

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

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007070950

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on November 26, 28, 29, and 30, 2007, in Costa Mesa, California.

Lyndsy Rutherford, Esq., of Rutan & Tucker, represented Petitioner Newport-Mesa Unified School District (District) at the hearing. Diana Casato, Special Education Director for the District, also appeared on behalf of the District.

Leejanice Toback, Esq., of Jarvis & Krieger, represented Respondent (Student) at the hearing. Student's mother and father were present for most of the hearing. Student was not present.

The District's due process complaint was filed on July 30, 2007. On August 13, 2007, the parties stipulated to a continuance of the hearing. On August 30, 2007, OAH issued an order granting the continuance and setting new dates for the hearing. At the close of the hearing on November 30, 2007, the parties requested time to file written closing argument. The matter was taken under submission on January 18, 2008, upon receipt of the parties' written closing argument.¹

¹ The District's written closing argument has been marked as Exhibit 109 in order to maintain a clear administrative record. Student's written closing argument has been marked as Exhibit S-71.

ISSUE

Did the proposed individualized education program (IEP) set forth in the May 29, 2007, and June 13, 2007 IEP documents offer Student a free appropriate public education (FAPE) in the least restrictive environment?²

FACTUAL FINDINGS

1. Student is a 17-year-old who is eligible for special education under the category of emotional disturbance (ED). Student is currently in the 11th grade and is scheduled to graduate from high school in 2009. He has already passed the California High School Exit Exam.

2. For the past few years, Student has attended the Winston School, a nonpublic school (NPS) located in Del Mar, California. This NPS placement was necessary because of Student's severe behavioral problems during his prior school years. The District now believes that Student has progressed behaviorally to the point where he should return to a public school to complete his high school education. The District contends that a public high school will be the least restrictive environment for Student. Student disagrees and believes that his progress is due to the supports in place at the NPS, and that Student will regress if removed from those supports and placed in the public school program proposed by the District. The law requires that a special education student be educated in the least restrictive environment appropriate to meet the student's needs.

3. Student also contends that the District committed procedural violations of the Individuals with Disabilities Education Act (IDEA) that prevented the District's offer from constituting a FAPE. A District is required to comply with the procedures set forth in federal and state special education law. A failure to abide by those procedures could constitute a denial of FAPE, if the procedural violations impeded the child's right to a free appropriate public education, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child, or caused a deprivation of educational benefits.

4. On April 23, 2007, the District sent a written notice of an IEP meeting to Student's parents with two possible dates for meeting – June 4, 2007, and June 8, 2007. On May 1, 2007, Student's father sent an email agreeing to the June 4, 2007 IEP date.

² During the Prehearing Conference held on November 21, 2007, the District sought leave to amend the due process complaint to add allegations regarding an IEP held in September 2007. Student opposed the motion to amend, and the motion was denied. During the hearing, the District once again sought leave to amend, or alternatively, to file a separate case based on the September IEP and consolidate the two cases for hearing. The motion to amend and the motion to consolidate were both denied. Nothing in this Decision or in the rulings on either of the two motions is intended to prevent the District from filing a new due process request based on the September 2007 IEP.

5. On May 4, 2007, the District sent an email to Student's father explaining that one of the District staff members was unavailable on June 4. The District proposed three other possible dates and times: May 29, from 10:30 a.m. to 12:30 p.m., May 31, from 10:30 a.m. to 12:30 p.m., or May 31, from 1:00 to 3:00 p.m. The District confirmed that the Winston School staff would be available by telephone during any of the three proposed dates and times.

6. On May 29, 2007, Student's annual IEP meeting was held. Student's parents and their attorney attended the meeting. Several individuals from the Winston School appeared telephonically. At the start of the meeting, the District discovered that the speaker phone in the meeting room was not working properly. Student's counsel objected going forward with the meeting until a working speaker phone could be found to enable the Winston employees to participate in the meeting. The District attempted to use a cellular telephone with a speaker to connect with the Winston employees, but the technology was not sufficient to allow the Winston employees to participate fully in the meeting. Student's counsel objected to the use of the cellular telephone. Finally, the District moved the meeting to a room which had a working speaker phone, and the meeting went forward.

7. As set forth in Factual Finding 5 above, the District originally noticed the IEP meeting to last for two hours, from 10:30 a.m. until 12:30 p.m. By the time the problem with the telephone was resolved, approximately an hour of the meeting time had been lost. The meeting went later than the time originally scheduled, and ended some time between 12:30 p.m. and 1:00 p.m.

8. During the meeting, the team discussed Student's proposed goals and objectives, but there was not sufficient time to discuss whether Student would participate in any extended school year (ESY) programs during the summer of 2007, or to discuss Student's placement and services for the 2007-2008 school year. Student's attorney tried to discuss placement, but the District members of the team explained that goals had to be addressed first.

9. Near the end of the meeting, the team discussed when to meet again to finalize the IEP. The Winston employees would not be available between June 15, when Winston's regular session ended, and July 2, 2007, when their summer classes began. The District school year ended approximately a week after June 15, 2007.

10. Student's attorney was not available to meet again until after June 20, 2007. Instead of adjourning the meeting and continuing on a different date, she suggested that they continue on the same date (May 29). Both Student's parents and their attorney were available for that entire day. Alternatively, she requested that the meeting be continued to a date after June 20, 2007, when she could attend with Student's parents.

11. The District staff had other commitments on the afternoon of May 29, 2007, and declined to continue the meeting that day. They determined that they had to meet again prior to June 15, before Winston ended its regular school year. Because Student's attorney

was not available to meet prior to that date, the District staff suggested that Student's parents attend the IEP meeting without their attorney. The parents refused to do so. Student's parents hired their attorney to assist them because they were not personally familiar with special education law. Their attorney had attended past IEP meetings with them, and they did not feel comfortable attending a meeting without her.

12. The District staff then explained that they would schedule another IEP meeting for a date prior to June 15, which the parents could attend if they wished.

13. The notes to the May 29, 2007 IEP stated, in part:

The District has requested that an IEP meeting be held prior to 6/15/07 as this is the last day of school for Winston. Parents attorney has indicated that she is not available prior to 6/15/07. District has requested that the parents attorney let the District know if she becomes available. In the meantime, the District will send out 3 possible dates for a follow-up IEP meeting prior to 6/15/07.

14. On June 1, 2007, the District sent Student's father an email which proposed three possible dates prior to June 15, 2007, for the follow-up IEP meeting. Part of the email message stated:

As Part 2 of [Student's] Annual IEP meeting needs to be held prior to June 15, 2007 which is the last of school at Winston, the District will proceed with the meeting on June 13, 2007 if we do not hear that one of the other proposed dates is more convenient for you. Please let us know your preference as soon as possible as there are many people holding these dates for the completion of [Student's] IEP.

15. On June 4, 2007, Student's counsel sent a letter objecting to the District's plan to hold an IEP meeting prior to June 20, 2007.

16. Counsel for the District sent a reply letter on June 6, 2007, asking that Student's parents appear at the IEP meeting without counsel. The letter repeated the concern that Winston's school year ended on June 15, 2007. The letter also mentioned that summer vacation for District staff and the need to discuss ESY were two additional reasons for holding the meeting before the 15th. However, the District did not specify any particular District employees who would be unavailable to meet after June 20, 2007, due to vacations, and the District staff did not ask Student's parents whether they would be willing to waive the appearance of any unavailable District personnel. In prior years, the parties had held IEP meetings for Student during the summer.

17. On June 11, 2007, Student's counsel sent a letter stating that Student's parents would send a representative to the IEP meeting to tape the meeting.

18. On June 13, 2007, the District held the follow-up IEP meeting. Neither Student's parents nor their attorney attended the meeting. A representative of the parents appeared to tape record the meeting, but did not participate in the meeting except to turn on and off the tape recorder. At the meeting, the Winston school employees participated by telephone. The District IEP members discussed handwriting samples and occupational therapy goals, determined that Student did not need ESY services during the summer, and proposed placement and services for Student for the 2007-2008 school year. Although the Winston staff participated in the meeting by telephone, the District staff made most of the recommendations for placement and services, and adopted those recommendations in the proposed IEP.

19. The District made the following offer of placement and services for the 2007-2008 school year for Student: placement in a general education class at Corona del Mar High School, Resource Specialist Support for 55 minutes per day, individual counseling by the school psychologist, once per week for 45 minutes each session for the first month of school (with the possibility of continuing counseling), group speech and language services once per week for 30 minutes, and occupational therapy consultation for 60 minutes per month. The District also recommended a referral to county mental health to provide additional counseling services.³

20. On June 13, 2007, after the meeting ended, the District sent a letter to the parents with a copy of the proposed IEP enclosed. The letter offered to hold another IEP meeting on August 30 or 31, 2007, during the week before school began in the fall.

21. Student's parents did not respond to the June 13 letter, so the District sent another letter on July 2, 2007. This letter served as the District's "prior written notice" of the District's intent to change Student from his Winston placement to a District public high school. When there was no response, the District sent another letter on July 13, 2007, enclosing the notice for an IEP meeting to be held on August 30 or 31, 2007.

22. On July 26, 2007, Student's counsel sent a letter in reply stating that Student's parents were unavailable for an IEP meeting on August 30 and 31. She offered to meet any time prior to August 21 or after September 2, and explained that Student's parents were rejecting the proposed IEP offered by the District at the June 13, 2007 IEP meeting.

³ The parties dispute whether the District's offer of placement and services constituted a free appropriate public education for Student. However, as set forth in the Legal Conclusions below, because the District's procedural errors significantly impeded the opportunity of Student's parents to participate in the decisionmaking process regarding their child's education, the District's offer did not constitute a FAPE. Therefore, it is not necessary to address the substantive disputes in this Decision.

Student's written closing argument also raised a host of minor procedural flaws with the IEP notices and IEP documents. In light of the Decision that FAPE was not offered, it is not necessary to address these alleged procedural flaws.

23. On July 30, 2007, the District filed this request for a due process hearing, contending that the IEP proposed at the May 29 and June 13 IEP meetings offered Student a FAPE for the 2007-2008 school year.

24. On August 1, 2007, Student's counsel sent a letter with an attachment that included the parents' concerns regarding the June 13 IEP offer of placement and services. She asked to have that attached to the June 13 IEP.⁴

25. As discussed in Legal Conclusions 5 – 15 below, the District's conduct in holding the June 13 IEP meeting without the parents and their attorney in attendance constituted a procedural violation of federal and state special education law.

LEGAL CONCLUSIONS

1. The District has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

4. However, not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

(A) Impeded the child's right to a free appropriate public education;

⁴ There was other correspondence between the attorneys during this time period, but it is not necessary to describe every letter for purposes of this Decision. As part of their correspondence, the parties agreed that Student's educational expert would have an opportunity to observe the proposed placement.

(B) Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(C) Caused a deprivation of educational benefits.

5. Both IDEA and state law require that a child's parents have the opportunity to participate meaningfully in the IEP process. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 893.) An IEP team must include one or both of the pupil's parents, a representative selected by a parent, or both. (Ed. Code, § 56341, subd. (b)(1).)

6. The law recognizes that one of the most important ways in which parents participate in the process is by attending and participating in IEP meetings. Districts are required to "take steps to ensure that no less than one of the parents" is present at each IEP meeting or is "afforded the opportunity to participate." (Ed. Code, § 56341.5, subd. (a).) IEP meetings "shall be scheduled at a mutually agreed-upon time and place." (Ed. Code, § 56341.5, subd. (c).)

7. A meeting may be held without a parent in attendance "if the local educational agency is unable to convince the parent...that he or she should attend." (Ed. Code, § 56341.5, subd. (h).) However, in that event, a district must "maintain a record of its attempts to arrange a mutually agreed-upon time and place...." (*Ibid.*) Even if a district is convinced that a parent will not agree to the district's proposed IEP, the district must still hold the meeting and give the parent the opportunity to discuss the placement and services. For example, in *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, the court held that the school district could not escape its obligation to make a formal placement offer on the basis that the parents had previously "expressed unwillingness to accept that placement."

8. The statutes and cases discussed above emphasize the importance of parental attendance at IEP meetings and the lengths to which a district must go if it intends to hold an IEP meeting without parental attendance. As set forth in Factual Findings 1 – 25 above, the District did very little in this case to try to set a mutually agreeable date for the meeting. The District staff members insisted on the meeting prior to June 15, even though they knew that Student's attorney was unavailable and that the parents did not feel comfortable attending a meeting without her. The law contemplates that parents may desire to have an attorney or other representative with them. That is why the law provides that the IEP team must include the parents, their representative, *or both*. (Ed. Code, § 56341, subd. (b)(1).)

9. The situation might have been different if the demands made by Student's parents or attorney had been unreasonable or if those demands placed the District in a position in which the District could not convene a proper or timely meeting. However, the District has not met its burden of proving that such a situation existed.

10. The actions of Student's attorney and parents in this case were reasonable and cooperative. Student's parents agreed to the initial IEP dates sent by the District and

cooperated when the District changed the date. They were prepared to go forward longer than two hours on the date the meeting was set in order to finish the IEP. It was not the fault of Student's parents or attorney that the District's meeting room did not have a working speaker phone. In light of the importance of Winston's participation in the IEP meeting, it was reasonable for Student's attorney to insist upon a dependable method of communication to permit the Winston staff to hear what was happening during the meeting and to be able to give input when appropriate.

11. It was also reasonable for Student's attorney to request a continued meeting date after June 20, 2007. Attorneys have many obligations, and the end of the school year is a very busy time in the special education field.

12. The District raises several reasons why it was necessary to hold the continued IEP meeting prior to June 15. The first is that the Winston school year ended on that date. However, the evidence established that the Winston summer program began on July 2, and the Winston staff would be available after that date. The meeting could have been continued until a date after that time. IEP meetings in past years had been held during the summer. That is not a sufficient reason to require a meeting prior to June 15.

13. The District also points out that a meeting prior to June 15 was necessary because one of the issues to be addressed was whether Student needed any extended school year (ESY) services during the summer of 2007. However, the June 13 meeting did not stop with the issue of ESY, but instead discussed placement and services for the 2007-2008 school year. Even if there was a need to go forward with the meeting regarding ESY, the District has not demonstrated that the same need applied to the 2007-2008 school year.

14. Finally, the District argues that the District's school year ended about a week after June 15, 2007. However, the District made no showing that any of the District personnel necessary for Student's IEP would be unavailable during the summer. There is no evidence that the District staff made any attempt to see if a meeting could be scheduled after July 2, when the Winston staff would be available. There was no evidence that the District contacted any District personnel to see if they could be available by telephone or if Student would waive attendance of any unavailable personnel. There was also no evidence that the District attempted to schedule another IEP meeting shortly after the June 13 meeting to include the parents. Instead, the District proposed a meeting at the end of August, just before the start of the school year, more than two months after the June IEP.

15. The District's conduct in holding the June 13, 2007 IEP meeting without Student's parents constituted a procedural violation of IDEA and California special education law.

16. The next question is whether that procedural violation gave rise to a substantive violation of FAPE. As set forth in Legal Conclusion 4 above, there are three questions to be considered. In this particular case, the critical question is the second one:

Did the procedural violation significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child?

17. Parental participation in IEP meetings is critical. In this case, major changes were proposed to Student's placement and services at the June 13, 2007 IEP meeting. Student's parents and attorney had no part in the discussion regarding those changes. While the parents taped the meeting and had the opportunity to object to the proposed changes through a due process proceeding, that is not the same as attending a meeting and taking an active part in the discussion. The Winston staff was not in a position to dissent to the District's proposals during the meeting and did not do so.

18. The law does not call for a one-sided IEP discussion with a written proposal sent later to the parents for review. If it did, there would be no need for IEP meetings at all. The point is to have the parents *participate* in the meeting. (See *Shapiro v. Paradise Valley Unified School District* (9th Cir. 2003) 317 F.3d 1072, 1078 (mailing IEP to parents after the meeting was not sufficient).) The District's procedural violation significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to their child. The procedural violation constituted a substantive denial of FAPE.

19. The District argues that the parents participated in other ways, such as listening to the recording of the meeting, providing written letters objecting to the District's placement offer, having their expert visit the proposed placement, and attending a follow-up IEP held in September. It is true that a follow-up IEP might remedy the lack of parental involvement. However, the District filed this due process request based on the May and June IEP offer, long before the September IEP was held. The District did not timely seek to amend to add allegations relating to the September IEP, and that subsequent IEP is not at issue in this case. The evidence is undisputed that between June 13, and July 30, 2007, when the District's due process complaint was filed, the District did not hold a follow-up IEP meeting, nor did it offer to hold an IEP meeting during that time period.

20. The other activities of the parents in this case do not remedy their lack of involvement in the June IEP meeting, given the strong preference for parental attendance at IEP meetings in California and federal law. The authority relied upon by the District is factually distinguishable. In *Student v. Los Angeles Unified School District* (2006) OAH case number N2006011031, the ALJ based his decision, in part, on the "obstreperous behavior" of the child's parent. There was no such obstreperous behavior in the instant case. The parents had agreed to the dates for the IEP meeting originally proposed and agreed to the District's request to change those dates. The parents' desire to have their attorney present at the IEP meeting was reasonable, and a delay of the meeting to accommodate the attorney's schedule was reasonable under these circumstances.

21. In *San Diego Unified School District v. Student* (2007) OAH case number N2006120002, the parents, on advice of counsel, had specifically informed the district that they would not attend the IEP meeting in question and that the district should hold the

meeting without them. The parents did not seek to reschedule the meeting. In the instant case, on the other hand, the parents wanted to attend the meeting and requested that the meeting date be postponed so that they could attend with their attorney. There was plenty of time to accommodate the attorney's schedule and still hold the meeting before the start of the following school year.

22. The Ninth Circuit case of *Shapiro v. Paradise Valley Unified School District* (9th Cir. 2003) 317 F.3d 1072 is directly on point. In that case, the District proposed a meeting date on June 8. Student's parents were unavailable that day and requested a postponement. The District refused to postpone the meeting because two District IEP team members would be unavailable after June 10. The court found that the development of the IEP on June 8 violated the procedural mandates of IDEA, in part, because of the parents' inability to participate in the meeting. (*Id.* at p. 1078.) "After-the-fact parental involvement" was not sufficient, and the district's inclusion of the parents in "certain parts of the process" did not excuse the district's failure to include the parents in the IEP meeting. (*Ibid.*)

23. This is a District filed case, and the sole issue in this case is whether the District's proposed IEP of May 29 and June 13 offered Student a FAPE. In order for the District to prevail, the District must show that the proposed IEP offered a FAPE from both a procedural and substantive point of view. If the District's offer denied Student a FAPE in either respect, the District cannot prevail. Because the District's offer was developed under procedures that violated IDEA and because that procedural violation significantly impeded the parents' opportunity to participate in the decisionmaking process that led to that offer, the proposed IEP did not offer Student a FAPE. For that reason, there is no need to look at Student's remaining objections to the District's offer. (*Shapiro v. Paradise Valley Unified School District, supra*, 317 F.3d at p. 1078, fn. 6; *Amanda J. v. Clark County School District, supra*, 267 F.3d at p. 895.)

24. The District has the burden to show that its May and June 2007 proposed IEP offered Student a FAPE. The District failed to meet that burden.

ORDER

The District's proposed individualized education program set forth in the May 29, 2007, and June 13, 2007 IEP documents did not offer Student a free appropriate public education in the least restrictive environment. The District may not change Student's placement or services based upon the offer made in those two IEP documents.

PREVAILING PARTY

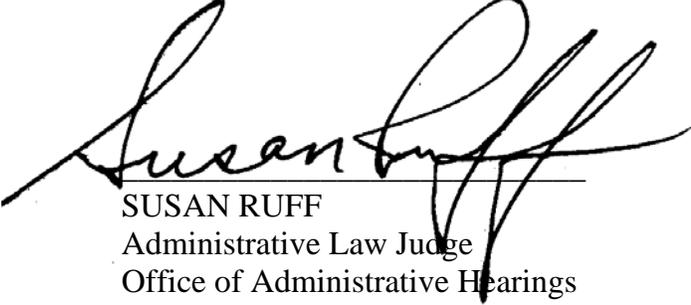
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and

decided. In accordance with that section the following finding is made: Student prevailed on the sole issue in this case.

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 90 days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: January 25, 2008



SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings
Special Education Division