

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

In the Matter of:

STUDENT,

Petitioner,

v.

MOUNT DIABLO UNIFIED SCHOOL
DISTRICT,

Respondent,

OAH NO. N 2005071000

MOUNT DIABLO UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH NO: N 2005071024

DECISION

Gary A. Geren, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on January 23-26, 2006, in Oakland, California.

The Student (Student) was represented by Robert A. Edwards, attorney at law, and Paul Foreman, advocate.

The Mount Diablo Unified School District (District) was represented by Matthew Juhl-Darlington, attorney at law, from the law firm of Miller, Brown and Dannis. Kenneth Ferro attended the hearing as District's representative.

Student called the following witnesses to testify: Student's mother (Parent); Kate Mountain Ph.D. (psychologist); Marjorie A. Kaplan MA, BCET (educational therapist); Soula Donchas (Director of the STAR Academy); and, Dr. Howard Diller (reading instructor).

District called the following witnesses to testify: Sandra L. Mitchell (teacher/reading specialist); Arlee S. Maier Ph.D. (educational psychologist); Terry McCormick (Principal, Oak Grove Middle School); Judith Bourke (special day class teacher); and, Diane Weber (special day class).

Oral and documentary evidence were received. At the hearing's conclusion on January 26, 2006, the record was closed, with the exception of permitting the parties to file closing briefs. On February 3, 2006, Student's counsel requested OAH to provide him with copies of the audiotaped record of the hearing. On February 8, 2006, Mr. Edwards instead requested a written transcript. His request was granted. The parties were then permitted to file their closing briefs 10 days after receiving the transcripts. Their briefs were received on April 10, 2006, and included in the record. The record was closed and the matter submitted.

These matters were originally filed with the Special Education Hearing Office (SEHO), prior to the hearing of special education matters being transferred to OAH. After the matters were transferred to OAH, they were consolidated for hearing. The matter was initially set for a hearing to commence on August 22, 2005. Several requests to continue hearing dates were made by the parties, and their requests were granted. A final decision in this matter is due no later than May 8, 2006.

ISSUES

1. Did District provide a free and appropriate public education (FAPE) to Student for the 2004-2005 school year (Student's fifth grade year), and if not, is Parent entitled to reimbursement for costs of Student's tuition and related expenses?

2. Did District offer Student a FAPE for the 2005-2006 school year (Student's sixth grade year), and if not, is Parent entitled to reimbursement for costs of Student's tuition and related expenses?

BURDEN OF PROOF

Student bears the burden of proof as to Issue One. District bears the burden of proof as to Issue Two.

FACTUAL FINDINGS

Issue One: Did District provide a free and appropriate public education (FAPE) to Student for the 2004-2005 school year (Student's fifth grade year), and if not, is Parent entitled to reimbursement for costs of Student's tuition and related services?

1. Student suffers from severe dyslexia. His dyslexia was likely caused or exacerbated by, his birth mother's intravenous drug use during pregnancy. Student has received special education services since he was three years old. He is eligible to receive special education and related services as a student with a specific learning disability. He has received such services since his enrollment in District during his second grade year (the 2001-2002 school year). While all witnesses generally described Student generally as a "bright boy," his dyslexia has very nearly prevented him from learning how to read. Student's Educational Assessment Report for his fourth grade year, prepared by District, showed that 99.9 percent of his peers read better than he did. Student read at a level of a child considered mentally retarded.¹

2. Prior to his fourth grade year, District attempted to develop an Individualized Education Plan (IEP) directed to meet Student's special educational needs for his upcoming year. His IEP team met on May 3, 2004, and offered a plan substantially similar to those contained in his prior IEPs (dated March 22, 2002, September 19, 2002, and October 13, 2003). District's offer proposed a general education curriculum with support from the resource specialist. His areas of needs were identified as reading, decoding, comprehension, and spelling. The IEP team agreed to wait until the report from Dr. Mountain was completed so that the team could review and consider it prior to making a more definitive offer.

3. At Parent's request, the IEP team reconvened on September 30, 2004, in order to review a neuropsychological examination that Dr. Mountain completed on June 10, 2004.² At that time, District offered to provide Student with two hours per day of language arts instruction in his SDC class, in a program that was focused on repetition and memorization of sight words with, "some kinesthetic learning." The IEP that followed noted, "The team is concerned that [Student's] needs require a more intense reading remediation. The team asks what is available in the district...[Parent] stated that she believes

¹ In an intelligence quotient test administered by Dr. Mountain, Student's results showed that he tested in the "high average to superior range" in perceptual reasoning, a measure of intelligence that stood in marked contrast to his inability to read.

² Dr. Mountain is a licensed psychologist at Kaiser Permanente Medical Group, Inc. and prepared her report based on a referral from a pediatric neurologist with whom Parent consulted about her concerns regarding Student's difficulties in learning.

[Student] needs more than the district's offer of full time specialized instruction as offered in the SDC class. The tutor [Dr. Diller] agreed with [Parent]." The District's emphasis on word memorization in Student's SDC class as the means to remediate Student's reading problems, was confirmed by District's School Psychologist, Barbara Blake, who on September 24, 2004, six days prior to the IEP meeting, reviewed Dr. Mountain's report. Ms. Blake concluded that Dr. Mountain's report seemed to, "appear valid and consistent overall with developmental history, academic history, and previous psychoeducational testing. Ms. Blake's conclusion that Student needed continued group services in his SDC class, however, differed greatly from the conclusion reached by Dr. Mountain that Student needed "intensive one to one instruction several hours a day for at least three to four months..." Parent refused District's offer, as noted on the September 30, 2004 IEP.

4. Dr. Diller was a well-qualified and credible witness who testified candidly and without bias. Dr. Diller's first career was as a pediatric cardiologist (he received his medical degree in 1951). His medical training, coupled with his extensive, scholarly study of dyslexia, qualified him to testify as an expert in the field. His tutoring of children who suffer from dyslexia added to his credibility to speak on the subject, and his extensive work with Student provided him with great insight as to Student's unique needs. Generally, Dr. Diller established that severely dyslexic children do not learn to read through conventional teaching techniques. Rather, dyslexic children require a kinesthetic component to their reading instruction, wherein they use large motor movements to draw a given letter or groups of letters (phonemes) in the air, while stating the sound the letter or phoneme designates. Dr. Diller's students work their way through a highly regimented, structured course book, starting with the short vowel sounds. This method for tutoring dyslexic students is a slightly modified version of the Slingerland Program. There was no dispute among the experts who testified that the Slingerland method is a valid methodology that may be used to teach dyslexic students to read. Furthermore, McGraw-Hill, as part of its Basic Reading Program, published the course books Dr. Diller used when he tutored Student. Dr. Diller has been successful in raising his students' reading ability to grade level in approximately 80 percent or more of his cases, usually within two years of commencing his instruction.

5. Dr. Diller began working with Student at the end of his second grade year, in March 2003. Student was the worst dyslexic child he had ever seen, either as a physician, or as a tutor. Student's reading aptitude near the end of his second grade year was at the "pre-primer" level, meaning he "read" on the level of an average pre-kindergarten student, or four-year-old. He was unable to recite the entire alphabet. Dr. Diller testified that Student presented as a "different type of dyslexic" because of the severity of his disorder. Student's progress in working with Dr. Diller was very slow. Dr. Diller doubted if Student was capable of progressing. However, within eighteen months of intensive, one to one tutelage, Student was able to read at a first grade level (an increase of two grade levels). This increase was measured by District's test results, as Dr. Diller did no testing of his own. Dr. Diller's testimony was found to be highly probative on two points--that Student possessed the *capacity* to read, if he was provided with the *appropriate* curriculum and instruction. Dr. Diller's opinion that District's offer for the 2004-2005 school year did not constitute a FAPE provided persuasive evidence on the point. The preponderance of evidence established that

under these previous IEPs, Student failed to make meaningful educational progress, primarily because Student was not provided enough intensive, one to one, reading-related instruction, aimed at dealing with his severe dyslexia. The District's offer for Student's fourth grade year similarly provided the intensive one to one intervention that Student needed to address his severe dyslexia and decoding problems.

6. The basis for his conclusion that District's offer did not constitute a FAPE was based on the following: (1) The progress that Student made in his reading ability was a result of his work with Student, and not the services District provided Student under prior IEPs; (2) The District offered substantially the same, unsuccessful plan outlined in prior IEP's; (3) District's proposed reading program focused on attempting to develop Student's sight word vocabulary, as opposed to teaching him how to read by decoding; and, (4) District's offer included one hour sessions, four days per week, of one to one reading instruction, and Dr. Diller believed he needed several hours per day. Dr. Diller's opinion in this regard was consistent with that of Dr. Mountain's, who conducted an exhaustive battery of tests of Student's abilities and deficits. District offered to pay Dr. Diller to continue his tutoring of Student; however, Dr. Diller declined. He believed Student needed more instruction than he could provide. The ALJ finds that Dr. Diller's opinions and reasoning were amply supported by the facts.

7. District augmented the terms of its offer on October 25, 2005, when it agreed to provide Student with reading intervention instruction in one hour sessions, four days per week, with Ms. Mitchell (District's Reading Specialist). Parent initially refused this offer, however, she later accepted it on Student's behalf. Student received instruction by Ms. Mitchell from January 31 through March 3, 2005. The methodology used by Ms. Mitchell focused primarily on word memorization, not word decoding. In that respect, her instruction differed from that provided by Dr. Diller. Student derived a *di minimus* benefit from Ms. Mitchell's instruction. Student memorized 14 words by February 12; and by March 3, he memorized 21 more. At this rate, he was on a pace to memorize (as opposed to decode) one word per day. Accordingly, he would have memorized a mere 100 words by the end of the school year. It must also be noted that the corresponding grade level of the words he memorized was not established in his progress reports. While well intentioned, the work done by Ms. Mitchell was insufficient to provide Student with a meaningful educational opportunity, and her instruction did not appropriately address his unique needs.

8. Student also contended that District committed procedural violations that deprived Parent of her opportunity to meaningfully participate making decisions regarding her son's education, and as a consequence, Student was denied a FAPE. Student contended that the September 30, 2004, IEP lacked identifiable and measurable goals and objectives. In short, the IEP (and progress reports that followed) were drafted such that Student's teachers simply indicated Student was "progressing." Such a generic point of reference prevented Parent from assessing the nature and quality of any alleged progress made by Student, and moreover, without providing specific benchmarks, Parent was precluded from drawing her own conclusion as to whether Student was progressing toward receiving an appropriate education. In sum, Parent was placed in the position of accepting, entirely on faith, Student's

teachers' reports of his progress. Absent specific, measurable goals and objectives, Parent was deprived of meaningful participation in Student's educational process, to the detriment of Student's receipt of a proper education. Once Dr. Diller became involved with Student, Parent's suspicion that Student was not progressing adequately was confirmed. Parent should not have been forced to rely on the advice of her own retained expert in order to ascertain whether Student was receiving an educational benefit from the curriculum and services provided by District. Thus, Student's assertion of a procedural violation in the IEP process was well founded and supported by a preponderance of the evidence.

9. The evidence established that District agreed to place Student in the Raskob Day School (RDS), a private school. However, RDS refused to accept Student because he was too far behind in his reading ability to qualify for admission into their program. On March 7, 2005, parent removed Student from District and unilaterally placed him in the Lindamood Bell Program (LBP), a private school. Parent sought reimbursement for the costs she incurred as a consequence of this placement.

10. Dr. Maier, an expert witness called by District, agreed that Student made modest progress while at LMP. At LMP, Student received thirty hours per week of one to one instruction, over twelve weeks, compared to the one hour of one to one reading instruction Student received in District's SDC class. (Student received this level of one on one instruction from September 2004 to January 2005. The frequency increased to four hours per week, between January and March 2005. LMP compared Student's achievement levels at the time of his enrollment to the time he completed LMP. (Petitioner's Exhibit 44). The re-testing showed a general trend of progress. Accordingly, Student obtained an educational benefit at LMP, and reimbursement to Parent for costs she incurred as a result of his tuition, evaluations, and travel, are appropriate.

11. Parent also sought reimbursement for the costs of services provided by Dr. Diller. As set forth above, Student's reading ability improved greatly as a result of his work with Dr. Diller. Accordingly, he received an educational benefit from Dr. Diller's tutelage, and reimbursement to Parent for the costs of Dr. Diller's services are appropriate.

12. District contended that Student's placement at LMB was inappropriate because such placement was not in the least restrictive environment. This argument is unpersuasive. The severity of Student's disability necessitated the removal of Student from the regular education environment, and as a general principle of law, discussed *infra*, at Legal Conclusion 11, a Parent's unilateral placement need not be in the least restrictive environment.

Issue Two: Did District Offer Student a FAPE for the 2005-2006 school year (Student's sixth grade year), and if not, is Parent entitled to reimbursement for the costs of tuition and related services?

13. An IEP team meeting was held on June 14, 2005 relating to Student's 2005-2006 school year; District offered Student a placement at the Literacy Intervention Program at the Oak Grove Middle School, a program in which special emphasis was to be placed on his reading difficulties. Student was to receive direct, individualized instruction in this program that was developed around a methodology called the REACH System (REACH). REACH is a systematic literacy program that includes decoding, comprehension, spelling and writing components. Daily decoding skills are taught to students. REACH was a newer reading intervention program to District, and accordingly, it was the first time it was offered to Student. District's offer also included additional reading support services to be provided by Ms. Mitchell.

14. Student contended that this plan was more of the same, unsuccessful, type of plan offered to Student in previous years. The evidence did support this decision. The 2005-2006 IEP offered a plan that differed substantially from the prior plans. The literacy intervention program offered was specifically designed for students, like Student, who are two to three years behind grade level in their reading ability. The program is a phonics-based program, taught in small groups, and is designed to develop a student's ability to decode words. REACH tested students prior to their starting the System, and then placed them in small groups, with similarly performing peers. REACH requires a student's progress to be consistently monitored and chronicled by the teachers, a tracking process absent from Student's prior IEP (Factual Finding Number 8).

15. Further details of District's literacy intervention program were described by Ms. Bourke, who has taught special education since the mid-1970's and has worked teaching reading remediation to special education students. She was a candid, sincere, and credible witness. Her experience providing this type of service to special education students, as well as, her formal education and training in the area, established that she was a well-qualified expert on the subject of literacy intervention. Ms. Bourke was specifically trained in administering the REACH System. She established that under the literacy intervention program proposed to Student by District, Student was to receive direct and individualized based instruction. Student would work through the REACH curriculum with her, or a special education assistant, in whose abilities Ms. Bourke has great confidence. Ms. Bourke testified that other severely dyslexic students with whom she worked benefited from their participation in REACH. REACH is a researched based, peer-reviewed curriculum, published by SRA/McGraw-Hill. (District's Exhibit 51, an overview of the REACH System). REACH was the methodology chosen by District to provide the basis of its Literacy Intervention Program. Lastly, as a general legal principle, as long as a District provides an appropriate education, the methodology of choice, is left to the district. Here, primarily through the testimony of Ms. Kaplan, Student generally attacked the appropriateness of REACH as an unfit methodology, inappropriate for all District students, not merely the student who was the subject of the hearing. Ms. Kaplan had no personal experience with the Reach System and her limited professional experience with the System was delineated by the work she did preparing to testify in the subject hearing. Accordingly, there is no basis in fact or law to reject District's choice of the REACH System as its chosen methodology.

16. District's 2005-2006 offer to Student contained in the IEP dated June 14, 2005, constituted an offer of a FAPE. It addressed all of his unique needs, not just his problem with reading, and therefore, provided him with an opportunity to receive an educational benefit. The offer included instruction within Student's Special Day Class (SDC), in math and writing and provided mainstreaming opportunities with his general education peers in physical education and elective classes. It differed from prior IEPs, as explained above. The offer provided a basic of floor of opportunity for Student to receive some educational benefit. Accordingly, Student's request for reimbursement for costs arising from Student's education and related services for any time after June 14, 2005, is without merit.

LEGAL CONCLUSION

General principles governing special education.

1. The party seeking relief has the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. ____; 126 S.Ct. 528).

2. Under the IDEA, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program IEP. (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).) "Related services" means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Cal. Educ. Code § 56363(a).)

3. There are two parts to the legal analysis in matters 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 Educ. of the Hendrick Hudson Sch. Dist v. Rowley*, (1982) 458 U.S. 176, 200, 102 S.Ct. 3034.) 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*, 458 U.S. at 206-07.)

4. In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 and 20 U.S.C. § 1415 (f)(3)9E)(ii).)

5. Another key aspect of the parents' right to participate in the IEP process is the school district's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

6. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion addressed the level of instruction and services that must be provided to a student with disabilities in order to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined 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 that are individually designed to provide educational benefit to the student. (*Id.* at 200.)

7. Moreover, the *Rowley* opinion established that as long as a school district provides an appropriate education, the methodology employed in so doing is left up to the district's discretion. (*Rowley*, 458 U.S. at 208.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, 361 F.3d at 84 (citing *Roland M.*, 910 F.2d at 992-93).) In *Adams*, 195 F.3d at 1149-1150, , the Ninth Circuit Court of Appeal explained:

Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children. *See, e.g.*, E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs). IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (citing *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, 1314.)

8. School districts are also required to provide each special education student with a program in the least restrictive environment with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b); Cal. Ed. Code § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*)

9. To determine whether a District offered a student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K.*, 811 F.2d at 1314.) If the school district's program was designed to address a student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if a student's parents preferred another program, and even if his parents' preferred program would have resulted in greater educational benefit.

10. The Ninth Circuit 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*, 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

11. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. For example, parents are not required to conform their unilateral placement to the content of the child's IEP, need not provide a placement that is certified by the state, and need not provide a placement in the LRE. The placement still must have met the child's needs and provided educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 114 S.Ct. 361; *Alamo Heights Independent Sch. Dist. v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161.)

12. With these principles in mind, District did not provide a FAPE to Student during his 2004-2005, school year. (Factual Findings 1-12).

13. Parent is entitled to receive reimbursement for the costs of Student's tuition, assessments, and travel expenses (at the rate employees of the District were reimbursed), related to Student's enrollment in the Lindamood Bell Program. (Factual Findings 9-10).

14. Parent is entitled to receive reimbursement for Dr. Diller's services. (Factual Finding 11).

15. District offered a FAPE to Student on June 14, 2005. Parent is not entitled to reimbursement for any period thereafter. (Factual Findings 13-16).

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the decision must indicate the extent to each party has prevailed on each issue heard and decided. Student prevailed on Issue Number One; District prevailed on Issue Number Two.

ORDER

WHEREFORE, the following orders are made:

1. Student is entitled to reimbursement as set forth in Legal Conclusions 13 and 14. Student shall present appropriate documentation itemizing those expenses to District no later than twenty days after the issuance of this decision.

2. District shall reimburse Parent within 30 days of receipt of the documentation referenced in order number one.

RIGHT TO APPEAL THIS DECISION

The parties to this case may 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. (Cal. Ed. Code § 56505(k).)

May 5, 2006.

GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings