BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. FALLBROOK UNION HIGH SCHOOL DISTRICT.	OAH CASE NO. 2011050794

DECISION

Administrative Law Judge (ALJ) Robert F. Helfand, Office of Administrative Hearings (OAH), State of California, heard this matter in Fallbrook, California, on December 7 and 8, 2011, and January 5, 2012.

Tania L. Whiteleather, Attorney at Law, represented Student. Student's mother (Mother), who is one of his conservators and holds his educational rights, was present throughout the proceeding.

Sharon A. Watt, Attorney at Law, represented the Fallbrook Union High School District (District). Sallie Hunt, Special Education Director for the District, was also present.

Student filed his due process complaint with OAH on May 19, 2011. On June 21, 2011, OAH granted a joint request to continue the due process hearing until December 7, 2011.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Mother; Sallie Hunt; Nicole Miller; Carla Crane; Adam Dawson; and Ellen Dowd.

Prior to commencement of the hearing, Student made a motion to bifurcate the remedy portion of the hearing on grounds that there will not be sufficient information for the ALJ to craft compensation in the event Student prevailed. The motion was denied without prejudice. Student resubmitted the motion during the hearing. The ALJ heard oral arguments and granted the motion on the record.

After the hearing, at the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on

January 17, 2012. Rebuttal closing briefs were filed on January 20 and 23, 2012. The matter was submitted on January 23, 2012.

On March 1, 2012, the parties agreed to extend the decision timeline in this case two weeks to March 14, 2012, due to a medical emergency of the ALJ.

ISSUES

The following issues, as listed in the Prehearing Conference Order, are to be determined in this matter:

Whether the District denied Student a free appropriate public education (FAPE) since May 19, 2009, because:

a) it has failed to conduct an individualized education program (IEP) meeting;

b) it has failed to conduct assessments of Student; and

c) it has failed to develop an individualized transition plan for Student?

FACTUAL FINDINGS

1. Student was born in April 1989. He is almost 23 years old. Student resides with his parents (Parents) who live within the geographical boundary of the District.

2. Student attended Fallbrook High School (FHS) for his 10th, 11th and 12th grade years in a special day class. Student was eligible for special education and related services under the category of autistic-like behaviors.

3. Student is considered in the "high-functioning" range of autism. He is in the average range of cognitive ability, but his disability impedes his academic and social progress. Student has significant problems with communications, social interaction, auditory memory, perseverating on issues, and anxiety.

4. In May 2007, the District conducted a triennial assessment of Student. This was the last assessment of Student that the District has performed.

5. On May 10, 2007, the District convened an annual IEP team meeting for Student, and discussed the results of the triennial assessment. On June 7, 2007, the IEP team reconvened the meeting and offered Student a placement in the FHS Transition Program.

6. On September 4, 2007, Parents, on behalf of Student, filed with OAH a due process complaint that challenged the June 2007 IEP. This was OAH case number 2007090067.

7. On November 20, 2007, OAH issued a decision in case number 2007090067 (2007 OAH Decision). In the 2007 OAH Decision, OAH ordered the District to hold an IEP team meeting within 30 days to discuss and consider placements, goals and services designed to help Student work toward a high school diploma. The 2007 OAH Decision denied Student's request for placement at the Fusion Academy (Fusion), a private school utilizing one-to-one teaching, on the grounds that Fusion was not a state-certified non-public school (NPS).

8. On December 13, 2007, Parents, on behalf of Student, filed a complaint in the United Stated District Court for the Southern District of California, challenging the 2007 OAH Decision (Federal Court Case).

9. On February 8, 2008, the District convened an IEP team meeting for Student, in accordance with the Order from the 2007 OAH Decision. The team members included Mother and her attorney, Ellen Dowd. At the IEP team meeting, District representatives discussed the potential placement of Student at an NPS called Springall Academy. Mother and Ms. Dowd requested that the District place Student at Fusion. Parents did not want Student to attend FHS, because he had experienced bullying and harassment there in the past. Nevertheless, the District again offered Student placement at FHS. In response, Ms. Dowd informed the District that Parents would place Student unilaterally at Fusion due to the District's failure to offer him a FAPE.

10. The February 8, 2008 IEP team meeting, was the last such meeting that the District has held for Student. The District did not prepare an IEP for Student for the 2008-2009, 2009-2010 and 2010-2011 school years. Student aged-out of special education in April 2011, when he turned 22. He has not obtained a regular high school diploma.

11. In April 2008, Student began to attend Fusion. Mother testified that Student did not register at Fusion, but that he was attending on a trial basis in order to determine whether Fusion would be appropriate for him. Parents hoped that the short period would demonstrate that Student would receive a high school diploma at Fusion. Parents also hoped this would lead either to the District agreeing to reimburse Parents for the cost of attending Fusion, or in the alternative, Parents would receive this remedy through the Federal Court Case. Parents did not notify the District that Student was attending Fusion, nor did Fusion request transcripts and other educational records involving Student from the District.

12. On August 1, 2008, a Magistrate Judge conducted a hearing in the Federal Court Case. Sallie Hunt, the District's Special Education Director, attended the hearing. During the hearing, Ms. Hunt learned for the first time that Parents had placed Student at Fusion. Through subsequent court papers, Ms. Hunt also learned that Student attended Fusion from April 2008 to August 2008, that the cost of the placement was $9,000, and that Parents could not afford to continue the placement there.

13. On August 29, 2008, the Magistrate Judge issued a Report and Recommendation to the United States District Court Judge in the Federal Court Case. The judge did not make a ruling in the case for over two years.

14. The District contends that Student was a unilaterally-placed private school student. District bases its position on Student's failure to register at FHS, and his attending Fusion. However, there is no dispute that Student was properly enrolled at the District.

15. Each year that a student attends FHS, the student must register with the school before classes are assigned. A student cannot attend classes until the registration process is completed. When a student fails to register, District personnel attempt to determine the status of the student. Adam Dawson, an assistant principal at FHS, stated that case managers for special education are aware of the status of the students on their case load. Special education students who do not attend FHS are not required to register. There is no requirement for a special education student to go through the registration process if he or she is going to receive special education services off the FHS campus.

16. Dawson also testified that when a student transfers to another school, the new school requests records, including transcripts, from FHS. This is another way that FHS learns that a student is no longer going to attend FHS.

17. Here, both FHS and Ms. Hunt were aware that Parents would not consent to Student attending any program on the FHS campus because of his anxiety resulting from past bullying and harassment. Parents disagreed with the District's FAPE offer, and were actively contesting the offer both with OAH and in the Federal Court Case. Parents never indicated that they were abandoning their claims against the District. In fact, Parents did just the opposite. On August 1, 2008, the District, through Ms. Hunt, was notified that, although Parents could not afford to place him at Fusion, Student would attend for "$9,000 worth of education." Thus, the District was on notice that Student could only attend Fusion for a limited time. Therefore, Student did not demonstrate a lack of intent of returning to District schooling. He only demonstrated intent to not attend a program on the FHS campus.

18. Following September 2008, neither the District nor Parents communicated with each other, as the matter proceeded in the Federal Court Case. Mother testified that the reason that she did not contact the District was that she was awaiting a decision from the court.

19. On January 27, 2011, the judge in the Federal Court Case issued an Order that adopted the Report and Recommendation of the Magistrate Judge. The Order affirmed the 2007 OAH Decision, but remanded the case to OAH for the resolution of two issues: (1) whether the February 7, 2008 IEP placement was appropriate under the IDEA, and, if not, (2) whether the private parental placement at Fusion was appropriate.

20. On May 19, 2011, Parent, on behalf of Student and through counsel, filed the due process complaint in this matter. Parents intended to obtain independent educational evaluations (IEE's) as part of the case, and have the District pay for such evaluations. Parents have not obtained IEE's due to finances.

21. On December 22, 2011, OAH issued a decision on the remand from the Federal Court Case (2011 OAH Decision). The 2011 OAH Decision found that the District had

predetermined the offer at the February 7, 2008 IEP meeting for Student, and awarded Parents reimbursement for the cost of placing Student at Fusion.

LEGAL CONCLUSIONS

Background

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has the burden of proof.

2. Under the 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(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. There are two principal considerations in claims brought pursuant to the IDEA: substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

4. After the initial assessment of a child with a disability, a school district is required to conduct a reassessment of the student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B)(ii); Ed. Code, § 56381, subd. (a)(2).) Reassessments are to provide the IEP team with the data to determine whether the child continues to have a disability and the child's educational needs. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (a)(1).)

5. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) School districts are required to have an IEP in place for each eligible child at the beginning of each school year. (34 C.F.R. § 300.323(a) (2006); Ed. Code, § 56344, subd. (c).) An IEP must be reviewed at least annually to determine whether the annual goals are being met, and at that time, the school district must revise the IEP as appropriate to address any lack of expected progress, new assessments, information provided by the parents, the child's anticipated needs, or any other matter. (34 C.F.R. § 300.324(b)(1) (2006); Ed. Code, § 56343, subd. (d).)

6. For a child with a disability who turns 16, his or her IEP must contain postsecondary goals based upon age appropriate transition assessments and transition services to help the child in reaching such goals. (34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) This requirement is sometimes referenced as a "transition plan." (See e.g., *K.C. v. Nazareth Area School Dist.* (E.D. Pa. 2011) 806 F.Supp.2d 806, 822.).

7. In California, an individual with exceptional needs includes a student "[b]etween the ages of 19 and 21 years inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma." (Ed. Code, § 56026, subd. (c)(4).) Here, Student's birthday is in April, and he turned 22 in 2011. (Factual Findings 1, 10.) Thus, under California law, he was able to participate in a special education program for the remainder of the 2011 fiscal year. (Ed. Code, § 56026, subd. (c)(4)(A).)

8. In special education administrative matters, there is a two-year statute of limitations. (34 C.F.R. § 300.507(a)(2) (2006); Ed. Code, § 56505, subd. (l).) Here, Student filed his due process complaint on May 19, 2011, making the two-year statute start running on May 20, 2009. (Factual Finding 20.)

Determination of Issues

9. The District owed Student a duty to develop an annual IEP for him for the 2008-2009, 2009-2010 and 2010-2011 school years. (Factual Findings 1, 2, 3, 5, 10; Legal Conclusion 5.) The duty to develop such IEP's also included the requirement to set forth a transition plan through postsecondary goals and transition services. (Legal Conclusion 6.) The District also owed Student a duty to perform a triennial assessment of him by no later than May 2010. (Factual Findings 1, 2, 3, 4; Legal Conclusion 4.)

10. The failure to develop IEP's for Student for the latter part of one school year and two school years thereafter, and to perform the triennial assessment of Student, are procedural violations of special education law. (Legal Conclusions 3, 4. 5, 7, 8.) These procedural violations amount to a substantive denial of FAPE because they both impeded Student's right to a FAPE and caused him a deprivation of educational benefit in that he did not receive from the District the special education services that he was entitled to. (Legal Conclusion 3.)

11. The District contends that it "does not have a duty to conduct annual IEP meetings and triennial assessments when a student no longer attends one of its schools if the adequacy of the prior year's IEP is not under administrative or judicial review." (District's Closing Brief, p. 1.) The District avers that its duties to Student ceased after the February 7, 2008 IEP meeting, as Student did not file for a due process hearing as to that IEP. But, this position is not tenable, as the District was under such a duty, because the parties were in the midst of judicial review in the Federal Court Case. (Factual Findings 7, 8, 12, 13) This judicial review included the February 7, 2008 IEP. (Factual Finding 19.)

12. Case law holds that "[a] school district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review. (*M.M. v. School Dist. of Greenville* (4th Cir. 2002) 303 F.3d 523, 536.) The rationale for this rule is that, without an IEP as a starting point, a court would be faced with a mere hypothesis of what the school district would have proposed and effectuated during the subsequent years. (*Town of Burlington v. Dept. of Educ., Commonwealth of Mass.* (1st Cir. 1984) 736 F.2d 773, 794.) It is the pendency of review that creates the need to maintain and update the IEP. (*Amann v. Stow School System* (1st Cir. 1992) 982 F.2d 644, 651, fn. 4.) Here, both the May 2007 and February 2008 IEP's for Student were under judicial review, thereby triggering the need for the District to provide continuing services through the development of IEP's and the performance of a triennial assessment. (Factual Findings 5, 8, 13, 19, 21.)

13. The District's contention that its obligations to Student ceased because he was privately placed is also without merit for several reasons. First, Student never indicated a desire to be privately placed as he never abandoned his administrative and judicial challenge to the District's actions. (Factual Finding 17.) Second, a unilateral special education placement occurs when one party unilaterally, without the consent or agreement of the other party, enrolls the pupil in another educational program. (*K.D. v. Dept. of Educ., State of Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1122.) Here, the District knew from the Federal Court Case that Parents had placed Student at Fusion for only five months, and could not afford a longer placement. (Factual Findings 11, 17.) Finally, the parties were in continued litigation over Student's prior IEP offers from the District at the time of the Fusion placement. Because litigation was pending and there had been no final determination of whether the District had offered Student a FAPE, at the time of the Fusion placement, District was not relieved of its continued obligation to conduct appropriate assessments and timely develop IEP's. (Factual Findings 6, 7, 8, 12, 13, 19, 21.)

Compensatory Education

14. Student is entitled to compensatory education. The District denied him a FAPE for the entire period of the two-year statute of limitations in this case. (Legal Conclusions 7, 8, 9, 10.)

15. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. ___ [129 S.Ct. 2484, 2494, fn. 11, 174 L.Ed.2d 168].)

16. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) "Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE." (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) Compensatory education awards depend upon the

needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*)

17. In an appropriate case, an ALJ may grant equitable relief that extends past graduation, age 22, or other loss of eligibility for special education and related services, as long as the order remedies injuries the student suffered while he or she was eligible. (*Maine School Admin. Dist. No. 5 v. Mr. & Mrs. R.* (1st Cir. 2003) 321 F.3d 9, 17-18 [graduation]; *Barrett v. Memphis City Schools* (6th Cir. 2004) 113 Fed.App. 124, p. 2 [nonpub. opn] [relief appropriate beyond age 22].)

18. Here, an award of compensatory education requires current assessment information about Student. "Just as IEPs focus on disabled students' individual needs, so must awards of compensating past violations rely on individualized assessments." (*Reid v. District of Columbia* (D.D.C. 2005) 401 F.3d 516, 524.)

19. Federal law provides that "[i]f a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense." (34 C.F.R. § 300.502(d)(2011).) State law reflects this authority, and allows an ALJ who is presiding at a special education administrative proceeding to "order that an impartial assessment, including an independent educational assessment of the pupil be conducted for purposes of the hearing and continue the hearing until the assessment has been completed." (Ed. Code, § 56505.1, subd. (e).) The cost of such assessment falls with the state Department of Education. (*Ibid*.) There is precedent for a hearing judge to order an assessment during the course of a due process hearing. (*Ojai Unified School Dist. v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1470.)

20. This is an appropriate case to invoke Education Code section 56505.1, subdivision (e). The District has not performed an assessment of Student since May 2007. (Factual Finding 4.) The parties have engaged in a long-standing dispute over educational services provided by the District to Student. (Factual Findings 4, 7, 8, 9, 20, 21.) In the opinion of this ALJ, Student requires an assessment by a third party who is unaffiliated with either Student or the District, in order to assist the ALJ in crafting an appropriate award of compensatory damages for the District's denial of FAPE in this case.

ORDER

1. Pursuant to Education Code section 56505.1, subdivision (e), the undersigned Administrative Law Judge appoints Dr. Michael Tincup to perform an independent educational evaluation of Student in the area of psychoeducation. In his evaluation, Dr. Tincup shall include the investigation and recommendation of appropriate placements for Student to obtain compensatory education. Such placements can include certified non-public schools, charter

schools, including those with virtual or home-based programs, and any program operated by the District, the North County Consortium of Special Education or local community college, which would be appropriate for Student.

2. Pursuant to Education Code section 56505.1, subdivision (e), the California Department of Education (CDE) shall bear the expense of the IEE performed by Dr. Tincup. The Office of Administrative Hearings shall provide the necessary information regarding the IEE to CDE.

3. Both Parents, Student and the District shall cooperate in the performance of the IEE by Dr. Tincup.

4. The Office of Administrative Hearings shall set a Trial Setting Conference for Wednesday, May 16, 2012, at 10:00 a.m. At the conference, the parties shall discuss the status of Dr. Tincup's IEE of Student, and provide mutually convenient hearing dates for the second phase of this case.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on the issues heard and decided in a due process proceeding. Here, Student prevailed on the three issues heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: March 14, 2012

/s/
ROBERT F. HELFAND
Administrative Law Judge
Office of Administrative Hearings