

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

RIALTO UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

STUDENT,

Respondent.

OAH NO. N 2006030109

DECISION

Eileen M. Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 1 and 2, 2006, at the offices of the Rialto Unified School District (District) in Rialto, California.

Petitioner District was represented by Gail Lindberg, program manager of East Valley Special Education Local Plan Area. Also present throughout the hearing was Dr. Barbara Mori, Student Services Director of the District.

Respondent Student (Student) was represented by her parents (Parents). A Spanish interpreter assisted Parents.

On May 1, 2006, Parents appeared at the hearing, and were present for the morning session of the proceedings. Shortly after the afternoon session commenced, Parents elected to leave the proceedings and did not return. The hearing proceeded in their absence.

The hearing continued through the afternoon of May 1, 2006, and concluded on May 2, 2006, without Parents. Oral and documentary evidence was received. The matter was submitted on May 2, 2006.

ISSUE

Whether the District's placement of Student in a special day class at Casey Elementary School with related services, including speech, language and hearing services, adapted physical education, and occupational therapy, provides Student a free and appropriate public education.

FACTUAL FINDINGS

1. Student was born on October 8, 1996, and is nine years old. Student is currently in a full-inclusion general education fourth grade class at Hughbanks Elementary School in the District, but is performing academically at the first grade level. She has been attending a general education class in the District since she entered the District as a pre-school Student on July 6, 2000. She has been receiving special education and related services from the District based on the eligibility categories of "other health impaired" and speech and language. Student suffers from an auditory processing disorder and has fine motor deficits. She receives resource specialist services in the resource specialist program (RSP) and has also been receiving designated instructional services in adapted physical education (APE). Student does best in a structured setting where instruction involves lots of repetition.

Procedural History

2. On January 31, 2006, Administrative Law Judge Roy Hewitt issued *Rialto Unified School District vs. Student*, OAH NO. N2005090655, 106 LRP 22396 (*Rialto One*).¹ In *Rialto One*, Judge Hewitt reviewed Student's assessments, unique needs and placement options through 2005. The core dispute between District and Student was whether a District special day class (SDC), or a private placement in a school called Big Springs, was necessary to provide Student a free and appropriate public education (FAPE). Student disagreed with District's offer of placement and insisted that Student be placed in a nonpublic school, Big Springs. Judge Hewitt determined that either placement would satisfy Student's unique needs and ordered District to "exercise its discretion in placing student in either Big Springs or a district SDC" within 30 days from the effective date of the decision. He further ordered District to pay for the costs associated with the Big Springs placement, including transportation costs, if it elected to place Student in Big Springs.

¹ Official notice is taken of *Rialto Unified School District vs. Student* (January 31, 2006) Case Number N200500655, 106 LRP 22396, pursuant to Section 11515 of the Administrative Procedures Act. At the hearing, Administrative Law Judge Hewitt granted Student's motion to withdraw her petition and it was dismissed with prejudice

3. *Rialto One* is a final determination of issues between District and Student that were raised and resolved in that proceeding. Accordingly, the parties can not re-litigate in this proceeding the findings of fact and conclusions of law of Administrative Law Judge Hewitt.²

The 2006-2007 Placement Offer

4. On February 9, 2006, District conducted its annual IEP for the 2006-2007 school year (the annual IEP). The annual IEP meeting was attended by Student's resource specialist, general education teacher, school psychologist, APE specialist, a language, speech and hearing specialist, and a District representative. Parents and Student also attended the annual IEP meeting. A Spanish translator was present. The occupational therapist could not attend the annual IEP meeting due to a scheduling conflict, but Parents agreed to review the occupational therapy information by facsimile transmission.

5. Parents' rights were reviewed. District explained that the meeting was an annual review of Student's present performance levels and proposed goals. Parents expressed concern about the absence of a District representative who could make decisions about placement. Parents asked the District whether student was in the correct placement. District would not discuss placement and limited the annual IEP meeting to Student's programs. District also explained that Parents could stop the meeting and reconvene it when the requested District personnel could attend. Parents agreed to proceed with the annual review and participated in the meeting. Parents tape recorded the meeting.

6. The annual IEP team reviewed Student's progress over the last year. Student achieved her goals for occupational therapy. Student's reading ability was discussed. Her overall reading level was determined to be similar to those students completing kindergarten through mid-year of first grade. She did not meet her reading goals. Student's writing was reviewed with the general education and RSP teacher. Student can write very basic sentences similar to an early first grade student. Student did not meet her writing goals. Student also did not meet her math goal. Parents inquired about the grade level set for student's math goal. The RSP teacher responded that the grade level set for student's math goal was mid-first grade.

7. The teachers confirmed that Student was not demonstrating adequate improvement in the current programs. The regular education teacher advised Parents that student's current program was not meeting her needs because Student was not meeting fourth grade standards and was functioning around the first grade level. The resource specialist further stated that although she provided Student with the maximum services offered in the RSP program and that student has made progress, she cannot give Student all the support she needs.

² The doctrine of collateral estoppel applies to administrative proceedings. (*Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944 (citing *People v. Simms* (1982) 32 Cal. 3d 468, 479-480 (1982).) Collateral estoppel applies to issues raised and resolved between the same parties. (*Pacific Lumber, supra*, 37 Cal. 4th at p. 943 (citing *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341.))

8. Parents expressed concern with Student's speech therapy, particularly the use of the Lindamood-Bell program. They requested that the program be provided separately from speech therapy. The speech therapist explained that she is trained in the Lindamood-Bell program and that the program is used as one technique to increase phonetic awareness. She further explained that Student would be receiving the program as part of speech therapy, twice weekly. The IEP team added the Lindamood-Bell program to Student's services.

9. At the annual IEP meeting new services were offered for the period of February 9, 2006, through February 9, 2007, and included: (a) 140 minutes a day, four days a week, of reading, writing and math in a small group, pull-out RSP; (b) thirty minutes, twice weekly, language, speech and hearing services in a small group, pull-out program; (c) APE, thirty minutes, twice a week, in a small group, pull-out program; (d) occupational therapy, forty-five minutes, once a week, in a small group, pull-out program; and (e) ongoing inclusion specialist services.

10. Parents were provided with a copy of the annual IEP, but did not sign it.

The February 27, 2006, follow-up IEP meeting

11. As a result of *Rialto One*, District conducted a follow-up IEP meeting on February 27, 2006, (the February 27 IEP meeting), to discuss Student's placement at a District SDC or at Big Springs. District made the following determination: (a) Student's placement would change from a full inclusion general education class to a District SDC at Casey Elementary School (Casey), 360 minutes a day, five days a week; (b) District would provide door-to-door transportation to Casey; (c) Student would receive related services set forth in paragraph 9(b-d), *supra*. Under this educational plan, 80 percent of Student's time will be devoted to special education and twenty percent of her time will be spent in general education.

12. In attendance at the February 27 IEP meeting were: (a) Student's parents; (b) principal and special day class instructor at Casey; (c) current principal and regular education teacher at Hughbanks Elementary School; (d) the APE specialist; (e) the RSP specialist; (f) Dr. Barbara Mori, Student Services Director of the District; and (g) a Spanish translator. Parents tape recorded the meeting.

13. The SDC teacher at Casey described her program, including the various reading programs she utilizes such as Lindamood-Bell. Parents requested a written description of the SDC program. Parents indicated that they requested a written description of the program many times before and did not want to rely upon a verbal description of the program. The SDC teacher offered to provide written descriptions of the different reading programs. Parents were informed that there was no written program description of the Casey SDC class. Parents refused to sign the February 27 IEP without a written program.

14. On March 6, 2006, District sent a letter to parents denying their request for a written description of the Casey SDC class. District repeated its offer set forth in the February 27 IEP, and reminded parents of their procedural safeguards. The letter was translated into Spanish for the Parents. Parents never signed the IEP.

15. District reviewed eight different District schools for the Student before selecting Casey. Casey's SDC was chosen as the most appropriate placement for Student because of the breadth of experience of the teacher, the tight structure and organization of the classroom, and the level of positive engagement of her pupils. Casey's SDC teacher has 25 years experience in special education and is credentialed. She was also involved for many years in training and mentoring other special education teachers under a state program. There has never been a complaint about her. Casey's SDC teacher is trained in, and utilizes, a variety of research-based reading programs including Lindamood-Bell. She applies pieces of various programs to cover a range of modalities (e.g., tactile, kinesthetic) and tailors the programs to each pupil's IEP and their individual needs. She prepares daily notes for the parents so that they can follow-up on homework and classroom exercise. She makes sure that there are opportunities for her pupils to participate in general education activities so that all pupils at Casey get to know each other. Pupils participate with other general education classrooms in reading, physical education and other activities. The Casey SDC includes approximately thirteen pupils in the third, fourth and fifth grades. Two aides work with the teacher three hours a day; two hours of which is devoted to working with pupils in small groups on specific projects. In addition to the Casey SDC teacher, Student will be working with an experienced APE specialist. Parents visited the Casey SDC prior to the February 27 IEP meeting.

16. District considered other placement options including the SDC at Student's home school, Hughbanks Elementary School, and Big Springs. District rejected the SDC at Student's home school. Parents visited Hughbank's SDC in 2005, and rejected it as well. District valued the teacher at Hughbanks but, in contrast to Casey's SDC teacher, she had only five years experience teaching special education. District also considered Big Springs and rejected it. District chose Casey's SDC over Big Springs for several reasons. First, District is familiar with Casey's teacher, her teaching methods and her class structure. With a private placement, like Big Springs, District could not monitor Student's teachers or teaching methods closely. Second, from the District's perspective, Casey offers more opportunities for physical activity because Big Springs does not have a playground and does not offer APE. Third, if Student is placed in Big Springs which is located in another county, Student would have to travel approximately forty-five minutes each way, every day.

17. Student did not present witnesses, or other probative evidence, to refute District's evidence that Casey SDC provided Student a FAPE. Parents conducted cross-examination of the APE teacher and cross-examination of the District representative before they left the proceeding. Parents' cross-examination primarily focused on District's pre-*Rialto One* settlement offer to place Student in Big Springs, and District's failure to provide them with a written program for the Casey SDC, or to involve them in the process of selecting a District SDC, instead of Big Springs. Parents refused to participate further in the proceedings if they

could not re-litigate whether placement in Big Springs is necessary to provide Student a FAPE. Parents refused to accept that *Rialto One* was final, and that this proceeding was focused on whether District's election of placement at its Casey SDC provided Student a FAPE. Parents insisted that they would only sign an IEP that placed Student in Big Springs.

LEGAL CONCLUSIONS

Applicable Law

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Ed. Code §56000 et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, meet state educational standards, and conform to the student's individualized education program (IEP). (20 U.S.C. §1401(a)(9).) "Special education" is defined" as specially designated instruction designed to meet the unique needs of the student. (20 U.S.C. § 1401(9)(16).) The term "related services" includes transportation and other services that may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(17).) However, the IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Board of Educ. v. Rowley*, 458 U.S. 176, 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

2. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, not on the alternative preferred by the parents. (See *Gregory K.*, *supra*, 811 F.2d at p.1314.) The IEP must be evaluated in light of information available at the time it was developed; it is not judged in hindsight. (See *Adams v Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) For a school district's offer of special educational services to a disabled pupil to constitute a FAPE, a school district's offer of educational services and/or placement must meet the following substantive requirements: (1) be designed to meet the student's unique educational needs; (2) comport with the student's IEP, (3) be reasonably calculated to provide the pupil with some educational benefit; and (4) be in the least restrictive environment. (*Rowley*, *supra*, 458 U.S. at p. 206-07.) To satisfy the requirement that the student be placed in the least restrictive environment, district's must limit student's removal from the regular education environment to those situations where 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); Ed. Code § 56031.)

3. The IEP is defined in the IDEA as 'a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.' (20 U.S.C. § 1401(11); § 1414(d)(1)(A); see also 34 C.F.R §300.346; *M.L. v. Federal Way School Dist.*, (9th Cir. 2004) 394 F.3d 634,642.) The IEP is the blueprint for successfully formulating and achieving the goal of IDEA. (*Murray v. Montrose County School Dis.* (10th Cir. 1995) 51 F.3d 921, 925; see also 20 U.S.C. § 1401(11).) The IEP

must include a statement of current educational status, annual goals, a description of the type of program and reasons for its selection, projected dates for initiation and duration, and some objective criteria by which instructional objectives can be evaluated. (20 U.S.C. § 1414((d)(A)(i)(I-VII); 34 CCR § 300.346.)

4. In addition to the substantive requirements, federal special education law also requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives a FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. Of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F. 2d 1479, 1483.) In California, Education Code section 56341.1 requires, among other matters, that the IEP team consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil. However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate; nor is a school district required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 (citing *Rowley, supra*, 458 U.S. at p. 207, and stating that the IDEA does not provide for an "education . . . designed according to the parent's desires.")

5. As part of the procedural requirements, District must assemble an appropriate IEP team to draft and then implement it. (20 U.S.C. § 1414(d).) The IEP team must include the following individuals: (i) the parents of a child with a disability; (ii) at least one regular education teacher of such child (if the child is participating in the regular education environment); (iii) at least one special education teacher, or where appropriate, at least one special education provider of such child; (iv) a representative of the local agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the availability of resources of the local educational agency; and (v) an individual who can interpret the instructional implications of evaluation results, who may be an existing member of the team; and (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise; where appropriate, the child with special needs. (20 U.S.C. § 1414(d)(1)(B).)

6. Furthermore, procedural flaws do not automatically require a finding of a denial of FAPE. (*W.G., supra*, 960 F.2d at p. 1484.) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) To constitute a denial of a FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process. (*Ibid.*; 10 U.S.C. § 1415(f)(3)(ii).) A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

7. Section 300.505(d), Title 34 of the Code of Federal Regulations, also requires states to adopt and implement procedures to “ensure that a parent's refusal to consent does not result in a failure to provide the child with a free and appropriate public education.” Hence, pursuant to federal law, states must balance a parent’s right to consent to services for his or her child with the duty of school districts to provide a FAPE. California law allows the District to take affirmative steps to ensure that a student receives a FAPE. (Educ. Code § 56346, subd. (c).) In such a situation, if a school district determines that the program (to which the parent has refused consent) is necessary to provide the child with a FAPE, the school district “shall” initiate due process hearing procedures to override the parent's refusal of consent. (*Ibid.*) While the school district’s due process hearing request is pending, the school district may convene a parent conference, or participate in mediation, to try to informally resolve the disagreement. But if the matter goes to hearing, the parties are bound by the decision resulting from the case. (*Ibid.*)

8. As the petitioner, the school district has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. ___, 126 S.Ct. 528, 163 L. Ed. 2d 387.)

Determination of Issues

9. As set forth in factual findings 1, 6, 7-9, 11, 13, 15-16, District’s placement of Student in the Casey SDC program with related services provides Student a FAPE. The Casey SDC with related services is designed to meet Student’s unique needs, including her speech and language deficits and her physical challenges. The SDC teacher uses a variety of methods tailor-made for Student and closely monitors Student’s progress. Furthermore, the Casey SDC placement comports with Student’s annual IEP as amended by the February 27 IEP. Student’s unique needs were clearly not being served in a full inclusion general education class. The Case SDC provides Student specialized attention in a small class. Finally, Casey’s SDC is designed to serve Student’s unique needs in the least restrictive environment. The Casey SDC provides for participation with general education students in the classroom and on the playground.

10. As set forth in factual findings 2-3, 4-6, 8, 10, 11-14, District complied with the procedural requirements of the IDEA in changing Student’s placement to the Casey SDC. District complied with procedural requirements in developing the annual IEP and the follow-up February 27 IEP. All necessary members of the IEP team were involved and Parents fully participated in the annual IEP and the February 27 IEP meeting. Moreover, Parents participated in *Rialto One* where Student’s assessments, unique needs and alternative placements were reviewed. Further, District’s refusal to provide Parents a written program of the Casey SDC does not violate Student’s right to a FAPE. Parents received written documentation of the annual IEP. They were verbally apprised of the Casey SDC program at the February 27 follow-up IEP meeting. The SDC teacher offered to provide written materials on the various programs she uses in the class. After the February 27 IEP meeting Parents received supplemental written confirmation of the District’s offer. Clearly, Parents have been involved in all decision-making concerning Student’s education.

ORDER

District's placement of Student in the District's special day class at Casey Elementary School, with related services, provides Student a free and appropriate public education for the 2006-2007 school year.

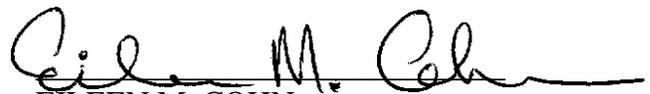
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the District prevailed on the only issue heard.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code §56505(k).)

DATED: June 26, 2006



EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division