

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2007020519

DECISION AFTER REMAND

DECISION AFTER REMAND

On April 19, 20, and 21, 2009, Administrative Law Judge (ALJ) Judith L. Pasewark, from the Office of Administrative Hearings (OAH), State of California, presided at the due process hearing on the remanded issue in this case.

Tania Whiteleather, attorney for Student (Student), appeared on behalf of Student. Student, who is now 21 years of age, resides in Wisconsin, and did not appear for the hearing. Student, however, testified by telephone, and stated under oath that she retained Ms. Whiteleather to represent her. Further, she requested that the hearing proceed without her presence. Suzanne Snowden and Rodney Ford, both from Ms. Whiteleather's office, also attended portions of the hearing.

Eric Bathen, attorney for the Bellflower Unified School District (District), appeared on behalf of the District. Natalie Ferrall, Mr. Bathen's assistant, and Christy Spear, the District's Administrator of Special Education, also attended the hearing each day.

STATEMENT OF PROCEDURE

ALJ Judith L. Pasewark originally heard this matter in April and May 2007. Upon appeal to the United States District Court in Case No. CV08-00394 GAF (CWx), the District Court, on November 9, 2009, remanded the matter to address the issue of whether Student is entitled to compensatory educational services resulting from her removal from school pending her proposed expulsion.

ISSUE

The sole issue for consideration is whether Student is entitled to compensatory education as a result of her removal from her educational placement between March 22 and April 25, 2005. In order to determine whether a remedy of compensatory education is fitting, it must first be determined whether the District committed any procedural violations of the IDEA by failing to provide Student with educational services following her removal from school on March 22, 2005.

FACTUAL FINDINGS

1. As of March 21, 2005, Student, age 16, attended the tenth grade at Mayfair High School (Mayfair). Student qualified for special education as a student with a learning disability. Student's implemented individualized education program (IEP) from January 11, 2005, consisted of placement in a special day class for all academic subjects; general education setting for ROTC and elective classes; and small group speech and language therapy for one class period per week.
2. On March 21, 2005, the District determined that Student violated Education Code sections 48900, subdivisions (b), (f) and (k). At that time, the District found Student to be in possession of a knife with a one-and-one-half-inch blade and three books of matches. Student also admitted using the matches in the restroom, which resulted in a fire causing substantial damage. The District notified Student's mother (Mother) that day by telephone and informed her that Student was suspended from school for five days, commencing March 22, 2005.
3. On March 25, 2005, the District sent Mother an amended notice of suspension, which repeated the reasons for suspension; provided a warning that Student was physically barred from school and school activities during suspension; and provided Notice of Parental Rights. The notice also scheduled a manifestation IEP on April 4, 2005, with a conference between Parents and the Assistant Principal directly following the IEP. It is noted that March 28 to April 1, 2005, represented the District's spring break, and was exempt from the suspension timeline as no classes were held during that period.
4. On April 4, 2005, the District held a manifestation IEP. The IEP team determined that Student's possession of the knife was a manifestation of her handicapping condition, but that her possession and lighting of the matches was not.
5. On April 4, 2005, directly following the IEP meeting, Joseph Perry, the Principal at Mayfair High School, held a pre-expulsion meeting with both of Student's parents (Parents) present. The purpose of the meeting was to review the factual basis for the suspension and to inform Parents that, based upon the facts presented, and the nature and seriousness of the violation, the District was recommending that Student be expelled from Mayfair High School and all schools in the District. On April 6, 2005, Parents were

informed that Student's suspension was being extended. On April 11, 2005, Mr. Perry sent Parents a letter repeating the above information. The letter specified that Student's original period of suspension had been extended under Education Code section 48911, subdivision (g), until such time as the Bellflower Unified School District Board of Education rendered a decision regarding Student's expulsion. None of the written information provided to Parents contained material regarding Student's special education rights to receive continuing services.

6. Student returned to school on April 28, 2005, as a result of an Interim Agreement reached as part of the underlying request for due process. Student missed a total of 22 school days.

7. Student contends that she was not provided educational instruction or special education services while she was suspended from school. Student correctly contends that she was entitled to independent study with the assistance of a special education teacher as well as speech and language services each week.

8. Principal Perry presided at Student's pre-expulsion meeting with Parents. Mr. Perry's testimony was somewhat self-serving.¹ Mr. Perry testified that, as a business practice, he absolutely provides students with educational services during suspension. It is Mr. Perry's usual practice to discuss a student's educational options during the pre-expulsion meeting and to provide parents with a "packet" of written information regarding education during suspension. Mr. Perry recalls that he orally made an offer of independent study for Student, but Parents, clearly angry and agitated, left the meeting before its conclusion, and therefore did not receive complete information or the packet.

9. Mr. Perry did not mail or otherwise provide Parents with the information packet. He indicated that his job to follow up on Student was interceded by Parent's legal action. The day after the pre-expulsion meeting, Student obtained counsel, and Mr. Perry deferred to the District to conduct any further communication with Student.

10. Mother's testimony contradicted Mr. Perry, although much of her testimony was also self-serving. Mother testified that the District did not offer to provide any alternate education or services for Student nor did the District provide her with any packet or any other written materials regarding continuing Student's education or services. Mother did acknowledge, however, that she was aware she could pick up Student's assignments and take them home, and she apparently did so. Mother also criticized the consistency and content of those assignments. Further, the District provided Student with two of four speech and language sessions, although they were not provided until the last week of the suspension.

11. In consideration of both Mr. Perry and Mother's testimony, it is clear that *at the time of the suspension*, the District's attempt to offer Student educational opportunities

¹ In fairness to all witnesses, however, the ALJ acknowledges that recall of events which occurred over five years ago may be difficult at best.

during her suspension was incomplete. While Mother may have been allowed to pick up assignments, the District failed to provide an organized independent study program with the assistance of a special education teacher. Additionally, the District failed to provide half of Student's speech and language services, and crowded the sessions actually provided into the last week of the suspension. The District's inaction during Student's suspension constitutes a procedural violation of the IDEA. By failing to provide an educational program with the assistance of a special education teacher, the District deprived Student of educational benefits, and thereby failed to provide Student a FAPE for a period of 22 days.

12. The parties, pursuant to stipulation, entered the April 27, 2005 Interim Agreement into evidence. The Agreement, which terminated the District's request for expulsion, also provided Student with corrective educational measures. Specifically, the Agreement provided that Student would return to Mayfair under her January 11, 2005 IEP, and would be allowed to make up any work missed since March 21, 2005. A special education staff member would provide assistance from 2:40 p.m. to 3:40 p.m., Mondays, Tuesdays, Thursdays and Fridays, until the work was completed.

13. A snapshot of Student as reported by her April 4, 2005 IEP indicated that she experienced processing deficits in attention and auditory perception, and further demonstrated inattention, social inappropriateness, impulsivity and poor motivation. The IEP reported Student's medical history of Bipolar Disorder, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder. Further, Student took medication to assist with concentration, and attended private therapy sessions which focused on improving her social maturity, interpersonal relationships and self-concept. The IEP team estimated Student's cognitive abilities to be in the low-average to average range based upon previous testing; however, her deficits, as described above, remained significant and negatively affected her ability to learn.

14. As of May 2007, the approximate date of the due process hearing in this matter, Student and her family had moved from California to Portage, Wisconsin. As of mid-hearing, the District, as well as Student, believed Student qualified for graduation as of June 1, 2007, and would receive her diploma at that time. By the end of the due process hearing, however, Mother testified that Student would not be graduating and instead would be continuing in the special education program provided by Portage High School (Portage). Although Student had completed all legal requirements and courses for graduation with a diploma as of June 1, 2007,² the Portage School District, over Student's objections, acquiesced to Mother's request that Student nonetheless be continued in special education to address her reading and daily living skills needs.

15. Student's November 1, 2007 IEP, conducted by the Portage district, indicated that the Portage district offered placement at Portage High School, but Student did not want

² Student was finally provided her diploma in 2009. The diploma reflects graduation on June 1, 2007. In Student's history and information provided to the Wisconsin Division of Vocational Rehabilitation, Northwoods, and in her communication assessment, Student indicated that she graduated from high school in 2007.

to take classes on the high school campus. As of 2007, Student's reading test scores remained low, between the fifth and ninth grade levels. The Portage district offered Student a reading skill building program for 90 minutes a day, but Student declined. Later, Student enrolled in a math concepts class at the community college, but often left class early, and did not make use of the Study Center or Math Lab. Student did not complete the math class.

16. Additional information indicated that Student's independent living skills were sporadic, at best. The Portage IEP information indicated that Student had lived independently from her parents; however, she moved frequently. She had obtained part-time employment but had difficulty keeping her job. In spite of her living difficulties, the IEP report indicated that Student had sufficient daily living skills to survive after graduation. The IEP reflected that, although Student scored below 50% in the areas of home living and community participation, growth in those areas of low scores was easily attainable for Student just by experience and guidance. She would need assistance in certain areas like money and time management, but there was assistance available in the community for those areas. Finally, the Wisconsin court in Columbia County determined that Student functioned at a level in which she did not need a guardian appointed nor, to date, has she qualified for social security disability benefits.

17. As of February 2, 2008, The Portage district opined that Student would be better served by concluding her education, graduating, and working with agencies to assist her with employment. Mother did not agree.

18. On February 25, 2009, the Portage district provided Student and Mother a Notice of Graduation which indicated that Student had met the credit requirement for graduation from Portage High School. The notice indicated that "the school has made attempts to have Student attend some modified classes to further meet her transition and reading needs at her mother's request, but Student has refused instruction and has not attended school since December 13, 2007." Portage deemed Student graduated as of February 25, 2009.

19. In July 2009, the Wisconsin Division of Vocational Rehabilitation (DVR) referred Student to Northwoods Incorporated of Wisconsin (Northwoods), for a Situational Assessment to address Student's work habits and behaviors in order to improve her future vocational pursuits. The Assessment indicated that Student would benefit from participating in a vocational training program, such as Northwoods, which would work with Student to improve key work habits and behaviors before transitioning into competitive employment.

20. Student completed the Northwoods vocational training program. The program, which is available to a variety of disabled adults, provides vocational and life skills training, as well as assistance in finding employment.

21. Konni Roll, Student's case manager at Northwoods, testified on her behalf, and described Student's current abilities and needs. Student exhibited difficulties in both obtaining and keeping jobs. Ms. Roll opined that much of Student's difficulties resulted

from (1) her difficulty understanding work protocols; (2) difficulty communicating effectively; (3) poor judgment; and (4) anger issues.

22. Through the efforts of Northwoods, Student has been employed part-time since April 20, 2010, in a janitorial position, cleaning restrooms in highway rest areas.

23. Ms. Roll expressed a sincere concern for Student's future. Student has not demonstrated that she is able to effectively take care of herself, given her limited life skills and transient living arrangements. She believes that Student needs a long-term support system, which would include supported employment and continued job coaching. Student would benefit from additional case management to oversee her organization in areas such as keeping mental health appointments and taking medications.

24. Student's referral information also indicated that Student had processing difficulties in the areas of auditory perception, visual processing, receptive language skills and attention. The assessor noted that Student had a hard time communicating and understanding her supervisors on occasion. Ms. Roll confirmed that Student's speech and language deficits limit her employability. Northwoods recommended a Communication Assessment, which was completed October 7, 2009. The Communication Assessment reported that Student presented with moderate deficits in the areas of immediate memory, problem-solving, abstract reasoning, organization, auditory processing and retention, and reading comprehension. In addition, Student demonstrated expressive and receptive vocabulary well below her age level which would likely interfere with her ability to follow directions. The report recommended that Student attend formal speech and language intervention to address deficit areas twice weekly for a period of two months, at which time her progress would be addressed. Northwoods offered Student the recommended speech and language services; however, according to Ms. Roll, Student was not compliant and did not complete the program. As Student is no longer eligible for services from Northwoods, the speech and language program is no longer available to Student.

25. It is also apparent that Student lacks certain motivations.³ As an example, Northwoods noted that Student has reading glasses, but chooses not to wear them when needed. Student is prescribed medications, but does not always take her medicine, which results in mood swings. Student declined to participate in an intensive (90 minutes daily) reading remediation program. Further, Student failed to consistently attend the speech and language services offered, and failed to complete a math program or use the study assistance available to her.

³ Student's lack of motivation was also noted in the initial due process decision.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of proof at the due process hearing. Student filed this matter and bears the burden of proof.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

3. A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include developmental, corrective, and supportive services, such as speech-language therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

4. In *Board of Education of the Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L. Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) 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. 200.)

5. Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of a FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

6. A student receiving special education services may be suspended or expelled from school. (Ed. Code, § 48915.5, subd. (a).)

7. When a school district changes the placement of a student receiving special education services for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. Specifically, when a special education student is suspended for disciplinary reasons for more than 10 days, federal law requires that the appropriate members of the IEP team meet to determine whether the student's conduct was a "manifestation" of her disability. (20 U.S.C. § 1415(k)(1)(E); 34 C. F.R. § 300.530(e) (2006).)

8. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to her. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) The removal of a special education student from her placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(1)(2006).)

9. The Code of Federal Regulations provides that a child with a disability who is removed from the child's current placement must continue to receive educational services so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. (34 C.F.R. § 300.530(d)(1)(i)(2006).) Further, the child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (34 C.F.R. § 300.530(d)(1)(ii)(2006).)

10. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.)

11. A district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361]; *Parents of Student . v. Puyallup School District No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 [*Puyallup*].) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Id.*, *supra*, at p. 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid.*) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

12. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of*

Columbia (D.C. Cir. 2005) 401 F.3d 516, 524.) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*)

13. Generally, a district's obligation to provide an eligible special education student with a FAPE terminates when the student graduates from high school. (*Puyallup, supra*, 31 F.3d at p. 1497.) Relief, however, may be provided even though the student is no longer eligible for special education services. (*Capistrano Unified School District v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 890; *Puyallup, supra*, 31 F.3d at p. 1496.) A student's graduation does not relieve a district's obligation to provide compensatory education to remediate the harm caused to the student by the district's failure to provide the student with a FAPE before graduation. (*Department of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1196, fn. 3.)

Did the District Deny Student a FAPE between March 22 and April 25, 2005?

14. Although a student receiving special education services may be suspended or expelled from school, a district must take special care in doing so. Pursuant to Legal Conclusions 6, 7, and 9, the removal of a special education student from her placement for more than 10 consecutive school days constitutes a change of placement. A student with a disability who is removed from her current placement must continue to receive educational services so as to enable her to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in her IEP.

15. Pursuant to Factual Findings 1 through 10, it is clear that the District suspended Student for a total of 22 consecutive days. Although Principal Perry indicated it was his practice to provide a suspended pupil with independent study, there is no evidence that this was done for Student. To the contrary, Mr. Perry indicated that he did not provide Parent with the educational information packet and he did not follow up after Student retained counsel. Although Mother may have picked up homework assignments, there is no evidence that Student was provided any assistance from her special education teachers during the suspension, nor did she receive any speech and language services until the last week of her suspension, after filing her request for due process hearing. Thus, the District committed a procedural violation of the IDEA. Pursuant to Legal Conclusion 5, a procedural violation constitutes a denial of a FAPE only where it results in the loss of educational opportunity to the student or seriously infringes upon the parents' opportunity to participate in the IEP process. Based upon Factual Findings 1 through 10, the failure to provide Student with an independent study program supervised by her special education teachers, in essence provided Student with no education at all. As a result, the District denied Student a FAPE by both impeding Student's right to a FAPE and depriving Student of educational benefit for 22 consecutive school days.

Is Student Entitled to Compensatory Education?

16. Pursuant to Legal Conclusion 11, a district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. As determined above and in Factual Finding 11, the District denied Student a FAPE for 22 consecutive days of her suspension. While a district's obligation to provide a special education student with a FAPE terminates when the Student graduates from high school, compensatory education may be provided even though the student is no longer eligible for special education services if it is necessary to remediate the harm caused by denial of a FAPE prior to graduation. (Legal Conclusion 12.)

17. It is important to note, however, that equitable considerations may be considered when fashioning relief. Pursuant to Legal Conclusions 11 and 12, compensatory education is an equitable remedy. The law does not require that day-for-day compensation be awarded for time missed. The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Determination of what is reasonably calculated to provide educational benefit reverts to a discussion of *Rowley* as contained in Legal Conclusion 4. *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. 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. Pursuant to Factual Finding 12, subsequent to the suspension, in the Interim Agreement, the District provided Student with a means of making up and completing all missed lessons and assignments with direct assistance from the special education staff. While Mother may disagree that such remedy is adequate, the District met its obligation under *Rowley* to provide Student with the basic floor of opportunity by providing access to specialized instruction.

18. The District did not, however, provide Student with all of the speech and language sessions required under her January 11, 2005 IEP. Calculations indicate that two small group speech and language sessions were not provided during Student's suspension. Pursuant to Legal Conclusion 10, two speech sessions, taken as part of the total sessions provided Student during the 2004-2005 school year, do not represent a material failure of the District to implement Student's IEP. Further, Student failed to establish that Student's current communication needs are a result of missing two, group speech sessions in 2005. It is clear that Student could benefit from continuing speech services to assist her with vocational communication. Based upon Factual Findings 24 and 25, additional speech and language services were offered to Student; however, as stated by Ms. Roll, Student was noncompliant and did not complete the speech therapy. Student's failure to take advantage of those services offered to her has not been limited to speech and language. Student failed to utilize an intensive reading program offered by Portage, but now wants the Bellflower District to provide these same services. Based upon the equities of the matter, the speech and language sessions omitted during Student's suspension in 2005 is a de minimus violation of the IDEA, and therefore, the District is not required to provide Student with additional

