BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT on behalf of STUDENT, v. SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2009061041

DECISION

Administrative Law Judge (ALJ) Gary A. Geren, Office of Administrative Hearings (OAH), heard this matter in San Ramon, California, on September 23, 2009.

Student was represented by Laurene Bresnik, Attorney at Law. Student's Father was present throughout the hearing. Student was not present for the hearing.

The San Ramon Valley Unified School District (District) was represented by Sarah Daniel, Attorney at Law. Karen Heilbronner, Director of Secondary Special Education for the District, was present throughout the hearing.

Student's request for due process hearing (complaint) was filed on June 18, 2009. A continuance was granted on July 15, 2009. At hearing, oral and documentary evidence were received. The matter was continued until October 6, 2009, to allow the parties to file closing briefs. Both parties timely filed their briefs, which were marked for identification as Student's Exhibit 11 and District's Exhibit 10. The record was closed and the matter was submitted on October 6, 2009.

ISSUE

Did the District deny Student a Free and Appropriate Public Education (FAPE), when it stopped reimbursing Parents for Student's after-school tutoring costs?

CONTENTIONS OF THE PARTIES

Student contends that after-school tutoring was part of his April 28, 2003 IEP, as amended on June 5, 2003, and notwithstanding several IEPs, due process actions, and settlement agreements since, is still a part of his agreed-upon program. He contends that the District therefore denied him a FAPE when it unilaterally stopped reimbursement for after-school tutoring in September 2007. Student further contends that before the District could stop making reimbursement, it was obligated to either obtain Parent's consent to do so, or obtain an order in a due process hearing allowing the District to stop making reimbursement. Since it did neither, Student concludes, District is still obliged to reimburse Parents for his after-school tutoring.

The District contends that after-school tutoring was never a part of any of Student's IEPs, and was never required or intended to provide him a FAPE. It argues that it agreed only temporarily to reimburse the tutoring in order to settle due process claims brought by parents, and that those agreements set a time when the reimbursement was to stop. It asserts that, even assuming reimbursement for after-school tutoring was once part of Student's IEP, subsequent IEPs superseded that obligation. Finally, it contends that Student's claim for reimbursement is barred by the statute of limitations.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a fourteen-year-old boy who resides with Parents within the District and attends the District's Stone Valley Middle School. He is disabled by autism, auditory processing disorder, language disorder, aphasia and dysphasia, and epilepsy (currently inactive). District personnel provided after-school tutoring for Student's 2003-2004 school year. Thereafter, District reimbursed Parents for private tutoring costs. In September 2007, the District stopped making reimbursement. Student then filed this due process hearing request seeking reimbursement from the District for $8,778 in private tutoring costs Parents incurred since September 2007.

Incorporation of After-School Tutoring Into Student's IEP

2. In order to provide a FAPE to a student, a district must, among other things, deliver services in conformity with the student's IEP.

3. On January 22, 2003, the parties participated in an Alternative Dispute Resolution (ADR) process sponsored by the Contra Costa SELPA Solutions Panel, and resolved their dispute in a document entitled "Solutions Agreement." As part of that agreement, the District promised "[a]n after-school program provided by the District, 2:30-3:55 p.m., five days/week, with a focus on curriculum/homework/pre-teaching by a

paraprofessional(s) currently assigned to work with [Student].” No ending date was stated. The parties understood that the District would provide the service by reimbursing Parents for their expenses in obtaining it.

4. On April 25, 2003, the District sent Parents a letter stating in pertinent part:

> Pursuant to our Alternative Dispute Resolution Agreement, the District will retroactively pay [Student’s] tutors for after-school tutoring from the week of January 27 to the end of the school year.

Thus, the District reimbursed Parents for their expenses in providing after-school tutoring until the end of school year 2002-2003.

5. On April 28, 2003, the District offered Student an IEP for SY 2003-2004 that did not include after-school tutoring. Father did not consent to the offer at the time. In a subsequent letter he requested that “the after-school tutoring … previously agreed to in the January 22, 2003, Alternative Dispute Resolution be reflected in the April 28, 2003 IEP." In response, on June 5, 2003, the District proposed an “Addendum to the April 28, 2003 IEP” as follows:

> As per an agreement reached in an alternative dispute resolution panel on January 27, 2003, the District will provide one hour and 25 minutes of after-school tutoring. Five days per week. This services [sic] begins 1/27/03 and will be reviewed at [Student's] next IEP meeting.

The IEP Addendum is signed, "Liz Block, Coordinator." Karen Heilbronner, the District’s Director of Secondary Special Education testified that by this addendum, after-school tutoring was added to Student's April 28, 2003 IEP.

6. In a subsequent letter on July 10, 2003, Ms. Block confirmed the addition to Student’s IEP:

> An addendum to the April 28, 2003 IEP has been written that reflects the additional after-school tutoring of one hour and 25 minutes per day, five days per week that was agreed upon in our Alternative Dispute Resolution.

7. During this time the parties agreed to mediate a disagreement regarding Student's summer 2002 and summer 2003 programs that included a dispute about whether District should reimburse Parent's Student's tutoring costs. In September 5, 2003, the parties entered into a Compromise and Release Agreement resolving that dispute. In that agreement Parents confirmed that they accepted the April 28, 2003 IEP as amended by the June 5, 2003 Addendum. The agreement states in pertinent part:

> The purpose of this Agreement is to resolve the disputes, causes of action, and claims to date concerning [Student's] education program and services. Parent's request for additional after-school services for the 2003-04 school year are not resolved herein.

The Compromise and Release agreement also provides:

> Nothing in this agreement shall be construed as an agreement to change the April 28, 2003 IEP as amended and as consented to on September 5, 2003. Any changes to that IEP must be in writing and agreed to by both parties in accordance with the law.

8. The District's claim in its closing brief that after-school tutoring "was never provided by the District as an element of [Student's] IEP program" is persuasively refuted by the plain language of the June 5, 2003 addendum to the April 28, 2003 IEP, and by Ms. Block's confirmation letter of July 10, 2003. It is apparent from those documents that after-school tutoring services had been added to Student's IEP. According to the September 5, 2003 agreement, that service was to be reviewed, like any other IEP service, at the next IEP meeting. The District's claim that the April 2003 IEP "was not amended to add tutoring as an IEP service" is contradicted by the documents themselves.

9. The District claims that after-school tutoring was added to Student's IEP solely to resolve disputes with Parents and not to provide a FAPE. Ms. Heilbronner testified that she did not attend any of Student's IEP meetings, but she did attend the SELPA Solutions Panel in 2003 where reimbursement for Student's after-school tutoring services was first agreed to. Ms. Heilbronner testified that it was her intention, at that time, to provide "some" reimbursement for after-school tutoring for a "short period" in an attempt to reach a "compromise" through the Solutions Panel process. It was never her intention that after-school tutoring services continue from year to year. She also testified that after-school tutoring services were listed on Student's IEPs so that a comprehensive, self-contained document itemizing Student's services would be available for review by District staff. Accordingly, all of Student's services were added to his IEP regardless of whether the District believed the services were necessary to provide Student with a FAPE, or whether the listed service was added to the IEP because of a compromise.

10. However, the motivation of District staff in agreeing to place after-school tutoring in Student's IEP, or to reimburse Parents for it, is irrelevant. Since the service was part of Student's IEP, the District was obliged to deliver it. There is no legal doctrine that allows a district unilaterally to cancel a service promised in an IEP on the ground that it was never thought necessary to provide a FAPE, or that it was placed in an IEP only to mollify parents.

11. The June 5, 2003 addendum to the April 28, 2003 IEP, Ms. Block's confirmation letter of July 10, 2003, and Father's subsequent consent to the IEP as amended,

establish that after-school tutoring was part of Student's IEP. The question thus becomes whether any subsequent event operated to remove the after-school tutoring service from Student's agreed-upon educational program.

The Parties' Ongoing Disagreement Over After-School Tutoring

12. On December 10, 2003, and on February 25, 2004, the District made new offers. Both offers included after-school tutoring. As was his practice, Father did not consent to the offers at the IEP meetings. Rather, he would later send the District an email consenting to some parts of the offers but stating objections to other parts. He consented to the provision of after-school tutoring by these IEPs but did not agree to any cessation of it.

13. Father testified without contradiction that in the spring of 2005 the District removed after-school tutoring from its offers. Father consented to some parts of the offers but protested the removal of after-school tutoring. A pattern developed: the District proposed to end after-school tutoring; Father protested and sought mediation and/or a due process hearing; and the District settled the dispute by promising retroactive reimbursement and allowing Father to reserve his ongoing argument that after-school tutoring was required in order to provide Student a FAPE. For example, in November 2006, Father filed a due process complaint protesting the District's removal of after-school tutoring from its IEP offers. In December 2006 that dispute was settled in another Compromise and Release Agreement in which the District promised to reimburse parents for the expenses of after-school tutoring through the end of the 2007 extended school year. Anticipating a disagreement about the subsequent school year, the agreement provided in pertinent part:

> In the event that a dispute arises regarding Student's program for the 2007-2008 school year, these tutoring hours shall not constitute any part of Student's stay put program. However, notwithstanding any other provision of this Agreement, Petitioner and Parents expressly reserve their right to contend that stay put should include tutoring services indicated on the September 5, 2003 addendum to the April 28, 2003 IEP.

14. It is apparent from the December 2006 settlement agreement and subsequent documents that, as the parties went in and out of litigation, they came to refer to Student's agreed-upon program as "stay put" or the "stay put placement." Technically, the duty of the District to respect Student's last agreed-upon placement -- to allow Student to "stay put" -- arose only when a complaint was filed, and ceased when a decision was rendered or a settlement reached that resulted in the dismissal of the complaint. However, the documents demonstrate, and Father's uncontested testimony confirmed, that the parties understood their references to "stay put" as references to Student's last agreed-upon placement, and to Father's argument that the District was obliged to provide after-school tutoring as part of that placement.

15. The District argues that a subsequent IEP of March 2, 2007, consented to by Parents, did not contain after-school tutoring, and therefore superseded the April 2003 IEP and its June 5, 2003 addendum. This assertion is not persuasive. Parents did not unconditionally consent to the March 2, 2007 agreement. Rather, Parents continued to preserve their right to obtain afterschool tutoring services for Student. This is made clear by the Compromise and Release Agreement executed by the parties on March 2, 2007, which states in pertinent part:

> However, notwithstanding any other provision of this Agreement, Petitioner and Parents expressly reserve their right to contend that stay put should include tutoring services indicated on the September 5, 2003 addendum to the April 28, 2003 IEP.

16. During these years, the parties never resolved their dispute about the need for after-school tutoring because the District avoided seeking an order in a due process hearing that would allow it to cease the service, and it settled any claim that Father brought by allowing him to preserve his argument. In this fashion Parents obtained after-school tutoring for Student at their expense, and received reimbursement from the District, until September 2007.

The District's Cessation of Reimbursement for After-School Tutoring

17. Starting in September 2007 the District refused to reimburse Parents for after-school tutoring. In October 2008 Father filed another due process complaint, alleging that the District had failed to provide or reimburse him for after-school tutoring "required by the IEP dated 4/28/03, as amended on 6/5/03." In December 2008 that complaint was also settled, in an agreement that provided in pertinent part:

> [The parties waive claims], except that Student and Parents reserve the right to pursue a claim for reimbursement for after-school tutoring services since the commencement of the 2007-08 school year, based on the continuation of the same Parent reservation of rights contained in Paragraph B.8. of the 2006 Confidential Compromise and Release Agreement … . Nothing in this paragraph prevents either party from raising any and all other arguments pertaining to the validity of the Parents' reservation of rights in either agreement, including the statute of limitations**.** This exception does not include the right to argue that such services, through the date of this Agreement, were substantively required as part of FAPE, only that such services were procedurally required.

18. The December 2008 settlement agreement is the final iteration of the documents that set forth the parties' after-school tutoring dispute. It is best described as the parties' ongoing "agreement to disagree." The record does not reveal the history or meaning of the distinction between that the parties intended to be substantive versus procedural

claims. However, the language of the agreement shows that Father adequately preserved his right to argue that the District should have been delivering after-school tutoring, or reimbursing Parents for obtaining it, since 2003, when the service was incorporated into Student's IEP.

The District's Duty to Resolve the Dispute

19. When a parent refuses to consent to an IEP, a district must continue to implement the student's previously agreed-upon program. If the district believes that implementation of all or part of an IEP to which the parent will not consent is necessary to provide the student a FAPE, it must seek resolution of the impasse by filing a request for a due process hearing and obtain an order from an ALJ allowing it to use that IEP without parental consent.

20. At no time did the District attempt to resolve its dispute with Parents over after-school tutoring by obtaining an order from an ALJ. On the contrary, it settled every attempt by Parents to do so except the instant matter. By avoiding the resolution of the dispute in due process, the District significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child. It denied them a forum in which their dispute with the District could be promptly resolved, and in which the District bore the burden of initiating the hearing, and the burdens of going forward and of proof. Instead it imposed on Parents the burdens of initiating the hearing, going forward, and proving their case if they wished to overturn the District's unilateral refusal to implement the provision of Student's IEP requiring after-school tutoring.

Statute of Limitations

21. The essence of Student's complaint is that, starting in September 2007, the District refused to reimburse Parents for their expenses in providing after-school tutoring. It was at that time that Student became aware of the facts underlying his grievance. This action was filed on June 18, 2009. The District's conduct in September 2007 is within the statute of limitations, so Parents' claim is not barred by that statute.

Amount of Reimbursement

22. The District argues that Parents failed to provide documentary proof of any expenditures by Parents to obtain after-school tutoring for Student, and that those expenditures must be proven "beyond a reasonable doubt." No such burden exists. Student’s Father credibly testified that he actually incurred after-school tutoring costs in excess of the $8,778 he now seeks. The District did not produce any evidence that the $8,778 was inaccurate. Therefore, Father’s testimony is sufficient to support the finding that Parents spent that amount.

LEGAL CONCLUSIONS

Burden of Proof

1. A party requesting relief in an IDEA administrative hearing has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The burden of proof here is on Student.

OAH's Jurisdiction

2. The jurisdiction of OAH to hear due process claims under the IDEA does not include jurisdiction over claims alleging that a school district has failed to comply with a settlement agreement, which must be pursued through a separate compliance complaint procedure with the California Department of Education (CDE). (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) However, OAH has jurisdiction to adjudicate claims alleging a denial of FAPE as a result of a violation of a settlement agreement, as opposed to "merely a breach" of the agreement that should be addressed by CDE's compliance complaint procedure. (*Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 26541.)

Duty to Implement the Provisions of an IEP

3. The duty to implement an IEP is part of the definition of a FAPE. The term means "special education and related services that –

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

A school district violates the IDEA if it is shown to have materially failed to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.)

Resolution of Disagreements Over IEPs

4. If a disagreement between a district and the parents of a student receiving special education services arises, the obligation of the district is to continue to provide those services set forth in the student's IEP and to file for a due process hearing requesting leave to implement its proposed IEP without parental consent. (Ed. Code, § 56346, subds. (d), (f).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed. (*Id.*, subd. (e).)

5. The duty of a district to file a request for a due process hearing under Education Code section 56346, subdivision (d), is mandatory, and failure to do so for a protracted period of time is a serious procedural violation of state law. (*Porter v. Manhattan Beach Unified School Dist*. (C.D.Cal., Dec. 21 2004 (Case No. CV 00-8402 GAF)) 105 LRP 40577; *Student v. Modesto City Schools* (2008) Cal.Offc.Admin.Hrngs. Case No. 2007080202.)

Placement While a Due Process Claim is Pending

6. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of this "stay put" provision is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

7. A placement intended by the parties to be temporary only is usually not a stay put placement. (See, *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.) The District substantially exaggerates this rule when it claims that any "service with specified start and stop dates" is therefore temporary and not part of Student's placement. An IEP must, by law, state the duration of a service (Ed. Code, § 56345, subd. (a)(7)), and it is common practice to propose a service that ends on the date of the next IEP meeting. The District's argument would make every such service temporary and not part of a placement. It cites no authority for that proposition. Whether a placement is temporary only is a question of the parties' intent. There is nothing in the record to indicate that Parents ever intended after-school tutoring to cease.

Procedural Violations

8. The Supreme Court in *Board of Education of the Hendrick Hudson School District v. Rowley* (1982) 458 U.S. 176, recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23*(9th Cir. 1992) 960 F.2d 1479, 1484.)

Requirement of Clear IEP Offer

9. In *Union School District v. Smith* (9th Cir. 1994) 15 F.3d. 1519, the Ninth Circuit ruled that, under the IDEA, it is the burden of the school district to make a clear IEP offer. The court explained:

> The requirement of a formal, written offer creates a clear record that will do much to eliminate the troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal specific offer from the school district will greatly assist parents in "presenting complaints with respect to any matter, relating to the ... educational placement of the child." *(Id*., p. 1526.)

Did the District deny Student a Free and Appropriate Public Education (FAPE), when it stopped reimbursing Parents for Student's after-school tutoring costs?

10. Based on Factual Findings 1 and 3 through 16 and Legal Conclusions 1 through 7, after-school tutoring became a part of Student's agreed-upon IEP in 2003. Although Parents consented to parts of subsequent IEPs, they never consented to the removal of after-school tutoring from any IEP. The District therefore denied Student a FAPE because it failed to provide a service in conformity with Student's IEP. The total amount of services denied, was substantial, so the violation was material.

11. Based on Factual Findings 17 through 20 and Legal Conclusions 6 through 9, the District committed a procedural violation of IDEA by removing after-school tutoring from Student's educational program without first obtaining a written agreement from Parents, or a ruling by OAH. Throughout this dispute, Parents expressly reserved the right to assert that the April 28, 2003 amended IEP included after-school tutoring. It was the District's obligation either to continue to implement Student's after-school tutoring service or to resolve the dispute in due process. The denial of after-school tutoring resulted in a significant deprivation of educational benefits. Moreover, the District substantially

interfered with Parents' procedural rights when it ceased providing the disputed service rather than requesting a due process hearing, as it should have done. As a consequence Parents had to bear the burden of filing this action, and assume the burden of proof. Both of those burdens should have been assumed by the District.

Remedy

12. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c)(2006); Ed. Code, § 56175; *School Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].)

13. Based on Factual Findings 17 through 22, and Legal Conclusions 6 through 9 and 12, the District unilaterally and improperly refused reimbursement to Parents from September 2007 to the present. The evidence showed that Parents spent $8,778 on such services. Reimbursement of that amount is appropriate.

ORDER

Within 30 days of the date of this order, the District shall pay Parents $8,778 as reimbursement for privately procured after-school tutoring services Parents obtained on behalf of Student.

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: Student prevailed on the sole issued presented and heard.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: November 18, 2009

/s/

GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings