

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:12-CV-3059-SVW-PJW	Date	November 28, 2012
Title	D.B., et al. v. Santa Monica-Malibu Unified School District		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE		
Paul M. Cruz	N/A		
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
N/A	N/A		

Proceedings: IN CHAMBERS ORDER Re COMPLAINT AND REQUEST FOR RELIEF [1]

I. INTRODUCTION

On April 9, 2012, Plaintiffs D.B., a minor, by and through her Guardian Ad Litem Reina Roberts, and D.B.’s mother, Reina Roberts (“Plaintiffs”) brought the instant action against Defendant Santa Monica Malibu Unified School District (the “District”) seeking a review of a decision of the California Office of Administrative Hearings (“OAH”), Special Education Division’s determination pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.* This Court has jurisdiction to review the OAH’s decision pursuant to 20 U.S.C. § 1415(i)(2)(A) and (3). For the reasons put forward in this order REVERSES the OAH decision and awards Plaintiffs relief as described in this Order.

II. FACTUAL BACKGROUND

D.B. is a sixteen year old girl who is also deaf. With the help of cochlear implants,¹ D.B. is able to communicate orally; however, she is unable to participate in normal school activities (including

¹ A cochlear implant is a “device for treating severe deafness that consists of one or more electrodes implanted by surgery inside or outside the cochlea (an organ in the inner ear that transforms sound vibrations into nerve impulses for transmission to the brain) ... [As the electrodes are implanted], a miniature receiver is implanted under the skin, either behind the ear or in the lower part of the chest. A wire connecting the electrodes to the receiver is implanted at the same time. Directly over the implanted

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classes) without appropriate support and services. AR1 105:13-106:23.² D.B.’s deafness has, for many years, qualified her for special education under the IDEA. AR8 1238:13-22. The IDEA, among other things, requires state and local education agencies who receive its funding to provide covered individuals with a Free Appropriate Public Education (“FAPE”), as defined by the statute. 20 U.S.C. § 1401(9). In order to ensure that covered individuals are provided a FAPE, the education agency must create an Individualized Education Program (IEP), that must be reevaluated at least annually. 20 U.S.C. § 1414(d)(2). The IEP is formed by an IEP Team, a statutorily defined group that must include the child’s parents, specified teachers, a representative of the education agency, and others. 20 U.S.C. § 1414(d)(1)(B). In accordance with the IDEA, the District, in conjunction with D.B.’s parents, had formed IEPs for D.B. for several years prior to the 2010-2011 school year. AR8 1541-47. Among other things, D.B. had been placed in the general education population with a form of transcription known as “CART” services and, when that proved ineffective, assigned her an aide to assist her in the classroom. Id., AR 5 775-779. By the end of eighth grade (school year 2009-2010), D.B. had been placed in special education classes. Id.

Concerned with her educational progress and her overall well-being, in the spring of 2010 D.B.’s parents began searching for other options. AR5 780:12-14; 791:3-9. They found Westview School, a state certified “Non-Public School” that offered education specifically tailored to children with disabilities. As part of the process of forming D.B.’s 2010-2011 IEP, D.B.’s parents asked the District to place D.B. at Westview in March of 2010. AR6 890:20-22. The IEP Team—including D.B.’s parents and various district personnel—were scheduled to meet on June 8, 2010 to finalize the IEP. D.B.’s parents had previously informed the District that they would be available for the June 8 meeting—on June 4, they informed the District that they would not be able to attend the June 8, 2010 IEP Team meeting. AR9 1979. D.B.’s parents requested that the meeting be moved to a date that they could attend—however, the District court refused, stating that the IEP needed to be formed before the end of the 2009-2010 school year and that the following week was the last week of school. AR9 1979. They also offered to have another meeting with D.B.’s parents, to which her parents did not respond. AR9 1979.

receiver, the patient wears an external transmitter, which is connected to a sound processor and a microphone.” Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1074 (9th Cir. 2003) (quoting American Medical Association, *Encyclopedia of Medicine* 286 (1989)).

² “AR” refers to the Administrative Record; the number after refers to the Volume Number lodged with this Court.

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The June 8 meeting went ahead as scheduled, without D.B.’s parents. At the meeting, the District finalized D.B.’s 2010-2011 IEP, assigning her much the same education as she had previously received. AR9 1891.

On July 7, 2011, D.B. filed a complaint and request for due process with the OAH, as required by the IDEA. On January 20, 2012, OAH issued a decision finding for the District and denying D.B. the requested relief. On April 6, 2012, D.B. and her mother brought the instant action in this Court. This Court held a hearing on this matter on November 20, 2012.

III. STANDARD OF REVIEW

The IDEA “provides an unusual formulation of the standard for district court review of an administrative decision.” Capistrano Unified Sch. Dist. v. Wartenberg By & Through Wartenberg, 59 F.3d 884, 890 (9th Cir. 1995). It tells the Court to “receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(e)(2). The Supreme Court has held that this preponderance of the evidence standard “is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” Board of Education v. Rowley, 458 U.S. 176, 206 (1982). The requirement that the district court receive the hearing officer’s record “carries with it the implied requirement that due weight shall be given to these proceedings.” Id. The Ninth Circuit has held that while the question of how much weight is “due” is a “matter for the discretion of the courts,” the amount of deference accorded to a hearing officer’s findings should “increase where they are thorough and careful.” Capistrano, 59 F.3d at 891.

In practice, a court’s review of an administrative decision focuses on two inquiries: first, whether the state has complied with the procedures set forth in the act, and second, whether the program “is reasonably calculated to enable the child to receive educational benefits.” Capistrano, 59 F.3d at 891 (citing Rowley, 458 U.S. at 206-07).

IV. DISCUSSION

“The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures.” N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, Mont., 541 F.3d 1202, 1207 (9th Cir. 2008) (internal citations and quotation marks omitted). Its “goal is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special

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education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” *Id.* (quoting 20 U.S.C. § 1400(d)(1)(A) (1997)).

“A state must comply both procedurally and substantively with the IDEA.” *Hellgate*, 541 F.3d at 1207 (internal citations, quotation marks, and alterations omitted). In determining whether the District denied D.B. a FAPE, the court must engage in a two-step inquiry. First, the court must examine “whether the State complied with the procedures set forth in the Act and, second, whether the individualized educational program developed through the Act’s procedures was reasonably calculated to enable the child to receive educational benefits.” *Id.* (internal citations, quotation marks, and alterations omitted). However, the court need not reach the question of substantive compliance if it finds “procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits.” *Id.* (internal citations and quotation marks omitted).

A. Procedural Violations

Although “[n]ot every procedural violation . . . is sufficient to support a finding that the child in question was denied a FAPE[.]” those that “result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE.” *Id.* at 1208. Parental participation in the IEP process is critical: “Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); see also *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072, 1077 (9th Cir. 2003), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B) (noting that “[t]he importance of parental participation in the IEP process is evident”). The IDEA explicitly requires parents to a part of the IEP team, which is responsible for developing and implementing the child’s IEP. 20 U.S.C. §§ 1401(14), 1414(d)(1)(B)(i). In developing the IEP, the IEP Team is required to consider “the concerns of the parents for enhancing the education of their child.” 20 U.S.C. 1414(d)(3) (A)(ii). As the Supreme Court made clear in *Board of Education v. Rowley*:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

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458 U.S. at 205-06 (internal citations omitted). See also id. at 205 (“When the elaborate and highly specific procedural safeguards embodied in [the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.”).

With certain limited exceptions, a child’s parents (or parent) *must* participate, either in person or via video or conference call, in *every* IEP Team meeting. 34 C.F.R. § 300.322. The Ninth Circuit has specifically held that a failure to include a child’s parents in a single IEP Team meeting results in the denial of a FAPE. See Shapiro, 317 F.3d at 1077. In Shapiro, the district scheduled an IEP Team meeting on a date on which the child’s parents could not attend, and the child’s parents requested a postponement. Id. at 1075. The district ignored the request and held the IEP Team meeting on the scheduled date, without the child’s parents. Id. The Shapiro Court held the failure to include the parents in the IEP Team meeting was a procedural violation that amounted to a denial of a FAPE. Id. at 1077. Moreover, the failure to include the parents at the IEP Team meeting could not be cured by subsequently sending the child’s parents the IEP for their approval: as the Shapiro Court observed, the IDEA

imposes upon the school district the duty to conduct a meaningful meeting *with* the appropriate parties. We have made clear that those individuals, like [the child’s] parents, who have first-hand knowledge of the child’s needs and who are most concerned about the child must be involved in the IEP *creation* process. After-the-fact parental involvement is not enough.

Id. at 1078. Finally, the Court held that the district’s inclusion of the child’s parents “in certain parts of the process” did not excuse the district’s failure to include the parents in the IEP Team meeting: “involvement in the ‘creation process’ requires the [District] to include the [parents] By proceeding with the . . . IEP meeting without [the child’s] parents, the [District] violated the IDEA.” Id.

D.B.’s case is on all fours with Shapiro. Here, as there, the District scheduled an IEP Team meeting on a day on which D.B.’s parents could not attend. Here, as there, the parents asked the District to postpone the meeting to a date on which they could attend, and, like the school district in Shapiro, the District ignored the request and held the meeting without D.B.’s parents. This failure violated the procedural requirements of the IDEA that “seriously infringe[d] the parents’ opportunity to participate in the IEP formulation process” such that D.B. was denied a FAPE. Hellgate, 541 F.3d at 1208. Finally, as in Shapiro, the fact that D.B.’s parents participated in “certain parts” of the IEP creation process did not cure the failure to include them in the June 8, 2010 meeting: that failure alone violated the IDEA and

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denied D.B. a FAPE.³ See also W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 960 F.2d 1479, 1485 (9th Cir. 1992), superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B) (holding that the school district did not provide a FAPE because it failed to comply with procedures for preparing an IEP, including parental and teacher involvement); Amanda J., 267 F.3d at 894 (holding that there was a student was denied a FAPE where the school district did not provide the parents with records indicating their child had autism and suggesting the need for additional testing).

The District contends that it did not violate the IDEA’s procedural requirements for several reasons. First, it contends that the June 8, 2010 meeting could not be postponed because the following week was the last week of the 2009-2010 school year, during which some of the other members of the IEP Team would not be available. The Shapiro Court rejected a similar contention: in Shapiro, the district refused to postpone the meeting because some members of the IEP Team would not be available after the set date of the meeting. 317 F.3d at 1075. The Court held that this unavailability did not excuse the district from including the parents in the IEP Team meeting: “The school district simply prioritized its representatives’ schedules over that of [the child’s] parents.” Id. at 1078. Like Shapiro, the unavailability of the District’s IEP Team members is not enough to excuse its failure to include D.B.’s parents in the June 8, 2010 meeting.

Second, the District contends that their failure to include D.B.’s parents in the June 8, 2010 meeting is excused because, by that time, D.B.’s parents had already made the unilateral decision to enroll her at Westview for the 2010-2011 school year. Even if they had, D.B.’s parents’ decision did not absolve the District of its responsibility to ensure that they were at every IEP Team meeting: the District has an affirmative duty to review to include D.B.’s parents in the IEP Team meetings, and “[n]othing in the [IDEA] makes that duty contingent on parental cooperation with, or acquiescence in, the state or local educational agency’s preferred course of action.” Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012).

³ Under the applicable implementing regulations, an IEP Team meeting can only be conducted without a student’s parents “if the public agency is unable to convince the parents that they should attend.” 34 C.F.R. § 300.322(d). Before holding an IEP meeting without a child’s parents, a school district “must document phone calls, correspondence, and visits to the parents demonstrating attempts to reach a mutually agreed upon place and time for the meeting.” Shapiro, 317 F.3d 1078. Here, the District has presented no evidence of “phone calls, correspondence, and visits to the parents” that might demonstrate that it had attempted to reach a “mutually agreed upon place and time for the meeting.” Moreover, a request to reschedule an IEP meeting does not amount to a refusal to attend a meeting that would excuse the District’s failure to include the parents in the June 8, 2010 meeting. See id.

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Finally, the District contends that their procedural error is excused because they offered to have *another* meeting with D.B.’s parents before the end of the 2009-2010 school year. However, as discussed above, parents are required to participate in *every* IEP Team meeting, especially one where the final plan is articulated. Including D.B.’s parents “in certain parts of the process” does not excuse the District’s failure to include them in the June 8, 2010 IEP Team meeting—by proceeding with the “IEP meeting without [D.B.’s] parents, the [District] violated the IDEA.” See Shapiro, 317 F.3d at 1078.

B. Remedy

Because D.B.’s IEP was flawed by procedural inadequacies that “seriously infringe[d upon her] parents’ opportunity to participate in the IEP formulation process,” the Court need not evaluate whether the IEP was “reasonably calculated to enable the child to receive educational benefits.” Hellgate, 541 F.3d at 1207 (internal citations and quotation marks). The failure to include D.B.’s parents at the June 8, 2010 meeting “clearly resulted in a denial of a FAPE.” Id. at 1208. Thus, the only question remaining is the proper remedy.

1. Reimbursement for 2010-2011 Tuition at Westview

The IDEA permits a district court to “grant such relief as the court determines is appropriate,” 20 U.S.C. § 1415(i)(2)(C)(iii), including “‘equitable’ solutions such as reimbursing parents for the costs of a private placement.” Shapiro, 317 F.3d at 1079 (quoting Scholl Committee of Burlington v. Dept. of Education, 471 U.S. 359, 369 (1985)). Parents are entitled to reimbursement for private school costs if a court concludes “‘both that the public placement violated IDEA and that the private school placement was proper under the Act.’” Shapiro, 317 F.3d at 1079 (quoting Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993); see also id. (awarding parents \$23,804 when the court found that the child had been denied a FAPE and placement at a private school was “educationally appropriate”); Union Sch. Dist. v. Smith, 15 F.3d 1519, 1527 (9th Cir.1994) (holding that the parents were entitled to reimbursement for tuition at a private clinic in which they unilaterally placed their child because the school district failed to offer the child an appropriate placement and the parents’ placement at the private clinic was appropriate); W.G., 960 F.2d at 1486 (noting that parents were “not barred as a matter of equity from recovering” reimbursement of private tutoring expenses because the school’s proposed public placement violated the IDEA).

The District does not dispute that D.B.’s placement at Westview was “proper under the Act.” Placement at a private school is “proper under the Act” when it is “reasonably calculated to provide [the student] with educational benefit.” Shapiro, 317 F.3d at 1080. D.B.’s placement at Westview clearly meets this low threshold: there is substantial evidence in the record that D.B. has flourished socially and

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academically at Westview. AR2 192:5-16, AR5 839:3-23, 841, AR9 1954-62, 2013-2018. The Court thus finds that reimbursing plaintiffs for the cost of tuition at Westview for the 2010-2011 school year is appropriate, and awards Plaintiffs the \$30,555.00 in tuition spent for that school year.

2. Reimbursement for other 2010-2011 Expenses

The IDEA provides that a FAPE includes “related services.” 20 U.S.C. § 1401(9). “Related services,” in turn, is defined as “transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services . . .) as may be required to assist a child with a disability to benefit from special education” 20 U.S.C. § 1401(26).

In their complaint and trial brief, Plaintiffs requested only “disbursements, costs [and] expenses . . . as prevailing parties in the administrative proceedings and this action,” but failed to specify the expenses incurred beyond the \$30,555 in tuition. At this Court’s November 20, 2012 hearing, the District conceded that reimbursement for therapy services for the 2010-2011 school year would be appropriate; however, Plaintiffs have failed to identify how much these costs were. Thus, the Court ORDERS Plaintiffs to submit a declaration no later than December 10, 2012 documenting the requested educational expenses incurred by Plaintiffs for the 2010-2011 school year. This declaration shall be supported by invoices or other evidence demonstrating the costs of these services.

3. Payment for on-going expenses

In their complaint filed with the OAH, Plaintiffs also requested that the District agree to D.B.’s on-going placement at Westview and reimbursement for therapy on an on-going basis. The IDEA requires an annual reevaluation of an eligible child’s IEP. See Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012). Awarding such prospective relief would run counter to the purpose of such annual reevaluations, which is meant to, among other things, “consider the child’s language and communication needs, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.” 20 U.S.C. § 1414(d)(3)(iv). Thus, to the extent the instant complaint requests this relief, it is denied.

4. Attorneys’ Fees

The IDEA provides that “[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs to a prevailing party who is the parent of a child with a disability.” 20 U.S.C.A. § 1415(i)(3)(B)(i)(I); see also Aguirre v. Los Angeles

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Unified Sch. Dist., 461 F.3d 1114, 1117 (9th Cir. 2006) (“In order for a court to award attorney’s fees [under the IDEA], the parent must (1) be a prevailing party and (2) seek reasonable attorneys’ fees.” (internal quotation marks omitted).

Because they are the prevailing party, Plaintiffs are entitled to attorneys’ fees. However, the parties did not discuss attorneys’ fees at length in their briefs. Thus, the Court sets the following briefing schedule to determine the appropriate fees to be awarded:

Plaintiff’s Motion for Attorney’s Fees	January 7, 2013
Defendant’s Opposition	January 14, 2013
Plaintiff’s Reply	January 22, 2013

A hearing on this matter will take place on February 11, 2013 at 1:30 p.m. Plaintiffs’ Memorandum of Points and Authorities in support of their motion for attorneys’ fees and Defendant’s Opposition shall be no more than fifteen (15) pages in length; Plaintiffs’ Reply shall be no more than five (5) pages in length.

V. CONCLUSION

For the reasons put forward in this Order, the decision of the OAH is REVERSED. Plaintiffs are awarded \$30,555.00 as reimbursement for the costs of placing D.B. at Westview for the 2010-2011 school year. Plaintiffs are further ORDERED to submit a declaration no later than December 10, 2012 documenting the requested educational expenses incurred by Plaintiffs for the 2010-2011 school year. Finally, the parties are ORDERED to submit motions on attorneys’ fees, consistent with this Order.

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