

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL
DISTRICT.

OAH Case No. 2014050996

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on May 20, 2014, naming Cupertino Union School District (Cupertino).

Administrative Law Judge Margaret M. Broussard heard this matter in Sunnyvale, California, on July 17, 18, 22, and 23, 2014.

Father represented Student. Student was not present during the hearing.

Eliza McArthur, Attorney at Law, represented Cupertino. Jennifer Keicher, Cupertino Special Education Director, was present at all times during the hearing.

On July 23, 2014, at the conclusion of the hearing, the matter was continued to August 4, 2014, for the parties to file written closing arguments. On August 4, 2014, upon receipt of the written closing arguments, the record was closed and the matter submitted.

ISSUES

ISSUE 1: Did Cupertino deny Student a free appropriate public education from March 27, 2014, forward by:

- a) Failing to consider the Center for Autism and Related Disorder's (CARD) assessments during the February 25, March 11, and March 27, 2014, individualized education program team meetings¹; and
- b) Predetermining Student's offered 2014-2015 school year placement at Cupertino Middle School at the February 25, March 11 and March 27, 2014, IEP team meetings?

ISSUE 2: Did Cupertino deny Student a FAPE by conducting Student's behavioral assessment between March 4 and March 11, 2014, without parental consent?

SUMMARY OF DECISION

Cupertino considered the CARD assessment reports when developing the offer of FAPE for Student. There was no evidence that Cupertino predetermined Student's placement at the February 25, March 11, and March 25, 2014 IEP team meetings, and, Father admitted that Cupertino had permission to conduct the behavioral observation assessments conducted between March 4 and 11, 2014.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a 12-year-old boy who currently resides within the geographical boundaries of Cupertino. Student is eligible for special education under the category of autistic-like behaviors.
2. Student has attended Cupertino Middle School (CMS) since the beginning of the 2013-2014 school year. Although Student's IEP called for a full day of placement in a special day class, Student attended the special day class from August until March for only about 1.5 hours per day per parent request. CARD provided in-home applied behavior

¹ Although the prehearing conference order referenced one assessment from CARD, the evidence at hearing established that Parents provided Cupertino with two assessments from CARD that they wanted the IEP team to consider. The issue was amended to reflect both assessments.

analysis (ABA) services to Student during the 2013-2014 school year, paid for by Parent's insurance and parental co-payments.

3. Cupertino gave Parents a triennial assessment plan dated January 21, 2014. It included assessments in the following areas: academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, and adaptive/behavior. The assessment plan specifically lists observation as an alternative means of assessing Student.

Consideration of the CARD Assessments

4. Student's triennial and annual IEP team meetings took place over three dates: February 25, 2014, March 11, 2014, and March 27, 2014. The recordings of the IEP team meetings submitted into evidence are almost five hours in length.

5. CARD had completed a psychological assessment of Student in May of 2013 and produced a report sometime during the summer of 2013. This assessment was completed by Evelin Garcia, Psy.D, and Ashley Langeliers, M.A. and provided diagnostic classification, assessed current levels of functioning in the areas of cognitive, language and adaptive development and determined current levels of progress in treatment with CARD. The assessment consisted of four standardized instruments, behavioral observations, and parental interviews.

6. The assessors affirmed Student's previous diagnosis of Autism Spectrum Disorder. His non-verbal reasoning, an assessment of cognitive ability, showed difficulties in all areas. His language functioning showed a lack of expressive vocal communication, and delays in receptive language. His adaptive functioning showed delays across all adaptive domains. The report made several recommendations; however, the recommendations are not characterized as educational recommendations specifically.

7. The assessment recommended that Student would continue to benefit from 25 hours weekly of in-home ABA therapy and then recommended several areas to focus Student's interventions. The report also contained a recommendation for a referral for a speech therapy evaluation to further assess Student's communication delays as well as to determine if an augmentative communication device is appropriate. Neither assessor testified in the hearing and there was no evidence that the recommendations were designed or intended to be implemented as part of Student's educational program or whether they were designed or intended to be part of Student's home program, which is in addition to Student's educational program.

8. Although Parents acknowledged receiving the assessment in the summer of 2013, they did not provide Cupertino with the report until the day before the IEP team meeting of February 25, 2014.

9. The second CARD assessment was a progress report by Ms. Ameena Sweeting, MA, BCBA. This report was based on observations of Student in the home and clinical setting, parent interviews, a review of historical records and progress through Student's individual CARD treatment plan. The report is dated February 6, 2014. The report notes that Student's speech therapy and occupational therapy, which he receives pursuant to his IEP from Cupertino, have similar goals as CARD and also that Student's school goals are similar to CARD's goals in increasing his adaptive and daily living skills. The report discusses Student's progress towards his goals from CARD, his behavioral issues, and the lessons CARD was employing in the home. Ms. Sweeting did not testify in the hearing and there was no evidence that the recommendations in her report were designed or intended to be implemented as part of Student's educational program or whether they were designed or intended to be part of Student's home program, which is in addition to Student's educational program.

10. The second report also contained a recommendation that Student receive in home ABA therapy with supervision and parent training. This report recommended 80 hours of ABA therapy in the home and community per month and mentions nothing about the school environment.

11. Ms. Erica Mazariegos, Student's special day class teacher for the 2013-2014 school year, attended all of the IEP team meetings at issue in this case. Ms. Ota, program coordinator for Cupertino, also attended all of the meetings. Both witnesses testified that they looked over both CARD reports prior to the February 25, 2014 IEP team meeting and read them more thoroughly before the March 11, 2014 continuation meeting. Both testified credibly that they considered the reports as the offer of FAPE was developed for Student at all three IEP team meetings.

12. Ms. Sweeting attending the IEP team meeting on February 25, 2014. She and the parents participated in the meeting, giving examples of Student's present levels of performance in the home program and sharing information with Cupertino. When the IEP team discussed goals, information regarding Student's performance in the home was discussed and Parents and Ms. Sweeting gave input. The information regarding Student's present level of performance in the home program is included in the second CARD report.

13. During the IEP team meeting, Mr. Gus Wang, speech therapist for Cupertino, specifically referenced the CARD psychological report when discussing the standardized test results he obtained, noting that the results for his testing and the testing done by CARD showed similar results. The team also discussed an augmentative communication assessment referral extensively during all three meetings, as recommended in the CARD psychological assessment.

14. Ms. Patricia Strass, Cupertino Behaviorist and manager of the Comprehensive Autism Program (CAP) for Cupertino, read the CARD reports thoroughly before she attended the March 11 and March 27, 2014 IEP team meetings. When she wrote her behavioral observation report in March 2014, she specifically addressed the same areas in the

educational environment that CARD had addressed in the home environment and mentions the CARD report specifically in her recommendations.

15. The IEP team did not specifically read the reports aloud at any of the IEP team meetings. However, Ms. Mazariegos, Ms. Strass, and Ms. Ota all had copies of the report, either hardcopy or digital, with them at all of the meetings they attended. All of the witnesses Father called, who were at the IEP team meetings, testified that they considered the CARD reports when developing the IEP. No employee of CARD was called to testify.

16. The information about Student obtained from the CARD assessments is consistent with Cupertino's assessments. Many of the areas of deficit found in the CARD reports were already addressed in Cupertino's assessments and in the draft goals provided to the Parents prior to the first IEP team meeting. Parents made several requests at the IEP team meetings that Cupertino add goal areas or services based on Father's interpretation of the CARD reports. The IEP team listened to Parents' input and integrated some of the suggestions into Student's IEP and rejected others. Some of the suggestions resulted in Cupertino requesting more assessments to be able to evaluate the appropriateness of the suggestions in the educational setting.

17. Father was clearly frustrated that Cupertino did not implement all of his suggestions. However, Father did not produce any evidence that Cupertino did not consider the assessments from CARD. To the contrary, Father elicited testimony and produced evidence that showed that Cupertino team members considered the CARD reports.

Predetermination

18. Prior to the IEP team meeting on February 25, 2014, Parents sent Ms. Mazariegos an email asking for a copy of the assessment done by the school psychologist, a draft copy of the IEP and the agenda for the IEP team meeting. Ms. Mazariegos sent only portions of the draft IEP she had developed, which contained present levels of functioning, results of her assessment and proposed goals. She clearly states in the email "[p]lease let me know if you have any questions and if there is anything you would like me to consider adding or changing to the draft of the IEP before our meeting on Tuesday."

19. The recordings of the IEP team meetings showed conclusively that Cupertino solicited Parents' opinions as all parts of the IEP were developed. When the team discussed goals, Parents asked that some goals be re-worded, some be added and others removed. Cupertino made several changes to the proposed goals, based solely on the input of Parents and CARD. In the areas of speech and language, augmentative communication and gross motor, Cupertino responded to concerns raised by Parents by offering assessments and stating their intent to further discuss Parents' proposals when the assessments were completed.

20. There were extensive discussions in the IEP team meetings regarding Student's days and hours of attendance. Cupertino deferred to Parents' desired school

schedule for Student. When the IEP team discussed placement, Parents objected to the speech therapist's initial recommendation for Student to have speech therapy twice a week in a group setting. Parents wanted the service to be individual, not group. The speech therapist spent a significant amount of time explaining to Parents why he felt group speech was a more appropriate service for Student. Cupertino ended up making a placement offer that included individual speech services, solely based upon parental preference.

21. Student's teacher recommended continued placement in her SDC class. Unlike when the speech therapist made his recommendation, Parents did not speak up and ask for a discussion of alternative placements. At no time in the IEP meetings did either parent discuss any dissatisfaction with the CMS placement. After further discussion, Ms. Ota clarified that the placement offer for Student would be continued placement at CMS in the SDC class. At that point, Parents asked about any other placements in Cupertino. Parents did not express any substantive concern about continued placement at CMS, but wanted a placement closer to their home. Parents expressed three reasons for this: parental convenience for IEP team meetings, closer proximity to a medical center in case of seizure and because one of the placements was closer to Student's pediatrician. After Ms. Ota explained that placement at an elementary school would not be appropriate for Student, who was going into seventh grade, Parents were primarily concerned with asking for placement at Miller Middle School and Lawson Middle School.

22. Ms. Ota explained that the placement at Miller was essentially the same program as the program at CMS. Further, Miller did not have any openings and Student had spent the year adjusting to CMS, after having been out of school for a year, and was slowly working up to a full day. Cupertino members of the IEP team all felt that Student was adjusting well to CMS and that moving him to another campus would not be appropriate, even if Student could be placed at Miller. There was a health plan in place that Parents agreed to in case of a seizure emergency that did not require Student to be in a certain proximity to a medical center. Testimony established that Miller is about a mile further from Parents' home than CMS. All placements discussed were less than five miles from Parents home.

23. Parents also asked about placement at Lawson. This classroom uses an ABA methodology in the classroom where the students spend their days in one to one instruction with little to no group interactions. The evidence showed that Student was interested in group interactions and tried to get the attention of his peers. No Cupertino IEP team member felt that the information available to the IEP team at the time of the meeting indicated that the Lawson placement would be appropriate for Student. However, the District noted that the behavioral assessment they had proposed would include a classroom observation and an observation of Student's home ABA program, which may result in data that might lead the IEP team to consider Lawson at a future IEP team meeting. Cupertino offered to take Parents on a tour of Lawson so that they could observe the placement.

24. Father asked for more than one appropriate placement offer from Cupertino, but Cupertino's offer remained CMS. In hearing, Father conceded that Student had not had

seizures in several months and that he was no longer concerned about the distance from Student's home to placement. Father also conceded that although Lawson was closer to his home, traffic patterns actually result in the trip to CMS taking less time than the trip to Lawson. Father's testimony, the IEP team meeting recordings, and written correspondence show that he often takes contrary positions to his own earlier positions and provides contrary explanations for events. His testimony about what he said in the IEP team meeting was very different in several circumstances than the recording revealed. Father's testimony as a whole was not credible for these reasons.

25. At no point was there any evidence in testimony, the written record or in the IEP team meeting recordings that Cupertino came to the IEP team meetings with a predetermined placement offer. The evidence showed just the opposite. Cupertino listened to the parents, made changes to the IEP based on the input of Parents and the reports they shared, and discussed the appropriateness and availability of alternative placements proposed by Parents.

Student's Behavioral Assessment Conducted from March 4-11, 2014

26. Cupertino sent Parents the triennial assessment plan on January 20, 2014, and Father signed the plan on January 29, 2014, without exception. Cupertino sent Parents notice of the IEP team meeting scheduled for February 25, 2014. Ms. Ota was not involved in the development of the assessment plan or the IEP team meeting notice that went to parents to notify them of the February 25, 2014 IEP team meeting.

27. Ms. Ota testified credibly that, when she arrived at the IEP team meeting on February 25, 2014, she was surprised that Ms. Strass, had not completed a behavioral assessment and was not present at the IEP team meeting. Ms. Strass had previously attended Student's IEP team meetings and Cupertino had offered Student services on his IEP from the CAP program as part of the offer of FAPE.

28. The IEP team did not complete the IEP team meeting on February 25, 2014 and planned to reconvene to complete the meeting. Ms. Ota subsequently contacted Ms. Strass and asked her to complete a behavioral assessment (the CAP assessment) for Student prior to the next IEP team meeting. The CAP assessment Ms. Strass contemplated would consist of a record review, observations of Student in the classroom, observations of Student in his home program and an interview of Parents.

29. Ms. Strass looked at the assessment plan from January 21, 2014 and determined that the assessment plan did not contain a provision for observations in the home environment specifically. In an abundance of caution, Cupertino sent Parents an assessment plan for a behavior assessment for the home program and parental interview specifically noting ABA in the description dated March 3, 2014.

30. In response to the March 3, 2014 assessment plan, Father sent an email to Cupertino staff that indicated that Student was busy until March 15, 2014, due to "medical

and other pressing engagements.” He also noted that Student’s medication for his seizure disorder was under transition to another medication, but gave no indication that the medication change had anything to do with the assessment of Student. Student continued to attend school at this time. Father variously characterized this email as not giving permission for the CAP assessment in its entirety, not giving permission for the CAP assessment until March 15, 2014, indicating that the home part of the assessment should not begin until after March 15, and indicating that Student should not be assessed at all until March 15 because of his medication change. Father later claimed that Student’s medication change would not be completed until well after March 15, 2014. Father’s testimony regarding his email was not persuasive and contradictory.

31. Ms. Strass completed the classroom observation portion of her assessment between March 4 and 11, 2014. She had not received the signed March 3, 2014 assessment plan back and did not complete any of the home portions of her assessment. At the IEP team meeting on March 11, 2014, she passed out the classroom observation portion of her assessment and began to present it to the team. Father stopped her and indicated at that time, for various reasons, that the classroom observations of Student should not have taken place and that she did not have permission to complete them.

32. Father admitted in his rebuttal testimony at the very end of the hearing that he believed that the January 21, 2014 assessment plan he signed included permission for the CAP behavioral assessment at the time he signed it. As Student’s Issue Two is solely whether parental consent was obtained for the CAP assessment, Father’s admission that the January 21, 2014 signed assessment plan gave consent for the CAP assessment renders unnecessary any further detailed discussion of the circumstances surrounding the behavioral assessment.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further

² Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

education, employment, and independent living; and (2) to ensure that the rights of children with disabilities and their parent are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. The IDEA affords parent and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student bears the burden of proof.

ISSUE 1(a): Consideration of Private Assessment

3. Student contends that Cupertino did not consider the CARD assessments during the IEP team meetings. Cupertino contends that the assessments were considered by the IEP team members when developing Student's IEP.

4. The results of an evaluation obtained by the parent at private expense must be considered by the school district, if the evaluation meets public agency criteria, in any decision made with respect to the provision of FAPE to the child. (34 C.F.R. 300.502(c)(1).)

5. Student had the burden to show that Cupertino did not consider the CARD assessments at the February 25, March 11, and March 27, 2014 IEP team meetings. Student based his contention, at least in part of the hearing, on the fact that Cupertino did not read the CARD reports aloud in the IEP team meetings. Student, however, provided no support for the contention that to consider an independent assessment, a district must read the report aloud in the meeting.

6. The evidence conclusively showed that Cupertino considered the CARD assessments at the IEP team meetings. Ms. Sweeting, the author of one of the reports, participated in the February 25, 2014 IEP team meeting. She gave input based upon her report regarding Student's present levels of performance. Mr. Wang referenced the CARD psychological report when discussing his speech and language report and noted the consistency with his assessment results. Ms. Mazariegos, Ms. Ota and Ms. Strass all testified that they considered the report. Ms. Strass' CAP assessment report refers specifically to the CARD progress report. Parents gave input in the IEP team meetings to the team from the CARD reports, goals were altered from their draft versions based upon information in the CARD reports, and an Augmentative Communication assessment was proposed as recommended in the CARD psychological report.

7. Finally, the CARD reports were consistent with the information Cupertino had regarding Student and his unique needs and present levels of performance. The CARD progress report reflects the similarities in the goals between the programs. This shows that the information contained in the reports was information known and considered by the IEP team, as it was essentially similar with Cupertino assessments and present level information.

8. The evidence overwhelmingly established that Cupertino considered the reports from CARD and there was no denial of FAPE to Student.

ISSUE 1(b): Predetermination

9. For IEP team meetings, predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs when a school district has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified Sch. Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 244-245 [nonpub. Opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

10. Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 503 F.Supp.2d 1206, 1216.)

11. Student had the burden to show that Cupertino predetermined his IEP. The evidence in this case conclusively showed that Cupertino did not come into the IEP team meeting with a take it or leave it offer. The evidence, including the IEP meeting recordings, shows that Parents were involved in the IEP development process as participants throughout the meetings. Parental input was sought regarding proposed goals even before the meeting began. Once the meeting began, Parents gave input regarding present levels of performance. Goals were altered based upon parental input and the offer of speech and language services was changed from group to individual based solely on parental request.

12. Student contends that predetermination occurred when Cupertino made the offer for Student to continue at CMS without first discussing several placement options.

However, Student provided no legal support for the position that a district must offer a variety of appropriate placement options.⁴ In fact, Student was already in the CMS placement and doing well transitioning into the program. At no time in the IEP team meeting did Parents express any dissatisfaction with the CMS program. After the CMS placement offer was made, and Parents inquired about other placements, Cupertino discussed the options at length and explained why the placements were not being offered at that time.

13. Finally, Cupertino did not cut-off discussion regarding other placement options at future IEP team meetings. Cupertino specifically noted that after the behavioral assessment was completed, the team would have more information to consider the Lawson placement, but that the information at the time did not indicate that the Lawson placement would be appropriate.

14. The IEP offer for the 2014-2015 placement was not predetermined. Parents fully participated in the IEP development process, Cupertino considered, but rejected other placement options, and there was no evidence that Cupertino came to the meeting with a “take it or leave it” offer. Therefore, there was no denial of FAPE based upon predetermination.

ISSUE 2: Consent to Assess

15. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his/her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3),(c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).)

16. Student complains that the CAP assessment, which consisted of behavioral observations by Ms. Strass from March 4-11, 2014, was done without parental permission. Father admitted that the assessment plan from January 21, 2014, which he signed, gave permission for this assessment. Therefore, there was no denial of FAPE.

ORDER

All Student’s requests for relief are denied.

⁴ Contrary to Student’s contention, in *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand.

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. Cupertino prevailed on all issues heard and decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: August 15, 2014

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings