

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

REED UNION SCHOOL DISTRICT.

OAH CASE NO. 2008080580

**DECISION**

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on December 1 and 3, 2008, in San Rafael, California, and December 9, 2008, in Tiburon, California.

Elizabeth Rho-Ng, Attorney at Law, and District Special Education Director Andee Abramson appeared on behalf of Reed Union School District (District).

Student's Mother appeared on behalf of Student. Student's Father was also present on all three hearing days, and Student was also present for part of each day.

The request for due process hearing was filed on August 18, 2008. A continuance was granted on September 22, 2008. A continuance was granted for good cause to file written closing briefs on December 9, 2009. Closing briefs were received on December 18, 2008. District's brief was marked as Exhibit MMM. Student's brief was marked as Exhibit 25. Thereafter the record was closed, and the matter was submitted for decision.

ISSUES<sup>1</sup>

1. Whether District committed a procedural violation which denied Student a free and appropriate public education (FAPE) when District would only discuss one placement option at an individualized education plan (IEP) team meeting on May 28, 2008?

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<sup>1</sup> The issues stated here were agreed to at the beginning of the hearing. They differ slightly from those listed in OAH's Order Following Prehearing Conference.

2. Whether the District failed to offer Student a FAPE for the 2008-2009 school year because the special day class (SDC) at Olive Elementary School (Olive):

- (a) was not academically appropriate;
- (b) did not provide appropriate peer modeling for language development; and
- (c) was an unreasonable distance from Student's home?

3. Whether Student was denied a FAPE because the District failed to timely respond to Mother's July 8, 2008 request for an IEP team meeting?

### FACTUAL FINDINGS

1. Student is a nine-year-old girl in the fourth grade. She resides with her parents within the geographical boundaries of the District. Student qualifies for special education and related services under the category of mental retardation based on her diagnosis of Down's Syndrome. She attends an SDC for severely handicapped students in grades kindergarten through second located at Valecito School, taught by Ms. Bonfilio, and managed by the Marin County Office of Education (MCOE). Student has been in Katie Bonfilio's SDC for more than two years.

2. Although the District has at all relevant times remained solely responsible for Student's FAPE, her special education services have been provided by MCOE. MCOE runs multiple programs throughout the county for children with severe disabilities like Student.

#### *Predetermination*

3. A district's failure to fulfill the procedural requirements of applicable law may result in FAPE denial, if, in pertinent part, the failure substantially impedes the parents' right to participate in the decision making process.

4. One such procedural violation is predetermination of a child's educational program. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A local educational agency (LEA) must fairly and honestly consider the views of parents expressed in an IEP meeting. LEA staff may not arrive at an IEP meeting having already decided on the program to be offered. LEA staff must participate in the IEP meeting with an open mind, and discuss and consider the parents' placement recommendations and concerns before the entire IEP team makes a final placement recommendation.

5. The District convened an IEP team meeting on May 28, 2008, to determine Student's placement during the 2008-2009 school year. Only four people attended the meeting: (1) Andee Abramson; (2) MCOE Program Manager AnnEtta Link; (3) Ms. Bonfilio; and (4) Mother.<sup>2</sup> The District offered to place Student at Olive, an SDC located in Novato, California, at the northern end of Marin County. In addition to placement at Olive, the IEP also offered a variety of related services, none of which is in dispute.

6. The evidence established that the District and MCOE members of the IEP team decided that Olive would be the IEP team's recommendation prior to the IEP team meeting; i.e., they predetermined that Olive would be Student's placement and the meeting was essentially convened to convey their decision. The IEP discussion notes reflect that only Olive was discussed.

7. Ms. Link, who chaired the May 2008 IEP team meeting and was the person most knowledgeable about MCOE placements available for Student, failed to discuss any other placement options at the meeting. Ms. Bonfilio, who was the person most knowledgeable about Student's unique educational needs, having taught Student for several school years, was unwilling to express any opinion at all regarding placement at the meeting. Also, both Ms. Link and Ms. Bonfilio discussed Olive with Mother as a potential placement prior to the subject meeting. Although a discussion ensued at the meeting regarding Mother's concern about the distance from Student's home and/or daycare to Olive no other options were presented by District and/or MCOE staff. In short, there was no evidence that the District and MCOE members of the IEP team came to the meeting with an open mind or that when Mother expressed concerns about the distance, that they were willing to reconsider their offer.

8. The District's predetermination substantially impeded Student's parents' right to participate in the decision making process. Because the District and MCOE members of the IEP team meeting predetermined that Olive would be Student's placement for the 2008-2009 school year, Mother had no meaningful input.

9. Because the District committed a procedural violation which substantially impeded Mother's right to participate in the decision making process, the District denied Student a FAPE.

#### *Whether Olive is Substantively Appropriate for Student*

10. In order to fulfill its obligation to offer a substantive FAPE to Student for the current school year, District was required to develop an IEP that was (1) designed to meet

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<sup>2</sup> It appears that at least one required team member was not present at the meeting, a regular education teacher. Applicable law requires that if a student is, or may be, participating in the regular education environment, "not less than 1 regular education teacher of such child" must also be a member of the team. (20 U.S.C. § 1414(d)(1)(B)(ii); Ed. Code, § 56341, subd. (b)(2).) Student did not raise this procedural violation as an issue in her complaint, so it is not decided here. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

Student's unique needs; and was (2) reasonably calculated to provide Student some educational benefit.<sup>3</sup>

11. Student's unique needs were generally not disputed. Student has global deficits, including significant needs in the areas of communication, social skills, behavior and pre-academics. She has corresponding goals in all those areas. Student did not dispute the appropriateness of the operative goals and objectives.

12. Student alleges that Olive was substantively inappropriate because it would not confer her with educational benefit due to the academic level of the peers, poor language modeling, and the lengthy commute.

*Academics/Appropriate Peer Modeling for Language*

13. The District offered Student the Olive SDC for children in grades three through five taught by Linda Brakestone. Ms. Brakestone is a credentialed special education teacher who has been teaching disabled students like Student since 1978. She was an excellent, credible witness.

14. Mother testified that she observed the Olive class for less than one half hour and the academic level of the other severely handicapped students was too low. Mother opined that because the children she observed functioned lower than Student, the class would not challenge her academically. Mother also opined that the students at Olive were not appropriate language models because they were nonverbal.

15. Ms. Brakestone's testimony established that Olive would provide Student with a FAPE in relation to academics and peer language modeling. Although she had never met Student, she reviewed Student's current IEP and other educational records, and explained at length how Student's IEP could be implemented in her class. Ms. Brakestone explained that, contrary to Mother's assertions, Student would be challenged academically -- she testified persuasively that Student would fall somewhere in the middle of her class academically if compared to the other students. She also persuasively testified that Mother was mistaken because nearly all of the students in her class used some verbal language, and more than half functioned at a level higher than Student. Ms. Brakestone's testimony was given more weight than Mother's regarding the academic and language aspects of her class because Ms. Brakestone is more familiar with her class than Mother, who observed the class for less than one half hour.

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

*Transportation to and from the Olive SDC*

16. When determining whether an IEP offers a FAPE to a student, the law requires that the determination be made based on information that a district either knew or that it should have known at the time of the offer.

17. Student alleges that the Olive SDC was inappropriate because of the distance Student would have to travel, via bus or car, to and from Novato, California. Although Olive was only approximately 20 miles away from Student's home, the bus ride for Student would be approximately one hour or longer because of traffic conditions.

18. Student failed to establish that the approximately two hour daily commute would result in a denial of a FAPE for Student. Although Student presented information at the hearing, including a note from Student's doctor stating that the commute would be inappropriate, this information was not shared with the District until well after the May 2008 IEP team meeting.

*Failure to Timely Convene an IEP team Meeting*

19. Parent requested an IEP team meeting in July 2008 during the summer break, and the District convened and IEP team meeting on September 10, 2008.

20. School districts are required to convene an IEP team meeting within 30 days of parental request, *unless* the request is made during the summer, in which case school districts are required to convene a meeting within 30 days of the start of the next school year.

21. District convened the IEP team meeting in a timely manner. There was no procedural violation.

*Compensatory Education*

22. Compensatory education may be awarded to remedy a denial of FAPE. Student's parents were denied a FAPE because of the District's failure to follow relevant procedures. Accordingly, an appropriate remedy should protect Student's parents from the District's misapplication of the law in the future.

23. As a remedy for the District's predetermination, the District shall ensure that all District special education employees receive no less than two hours of training regarding predetermination and parental participation in IEP team meetings, no later than 50 school days from the date of this decision. The training shall be provided by an outside agency, other than MCOE.<sup>4</sup>

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<sup>4</sup> MCOE staff were partly responsible for the procedural violation, but MCOE was not a party to this action, so the ALJ has no jurisdiction over MCOE in this matter.

## 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.

2. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the state's educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," called designated instruction and services (DIS) in California, includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690](*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

4. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

5. Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) In *W.G. v. Board of Trustees of Target Range Unif. Sch. Dist. No. 23*, *supra*, 960 F.2d at p.1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

*Issue 1: Whether District committed a procedural violation which denied Student a free and appropriate public education (FAPE) when District would only discuss one placement option at an individualized education plan (IEP) team meeting on May 28, 2008?*

6. As determined in Factual Findings 3 through 9, District staff predetermined prior to the May 2008 meeting that Student's placement would be Olive, and this procedural violation seriously infringed on Parent's right to meaningfully participate in the development of Student's IEP. Accordingly, District denied Student a FAPE.

7. In *Rowley, supra*, 458 U.S. at p. 200, 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 a district to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.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 p. 201.)

8. To determine whether the District offered Student a substantive FAPE, the analysis must focus on the adequacy of the school district's proposed program, not the parents' preferred alternative. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.)

9. 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 *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

*Issue 2: Whether the District failed to offer Student a substantive FAPE for the 2008-2009 school year at the SDC at Olive?*

*Issue 2(a)-(b): Academics and Peer Modeling for Language at the Olive SDC*

10. As determined in Factual Finding 15, District established that the Olive SDC was reasonably calculated to provide Student with meaningful education benefit related to Student's academics and language modeling. Accordingly, the placement is substantively appropriate.

*Issue 2(c): Transportation to and from Olive SDC*

11. As determined in Factual Finding 18, Student failed to establish that the commute to and from Olive SDC would deny Student a FAPE. Although some information was provided to the District subsequent to the May 2008 IEP team meeting, as discussed in Legal Conclusion 9, the District was only required to take into account information that it knew or objectively should have known at the time of the meeting.

12. As determined in Legal Conclusions 10 and 11, Student failed to establish that the District's offer of placement in the Olive SDC was not a FAPE.

*Issue 3: Whether Student was denied a FAPE because the District failed to timely respond to Mother's July 8, 2008 request for an IEP team meeting*

13. A school district is required to hold an IEP team meeting within 30 days of parental request, not counting school vacation days in excess of five school days. (Ed. Code, § 56341.1.) As determined in Factual Finding 21, the District convened an IEP team meeting in a timely manner. There was no violation.

#### *Compensatory Education*

14. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.*, *supra*, 471 U.S. 359, at pp. 369, 370; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) Teacher training is an appropriate remedy; the IDEA does not require compensatory education services to be awarded directly to a student. (*Park, ex rel. Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1034.)

15. As determined in Factual Finding 22, an appropriate remedy for the District's failure to follow applicable procedures, specifically, the District's predetermination of placement, is training. Accordingly, the training determined in Factual Finding 23 shall be provided by the District to all special education employees in accordance with this decision.

### ORDER

1. Reed Union School District shall ensure that all District special education employees receive no less than two hours of training regarding predetermination and parental participation in IEP team meetings no later than 50 school days from the date of this decision. The training shall be provided by an outside agency or person, other than MCOE or an MCOE employee.

2. All other relief requested by Student is denied.

