's desires," citing *Rowley*, 458 U.S. 176, 207).

Technical deviations from procedural requirements in developing an IEP do not automatically lead to the conclusion that the IEP is invalid. *Urban v. Jefferson County School District R-1* (10th Cir. 1996) 89 F.3d 720, 726. Rather, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *O'Toole*, 144 F.3d at 707.

Not all procedural violations automatically constitute a denial of FAPE. Procedural violations which result in a "loss of educational opportunity" or which "seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE." *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.

Determination of Issues

1. The District offered the student a FAPE based upon the May 31, 2005, IEP. Furthermore, the District acted reasonably and appropriately in seeking to address the student's educational program and progress in the 2004-2005 school year.

2. The composition of the IEP team on May 31, 2005 was appropriate and complied with legal requirements. Information specific to the student was obtained and discussed at the May 31, 2005, meeting. The student's mother and others were not prevented from participating in the IEP meeting in a meaningful fashion.

While it was not a model of clarity, the district's offer was communicated in writing to the student's parent and was sufficiently specific to permit the parties to know what was being offered. Under the circumstances, it is concluded the offer met the standards set in *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519.

The IEP plan the district offered to the student was individualized and unique. The IEP plan provided the student with access to specialized instruction and related services individually designed to provide educational benefit.

3. The district provided credible expert testimony to support its plan and its claim that the proposed program was reasonably calculated to provide the student with meaningful

educational benefits, even though the mother and others disagreed and questioned the district's judgment. The evidence offered by the student did not establish any rational basis to conclude there were any procedural inadequacies that compromised the student's right to an appropriate education, or seriously hampered the parents' opportunity to participate in the IEP process, or caused a deprivation of educational benefits. Nor did the evidence offered by the student establish the district's offer was not reasonably designed to ensure the student had access to a FAPE designed to meet his unique needs and to prepare him for employment and independent living after high school. The conflicting evidence merely established the existence of a disagreement, and disagreement is not uncommon when trying to predict the future.

4. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the (1) child's needs and appropriate goals; (2) extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs (Code Fed. Reg., tit. 34, §§ 300.343(c)(iii) and 300.346(a)(1) and (b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

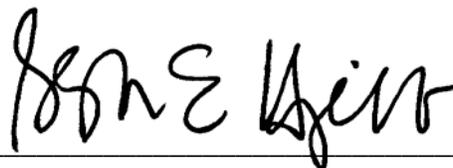
Prevailing Party

1. This District is the prevailing party in this Due Process Hearing.

ORDER

The claim of student Student N. that she was denied FAPE is dismissed with prejudice.

Dated: January 5, 2006



STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings