

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SAN BENITO HIGH SCHOOL DISTRICT.

OAH CASE NO. 2008070626

DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on October 6-9, 2008, in Hollister, California.

Attorney Tracy Tibbals represented San Benito High School District (San Benito). Karen Schroder, Director of Student Services, attended the hearing on the District's behalf.¹

Attorney Christian M. Knox represented Parent and Student. Student was present the morning of the first hearing day. Student's mother was present during the entire hearing.

Evidence was received on October 6-9, 2008. Closing briefs were received on October 20, 2008. San Benito's brief was marked as Exhibit 33. Student's brief was marked as Exhibit 34. Thereafter the record was closed, and the matter was submitted for decision.

ISSUES²

1. Did San Benito deny Student a free appropriate public education (FAPE) during the 2006-2007 and 2007-2008 school years?

¹ Hollister School District was originally a party to the hearing and attorney Laurie Reynolds appeared on Hollister's behalf the morning of the first day of hearing. Hollister subsequently settled all issues with Student, and Student withdrew her complaint and all issues against Hollister. The terms of the confidential settlement agreement between Hollister and Student were not disclosed.

² The issues stated here have been condensed. The sub-issues identified in Student's complaint and OAH's Order Following Prehearing Conference are analyzed in the Factual Findings and Legal Conclusions that follow.

2. Did San Benito deny Student a FAPE for the 2008-2009 school year because the May 2008 individualized education program (IEP) and the August 2008 IEP Addendum fail to adequately address her needs as a visually impaired (VI) student?

CONTENTIONS

Student contends that San Benito denied her a FAPE during the 2006-2007 and 2007-2008 school years principally because San Benito personnel failed to provide her with necessary VI services, orientation and mobility training (O&M), Braille instruction, and appropriate assistive technology (AT) and AT training. San Benito contends that Hollister School District was Student's responsible local educational agency (LEA) during those school years, and Hollister was therefore responsible for Student's FAPE.

For the current school year, Student contends that San Benito failed to offer her a FAPE because the May 2008 IEP and the August 2008 IEP addendum fail to address her VI needs. Specifically, Student's IEP lacks goals in social skills and daily living skills. Additionally, Student argues that the level of VI services, three hours per week, is insufficient to confer her with some educational benefit; Student argues that she requires five hours per week plus the services of a VI teacher during her math class. Student also argues that the IEP lacks goals in her greatest area of need: O&M. Furthermore, Student argues that the District offer of 2 hours per week of O&M instruction is insufficient. Also, Student argues that San Benito committed a procedural violation when it failed to consider the recommendations of the California School for the Blind (CSB) who assessed Student and prepared a report in the spring of 2008. Finally, Student argues that San Benito failed to develop a transition plan to help her transition from grade school to high school.

San Benito argues that it offered Student a FAPE during the current school year.

FACTUAL FINDINGS

1. Student is a 14-year-old girl who currently resides within the boundaries of the San Benito High School District with her mother. She is eligible for special education under the category of a VI pupil. She has been blind since she was four to six weeks old.

Whether San Benito was Responsible for Student's FAPE during the 2006-2007 and 2007-2008 School Years

2. Student was in the seventh grade during the 2006-2007 school year and the eighth grade during the 2007-2008 school year.

3. Student's LEA during the seventh and eighth grades was Hollister School District. Hollister serves children from kindergarten through the eighth grade. In contrast, San Benito serves children from the ninth through the twelfth grade. Hollister School

District and San Benito are part of the San Benito County Special Education Local Plan Area (SELPA).

4. Children with visual impairments whose FAPE is the responsibility of Hollister School District receive some of their special education services from San Benito personnel as part of the SELPA agreement because San Benito operates the SELPA's low incidence programs. Blindness is a low incidence disability.

5. During her seventh and eighth grade years, Student received some services from her LEA, Hollister School District, and some services from San Benito personnel. Generally, San Benito provided VI services, O&M services, AT services, Braille translation services, and other services related to Student's specific needs as a blind student. San Benito personnel also attended Student's IEP team meetings during this period.

6. The evidence did not establish that San Benito was responsible for Student's FAPE during the school years at issue. The evidence established only that San Benito agreed to provide services to Student and others like her. There was no evidence of any legal transfer of responsibility from Student's responsible LEA to San Benito, such as a SELPA agreement wherein San Benito agreed to accept legal responsibility for the provision of a FAPE for all students to which it provides any services. Absent such an agreement, legal responsibility rests with a student's LEA.

7. Because Hollister School District, not San Benito, was responsible for Student's FAPE during the 2006-2007 and the 2007-2008 school years, San Benito did not deny her a FAPE.

Whether San Benito offered Student a FAPE for the 2008-2009 School Year

8. Student currently attends Anzar High School (Anzar) in San Juan Bautista, California. She attends Anzar principally because it is a small high school and therefore easier for Student to navigate. Although Anzar is in another school district, San Benito remains responsible for all aspects of her education.

9. San Benito was involved in the development of the May 2008 IEP, which was developed by Hollister School District. San Benito convened an IEP team meeting in August 2008. Together, the May 2008 IEP and the August 2008 Addendum constitute San Benito's offer of a FAPE to Student for the current school year.

10. In order to fulfill its obligation to offer a FAPE to Student for the current school year, San Benito was required to develop an IEP that was (1) designed to meet Student's unique needs; and (2) reasonably calculated to confer Student with some educational benefit.³

³ There are other substantive requirements for a FAPE which are not relevant to the issues presented in this decision.

Designed to Meet Student's Unique Needs

11. Student's unique needs are generally not disputed. Because she cannot see, she requires O&M services, VI services (social skills, independence skills and life skills), AT, and ongoing training in AT. Student also has deficits in mathematics, a difficult subject for students who are blind. While Student reads Braille, the evidence established that she has an ongoing need for Braille instruction. She also has a unique need for additional instruction on the Nemeth Code. The Nemeth Code is a special kind of Braille used for math and science notations. Moreover, all of Student's reading material must be provided in Braille, including all textbooks, assignments and hand outs.

12. Student's most significant area of deficit is O&M. Student is significantly deficient when compared to same-age VI students in her ability to move around a familiar environment, locate landmarks, and adapt to a new environment.

13. The May 2008 IEP and the August 2008 IEP addendum (collectively, the operative IEP) contain annual goals which address many of Student's unique needs. Student has at least one annual goal in each of the following areas: mathematics, use of an AT device called Braille Note, use of an AT device called JAWS (a computer interface program for the visually impaired), the use of tactile graphics, and social skills development.

14. While Student's current operative IEP addresses several areas of need, it lacks any goals in her most critical area of need, which is O&M. It also lacks goals in the areas of independence skills and life skills, two areas where Student struggles. Finally, Student's IEP lacks a goal related to the Nemeth Code.

15. Because Student's IEP lacks goals in four areas of need, one of which is her primary area of need, the IEP is not designed to meet her unique needs. San Benito's failure to offer a program designed to meet Student's unique needs constituted a substantive violation that denied her a FAPE.

Reasonably Calculated to Provide Student with Some Benefit

16. The operative IEP offered Student an instructional aide six periods per day; O&M instruction two hours per week; and VI services three hours per week. Student contends that the service levels offered by San Benito in the areas of VI instruction and O&M instruction were insufficient, and that instead of an aide, Student should have a VI specialist work with her during math.

17. Regarding O&M, there was no persuasive evidence that Student needed more than two hours of O&M instruction per week. Indeed, Carlene Healy, who is an O&M specialist at the CSB and evaluated Student in the spring of 2008, testified that two hours is sufficient.

18. Regarding VI services, Sonja Biggs testified persuasively that Student requires no more than three hours of VI services to address her current VI needs. Ms. Biggs, who presented as an excellent witness, is a doctoral candidate with 20 years experience as a teacher. She has worked extensively with VI students, and has a sixteen-year-old son who is blind. Ms. Biggs has worked with Student since the beginning of the current school year and believes Student is faring well.

19. Lizabeth Barclay, who is a diagnostic teacher of VI pupils, works for the CSB. She assessed Student in the spring of 2008. She testified that Student required up to 10 hours of VI services per week, including a VI specialist in mathematics class. She explained that, particularly in the area of mathematics, Student's problems in the area of spatial awareness, her lack of a complete understanding of the Nemeth Code, and her lack of experience with some of the AT used in mathematics (like an abacus) require the supports of a VI specialist during that period.

20. Regarding areas other than mathematics, Ms. Biggs' testimony was more persuasive than Ms. Barclay's regarding the appropriateness of the current level of VI services. Ms. Biggs has worked with Student for several weeks, and has seen her progress at the current level of services. Thus, the evidence established that San Benito's offer of two hours per week of VI services was reasonably calculated to confer educational benefit on Student. However, Ms. Barclay was more familiar with Student's needs in mathematics than Ms. Biggs was. In light of all evidence, Ms. Barclay's testimony was more persuasive on the issue of whether Student should have the services of a VI specialist during mathematics because of her problems in math.

21. Hence, San Benito should have provided VI services during math. Student's operative IEP does not offer those services. Accordingly, San Benito failed to offer services in math which were reasonably calculated to provide Student with some educational benefit.

22. In sum, San Benito's offer of services denied Student a FAPE in two regards: (1) lack of goals and objectives in four areas, particularly in O&M; and (2) insufficient VI services in math.

Failure to Consider the CSB Evaluation

23. The evidence did not establish that San Benito failed to consider CSB's evaluation. San Benito first received the written report in the summer of 2008 after the May 2008 meeting. San Benito considered the report at the August 2008 IEP meeting. There was no procedural violation.

Failure to Develop a Transition Plan

24. There is no legal requirement that a high school district draft a transition plan when every special education student matriculates from an elementary school district.

However, if a student has a unique need for a transition plan, the school district must develop one.

25. Student's unique needs required San Benito to develop a formal, written transition plan. Student has significant needs related to O&M, and the IEP team knew at the time of the August Addendum meeting that she would be moving to a high school in a different town, on an unfamiliar campus. She needed a transition plan which included, at a minimum, O&M services to be provided prior to the beginning of school so that Student could begin to access the general education curriculum as quickly as possible.

Compensatory Education

26. Compensatory education may be awarded to remedy a denial of FAPE. This Decision has determined that San Benito denied Student a FAPE from the beginning of the current school year to date by failing to develop a transition plan, failing to develop goals in four areas of unique need, and failing to provide VI services during mathematics.

27. As a remedy for this denial, San Benito shall provide Student with a total of 50 hours of compensatory education. The compensatory hours include 20 hours of O&M services for the lack of a written transition plan and transition O&M services and the failure to draft any written O&M goals, as well as 30 hours of VI services to address the failure to provide VI services during mathematics and the failure to draft goals related to learning the Nemeth Code, independence skills and life skills for the first two and one-half months of school. San Benito is permitted to utilize qualified District employees to deliver these compensatory hours. In calculating the number of hours that will adequately compensate Student for the denial of FAPE, the ALJ considered the relatively short time the denial of FAPE occurred, and the context of Student's full-time attendance in a ninth-grade class this year. This amount represents the total amount of compensatory services.⁴

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student requested the hearing and, therefore, Student has the burden of proof.

⁴ Much of the testimony from CSB witnesses regarding compensatory services assumed that San Benito denied Student a FAPE since 2006, and thus was not particularly helpful in fashioning an appropriate remedy. The ALJ notes that whether San Benito actually provided the services it was supposed to provide under the agreed-upon portions of the pertinent IEP was not at issue and so this decision does not address any compensatory remedies for those failures. Indeed, it was not disputed that the San Benito District failed to provide O&M services for several weeks at the beginning of the school year because of the state-wide shortage of O&M instructors, or that San Benito failed to procure a Braille copy of Student's Spanish book. Nonetheless, those failures were not at issue in this hearing.

Did San Benito deny Student a FAPE during the 2006-2007 and 2007-2008 school years?

2. California Education Code section 56026.3 defines "local educational agency" as "a school district, a county office of education, a charter school participating as a member of a special education local plan area, or a special education local plan area."

3. A "local educational agency" is responsible for providing a FAPE to those students with disabilities residing within its jurisdictional boundaries. (34 C.F.R. § 300.201(a); Ed. Code, § 48200.)

4. As determined in Factual Finding 7, it was not established that San Benito was the responsible LEA for Student during the 2006-2007 and 2007-2008 school years. Because another school district was responsible for Student's education during that period, San Benito did not deny Student a FAPE.

Did San Benito deny Student a FAPE for the 2008-2009 school year because the May 2008 IEP and the August 2008 IEP Addendum fail to adequately address her needs as a VI student?

5. 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. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

6. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

7. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not

require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

8. To determine whether San Benito offered Student a FAPE, the analysis must focus on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.)

9. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

10. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

11. As determined in Factual Findings 14 and 15, San Benito failed to develop goals in four areas, including the critical need area of O&M. As determined in Factual Findings 19 through 21, San Benito also failed to offer sufficient VI services, including (in addition to the three hours per week offered in the operative IEP) the services of a VI specialist during Student's mathematics class. Accordingly, San Benito denied Student a FAPE.

San Benito's Failure to Consider the CSB Assessment

12. A school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56341.1.) As determined in Factual Finding 23, San Benito considered the CSB assessment. There was no violation.

San Benito's Failure to Develop a Transition Plan

13. California Code of Regulations, title 5, section 3024, subdivision (b) requires a high school district, like San Benito, to participate with the elementary school personnel in

the last scheduled IEP team meeting before the pupil enters high school. Nothing in that section, however, requires a high school district to develop a transition plan for every student.

14. However, as discussed in Factual Finding 25, Student, unlike many students with disabilities, had a *unique need* for a transition plan. At the time of the August 2008 Addendum IEP team meeting, San Benito was aware that Student was transitioning from grade school to a high school in another community, and it knew that she had extensive difficulties navigating new environments. San Benito should have developed a written plan to ease her transition to the new environment, and the plan should have included, at a minimum, O&M services at the new site. San Benito's failure to address Student's unique need for a transition plan denied her a FAPE.

Compensatory Education

15. Compensatory education may be awarded to a pupil who has been denied a FAPE. 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 High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025 (citing *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496).)

16. Based on Factual Finding 26 and 27 and Legal Conclusion 15, San Benito shall provide Student with a total of 50 hours of compensatory education, which includes 20 hours of O&M services and 30 hours of VI services, to compensate for the denial of FAPE from the beginning of the current school year to the date of this decision. The areas to be addressed should generally be those that meet Student's O&M and VI needs. San Benito is permitted to utilize qualified District employees to deliver these compensatory hours.

ORDER

1. Within 20 school days of the date of this order, San Benito shall hold an IEP team meeting, the purpose of which is to revise Student's IEP to conform with this decision. San Benito shall consider the CSB evaluation and any other relevant information and may, but is not required to, invite CSB personnel to the meeting. All legally required members must attend the meeting. The team shall develop goals in the areas of need described in Factual Finding 14. Additionally, the team shall revise Student's IEP to include the requirement that at each mathematics class, Student shall be accompanied by a VI specialist. This service is in addition to the three hours San Benito offered in the May 2008 IEP, as revised by the August 2008 IEP Addendum.

2. San Benito shall provide Student with a total of 50 hours of compensatory education, which includes 20 hours of O&M services and 30 hours of VI services, to compensate for the denial of FAPE from the beginning of the current school year to the date of this decision. The areas to be addressed should generally be those that meet Student's

