

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2011110416

DECISION

Susan Ruff, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on January 23, 2012, in Temecula, California.

Student's mother represented Student. Student was present throughout the hearing and assisted her mother with the presentation of the case. Ignacio Carrillo provided Spanish interpretation services.

Sarah Sutherland, Esq., represented the Temecula Valley Unified School District (District). Melanie Hertig, Assistant Director of Special Education, also appeared on behalf of the District.

Student's request for due process hearing was filed on November 9, 2011. On December 16, 2011, OAH granted the parties' request to continue the hearing date. The case was taken under submission at the conclusion of the hearing on January 23, 2012.

ISSUES

1. Is the District required to provide Student with curb-to-curb transportation at her current school of attendance in order to provide Student with a free appropriate public education (FAPE)?

2. Is the District required to provide Student with a one-to-one aide at her current school of attendance in order to provide Student with a FAPE?

FACTUAL FINDINGS

1. Student is a 17-year-old who currently attends Great Oak High School (Great Oak) within the District. Student has Morquio Syndrome as well as a history of asthma and scoliosis. She is eligible for special education services as a pupil with an orthopedic impairment. Student is short for her age and has difficulty with physical tasks such as walking and lifting.¹ As will be discussed in more detail below, her individualized education program (IEP) for the current school year places her in general education classes for 100 percent of her school day, and provides for services and supports to assist with things such as note taking and transitioning between classes.

2. Student is a charming young woman who is aware of her scholastic and orthopedic needs. During the hearing, she testified on her own behalf and assisted her mother with the presentation of her case. She is currently a senior in high school and is scheduled to graduate with a high school diploma at the end of the 2011-2012 school year. She has already passed the California High School Exit Exam (CAHSEE). She intends to go to college after she graduates, and plans to study business communication, among other things.

3. The current IEP for Student was developed in September 2011. The IEP contains a transition plan and goals in the areas of literary criticism, transition to college, and writing strategies. The supplemental aids and services called for in the IEP include: 1) preferential seating; 2) note taking services; 3) extra time on tests/quizzes/assignments; 4) access to assistive technology (keyboard); 5) foot stool for use in restroom; 6) test breaks for note review; 7) use of a voice recognition program; and 8) a voice recorder. On the IEP document, the box for "transportation" services is checked "yes."

4. Rachel Medwid, a special education teacher at Great Oak, has been Student's case manager since Student's sophomore year. During the hearing, Medwid described the supplemental aids and services in Student's IEP. She explained that the note taking called for in the IEP can consist of copies of notes from a peer as well as printed notes from the teacher's PowerPoint presentation. The keyboard is an assistive technology device designed to assist Student with typing. At the moment she has an "iPad," but the technology can also refer to devices such as a laptop or a "Neo 2." There is a foot stool in one or two of the bathrooms that Student can use when she needs to reach the sink. With respect to testing, Student is given time-and-a-half to complete her tests, and she is permitted to take breaks during tests to review her notes.

¹ There was no testimony or other evidence during the hearing that provided complete information regarding the impairment caused to Student by the Morquio Syndrome. The evidence at hearing focused on the impairments that affected her at school, so those are the only impairments discussed in this Decision.

5. Student is permitted to meet with Medwid or another special education teacher if she needs assistance. There is also a room called the “support den” that Student can go to if she is taking a test and wants a smaller testing environment.

6. Because of Student’s disability, she has difficulty with writing and tires easily while typing. The computer in the support den is equipped with voice recognition software, which Student can use to dictate writing assignments for class. Her IEP also provides her with a recording device so she can record the teachers’ lectures.

7. The IEP provides for specialized academic instruction for Student totaling 45 minutes a week to address needs regarding “assistance transitioning from class to class and at the beginning/end of class to collect her things.” Student uses a motorized cart (sometimes referred to as a scooter) to travel between her classes at school. She needs help bringing things such as her binder from the cart to her desk at the beginning of class and placing things back in her cart at the end of class.

The Request for Curb-to-Curb Transportation

8. When Student was in the 10th grade, her family moved from San Bernardino into the District. At that time, Student’s family lived within the attendance area of Great Oak, so Student began attending that high school. Student was provided with transportation to and from school as part of her IEP related services.

9. Around the summer of 2011, between Student’s junior and senior year in high school, her family moved to a different part of the District. Because of the move, Student came within the attendance area of a different high school, Temecula Valley High School (TVHS). Because of the move, TVHS would normally have been her school of attendance for her senior year and would be considered her “home school.”

10. The District has policies regarding intra-district transfers of high school pupils between one high school and another. If a general education pupil’s family moves from one part of the District to another, the District’s policy permits the parents of a high school senior to request an intra-district transfer to permit the senior to attend and graduate from the high school that the pupil attended during his or her junior year. However, if such an intra-district transfer is approved, the pupil’s parents must agree to transport the pupil to and from school. Parents are required to sign a form agreeing to provide transportation as part of the request for the transfer.

11. When Student’s family moved, her mother requested an intra-district transfer of Student to permit her to attend Great Oak for her senior year. Student’s mother signed the intra-district transfer request form on June 30, 2011. On the form was a statement in bold lettering: “Parent/Guardian agrees to furnish transportation to and from school.”

12. Student’s mother does not speak English. The intra-district transfer form that she signed was written in English. However, the evidence at hearing showed that Student’s

mother understood the transportation situation. Both Student's mother and Breck Smith, a District program specialist, testified that the District telephoned Student's mother to explain that she would be responsible for transportation of Student to and from Great Oak if the intra-district transfer was granted. Student's mother also indicated that Student told her mother about the transportation statement on the form at the time Student's mother signed it.

13. It is approximately four to five miles from Student's current home to Great Oak. It is approximately one to two miles from Student's home to TVHS.

14. During the IEP team meetings held in September 2011, Student's mother requested curb-to-curb transportation for Student provided by the District to and from her home and Great Oak. The District ultimately denied that request for curb-to-curb transportation on the basis that Student's mother had agreed to provide transportation at the time of making the intra-district transfer request. The notes to the September 28, 2011 IEP stated this regarding transportation:

Transportation: Parent wants transportation, but [Student's] home school is TVHS. She would get sped transportation to TV but not to GOHS; when the parent agreed to the inter district transfer she agreed to transport [Student] to GOHS. Program specialist is going to check if the regular bus can accommodate picking [Student] up closer to home and coordinate the bus stops.

The District offered transportation through a general education bus which stopped near Student's home, but that transportation was not curb-to-curb, and it was not clear from the evidence whether that bus had a ramp or other means for Student to climb into the bus.

15. Student's mother wants Student to continue attending Great Oak for Student's senior year of high school. During her testimony, she explained that, because of Student's disability, it is not always easy for Student to adapt to new surroundings. Student's mother was concerned that a new school might have a negative effect on Student because she would find it difficult to adjust.

16. Student's mother currently transports Student to and from school each day. Student's sister goes to school in the District at a different school. Student's mother waits for her other daughter's school bus in the morning, and then after it is gone, takes Student to school. At the end of the school day, Student's mother picks up Student from school. At the request of Student's mother, the driver of the school bus waits for the end of the bus route to drop off Student's sister. That gives Student's mother enough time to pick up Student from school and still be present when her other daughter arrives home. At times, the drive is difficult because of traffic. If the sister's school bus is late in the morning, then Student's mother is delayed in leaving, and Student may arrive late at school.

17. Aside from her own testimony, Student's mother did not present evidence at hearing to show that Student's unique needs required her to remain at Great Oak for her

senior year. There was no expert testimony or report to show that Student's disability prevented her from transferring successfully to a different school. There was no psychological testimony or evidence to show that her disability would prevent her from making friends and being socially active in a new school location.

18. There was also no evidence to show that the District would be unable to provide Student with a FAPE at TVHS. Student had transitioned successfully when she moved into the District in her 10th grade year. While it might be easier for Student to navigate a familiar school location, there was no evidence to show that the District could not provide her with the necessary supports to assist the transition to her home school after her family moved. Student's IEP and the testimony of the District witnesses indicated that the District was ready, able and willing to provide Student with curb-to-curb transportation if she attended TVHS.

19. Absent evidence of an educational need for Student to remain at Great Oak, Student's situation is no different than that of any other high school senior whose parent prefers a different school and requests an intra-district transfer. As will be discussed in the Legal Conclusions below, under these circumstances the District was not obligated to provide curb-to-curb transportation in order to provide a FAPE to Student.

The Request for a One-to-One Aide

20. Some classes at Great Oak have classroom aides assigned to assist the pupils in that class. Other classes are collaborative classes in which a general education teacher and a special education teacher work together in teaching the class. Some classes have only one general education teacher with no aide support.

21. Student's IEP team has never assigned a one-to-one aide to Student during the time she attended high school in the District. When she first started in the District during her 10th grade year, in order to assist with her transition to the new high school, the District staff chose classes for her that had classroom aides. At that time, most or all of Student's classes had classroom aides. One or more of the classroom aides may have assisted Student by walking with her between classes. Student ended up eating lunch with one of the aides and the aide's daughter.

22. During Student's junior year, only two of her classes had classroom aides. Student passed all her classes in her junior year with grades of C or better.

23. In the current school year (Student's senior year), none of her classes have classroom aides. However, three of her current classes are co-taught, with a general education teacher and special education teacher jointly teaching the class.

24. Student's mother believes that it is important for Student to have a one-to-one aide assigned to assist her with activities such as opening doors, carrying her backpack, taking notes and helping with her lunch tray. Student's mother testified that during the first

year Student was at Great Oak, the District provided full-time assistance for her. The next year, aide assistance was given only for certain subjects. At the IEP meeting at the beginning of this school year, the District staff commented that it would be better to remove the aide support so Student could be more independent. Student's mother initially agreed to try that. She signed her consent to the District's IEP offer.

25. However, since that time, Student's mother has grown concerned about the lack of aide support. Student has complained to her mother about pain in her arms and her back. Student's mother has observed that Student is more tired than before and requires pain medication.²

26. Student agrees with her mother's request for a one-to-one aide. Student testified that it is difficult for her to pick up her backpack when she arrives at class. She is having a lot of back pain now from carrying her own class supplies. She also explained that she needs help after she uses the restroom with buttoning her pants and opening the classroom door.

27. The testimony of Student's mother was sincere and heartfelt. It is clear that she cares deeply about her daughter and wants to see her succeed. Student's testimony was also very sincere and credible. She genuinely believes that an aide will assist her at school.

28. Unfortunately, Student's mother did not bring in any expert testimony or reports to support her position. According to Student's mother, one of Student's physicians wrote a note to the school in November 2011 indicating that Student needed assistance. Student's mother testified that she gave the doctor's note to the school staff. She did not have a copy of the note to enter into evidence at the hearing. During a break in the hearing, she attempted to obtain a copy of the note from the doctor's office, but was told that the doctor's office was unable to fax a copy of the document because it had been archived. Without the actual note in evidence, it was not clear precisely what type of assistance the doctor recommended in the note. No physician testified at the hearing, and there was no doctor's report or other expert opinion regarding the need for a one-to-one aide. There was also no physician testimony or other expert evidence to verify that the pain Student was experiencing was due to lifting her binder and/or backpack at school.

29. Breck Smith, a program specialist for the District who testified at the hearing, did not believe that Student required a one-to-one aide. Smith holds a master's degree in

² Student's mother testified that Student may undergo surgery on her arms in the near future. If so, she may lose mobility in her arms for a time after the surgery. As of the time of the hearing, no surgery date had been set, and the District staff had not heard about the surgery prior to the hearing. This Decision is based solely on Student's current circumstances and current IEP at the time of the hearing. If Student's circumstances change because of surgery or for some other reason, that would be a matter for future discussion by the IEP team.

special education as well as administrative and special education credentials. She has taught special education classes and has attended dozens of IEP meetings. She conducted the intake for Student when Student's family moved into the District and has participated in some of Student's IEP meetings.

30. Smith explained that Student has been making academic progress during her time in the District and is on track to graduate. The District members of the IEP team did not recommend a one-to-one aide for Student, because they wanted her to be as independent as possible since she will be going on to college. In Smith's opinion, the accommodations listed in Student's IEP were sufficient to meet Student's needs without the addition of a one-to-one aide. Smith testified that Student's case carrier collaborates with the teachers to ensure that doors are open for Student to arrive and leave her classes. Student is permitted to leave a few minutes before the end of class. A peer or teacher can help her lift her things to and from her scooter before and after class. Smith said that school personnel have asked Student if she needs help with lifting, and she has told them that she does not need help.

31. Medwid also opined that Student did not need a one-to-one aide. She pointed out that Student was successful in classes without aides in the past. She testified that Student can receive assistance from a peer or teacher with lifting her binder from her backpack to her desk. If a large binder is too heavy for Student, she can use smaller binders for each class instead of the one heavy binder.

32. With respect to Student's needs regarding the restroom, Medwid testified that, on those occasions when Student needs help buttoning her pants, there are several ways she can seek assistance. In her collaborative classes, the special education teacher can assist her. In other classes, she can seek assistance from an adult in the nurse's office or in the Bridge Program room. The Bridge Program is a special education adult program housed on campus. There is also at least one aide or teacher available in the support den.

33. Student's mother is also very concerned because Student failed two of her classes during the first semester of her senior year (English 12 and trigonometry). Student's mother explained that Student had never failed a class before, and she is concerned that the additional burdens being placed on Student might have contributed to that problem. Student's mother reported that classmates or teachers will sometimes help Student carry her binder from the scooter to her desk, but it is not their responsibility to look after her. Instead, she needs aide support.

34. Student's current classes for her second semester consist of economics, English 12, health, computer essentials, English 9, and geometry. Student had previously taken English 9 during her freshman year in San Bernardino prior to moving to the District. She received a D in the class during her freshman year. She is retaking that class in her senior year, because the District permits pupils to retake classes for higher grades to assist them with college entrance requirements. Student is retaking the geometry class for the same reason.

35. According to Smith, Student's grade in English 12 suffered during the first semester because she was not turning in all her homework. Medwid also testified that the failing grade in English was due, at least in part, to incomplete assignments.

36. With respect to trigonometry, Smith testified Student's failure was due to low test scores. Pupils tend to take geometry before trigonometry. Medwid felt trigonometry might have been too high academically for Student. In contrast to her failing grade in trigonometry, Student received a B- in geometry during that same semester.

37. A review of Student's IEP's, her 2010 triennial assessment, and her school transcript, supports the District's position that Student has been gaining educational benefit from her classes. With the exception of English 12 and trigonometry, she has been passing her classes and meeting or making progress on her academic IEP goals. She is accessing the general education curriculum and has nearly completed the requirements for graduation.

38. The testimony of Student's mother and Student regarding the one-to-one aide was sincere and credible. However, once again there was no expert evidence to support the contention that the lack of a one-to-one aide contributed to Student's failure in trigonometry and English 12. Student passed all her classes in her junior year even though there were only classroom aides in two of the classes. Under these circumstances, there was not sufficient evidence to show a denial of FAPE by the District. The District is not required to provide Student with a one-to-one aide.

LEGAL CONCLUSIONS

General Legal Provisions

1. The party filing a due process case has the burden of proof in the proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In this case, Student, as the petitioning party, 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. 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] (*Rowley*), 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. In *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, supra*, 458 U.S. at p. 201.) *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. (*Ibid.*)

5. 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. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not 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. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that an IEP “is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

6. Both federal and state laws require a special education child to be educated in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with non-disabled peers “to the maximum extent appropriate.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (2006); Ed. Code, § 56040.1.) The least restrictive environment doctrine requires a school district, in making placement decisions, to offer a placement “as close as possible to the child's home.” (34 C.F.R. § 300.116(b)(3) (2006); see 71 Fed.Reg. 46588 (Aug. 14, 2006) [“The Department has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location.”].)

The District is Not Required to Provide Curb-to-Curb Transportation to Student

7. A disabled child's special education program may require “related services” which include transportation and such developmental, corrective and other supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a)(2006).) In California, “related services” are called “designated instruction and services.” (Ed. Code, § 56363, subd. (a).)

8. As a related service, “transportation” means (1) travel to and from school and between schools, (2) travel in and around school buildings, and (3) specialized equipment

(such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16)(i)-(iii)(2006).)

9. The IEP team makes the decision about whether a disabled child requires transportation as a related service. (Ed. Code, § 56342, subd. (a); 71 Fed.Reg. 46576 (Aug. 14, 2006).) The decision is based upon the unique needs of the disabled child. (*McNair v. Oak Hills Local School District* (6th Cir. 1989) 872 F.2d 153, 156.) The decision is not based upon the geographic boundaries of the school district. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir. 1986) 790 F.2d 1153, 1160.)

10. The issue in this case is not whether the District is required to provide Student with transportation as a related service under her IEP. There is no question that Student's IEP calls for her to receive transportation. The question is whether the District is required to provide transportation when Student's mother specifically agreed to provide transportation as part of her request to have Student attend a school different from Student's home school.

11. A similar issue arose in the Eighth Circuit in the case of *Timothy H. v. Cedar Rapids Community School District* (8th Cir. 1999) 178 F.3d 968 (*Timothy H.*). In that case, the pupil had disabling conditions of cerebral palsy, spastic quadriplegia, and multiple orthopedic problems. The pupil's parents applied for an intra-district transfer to a school other than the pupil's home school, and the school district granted the application. The school district's intra-district transfer policy provided that the parents would be responsible for the transportation of pupils not attending their resident area school. The United States District Court determined that the school district had violated section 504 of the Rehabilitation Act of 1973 by failing to provide transportation for the pupil. (*Id.* at p. 971.) Upon appeal, the Eighth Circuit Court of Appeals reversed the federal district court, finding that the school district's intra-district transfer program was facially neutral and did not discriminate against the pupil based upon a disability. (*Id.* at p. 972.) Although the *Timothy H.* case involved a claim under section 504 of the Rehabilitation Act, the Eighth Circuit later affirmed that its rationale also applies to cases arising under the IDEA. (*Fick v. Sioux Falls School District* (8th Cir. 2003) 337 F.3d 968, 970.)

12. OAH has also followed the *Timothy H.* holding that a school district does not deny a FAPE by failing to provide transportation when a parent agrees to provide transportation as part of an intra-district transfer. (See, e.g., *Parents On Behalf Of Student v. Garden Grove Unified School District* (2009) OAH case number 2009081095.)

13. As set forth in Factual Findings 1 – 19 above, Student's position is analogous to that of the *Timothy H.* case. Student's mother requested an intra-district transfer for Student and agreed to provide transportation. If she does not wish to provide transportation, then her remedy is to request that Student return to her home school (TVHS). There was no evidence at hearing to show that Student's unique needs required her to attend Great Oak instead of TVHS. Student's mother has the burden of proof on this issue and failed to meet that burden. There was no denial of FAPE by the District.

The District Is Not Required to Provide a One-to-One Aide to Student

14. In addition to transportation, related services (designated instruction and services) can include:

“such developmental, corrective, and other supportive services (including . . . orientation, and mobility services . . .) as may be required to assist an individual with exceptional needs to benefit from special education”

(Ed. Code, § 56363, subd. (a).)

15. One-to-one aide assistance can be included in IEP services if required to assist an individual with exceptional needs to benefit from special education. In this particular case, both Student and her mother believe that Student will benefit from the assistance of a one-to-one aide.

16. However, as set forth in Factual Findings 20 – 38 above, Student’s mother has not made a sufficient showing that Student *requires* a one-to-one aide to benefit from special education. Student has numerous accommodations in her IEP to assist her with her orthopedic needs, including peers and teachers to help her with lifting items in the classroom if Student needs help. On those occasions in which she needs assistance with buttoning after using the restroom, there are multiple places she can go on campus when her classroom does not have a special education teacher.

17. Student has been accessing her special education and gaining educational benefit without the need for a one-to-one aide. She passed her classes in her junior year, even though only two of those classes had classroom aides. There was no showing that her failure in trigonometry or English 12 in the first semester of her senior year was due to the lack of a one-to-one aide.

18. Because Student’s mother filed this case, she has the burden of proof to show that an aide is required. The evidence at hearing was not sufficient to meet that burden. There has been no denial of FAPE.

ORDER

Student’s claims for relief are denied.

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. Here, the District prevailed on all issues heard and decided.

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. (Ed Code, § 56505, subd. (k).)

Dated: February 22, 2012

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings