

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

In the Matter of:

STUDENT,

Petitioner,

v.

SAN JOAQUIN COUNTY OFFICE OF
EDUCATION and RIPON UNIFIED
SCHOOL DISTRICT,

Respondents.

OAH CASE NO. N 2007020542

AMENDED DECISION¹

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on September 17 through 21, 2007, in Stockton, California.

Mother represented Student. Student's Father and Mother's Uncle attended portions of the hearing.

Rodney Levin, Attorney at Law, represented the San Joaquin County Office of Education (SJCOE). Sandy Kludt, Assistant Superintendent, Kathleen Skeels, Special Education Division Director, and Dorian Rice, Program Administrator, attended the hearing.

Peter Sturges, Attorney at Law, represented Ripon Unified School District (District). Camille Taylor, District's Director of Special Education, also attended the hearing.

Student's second amended due process hearing request was filed on April 17, 2007. OAH granted a continuance on May 23, 2007. At the hearing, oral and documentary evidence were received. The record was held open for the submission of closing briefs,

¹ This decision was amended to correct a paragraph numbering error found in the original decision.

which were timely filed on October 5, 2007. The record closed and the matter was submitted on October 5, 2007.

ISSUES²

1. Did the SJCOE fail to provide Student with a free, appropriate public education (FAPE) during the 2005-2006 and 2006-2007 school years (SY) by:
 - A. allowing a classroom aide to engage in inappropriate behavior, which interfered with or prevented Student from receiving educational benefit?
 - B. failing to provide occupational therapy (OT) consultation sessions, and by failing to convene an IEP team meeting to review those sessions, based on the individualized education program (IEP) addendum dated April 18, 2006?
 - C. failing to provide speech and language (SL) services and consultation after Student was withdrawn from school in January 2007?
2. If the SJCOE failed to provide Student with a FAPE, did the District fail to provide Student with a FAPE during the 2006-2007 SY by failing to ensure that Student received the special education and services required by her IEP?

PARTIES' CONTENTIONS

Student contends that, among other things, Virginia Castro, the classroom aide: displayed inappropriate affection, including physical touching in violation of the "Circles" program that was a part of Student's daily program; learned and revealed confidential personal information that was part of a daily behavior report (DBR) between the classroom teacher and Mother, which prevented Mother from fully participating in the DBR (sharing information as to Student's activities at home); and interfered with the instructions and efforts of various staff members, including Meghan Harrison, Student's one-to-one aide, by discouraging them from working with Student. Student contends that Ms. Castro's conduct caused tension and friction in the classroom, which interfered with the provision of services to Student due to the staff's lack of comfort (including at least one staff member's belief that her job was at risk). Student also alleges that the SJCOE failed to provide Ms. Castro with the medical training for Student's numerous and serious medical needs, which was necessary for Ms. Castro to serve as Student's substitute one-to-one aide.

Student contends that, in about January 2007, due at least in part to Ms. Castro's inappropriate conduct, Student could no longer attend the SJCOE school. However, Student

² The ALJ has slightly rephrased the issues and contentions for purposes of clarity and organization.

further alleges that, at an IEP team meeting on January 16, 2007, SJCOE verbally agreed to continue to provide Student's SL services, as long as Mother transported Student to the services. Student contends only one such SL session occurred. Mother contends that, when she contacted Cynthia Downs, Student's SL pathologist, to arrange additional SL sessions, Ms. Downs told her that she was no longer allowed to talk with her.

Student acknowledges that the last agreed-upon and implemented IEP is dated October 18, 2005, with an IEP addendum on April 18, 2006, which added three 50-minute sessions of OT consultation. However, Student contends that the SJCOE failed to comply with the IEP addendum by failing to provide the three OT consultations, and by failing to convene an IEP team meeting to review the OT consultations.

Student contends that Mother called Ms. Taylor, District's special education director, as well as Leo Zuber, the District superintendent, and told them about the SJCOE's failure to provide Student with a FAPE. Mother also wrote letters to make the District aware of the SJCOE's failure to provide a FAPE. Student alleges that the District failed to appropriately investigate and remedy the SJCOE's failures.

Student seeks an order preventing Ms. Castro from any involvement in Student's education, as well as compensatory SL and OT services

SJCOE asserts, among other things, that: (1) Student's claims regarding Ms. Castro are baseless; (2) Student received the OT sessions noted in the IEP addendum of April 18, 2006; (3) no OT consultation review was offered; and (4) Student received the SL services called for in her IEP until she was unilaterally removed from school in January 2007. District asserts that it took proper action to follow up on Mother's concerns, including phone calls and attendance at the January 2007 IEP, and that, based on its follow-up, it determined that Student was receiving appropriate services.

FACTUAL FINDINGS

Background Facts

1. Student was born November 4, 1985, and lives with her parents within the District's boundaries. The parties do not dispute that Student is eligible for special education and related services, and that Student has serious medical needs, including seizures. Student attended a SJCOE special day class for severely disabled young adults at the Manteca Community School until Mother unilaterally removed her in mid-January 2007.

2. On October 18, 2005, the IEP team agreed to provide Student with, among other things, two 30-minute sessions of SL services per month at the Manteca Community School. Mother signed her consent to the IEP. This remains the last agreed-upon and implemented IEP, with the addendum of April 18, 2006, discussed below. Mother did not

consent to the IEP proposed in the IEP team meetings held on December 6, 2006, and January 16, 2007, the latter of which was recorded on two compact discs.

Classroom Aide

3. Local education agencies must offer pupils a FAPE. Specifically, each pupil's IEP must be designed to meet the pupil's unique needs and be reasonably calculated to provide the pupil with some educational benefit; then, the services provided to the pupil must comport with the pupil's IEP.

4. Student's primary contentions are that Ms. Castro interfered with or prevented Student from receiving educational benefit by inappropriately hugging Student, and by engaging in back rubs with Student.

5. Several credible witnesses established that Student was an affectionate, happy person who attempted to hug others, including peers and SJCOE staff members. Jennifer Bauer, Student's teacher, described Student as the "hugger" of the class. However, the witnesses established that the hugs were "sideways" hugs, which essentially consisted of putting an arm around another person's shoulders. The IEP of December 6, 2006, noted that Student "needs to keep working [on] appropriate touching with peers and staff in [the] school setting." As a result, the evidence demonstrated that Student was the initiator of hugs in the classroom, not only with Ms. Castro, but with other classroom staff as well as the pupils in the classroom.

6. The evidence also demonstrated that any back rubs were initiated by Student, and consisted of her flattening her hand to make a circular motion across the shoulder blade area. Ms. Castro did not think the back rubs were appropriate. As a result, when Student attempted to rub her back, she re-directed Student – as did other staff, when Student attempted to rub their backs.

7. Student also claims that Ms. Castro interfered with the work of Meghan Harrison, Student's one-to-one aide, by assisting Student when Ms. Harrison was attempting to have Student work independently. At the hearing, Ms. Castro persuasively established that she did not interfere with Student's independent work time. Ms. Castro was not specifically aware of Ms. Harrison's efforts in having Student work independently, but she saw Ms. Harrison step away from Student in the classroom, and saw Student working independently in the classroom. About once or twice a week, Ms. Harrison would step away from Student to "re-group," because she experienced tension as a result of not getting along with another classroom aide. During these times, Ms. Bauer would step in to console Ms. Harrison or to work with Student. Also, because Ms. Castro knew sign language, her classroom time was occupied by working with a deaf pupil. There is no evidence that Ms. Castro interfered with Student's educational progress by inserting herself into Student's independent work time.

8. Student also contends that Ms. Castro learned and revealed confidential personal information that was part of a daily behavior report (DBR) between the classroom teacher and Mother, which prevented Mother from fully participating in the DBR program (regarding sharing information as to Student's activities at home). However, there is no evidence that any personal information that Ms. Castro gained by seeing Student's DBRs interfered with the provision of a FAPE to Student. Moreover, the DBRs from the 2006-2007 SY reflect that Mother continued to put a variety of personal information in the DBRs.

9. Student also asserted that Ms. Castro inappropriately called Student "Babe," a nickname which she used only for Student. Ms. Castro admitted that she used the nickname "Babe" only for Student in the classroom, but pointed out that Student first used the term when speaking to her, trying to get her attention, during the 2004-2005 SY. However, Ms. Bauer used the nickname "Sunshine" for all of the pupils in her class, and Ms. Harrison used nicknames for Student. Ms. Bauer also testified that other classroom aides had pet names for pupils in the class. As a result, there is no indication that the use of a nickname for Student interfered with Student's educational progress or otherwise denied Student a FAPE.

10. Student also claims that Ms. Castro made inappropriate comments to the effect that Student had a "cute little figure." At the hearing, Ms. Castro persuasively established that she had not made such statements. Instead, Ms. Castro once commented that Student had a tiny figure, in the context of a discussion that the type of jeans Student was wearing were designed for people with a tiny figure. Ms. Castro also complimented Student's attire at times, "What a cute top you have on today." Hence, there is no evidence that Ms. Castro made inappropriate comments to Student, or that any comments interfered with Student's educational progress or otherwise denied Student a FAPE.

11. Student also alleges that Ms. Castro did not have the requisite medical training to serve as a substitute one-to-one aide for Student. Apparently, the source of the allegation is a January 2007 letter Mother received from the SJCOE attorneys, noting that Ms. Castro would be utilized as a substitute one-to-one aide to Student, if Student's assigned one-to-one aide was unavailable. However, in about April 2006, Gayle Ubaldi, the school nurse, trained Ms. Castro on Student's seizure protocol. Ms. Castro knew that she was to call the school nurse if Student's cecostomy tube came out. Moreover, it is not clear that Ms. Castro ever served as Student's one-to-one aide. Ms. Harrison and Ms. Bauer re-scheduled their lunch times at Mother's request to ensure that Ms. Castro would not be alone with Student.

12. Mother's devotion to Student's education and rights is unquestioned, particularly in light of the efforts Mother has made to protect Student's education and rights. However, Mother's testimony was not entirely credible. For example, Mother testified that she did not have a "history" with or a vendetta against Ms. Castro. However, Mother detailed the events that had occurred between her and Ms. Castro over the years that they had known each other. Furthermore, in a September 2006 letter, Mother expressed her "extreme resentment" at having to recount her allegations in a letter, asked that Ms. Castro be fired "with a serious recommendation for psychiatric and/or spiritual counseling," and alleged that Ms. Castro had gone to "unnerving, scary and bizarre" lengths as she "tried to define an ugly

fabricated reputation to attach to [Student and her family].” Mother wrote that Ms. Castro had an “unhappy home li[fe],” and called Ms. Castro a “miserable wom[a]n.” About eight minutes and 20 seconds into the first compact disc recording of the January 2007 IEP team meeting, Mother stated that the only way Ms. Castro would work with Student would be over Mother’s “cold, dead body.”

13. Student’s allegations are also based on the testimony of Ms. Bauer and Ms. Harrison. However, Ms. Bauer and Ms. Harrison are generally not credible as witnesses, due in part to their biases in favor of Mother. Both Ms. Bauer and Ms. Harrison characterized Mother as a friend. Student’s DBRs note that Ms. Bauer participated in Student’s family activities outside of school time. Ms. Harrison became Student’s one-to-one aide based on Mother’s request. Later, Ms. Harrison obtained a position with Pacific Care Homes providing respite care to Student at home. At Mother’s request, both Ms. Harrison and Ms. Bauer wrote letters to support Mother’s allegations regarding Ms. Castro. Ms. Harrison wrote a second letter because Mother “needed proof” as to the situation between Ms. Castro and Student. When Ms. Harrison asked Mother why she was to write a letter, Mother told her that she (Mother) was asking anyone who had a conflict with Ms. Castro to write a letter about it. Ms. Bauer complained about the asserted situation between Ms. Castro and Student only when Mother brought it to her attention.

14. Another example of Ms. Bauer’s lack of credibility is her testimony that, by the time of the April 2006 IEP team meeting, the alleged inappropriate physical contact between Ms. Castro and Student had been occurring for months. Ms. Bauer claimed that she did not mention the alleged inappropriate physical contact during the IEP team meeting because she did not want to “involve” Student’s family. This testimony is not credible, given Ms. Bauer’s friendship with Mother, and Mother’s involvement in raising allegations against Ms. Castro, and in seeking the support of others while doing so.

15. Ms. Bauer and Ms. Harrison are also generally not credible witnesses because of conflicts between their testimony and the letters they wrote at Mother’s request. Neither of the first letters written by Ms. Bauer or Ms. Harrison mentioned hugs or back rubs. However, Ms. Harrison’s second letter asserted that Ms. Castro hugged Student, and Ms. Harrison testified that this occurred about two to four times per day. At one point, Ms. Bauer testified that Ms. Castro engaged in inappropriate physical contact with Student about two to three times per day, and that she re-directed Ms. Castro. Ms. Bauer’s second letter asserts that Ms. Castro “shower[s] [Student] with attention and affection” when Mother is not present. However, Ms. Bauer also testified that she did not recall Ms. Castro initiating hugs with Student. On the IEP of December 6, 2006, Ms. Bauer noted that Student “greet[s] staff and friends correctly.”

16. Ms. Bauer and Ms. Harrison are also generally not credible witnesses because they are prejudiced against the SJCOE. Ms. Harrison lost her job when Mother withdrew Student from school. The SJCOE reprimanded Ms. Bauer because, while she was Student’s teacher, she created a legal conflict of interest by providing respite care to Student at Student’s home, as a paid employee of Pacific Care Homes. At the end of the 2006-2007

SY, the SJCOE did not retain Ms. Bauer as a SJCOE teacher. Subsequently, Ms. Bauer received Mother's assistance to return to Pacific Care Homes, providing respite care for Student.

17. Several witnesses, including Ms. Bauer and Cynthia Downs, Student's SL pathologist, established that Student was a good pupil who received educational benefit from the special education and related services that she received. In addition, Student received "Good" ratings on almost all of the DBRs for the 2006-2007 SY except for an occasional "Excellent" or "Satisfactory" rating. Ms. Downs established that Student had met one of her goals, in that Student had progressed from sequencing two pictures to four pictures, along with telling a story. Student would not have made such progress and received such positive ratings had the classroom situation been as Mother, Ms. Bauer, and Ms. Harrison claimed—a confusing, tense, and frustrating place where inappropriate behaviors and language were commonplace and where Ms. Castro interfered with Student's independent work time.

18. As noted above, Student failed to prove that the inappropriate behavior she alleged actually occurred, or that Ms. Castro inappropriately interfered with Student's special education and related services. In addition, SJCOE proved that Student accessed her curriculum and received educational benefit.

The Provision of OT to Student

19. In March 2006, Janelle Vella, a SJCOE occupational therapist, assessed Student. Ms. Vella found that Student had her own way of doing things, which was not necessarily delayed or inappropriate. For example, most people use a tripod grasp to write. Student did not use a full tripod grasp, but the grasp she used allowed her to write. Ms. Vella did not recommend OT services for Student.

20. At the April 2006 IEP addendum team meeting, Ms. Vella explained her assessment report. However, Mother was concerned that Student needed OT services. As a result, the team agreed that Student would receive one 50-minute session of OT consultation/collaboration per month for the next three months. Mother signed her consent.

21. The first OT consultation/collaboration session occurred in May 2006. Ms. Vella walked with Student and her one-to-one aide for less than an hour during a class outing. Ms. Vella talked with the one-to-one aide about ways to reduce the level of cueing and prompting Student required. Ms. Vella also contacted Ms. Bauer, resulting in a discussion of Student's pencil grip and self-help skills on items such as fasteners.

22. The second OT session occurred in June 2006. Ms. Vella spent about two hours developing an exercise program Student could do at home with her family over the summer break. Ms. Vella called Mother and they talked about the program and other issues for at least 30 minutes.

23. Student did not attend summer school in 2006 due to several surgeries.

24. The third OT session occurred in September 2006, when Ms. Vella visited Student's classroom. Ms. Harrison, Student's new one-to-one aide, put Ms. Vella and Student in a room off of the classroom, but did not stay to watch the direct OT services that Ms. Vella provided to Student. The session lasted for 30 to 45 minutes. Afterwards, Ms. Vella talked with Ms. Harrison for about 10 to 15 minutes. Ms. Vella spent about 10 to 15 minutes writing notes about the session, in part for any future occupational therapist who might work with Student. Ms. Vella left her employment with the SJCOE at the end of September 2006.

25. At the IEP team meetings in December 2006 and January 2007, the team reviewed Student's OT services.

26. The OT consultation and collaboration services provided to Student by SJCOE comported with the SJCOE offer to Student in the IEP addendum of April 18, 2006. Any delay in providing the third session was not due to a SJCOE failure, but was rather due to Student's surgeries in the summer of 2006. The SJCOE appropriately reviewed Student's OT services during the December 2006 and January 2007 IEP team meetings.

The Provision of SLT to Student

27. The parties do not dispute that Student required SL services. The parties agree that the last agreed-upon and implemented IEP is dated October 18, 2005, (with the OT addendum of April 2006, as discussed above), which called for Student to receive, among other things, two 30-minute sessions of SL services per month at the Manteca Community School. The parties do not dispute that Student received the SL services she was due until Mother unilaterally withdrew Student in mid-January 2007.

28. Student contends that, at the January 2007 IEP team meeting, the SJCOE verbally agreed to continue to provide SL services to Student, as long as Mother transported Student to the services. Student contends that only one such session of SL services occurred, and when Mother contacted Ms. Downs to arrange addition sessions of SL services, Ms. Downs told her that she was no longer allowed to talk with her.

29. The SJCOE argues that the October 2005 IEP dictated that Student was to receive SL services at the Manteca Community School, and that Student's removal from school essentially prevented Student from receiving SL services.

30. As noted above, the January 2007 IEP team meeting was recorded on two compact discs, which the parties agreed to admit into evidence. About 11 minutes into the recording, Mother stated her intent to keep Student out of class until a "full investigation . . . is completed" regarding Mother's allegations against Ms. Castro. About 22 minutes into the second compact disc recording, the IEP team discussed SL therapy for Student, in light of the fact that Student would not be attending school. The discussion lasted several minutes, in order to arrange for the provision of SL services to Student outside the school setting. Mother agreed to transport Student to a school setting, or to other settings – such as a

restaurant – where the SL services could be provided. Ms. Downs agreed to a lunch meeting with Mother and Student the day after the IEP team meeting.

31. Ms. Downs met with Mother and Student, and provided them with SL materials. This was Ms. Downs's second SL session with Student in January 2007, and it lasted about 60 minutes. Because there was not sufficient time for Ms. Downs to explain all of the SL materials, they discussed potential sites for future meetings.

32. However, at a subsequent SJCOE monthly staff meeting, Ms. Downs asked Ms. Skeels and Brandi Brunni, Student's program administrator, about continuing to provide SL services to Student outside the school setting. Ms. Skeels and Ms. Brunni told Ms. Downs not to speak with Mother. As a result, when Mother called Ms. Downs to follow up on their conversation regarding additional SL services, Ms. Downs told her that she was no longer allowed to speak with her.

33. As noted in the October 2005 IEP, Student was to receive SL services for two 30-minute sessions per month. However, the SJCOE prohibited Student's SL pathologist from communicating with Mother. As a result, the SJCOE failed to provide Student with a FAPE by failing to provide Student with the SL services that she was due after she was withdrawn from school. As discussed below, compensatory education is appropriate to remedy this FAPE denial.

District's Response to Student's Complaints

34. Mother contends that the District failed to provide Student with a FAPE during the 2006-2007 SY by failing to ensure that Student received the special education and services called for in her IEP. Mother's contention is predicated upon her allegation that the SJCOE failed to provide Student with a FAPE, coupled with Mother's reports to the District about the SJCOE's alleged failures, and Mother's allegation that the District failed to properly investigate her reports. It is unclear what procedural violation Mother is alleging against the District, since there is no statutory or regulatory obligation to investigate imposed upon school districts. Furthermore, as noted above, the SJCOE provided a FAPE to Student, except as to the provision of SL services after Student was withdrawn from school.

35. In any event, the District properly responded to and investigated Mother's complaints regarding the alleged failure of the SJCOE to provide Student with a FAPE. In the fall of 2006, when Mother was not satisfied with the SJCOE response to her complaints, she contacted Ms. Taylor, the District's special education director, and Leo Zuber, the District superintendent, who forwarded Mother's inquiries to Ms. Taylor. Ms. Taylor responded to all of Mother's phone calls.

36. As a result, Ms. Taylor contacted several SJCOE personnel. For example, Ms. Skeels explained the SJCOE process to Ms. Taylor, and told Ms. Taylor that the SJCOE had investigated Mother's complaints, including SL services, OT, and personnel issues. Ms.

Taylor noted that SJCOE had “extensive documentation.” Ms. Taylor was satisfied with SJCOE’s explanations of the actions it was taking in response to Mother’s complaints.

37. Ms. Taylor also agreed to attend the December 2006 IEP team meeting. However, a scheduling conflict arose, so Ms. Taylor secured Mother’s permission to miss that meeting. Ms. Taylor attended the January 2007 IEP team meeting. Ms. Taylor believed that the SJCOE was offering appropriate placement and services to Student, and that Student’s needs were being met. As noted above, at the January 2007 IEP team meeting, Mother and Ms. Downs arranged an out-of-school meeting related to the provision of SL services to Student. Subsequently, the SJCOE prohibited Ms. Downs from talking to Mother. It is not clear whether the District knew about the prohibition on communication. This matter was filed on February 20, 2007, about a month after the January 2007 IEP team meeting.

38. District did not violate Student’s right to a FAPE. Rather, the District appropriately researched and responded to Mother’s complaints about the SJCOE placement and services. There was no evidence that District was aware of or condoned the SJCOE’s prohibition on communication between Ms. Downs and Mother.

Remedy

39. As described in Legal Conclusion 8, an award of compensatory education may be appropriate when a local education agency violates the right of a disabled pupil to receive a FAPE. Compensatory education is an equitable remedy. Relief must be calculated to provide the educational benefit that would likely have accrued from the special education services that the school district should have provided. The conduct of both parties must be evaluated when determining what, if any, relief is appropriate.

40. As noted in Factual Findings 27 through 32, the SJCOE failed to provide Student with a FAPE by failing to provide Student with two 30-minute sessions of SL services per month after she was withdrawn from school. Instead, the SJCOE only provided the second January 2007 session of SL services before prohibiting any further communication between Ms. Downs and Mother. Given Mother’s willingness to transport Student to any one of a variety of settings to ensure that Student would continue to receive SL services, the SJCOE’s conduct was unreasonable. Furthermore, given the severity of Student’s disabilities, an award of more than one-to-one is appropriate, in order to truly remedy the lack of SL services for approximately the last nine months.

41. As a result, the SJCOE shall provide Student with 18 hours of SL services within 9 months of the date of this decision.

LEGAL CONCLUSIONS

Foundational Legal Principles

1. Student has the burden of proving the essential elements of his special education claims. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed 2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400 et al.;³ Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) "Related services," known in California law as Designated Instruction and Services (DIS), means transportation and other developmental, corrective and supportive services that may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

For the 2005-2006 and 2006-2007 School Years, did the SJCOE fail to provide Student with a FAPE by allowing Ms. Castro to interfere with or prevent Student from receiving educational benefit by engaging in inappropriate behavior?

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Ed. of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [*Rowley*].) However, Student does not allege any procedural violations.

4. Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

5. The second prong of the *Rowley* test analyzes substantive appropriateness, specifically, the level of instruction and services that must be provided to a pupil with disabilities to satisfy the IDEA's requirements. The *Rowley* Court determined that a pupil's IEP must be designed to meet the pupil's unique needs, be reasonably calculated to provide the pupil with some educational benefit, and comport with the pupil's IEP. (*Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) A school district must offer a program that is reasonably

³ All statutory references are to the Individuals with Disabilities Education Act (IDEA), Title 20 of the United State Code, unless specifically noted otherwise.

calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

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. (*Rowley, supra*, 458 U.S. at pp. 198-200; see *Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.) Rather, the *Rowley* Court held 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. (*Rowley, supra*, 458 U.S. at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

6. As determined in Factual Findings 1 through 16 and 18, as well as Legal Conclusions 1 through 5, Student failed to demonstrate that Ms. Castro engaged in inappropriate behavior, or that Ms. Castro interfered with Student's educational placement and services. Ms. Castro did not initiate any hugs with Student, re-directed Student when Student attempted to hug or give back rubs to her, and did not make inappropriate comments regarding Student's anatomy. Ms. Castro did not interfere with Student's independent work time. There is no evidence that any personal information that Ms. Castro gained by seeing Student's DBRs interfered with the provision of a FAPE to Student. In addition, if Ms. Castro ever served as Student's substitute one-to-one aide, she was medically trained as to Student's seizure protocol, and knew to call the school nurse if Student's cecostomy tube came out. As determined in Factual Finding 17, Student received educational benefit, and made educational progress, during the 2005-2006 and 2006-2007 school years. Accordingly, SJCOE provided Student with a FAPE during the 2005-2006 and 2006-2007 school years.

For the 2005-2006 and 2006-2007 School Years, did the SJCOE deny Student a FAPE by failing to provide OT consultation sessions, and by failing to convene an IEP team meeting to review those services, based on Student's IEP?

7. As determined in Factual Findings 19 through 26, as well as Legal Conclusions 1 through 5, the OT consultation and collaboration services provided to Student by SJCOE comported with Student's IEP Addendum dated April 18, 2006. Ms. Vella provided three sessions of OT consultation/collaboration between May and September 2006. Any delay in providing the third and final OT consultation session was not due to a failure on the part of the SJCOE, but was rather due to Student's surgeries in the summer of 2006. Although the IEP addendum did not require an IEP team meeting to review the OT services, the SJCOE appropriately reviewed the OT services at the next scheduled IEP team meeting. As a result, SJCOE provided Student with a FAPE as to OT consultation services.

For the 2006-2007 SY, did the SJCOE deny Student a FAPE by failing to provide the SL services and consultation called for in Student's IEP, pursuant to a verbal agreement at the January 2007 IEP team meeting, after Student was withdrawn from school in January 2007?

8. As noted in Factual Findings 27 through 33, after January 2007, the SJCOE failed to provide Student with a FAPE by failing to provide Student with the two 30-minute SL services per month to which she was entitled after she was withdrawn from school. Instead, the SJCOE only provided one session of SL services before prohibiting any further communication between Ms. Downs and Mother. As a result, the appropriate remedy is an award of compensatory SL services to Student.

9. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, citing *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief." (*Student W.*, *supra*, 31 F.3d at p. 1497; see also *School Committee of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [equitable considerations are relevant in fashioning relief].) "The conduct of both parties must be reviewed to determine whether relief is appropriate." (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1486; see also *Student W.*, *supra*, 31 F.3d at p. 1496.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

10. As noted in Factual Findings 39 through 41, the SJCOE unreasonably prohibited communication between Ms. Downs and Mother and, in so doing, prevented Student from receiving the SL services to which she was entitled. This is particularly true in light of Mother's willingness to transport Student to any one of a variety of settings to ensure that Student would continue to receive SL services. Furthermore, the severity of Student's disabilities justifies an award of compensatory education at greater than a one-to-one ratio of the approximately nine hours of SL services that Student did not receive between February 2007 and the present. As a result, the SJCOE shall provide Student with 18 hours of SL services within nine months of the date of this decision.

For the 2006-2007 SY, did the District deny Student a FAPE by failing to ensure that Student received the special education and services, by failing to address Mother's telephonic and written complaints regarding the SJCOE's alleged failures?

11. Based on Factual Findings 34 through 38, as well as Legal Conclusions 1 through 8, District did not violate Student's right to a FAPE. Rather, the District appropriately researched and responded to Mother's complaints about the SJCOE services. There was no evidence that District was aware of or condoned the SJCOE's prohibition on communication between Ms. Downs and Mother.

ORDER

Student's request for relief as to SL services is granted. The SJCOE shall provide Student with 18 hours of SL services within nine months of the date of this decision. Student's other requests for relief are denied.

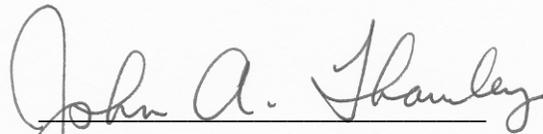
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on Issue 1c. SJCOE prevailed on Issues 1a and 1b. The District prevailed on Issue 2, the only other issue in this matter.

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: November 8, 2007



JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings