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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

M.K., a minor, by and through his Guardians ad litem, RICK K. and KATHY K; RICK K. on his own behalf; and KATHY K., on her own behalf. Plaintiffs, vs. LONG BEACH UNIFIED SCHOOL DISTRICT, et al., Defendants.	**CASE NO.: 08-CV-02213-GAF (VBKX)** *[Assigned to the Hon. Gary A. Feess, Courtroom 740]* **JUDGMENT**

The Court, having entered its findings of fact and conclusions of law on January 13, 2009, hereby orders JUDGMENT entered in favor of defendant, LONG BEACH UNIFIED SCHOOL DISTRICT, and against plaintiffs, M.K., a minor, by and through his Guardians ad litem, RICK K. and KATHY K.; RICK K. on his own behalf; and KATHY K., on her own behalf.

DATED: January 21, 2009

GARY ALLEN FEESS
United States District Judge

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M.K., a minor, by and through his Guardians ad litem, RICK K. and KATHY K; RICK K. on his own behalf; and KATHY K., on her own behalf. Plaintiffs, vs. LONG BEACH UNIFIED SCHOOL DISTRICT, et al., Defendants.	**CASE NO.: 08-CV-02213-GAF (VBKX)** *[Assigned to the Hon. Gary A. Feess, Courtroom 740]* ~~PROPOSED~~ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the proposed findings of fact and conclusions of law, and having considered the

THE COURT, HAVING ANNOUNCED ITS STATEMENT OF OUR INTENDED DECISION ON DECEMBER 11, 2008, hereby ~~adopts~~ sets forth the following Findings of Fact and Conclusions of Law.

On April 9, 2008, plaintiff, M.K. a minor by and through his guardians ad litem, Rick K and Kathy K, and Rick K and Kathy K on their own behalves, filed their complaint in the United Stated District Court.

Plaintiff's complaint, brought under the *Individuals With Disabilities Education Act* ("IDEA") 20 USC Section 1400, *et seq.*, contended that the Administrative Law Judge who conducted a due process hearing erroneously concluded that defendant School District offered the Student, M.K., a free and appropriate public education (FAPE). The Court issued a Scheduling Order on July 23, 2008 directing the parties to brief the matter for a trial on the administrative record. The trial was on November 25, 2008. The Court, after reading and reviewing the briefs of both parties and, after oral argument, on November 25, 2008, hereby issues the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. M.K., a 7-year old child who lives within the Long Beach Unified School District ("LBUSD"), suffers from autism. (DIS 1:0011[1]; PLD 1:0001[2]) Beginning in 2004, he began receiving intensive behavior intervention therapy through Autism Partners, a non-public agency ("NPA"). (STU 6:0072[3])

2. M.K.'s last agreed-upon and implemented individualized education program ("IEP") was held on November 3, 2005 and November 15, 2005. (STU 19:0218). Parents partially consented to the aforementioned IEP in December 2005. (STU 19:0218). Parents did not consent to the speech and language services or a preschool placement from the District. (STU 19:0218). Parents did agree to M.K.'s receipt of thirty-five (35) hours of in-home ABA services through Autism Partnership ("AP"), a non-public agency ("NPA"). (STU 19:0218).

3. ~~On or about March 2006,~~ Prior to the fall of 2006, Parents ~~unilaterally and without notice,~~ enrolled M.K. in Los Altos Methodist Pre-School. (~~10/4/07 AT 3:50-53:17-8~~ STU 13:0137)[4]. ~~AP~~

[1] All references to portions of the administrative record entitled "District's Exhibit Book" will utilize the following format – "DIS [Tab number]: [bate stamp range]."
[2] All references to portions of the administrative record entitled "Pleadings and Correspondence" will utilize the following format – "PLD [tab number]:[bate stamp range]."
[3] All references to portions of the administrative record entitled "Student's Exhibit Book" will utilize the following format - "STU [tab number]:[bate stamp range]."
[4] All references to testimony at the administrative hearing below, will utilize the following format "[Date of testimony] AT [volume number]:[page range]:[line range]."

~~provided services in the form of a shadow aide while M.K. was in school. (10/4/07 AT 3:50-53:17-8).~~ The District became aware of ~~this unilateral~~ placement through a report submitted by AP. ~~(10/4/07 AT 3:226:10-19~~; 10/4/07 AT 3:262-263:22-12; 10/4/07 AT 3:114:22-25).

4. On or about October 19, 2006, Parents informed the District via letter that M.K. would begin receiving IBI services ~~from~~ CUSP and requested "the existing allocated funds be provided to CUSP." (10/4/07 AT ~~3:50-53:17-8~~ and STU 9:0100) While the letter states that it is a "10 business day notice," M.K. began receiving services from CUSP on October 23, 2006, a ~~mere four (4) calendar days from the date the District received the letter.~~ (10/4/07 AT 3:50-53:17-8; 10/3/07 AT 2:80:13-20 and STU 12:0107).

5. At about the time of the change, LBUSD scheduled IEP meetings for the purpose of developing a FAPE for M.K. (STU 14:0138-0175). Before the first meeting, Sue Campbell, a Special Education Team Leader, visited M.K.'s then current placement, Los Altos United Methodist Preschool, where she observed M.K. in a classroom setting. (10/4/07 AT ~~3:275-276:1-6~~). The district convened the first IEP meeting on November 9, 2006, which was attended by his parents, representatives of CUSP, and members of the LBUSD special education staff led by Dennis Sweningson, the district's Coordinator of Autism Services. (STU 14:0138-0175). Among other things, LBUSD offered placement in a Head Start preschool through the end of the 2007 school year. (STU 14:0138-0175). The meeting concluded with an agreement to meet again on December 7, 2006. (STU 14:0169).

6. On December 7, 2006, the parties reconvened and discussed the district's offer, which included 16-hours per week of school based intensive behavioral intervention (IBI), 18-hours a week of home based services, and 12-hours per month of supervision of the home and school IBI. (STU 14:0171-0173). The offer was set forth in a written IEP. (STU 14:0138-0175). That document contains a form with boxes labeled "start date" and "end date" for the special

education services being offered. (STU 14:0162). It includes a listing for in-home IBI with a start date of 11/9/06 and an end date of 3/2/07. (STU 14:0162). A footnote linked to the IBI services references the "transition plan" (STU 14:0173). Specifically, the subject IEP states:

> 18 hrs/week at home through 3/2/07. * Addendum IEP will be held to determine home intervention hours based on progress reports and intervention data prior to 3/2/07. (STU 14:0172).
>
> ...
>
> Addendum IEP held by 01/31/07 to discuss []' s progress, home IBI hours and District Assessment Plan . . . District will reimburse and fund the NPA-C.U.S.P. to the parents for the time the current NPA started through the transition plan. District Autism Coordinator will contact the parents to further discuss this. (STU 14:0173)

7. On December 19, 2006, M.K.' s parents advised the district that they rejected the IEP offer and opted to "stay put" under the November 2005 IEP but purportedly accepting that portion of the IEP that provided reimbursement for CUSP's services. (STU 17:0214). The district responded in January 2007 by offering to schedule an addendum IEP meeting to address the Kaplan's concerns, but the Kaplans rejected that offer in their letter of February 5, 2007. (STU 18:0215-0217); STU 19:0218-0220).

8. No addendum IEP meetings were held, and in April 2007, the Kaplans filed their Due Process Hearing Complaint. (PLD 1:0001-0005). On February 5, 2008, the ALJ rendered his decision in which he found for the district on all issues; on April 3, 2008, M.K. filed the present action seeking review of that decision. (PLD 31:0526-0550; Plaintiff's Complaint).

9. At the IEP meetings, M.K. 's preschool teacher at Los Altos declined to attend and the school declined to make her available. (10/4/07 3:219-220). The

district therefore arranged to have Marsha Swinford, a general education teacher on special assignment, participate in the IEP meetings instead of Aleta Millner, a Head Start teacher. (STU 14:0170,0174; PLD 31:0528:6). Swinford taught as a substitute and had observed Head Start classrooms, but had not been regularly assigned as a Head Start teacher. (10/4/07 AT 3:35-36:9-13). Ms. Swinford held a celar credential for general education at the time of her attendance at the subject IEP and at the time she testified, and further worked as a teacher for the District for the previous four (4) years. (10/4/07 AT 3:35:9-15). While Ms. Swinford's job duties also included substitute teaching during her four plus years in the District, her job duties also included attending IEP meetings in the capacity of the regular education teacher. (10/4/07 AT 3:36:9-25). The ALJ ~~noted~~ found that Ms. Swinford was a "District General Education Teacher with several years of experience." (PLD 31:0528:6). Further, Ms. Swinford's years of experience include awareness of the District's pre-school programs, observation of head start classrooms, and, her specific job assiting parents with the transition from regional center services to District services or transitioning from Part C to Part B of the IDEA. (PLD 31:0528:6). Ms Swinford testified that prior to attending M.K.'s IEP meetings of November 9, 2006 and December 7, 2006, she had reviewed records including the CUSP and AP reports to familiarize herself with M.K. and to assist M.K.'s IEP team by drafting goals and objectives based thereupon. (10/4/07 AT 3:37:3-10).

10. Yvonne Millner ~~testified at the due process hearing that~~ having attended IEP meetings in the past for other children, at which time she generally ~~testified as to~~ described how her students were progressing, behaving, and if the children's needs were being met in her classroom. (10/4/07 AT 3:28-29:1-3). Ms. Milner ~~testified that she~~ had never met M.K. as of November and December 2006 or even by the time of her November 4, 2007 testimony at the due process hearing. (10/4/07 AT 3:27:7-12

11. M.K.'s IEP team was made aware of M.K.'s progress and present functioning by way of input from M.K.'s IBI providers from AP and CUSP who

were present at both the November and December 2006 IEP meetings (STU 14:0170, 0174). The most current information regarding M.K. was available for M.K.'s IEP team at both the November and December 2006 IEP meetings via CUSP and AP's written reports – both of which M.K.'s IEP team reviewed. (STU 14:0167).

12. Here the ALJ, who issued a lengthy and detailed ruling, concluded that M.K. was not denied a FAPE relative to any procedural violation associated with the general education teacher requirement because the evidence and record established that M.K.'s parents' opportunity to participate in the IEP formulation process was not seriously infringed, and M.K. did not suffer a loss of an educational opportunity. (PLD 31:0539:5). Swinford had sufficient qualifications to provide the perspective of a general education classroom teacher and had a broader perspective than the Head Start teacher because of her participation in an earlier IEP meeting for M.K, her participation in IEP meetings involving other students, her observation of Head Start classrooms and other teaching environments involving special needs children. (PLD 31:0528:6; 10/4/07 AT 3:39:4-24, 37:3-10). In addition, Sue Campbell, a Special Education Team Leader, who also participated in the IEP meetings, had personally observed M.K. in his preschool environment and had spoken to his then current teacher. (STU 14:0137; 10/4/07 3:~~219-220:12-23~~ 215-216:1-6). The IEP itself describes a detailed, thorough and comprehensive educational program designed to address M.K. 's needs, and contemplated an ongoing series of reviews and assessments to insure that any changes in his needs would be accommodated by appropriate adjustments in his education program. (STU 14:0138-0175).

13. March 2, 2007 was a tentative date that was intended to be the subject of discussion at an addendum IEP. (STU 14:0172-0173); 10/2/07 AT 1:103-106.) Sweningson testified that March 2, 2007 was identified as ~~a reference point on which to convene an IEP and~~ the date on which the parties would revisit the issue of M.K.'s ~~then~~ current need for IBI services, and to determine how M.K. was progressing; Sweningson testified that if there was

in fact a disagreement, the District would continue to provide services until it reached a resolution with the parents. (10/2/07 AT 1:104-105). Explaining, Mr. Swingingson testified that "[t]he date is written there as a date. I believe its in the minutes section of the IEP to utilize that date as a point of coming back and looking at [M.K.'s] progress and [to] determine whether or not we need to add or change or modify and o f the services he is receiving. March is the progress reporting period. So let's check-in to come back and talk about how these were going."" (10/2/07 AT 1:104:10-16). The IEP expressly contemplated an addendum IEP meeting in late January 2007 to discuss a number of issues including "[M.K]' s home IBI hours." (STU 14:0173). When asked why the IEP reflected a date of March 2, 2007, Sweningson testified that the date was, "to come back and review and determine how things were going due to the fact that we were transitioning – the offer was to transition from CUSP to District." (10/2/07 AT 1:105:10-13). The ALJ concluded that the district did not deny M.K. a FAPE with respect to its offer of IBI services in the subject IEP. (PLD 31:0530:17, 0533:32-33, 0541-0542:12-13).

14. The District conducted multiple IEP meetings - the first in 2005 and two more in 2006, all of which were attended by the parents. (STU 2:0041, 0044, 0048; STU 14:0170, 0174). After the December 2006 meeting, the District prepared a detailed IEP setting forth a program that provided M.K. with 46 hours of special education services directed to his specific needs. (STU 14:0138-0175). His parents refused to agree to the IEP, refused to attend a follow-up IEP meeting to discuss their concerns and in February 2007, reiterated that they objected to the proposed IEP. (STU 17:0214, 19:0218-0220). Within three months, they initiated litigation when they filed the due process complaint that led to the hearing under review in this case. (PLD 1:0001-0005; (STU 17:0214, 19:0218-0220).

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Based on the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. This case arises from an appeal by M.K. of an adverse decision by the Office of Administrative Hearings ("OAH") dated February 5, 2008 and designated OAH CASE NO. N2007040442.

2. The Court has jurisdiction over these proceedings because M.K. timely appealed the February 5, 2008 OAH Decision, which was adverse to M.K. See 20 U.S.C.§1415(i)(2).

3. The case has been narrowed and the issues presented at the hearing on this case have been identified as the following:

Issue 1: Was the student denied a FAPE as the result of a procedural error in the conduct of a Individualized Education Program ("IEP") meetings by failing to include a general education teacher who "is, or may be, responsible for implementing a portion of the child's IEP. In resolving this issue, the court must determine whether a procedural violation occurred, and, if so, whether the procedural violation "resulted in a loss of education opportunity or seriously infringed the parents' opportunity to participate in the IEP formulation process." R.B. ex rel. F.B. v. Napa Valley Unified School Dist., 496 F.3d 932, 938 (9th Cir 2007), (quoting W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.3d 1479, 1484 (9th Cir 1992)).

Issue 2: Did the IEP prepared and presented at the December 7, 2006 IEP meeting offer M.K. a FAPE and, in particular, appropriate in-home benefits, and, if so, did the parents' rejection of the offer excuse the district from any obligation to conduct the addendum IEP meetings described in the December 7, 2006 IEP offer? In resolving this issue, the Court must consider whether the district violated the procedural safeguards of the IDEA by improperly abandoning the anticipated meetings because of the conduct of M.K.'s parents Union Sch. District v. B. Smith, 15 F3d 1519, 1526 (9th Cir 1994); Target Range, 960 F2d, at 1485

Issue 3: Assuming that Plaintiff prevails on the first two issues, is the District obligated to reimburse Plaintiffs for the sums paid to CUSP for services rendered for the benefit of M.K."

4. The Court's consideration of these issues requires it to review the decision of the ALJ in light of the applicable standard of review.

When a party challenges the outcome of an IDEA due process hearing, the Individuals with Disabilities Education Act ("IDEA") establishes the formulation of the standard for a court to review the decision of an administrative hearing officer. See Capistrano Unified School District v. Wartenberg, 59 F3d 884, 891-92 (9th Cir 1995). Section 1415 (i)(2)(B) of the IDEA provides that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." Ojai Unified School District v. Jackson, 4 F3d 1467, 1471 (9th Cir 1993). Although defendants often move under the framework of summary judgment, "the procedure is in substance an appeal from an administrative determination, not a summary judgment." Capistrano, 59 F3d at 892. "[T]he preponderance of the evidence standard *** 'is by no means an invitation to the courts to substitute their own notions of sound educational policy for that of those of the school authorities which they review.'" Capistrano, 59 F3d at 891 (quoting Board of Education v. Rowley, 458 US 176, 206 (1982)). "The Requirement that the district court receive the hearing officer's record 'caries with it the implied requirement that due weight shall be given to these proceedings." Id (quoting Rowley, 458 US at 206). As the Ninth Circuit has made clear, "[h]ow much deference to give state educational agencies *** is a matter for the discretion of the courts." Gregory K. v. Longview School District, 811 F2d 1307, 1311 (9th Cir 1987). "The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue."

Gregory K, 811 F2d at 1311 (quoting Town of Burlington v Dept of Education, 736 F2d 773, 792 (1st Cir 1984)). "The amount of deference accorded to the hearing officer's findings increases where they are 'thorough and careful.'" Capistrano, 59 F.3d at 891 (quoting Union School District v Smith, 15 F3d 1519, 1524 (9th Cir 1994)). Efforts to persuade the courts to conduct a de novo review have been rejected; the Ninth Circuit, in Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1104 n. 4 (9th Cir 207) noted that "the fact-intensive nature of a special education eligibility determination coupled with consideration of judicial economy render a more deferential approach when appropriate."

5. The Court concludes that M.K. was not denied a FAPE as a result of a procedural error in the conduct of IEP meetings by failing to include a general education teacher who "is, or may be, responsible" for implementing a portion of the child's IEP. The District must ensure that the general education teacher "be a teacher who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child." R.B., 496 F3d, at 939. The Court concludes that it is unlikely that Marsha Swinford would have been responsible to implement M.K.'s IEP. The Court, therefore, concludes that the District did not satisfy the general education teacher requirement, and committed a procedural violation of the IDEA on that basis. Nevertheless, R.B. explains that a procedural violation gives rise to a denial of FAPE only if it seriously infringes on the parents' opportunity to participate in the IEP formulation process or results in the loss of an educational opportunity for the child. Id; 20 U.S.C.§1415(f)(3)(E). Here, the record amply supports the ALJ's findings and conclusion that the participation of Swinford instead of Milner, even if it constituted a procedural error, did not seriously infringe on the parents' right to participate in the IEP process or the loss of educational opportunity for M.K. (See Factual Findings 5, 9, 10, 11, and 12).

6. In accordance with Factual Findings 5, 6, 7, 8, 11, 13, and 14, the District met its obligation of conducting IEP meetings, developing an IEP, and offering M.K. a FAPE, which included appropriate IBI services, and which the parents rejected. The district was required to do no more.

7. The Court declines to reach Student's third issue regarding reimbursement for costs associated with CUSP services provided for the benefit of M.K. because the Court has concluded that the District offered M.K. a FAPE (See Legal Conclusions 5 and 6).

DATED: 1/13/09

Judge of the US District Court

Respectfully Submitted,

DATED: December 22, 2008

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