

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

In the Matter of:

STUDENT,

Petitioner,

vs.

BERKELEY UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005110745

DECISION

Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Berkeley, California, on January 17, 2006.

Jennifer E. Torbohn, Attorney at Law, represented the Student, who was not present. The Student's Mother was present.

Christine D. Lovely, Attorney at Law, represented Respondent Berkeley Unified School District (District). Also present was Elaine Eger, District Manager of Special Education.

The record remained open to receive written briefs, which OAHSED received on January 31, 2006.¹

The record closed on January 31, 2006.

¹ At the close of hearing, the Administrative Law Judge instructed the parties to submit closing briefs to OAH and the opposing party, and that fax transmissions must be completed by 5:00 p.m. on January 31, 2006. Petitioner's closing brief was faxed to OAH at 4:53 p.m., and the fax completed transmission at 5:07 p.m. Petitioner's counsel did not start faxing the closing brief to the District until after that time.

ISSUES

In the Due Process Complaint, and at hearing, Petitioner raised the following contentions:²

1. The District failed to provide Student with a Free Appropriate Public Education (FAPE) from August 31, 2005 through December 31, 2005, as follows:
 - A. The District failed to implement Student's May 27, 2005 Individualized Education Program (IEP).
 - B. The District failed to provide Student with the services identified in the May 27, 2005 IEP.
 - C. The District failed to provide Student with a qualified deaf-blind special education teacher.
 - D. The District failed to provide Student with a qualified intervener, as identified in the May 27, 2005 IEP.
 - E. The District failed to place Student in a District classroom.
2. The District should reimburse the Mother for assessments that the Mother has obtained, or is in the process of obtaining, for the Student.

As a proposed resolution, Petitioner requests that the District implement the May 27, 2005 and that the District provide the Student with compensatory education, including an order of compensatory education in the form of "day-for-day" compensation for the education and services District failed to provide. Additionally, Petitioner requests that the District reimburse the Mother for the cost of the assessments and for transporting Student to physical and aquatic therapy sessions.

FACTUAL FINDINGS

1. Student, born March 14, 1996, lives with his mother within the District. Student qualifies for special education under the classification of "deaf-blind." Student is cortically blind and cortically deaf from which he has periods where he has limited vision and limited hearing. Student is medically fragile, and suffers from conditions including cerebral palsy, epilepsy, fluctuating muscle tone, poor head control and problems with temperature regulation. Student requires the use of a wheelchair.

² OAH issued an Order on January 12, 2005 that limited the issues for hearing.

2. On December 16, 2005, OAH issued a Decision, dated December 14, 2005, in OAH No. N2005070046, involving the same parties. The issues in the December 14, 2005 Decision involved whether the District failed to provide the Student with FAPE from March 14, 2003 through July 15, 2005. Petitioner prevailed in the prior hearing.

May 27, 2005 IEP

3. Student's annual IEP team met on May 27, 2005, and discussed extensively the appropriate educational placement and services for Student. As to placement, the entire IEP team concluded that Student should be placed in a "classroom specifically designed for AAC [assisted augmentative communication], medically fragile and deaf-blindness." During the meeting, the District offered to place Student in a general education class "blended with" a special day class. This was not the educational placement unanimously agreed to by the IEP team and the team members did not agree that District's offer constituted an appropriate placement for Student. On August 31, 2005, Mother consented to all portions of the IEP, except for the District's offer to place Student in the special education classroom of teacher Hali Hammer.

August 31, 2005 through December 31, 2005 School Attendance and Services

4. At the start of the 2005-2006 school year, the parties were still in litigation concerning whether the District needed to implement the May 27, 2005 IEP. Student was not attending school at the end of the prior school year. Just before the 2005-2006 school year began on August 31, 2005, the District decided that Student's placement for purposes of Stay Put was the March 31, 2004 IEP as the last implemented and agreed to IEP and made plans to implement this IEP.³ The District planned to have Student attend a special day class at the Oxford Elementary School taught by Ms. Hammer. On August 30, 2005, Ms. Eger⁴ contracted with a transportation service to bring Student to Oxford Elementary, and with Nursing Resources to provide Student with a registered nurse.

5. Ms. Eger attempted to contact the Mother before the start of the school year, but was not successful. The evening of August 30, 2005, Ms. Eger personally delivered two letters to Mother's home, when she was not at home.⁵ The first letter stated that the District would implement the March 31, 2004 IEP at Oxford Elementary in a medically fragile special day class. The District stated that it had contracted to provide transportation and a nurse for Student, and that the District had moved Student's equipment to Oxford Elementary. The letter did not state when the transportation or nurse would arrive on the 31st.

³ The District did not introduce the March 31, 2004 IEP as an exhibit at hearing.

⁴ Ms. Eger was appointed interim Manager of Special Education on July 1, 2006, and became the full-time Manager on November 1, 2005.

⁵ The second letter involved assessments for the Student and will be discussed more fully below.

6. On the morning of August 31, 2005, the nurse and transportation did not arrive at Student's home. The Mother went alone to Oxford Elementary around 10:00 a.m. to observe Ms. Hammer's classroom and find out what had happened to the nurse and transportation. The Mother spoke to Ms. Hammer and discovered that she did not have a curriculum for Student or a service provider plan. Ms. Hammer, while a qualified special education teacher, was not a qualified deaf-blind teacher. The District did not have the intervener in class. The District did not have assembled Braille and AAC devices that Student required as the devices were still in their packages. The room did not have a lift for Student, as part of the lifting device was broken. While the District designated Ms. Hammer's classroom for medically fragile children, the classroom contained non-medically fragile children. The temperature in the classroom was approximately 80 degrees, which is a concern due to Student's problem in regulating his body temperature. While the Mother was at the school, the transportation service arrived at Student's home.

7. Student never attended Oxford Elementary. Between August 31, 2005 through December 31, 2005, the Mother and the District did not meet face-to-face to discuss Student's education and communicated through a series of letters, voice mails, and one phone call. The District admitted that it had difficulty getting needed parts for the lift that Student needed to attend Oxford as Student weighed too much for an aide to safely lift him out of his wheelchair. Also, the District did not get Student's computer equipment working in Ms. Hammer's classroom. Without these pieces of equipment, Student could not attend Oxford, and the District could not implement either the March 31, 2004 or the May 27, 2005 IEP.

8. Because the District could not implement the March 31, 2004 IEP at Oxford Elementary, Ms. Eger decided that the District would attempt to provide Student special education services at Student's home. In a letter to the Mother dated September 20, 2005,⁶ Ms. Eger acknowledged the problems that the District was having in getting the needed equipment set up at Oxford Elementary. Ms. Eger offered that the District provide Student with special education services, with District personnel, at Student's home. Ms. Eger also phoned and left a message for the Mother on September 21, 2005. The District never provided services to Student at the home as Ms. Eger and the Mother could not arrange a time to meet due to the lack of available free time in either person's schedule. The only services provided in either IEP that Student received from August 31, 2005 through December 31, 2005 for which the District paid, were physical therapy and aquatic therapy. The Mother drove Student to and from these therapy sessions, a total of 675 miles.

Assessments

9. At the beginning of August 2005, the District started preparations to have assessments conducted on Student. On August 30, 2005, Ms. Eger delivered to Student's home a letter dated August 26, 2005, and a computer generated Assessment Plan for the Mother to sign. Due to limitations with the District's computer program, the Assessment

⁶ Ms. Eger did not send this letter until October 5, 2005.

Plan only printed ‘Sign-Home’ as Student’s primary language. The Assessment Plan designates the purpose of the assessments as a change in Student’s placement and/or related services. The Assessment Plan called for Student to be assessed in the areas of Academic Achievement, Psycho-Motor Skills, Language/Speech/Communication Development. The District could not enter into contracts with Partners for Augmentative Communication and Technology (PACT) and Liz Hartman, teacher of the visually impaired, to start their assessments until the Mother signed the Assessment Plan. The District chose PACT to conduct an assessment for augmentative communication and assistive technology, in part, because the Mother consulted with PACT for this assessment. The District chose Ms. Hartman, as she is one of the few qualified deaf-blind specialists in the community.

10. The Mother did not sign the Assessment Plan because Student’s language should be “tactile (deaf-blind) sign/AAC/English.” The Mother also pointed out in a August 31, 2005 letter that the District’s assessors, PACT and Ms. Hartman, did not have the expertise to conduct the Psycho-Motor Skills assessment. The Mother stated that she would sign the Assessment Plan with these corrections.⁷

11. The District attempted to get a revised Assessment Plan to the Mother, but failed. On October 12, 2005, the Mother sent to the District an Individual Assessment Plan that she drafted. The Mother’s Individual Assessment Plan detailed a series of assessments and who would conduct the assessments, along with the projected cost. While the District concurred with these assessments, the District did not sign the Mother’s Individual Assessment Plan since the Mother’s plan did not include information needed by the District, such as the reason for the assessments. The Mother has since paid for all the assessments identified on her plan. As of the date of hearing, the assessment reports had not been completed.

LEGAL CONCLUSIONS

Applicable Law

1. Petitioner has the burden of proof as to the issues designated in Issues, paragraphs 1 through 2, of this Decision. (*Schaffer v. Weast* (2005) 126 U.S. 528 [163 L.Ed.2d 387].)

2. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §§ 1400, et seq.⁸; Cal. Ed. Code §§ 56000, et seq.) The term “free appropriate public education” means special education and related services that are available

⁷ At hearing, the Mother stated that she objected to the Assessment Plan because the reason for the assessment should have been to “conduct Annual Review or Three Year special education re-evaluation.” The Mother did not raise this objection to the District in her August 31, 2005 letter.

⁸ All federal statutory citations are to Title 20 United States Code, unless otherwise noted.

to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (§ 1401(a)(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (§ 1401(a)(29).)

California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Cal. Ed. Code § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (§ 1401(a)(26).)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. To constitute a FAPE as required by the IDEA and *Rowley*, the District must design its offer to meet Student's unique needs and be reasonably calculated to provide Student with some educational benefit. Although not the focus of the dispute here, additional requirements are that the District's offer must conform to the IEP, must be in the least restrictive environment (LRE), and provide the student with access to the general education curriculum. (See, § 1412(a)(5)(A); 34 C.F.R. §§ 300.347(a), 300.550(b); Cal. Ed. Code § 56031.)

5. *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA as part of the FAPE analysis. Pursuant to Section 1415, subdivision (f)(3)(E)(ii), of IDEA, for a procedural violation to deny the student FAPE the procedural violation must either: 1) impede the student's right to FAPE; 2) significantly impede a parent's opportunity to participate in the education decision making process; or 3) caused a deprivation of educational benefits.

6. Pursuant to Title 34 Code of Federal Regulations section 300.502 and California Education Code section 56329, subdivision (b), a parent has the right to obtain an independent educational assessment of the pupil from a qualified specialist, at public expense, if the parent disagrees with the assessment obtained by a district, unless a district shows at a due process hearing that its assessment is appropriate, or a district refuses to provide a requested assessment.

Determination of Issues

Issue No. 1: District's Failure to Implement the May 27, 2005

1. The December 14, 2005 Decision of ALJ Anderson rejected the District's continuing contention that Student should "remain in the last agreed upon placement, i.e., his March 2004 IEP placement . . ." The December 14, 2005 Decision found that the District needed to implement the May 27, 2005 IEP that the IEP team developed. Further, the District did not provide a Stay Put placement as the District wished to move Student from his prior placement at Montclair Elementary to Oxford Elementary, and into a classroom that the Mother rejected in May 2005. More disturbing is that the District made arrangements for Student the day *before* school started. The transportation and nurse did not arrive the next morning and the equipment required in both IEPs did not work. The District's attempt to provide Student services at Student's home is untenable, as this constituted a change in placement that required a new IEP, which the District did not do. (*Mewborn v. Government of the District of Columbia* (D.D.C. 2005) 360 F.Supp.2d 138, 143-144; § 1414(d)(3)(D).) Thus, the District failed to implement the May 27, 2005 IEP from August 31, 2005 through December 31, 2005, and failed to provide a qualified deaf-blind special education teacher and qualified intervener, which denied the Student FAPE.

Compensatory education and services

2. Within a court's inherent power is the authority to grant an award of compensatory education. (*Student W. v. Puyallup School District* (1994) 31 F.3d 1489, 1496.) Compensatory education is an equitable remedy that courts may employ to craft "appropriate relief" for a party. Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) Given the lack of education and services the District provided Student, Student is entitled to education and services designed to compensate for his lost opportunities. However, as noted in the December 14, 2005 Decision, more information is required to determine the nature and extent of the compensatory education.

Student continues to request an order that the District provide compensatory services on a one-for-one basis without evidence that the requested relief is appropriate. Straight relief of one hour of compensatory education for each hour of education lost has been specifically disallowed. In *Reid v. District of Columbia* (2005) 401 F.3d 516, 524, the Court confirmed the availability of compensatory education awards as an equitable remedy, not damages. It rejected the "one-for-one" formula the parents advocated and held that designing the remedy requires "a fact-specific exercise of discretion by either the district court or a hearing officer." The result should be an award that is "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." (*Id.* at p. 523.)

3. Nothing has changed from the December 14, 2005 Decision as information necessary to craft the remedy in this matter is lacking in at least two categories: Student's inherent abilities and his ability to perform in an educational setting once provided with an appropriate classroom environment and supplementary services. Therefore, this Decision incorporates the December 14, 2005 Decision that found:

[T]o acquire the information necessary to determine the appropriate award of compensatory education, it is essential that District assess Student in all areas of suspected disability, including but not limited to: communication, cognition, vision, academics, self-help, gross and fine motor ability, orientation and mobility. The assessments in all areas must include the written observations by all assessors of Student in his classroom environment. When the assessments are completed and reports generated, after conferring with Student regarding a meeting date and time, District will convene and complete an IEP team meeting. District will invite Student's attorney to attend. The purpose of the meeting will be to review the assessments, including the classroom observations, and to develop an agreed-upon award of compensatory education services.

(December 14, 2005 Decision, Legal Conclusion 5, p. 8.)

Reimbursement for Assessments

4. In this case, the District did not refuse to conduct the assessments that the Mother requested, and the Mother did not object to the District's proposed assessments. While the Mother was justified in rejecting the District's first assessment plan, the Mother's continued refusal to be available to review the District's revised assessment plan, which incorporated the changes that the Mother requested, is not. The District could not commence the assessments until the Mother signed the assessment plan. (Cal. Ed. Code § 56321(a).) The Mother is not entitled to reimbursement for the assessments she paid for as the District never refused to conduct the assessments the Mother requested and the District made a reasonable effort to obtain her consent to an assessment plan with the corrections she requested. (Cal. Ed. Code § 56329(b).)

ORDER

1. District shall immediately provide the educational placement and services for Student provided for in the May 27, 2005 IEP, including, but not limited to, placement in a classroom designed for AAC and to accommodate a medically fragile, deaf-blind child.

Compensatory education and services

2. The Office of Administrative Hearings retains jurisdiction for the sole purpose of deciding the compensatory education and services, should resolution of that issue be necessary.

3. District shall immediately initiate assessments of Student as specified in Legal Conclusion 3. The assessments shall be completed and reports generated no later than April 28, 2006. The assessment reports shall be provided to Student's mother and attorney no later than May 5, 2006.

4. No later than May 19, 2006, District shall convene an IEP team meeting to develop an agreed-upon award of compensatory compensation services. District shall confer with Student regarding a date and time for the meeting. District shall invite Student's attorney to attend.

5. No later than May 26, 2006, the parties shall notify OAH regarding the status of the matter so that further hearing dates may be calendared if necessary.

6. Within 15 days of this Decision, the District shall reimburse the Mother for \$363.88 for transportation, 675 miles at 38.5 cents per mile, and tolls, \$104, for taking Student to physical and aquatic therapy sessions.

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. The following findings are made in accordance with this statute:

7. Student prevailed regarding Issue No. 1.
8. District prevailed regarding Issue No. 2.

RIGHT TO APPEAL THIS DECISION

The parties to this case may appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code § 56505(k).)

Dated: February 16, 2006



PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings