

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019120533

POWAY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

April 2, 2020

On December 13, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Poway Unified School District, naming Student. OAH continued the hearing for good cause on December 23, 2019. Administrative Law Judge Brian H. Krikorian heard this matter in San Diego, California, on February 11, 12, and 13, 2020. An Administrative Law Judge is referred to as ALJ.

Attorneys Justin Shinnfield and Danielle Gigli represented Poway. Special Education Director Jodi Payne attended all hearing days on Poway's behalf. Parent represented Student and participated in all hearing days on Student's behalf. Student did not attend the hearing.

At the parties' request, the ALJ continued the matter to March 2, 2020, for written closing briefs. The record was closed, and the case was submitted on March 2, 2020.

ISSUE

Did Poway's May 7, 2019 individualized education program offer Student a free appropriate public education?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing concerning any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in

the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Poway has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 15 years old and in ninth grade at the time of the hearing. Student resided within Poway's geographic boundaries at all relevant times. Student was eligible for special education under the categories of multiple disabilities, including intractable epilepsy developmental delay, intellectual disability, and autism.

Student attended a Poway special day class for third through fifth grades. From 2016 through the hearing, his placement was at non-public schools. On November 20, 2017, Community School of San Diego terminated his placement there because Student needed more site-based instruction than it could provide. On May 1, 2018, Student began attending Training Education Research Institute, referred to as TERI.

ISSUE: DID THE MAY 7, 2019 INDIVIDUALIZED EDUCATION PROGRAM OFFER STUDENT A FAPE?

Poway contends that they followed the appropriate procedural safeguards under the IDEA and that the May 7, 2019 individualized education program offered Student a FAPE. An individualized education program is referred to as an IEP. The May 7, 2019 IEP was amended on May 23, June 12, and October 24, 2019. The May IEP, as amended, will be referred to as the May 2019 IEP. Parents contend that the proposed goals are not measurable, the placement is not appropriate, and that Poway denied Parents full participation in the process.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

The legal analysis of a school district's compliance with the IDEA consists of two parts. First, the tribunal must determine whether the district has complied with the procedures outlined in the IDEA. (*Rowley*, supra, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

PROCEDURAL REQUIREMENTS

An IEP team develops an IEP. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's

education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

RECENT EVALUATION, ACADEMIC AND FUNCTIONAL NEEDS

Poway assessed Student in the areas of psychoeducation, speech and language, occupational therapy, adapted physical education, physical therapy, and health in May 2019. Poway also funded independent evaluations in functional behavior and psychoeducation. The IEP team considered the results of these recent evaluations of Student's academic and functional needs in developing Student's annual IEP at the IEP team meeting on May 7, 2019.

PSYCHOEDUCATIONAL ASSESSMENT

School psychologist Michelle Fouts-Doig conducted Student's psychoeducational assessment in March 2019 and prepared a written report dated March 18, 2019. She has been employed as a Poway school psychologist since 2003, held a pupil personnel services credential in school psychology, and a master's degree in school psychology. She was familiar with Student and had acted as his full-time case manager until the Spring of 2019.

Fouts-Doig reviewed Student's relevant educational records and reports, conducted observations in different settings, utilized assessment tools including standardized assessment instruments, and solicited input from Student's teacher Nicole Felix. She also administered or attempted to obtain standardized rating scales for behavior and autism. Fouts-Doig received input from Felix for the Adaptive Behavior and Gilliam Autism Rating tests. She solicited feedback from Parents, but they did not return their questionnaire.

Fouts-Doig observed Student at school twice. Finally, she reviewed and incorporated into her report Student's health evaluation by the school nurse.

Fouts-Doig assessed cognitive and academic skills using standardized assessments, with some deviations due to his lack of response and participation. Where a student has difficulty with accessing the standardized assessments, the examiner may deviate from the standardized administration of the test. The testing, although modified, provided Fouts-Doig a better understanding of his present levels, and it permitted her to identify skill areas to target instructional objectives appropriate for his needs. Fouts-Doig included these findings in her report.

Student transitioned well from the school bus and into class during Fouts-Doig's observations. The staff gave positive reinforcements, including allowing Student to use his iPad to watch videos, rewarding him with stickers, and participating in activities he enjoyed, such as shredding papers, watering plants, and hanging clothes. On the few occasions where Student showed resistance or refusal, the school staff was able to engage him successfully and redirect him.

Fouts-Doig's report was given to Parents before the first IEP meeting on May 7, 2019. Fouts-Doig recommended continued placement of Student at TERI along with supportive services. Fouts-Doig's testimony regarding her observations, testing, and findings was credible based upon her background, experience with Student.

Fouts-Doig was knowledgeable about Student's disability and had personal experiences with Student. Her psychoeducational assessment identified Student's academic and functional needs to be considered in developing the May 2019 IEP.

FUNCTIONAL BEHAVIORAL ASSESSMENT REGARDING TRANSPORTATION

Student exhibited resistance to transitioning from home to the bus and the bus to school when he began attending eighth grade at TERI during the 2018-2019 school year. Poway provided behavior support instruction to Parents at home to assist with the transition.

On October 31, 2018, the IEP team met to review Student's progress on his annual goals. On December 5, 2018, the IEP team reconvened and made changes to Student's IEP based upon a mediated settlement agreement. The changes included removal of a safety harness as support for Student, having transportation with aide support, and implementing services to assist Student transitioning from home to the bus until services were no longer needed.

In December 2018, Poway assigned Beth Mori to assist Student's behavior when using transportation. Mori had a master's degree in education and was working on a master's degree in applied behavior analysis at the time of the hearing. Mori was part of Poway's behavior support team and was referred to a classroom or school site to assist students who are beyond the capabilities of the school staff. Poway asked Mori to provide recommendations for Student related to his bus transportation.

Mori explained that when a student exhibited inappropriate actions, and someone attempted to re-direct or correct the student's response, the student often "upped the ante" to maintain their preference. She referred to this as "extinction" behavior. However, if the correcting action was consistently maintained, the student eventually gives up and modifies the inappropriate conduct. Initially Mori saw Student engaging in this type of "extinction burst" when he was told to board the bus.

In December 2018, the IEP team agreed to fund a functional behavior evaluation related to bus transportation. Heather Diaz of Verbal Behavior Associates conducted the evaluation. Diaz had a teaching credential from the State of California and a master's degree in psychology. She prepared a written report dated February 1, 2019, which was amended on June 10 and October 24, 2019. In addition to evaluating Student, Diaz also personally assisted Student's transition from home to the bus and from the bus to school. Diaz was knowledgeable about Student's disability and had personal experiences with Student.

Diaz conducted a functional behavior analysis to determine why Student had difficulty getting on and off the bus. Diaz created a plan for Parents to implement before the school bus arrived in the morning to enable Student to transition from home to school smoothly, including providing access to Student's couch, iPad, and television as reinforcers. The goal was to avoid taking things away from Student as a punishment, but instead, use them as a reward for him when he exhibited appropriate behavior.

Diaz observed Student at home and school and obtained input from Student's teacher and Parents. Diaz began implementing the transportation plan in early 2019. At that time, Student avoided the bus transition 50 percent of the time. By May of 2019, Student could transition to and from the bus nearly 100 percent of the time. Mori worked with Diaz to create a behavior plan for Student to be transported more frequently by the bus. Mori consulted with Diaz daily for the first week of Diaz's involvement, and then weekly, as time progressed, regarding Diaz's implementation of the plan. Once Diaz took over, Mori reviewed her data. The intervention by Poway was highly successful, and after two to three weeks, Parents began to transition and "fade-out" Diaz's services. By October of 2019, Parent had entirely taken over

implementation of the transition plan, and there were minimal instances of non-compliance in bus transitioning by Student.

Diaz prepared a written report. The report was given to Parents before the May 7, 2019 IEP meeting. Subsequent amendments were provided to Parents before a final meeting on October 24, 2019.

Diaz was knowledgeable about Student's suspected disability and had personal experiences with Student. Her assessment identified Student's functional needs for bus transportation to be considered in developing the May 2019 IEP.

SPEECH AND LANGUAGE ASSESSMENT

Renee Tompkins evaluated Student for speech and language in March 2019, prepared a written report dated May 7, 2019, and updated it on June 10, 2019. Tompkins was a licensed speech-language pathologist. She held a Master of Science degree in speech-language pathology and was employed by Poway since March of 2004. She also provided compensatory speech services to Student in the spring of 2018.

The objective of the evaluation was to measure Student's skills in the area of speech and language, to help determine whether he qualified for continued speech and language services and provide guidance to the IEP team for the May 7, 2019 IEP team meeting.

Tompkins observed Student for over an hour on March 1, 2019, as part of her assessment. She solicited input from Parents regarding their communication concerns, but Parents did not respond. Tompkins reviewed and relied upon a Functional Communication Profile prepared by Deanna Hughes, Student's speech and language

pathologist employed at TERI. Student was rated in the areas of receptive language, expressive language, and pragmatic language.

In the receptive language category, Student comprehended words, phrases, sentences, and direct requests. Student was attentive to cartoons and videos but tended to lack interest when looking at pictures. In expressive language, Student utilized "total communication." Consequently, while he had limited verbal communication, he resorted to emotions, pointing, words, object symbols, and icons, and used his augmentative communication voice output device to communicate. Student was able to state his name, express his basic needs and preferences, and engage in social exchanges. In pragmatic language, Student occasionally initiated communication with others if prompted.

Tompkins opined that Student was a complex communicator, with multiple "modalities." Those modalities included using hand gestures, speech, pointing, symbols, and his iPad. In response to Parent's challenge that Student was not accessing his iPad enough at home, Tompkins testified that it was necessary "to honor" any way a student communicates, especially if the student had multiple means to do so. She further opined that augmented assistance was not limited to an iPad and that Student's overall ability with such devices were classified as "emerging." In her opinion, no one should force Student to choose one particular form of communication over another one, such as favoring an iPad. She recommended that augmentative assistance goals should expand Student's communicative contexts and partners to provide Student with total communication.

Tompkins' written report was given to Parent before the May 7, 2019 IEP meeting. Tomkins amended the report once Parent provided additional information at that meeting. Tompkins recommended continued placement of Student at TERI along with supportive speech and language services.

Tompkins was knowledgeable about Student's speech and language needs and had prior experiences with Student before the evaluation. Tompkins' assessment identified Student's functional needs in speech and language to be considered in developing the May 2019 IEP.

OCCUPATIONAL THERAPY ASSESSMENT

Betsy Slavik conducted an occupational therapy assessment in February 2019. Slavik prepared a written report dated February 27, 2019, which was amended on March 11, 2019. She had a Master of Arts degree and was a registered occupational therapist.

Slavik reviewed Student's records, interviewed Student's teacher, observed Student on two separate occasions, and attempted administering various assessment instruments, including standardized tests as part of her assessment. She requested input from Parents but received no response.

Slavik measured Student's sensory processing abilities and their effect on Student's functional performance. Student demonstrated sensory processing concerns "Much More than Others" in the areas of auditory, movement, and behavior influences by sensory processing. Student primarily sought out movement and visual input. Student was very mobile and was attracted to computer screens with fast-paced, brightly colored objects. Student also demonstrated sensitivity to auditory, touch, and movement input.

Slavik concluded in her report that Student benefited from visual structure and support for understanding verbal and demonstrated instructions, along with frequent breaks to manage his sensory behaviors. Student also benefited from a quiet learning environment and one-on-one support.

Slavik attempted to administer the visual-motor integration test. Student had difficulty completing the standardized test. This difficulty did not affect the results. Based upon the assessment, Student showed areas of need in motor planning multi-step activities, attention, and focus particularly with non-preferred tasks, expanding independence and his repertoire of vocational tasks, and independent self-care.

Slavik's written report was given to Parent before the May 7, 2019 IEP team meeting. Slavik was knowledgeable about Student's functional needs in the area of occupational therapy and she recommended services and supports for Student.

ADAPTED PHYSICAL EDUCATION AND PHYSICAL THERAPY ASSESSMENTS

Jean Young, Poway's adapted physical education specialist, evaluated Student on March 4, 2019, and prepared a written report dated March 4, 2019. Young reviewed Student's records and observed him in the classroom and playground settings, including watching Student play with a weighted ball and a modified form of basketball. Young concluded that Student met the eligibility requirements for adapted physical education services and demonstrated gross motor skills below his age level due to his disabilities. She recommended continued adapted physical education services to improve his gross motor skills. Her report did not specify any specific services.

Dan Cicchelli, a physical therapist, evaluated Student for educational, physical therapy on March 4, 2019, and prepared a written report dated March 5, 2019. His

assessment included observations in both the classroom and the play areas. He solicited Parent input but received no response.

Cicchelli opined that Student was functioning adequately enough to access both the classroom and play areas and was making progress in the learning environment. He reported that TERI staff observed Student stumbling a couple of times a day, but the staff was able to assist him. He did not observe that Student had difficulty accessing his educationally based activities due to a physical ability. Cicchelli concluded that Student did not qualify for educationally based physical therapy services at that time. He recommended that Parent request a soft-shelled helmet if there were concerns Student may stumble during an outing.

Poway provided the Young and Cicchelli reports to Parents before the May 7, 2019 IEP meeting.

HEALTH ASSESSMENT

Stacy Munro evaluated Student on March 18, 2016 and prepared a written report of the same date. She was a registered nurse with a Bachelor of Science degree in nursing and was employed by Poway since 2016.

Munro reviewed the health history on file for Student and conducted a physical assessment of Student she could update his health history with any new information. She based her assessment on input from Parent, a hearing and vision screening, as well as her daily observations of Student. Student responded appropriately to sounds and was able to track a red ball both at near and far distances at 20/30 vision. Student navigated his environment well.

Munro recommended that the IEP team implement “sufficient levels of support” for Student so that he could be successful at school, although the report did not list specific suggestions. Munro worked with staff on a written emergency plan to be followed in the event of any significant seizures suffered by Student. Munro opined that Student required close supervision for safety reasons due to his seizures and that school staff should log each seizure and communicate with Parents each time they occur.

The report was given to Parent before the IEP meeting on May 7, 2019. Munro completed a written emergency plan in the event of severe seizures occurring with Student and this was provided to Parent as well.

2019 IEP TEAM MEETINGS

Unless excused in writing, the IEP team must include: 1) one or both of the student's parents or their representative, 2) a regular education teacher if a student is, or may be, participating in the regular education environment, 3) a special education teacher, and 4) a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have the knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code,

§§ 56304, 56341.) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a).) In addition to other requirements, the notice must indicate the purpose, time, location of the meeting, and who will be in attendance. (34 C.F.R. § 300.322(b)(1)(i).) It must also inform the parents of the provisions in 34 Code of Federal Regulations part 300.321(a)(6) and (c) relating to the participation of other individuals on the IEP team who have the knowledge or special expertise about the child. (34 C.F.R. § 300.322(b)(1)(ii).)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled and that parents are involved in the formulation of the student's educational program. (*Target Range* (9th Cir. 1992) 960 F.2d at 1483. To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range*, supra, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

The IDEA explicitly requires formal written notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. Sec. 1415(b)(1)(C); *Union School District v. B Smith 2-7*

Union School District, (9th Cir. 1994) 15 F.3d 1519 [“The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.”]

Poway met the notice requirements for an IEP meeting on May 7, 2019. The IEP team met for Student’s triennial and annual review on May 7, 2019. Parent was offered written procedural safeguards and a review of this information. Parent declined and indicated he was familiar with the protections.

All required people attended the meeting. Parent, the special education teacher, representatives of both Poway and TERI who were qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, and all of the assessors except Young, Cicchelli, and Munro, were present. There was no general education teacher present since Student was placed in a special education setting only.

Poway provided all assessment reports to Parent. The IEP team considered Student's communication challenges, occupational therapy challenges, behavioral needs, strengths, progress and transportation assistance provided by Poway. Parent provided some feedback to Tompkins during the meeting. Parent told the team that Student did not use his iPad device for prompting at home. Tompkins later updated her report on June 10, 2019, to incorporate Parent's concerns. The IEP team agreed to reconvene the meeting to complete a review of the remaining triennial assessments and to complete its development of the IEP.

On May 23, 2019, the IEP team met and completed the review of the remaining assessment reports. Parent was offered and declined written procedural safeguards and a review of this information. All parties were in attendance except the transportation assistant director, Mori, and Tomkins, who had been excused with Parent consent. Also, in attendance were Young, Cicchelli, and Munro. Parent questioned some of the assessors, and the IEP team agreed a third meeting was necessary. Parent also indicated that he had more questions for Tompkins, who had been excused. The team decided to convene a third meeting on June 12, 2019, and request Tomkins attend.

At the June 12, 2019 IEP meeting, Parent was again offered and declined written procedural safeguards and a review of this information. Mori, Slavik, and Young did not attend. Cicchelli was excused with Parent's consent and did not attend. Tompkins attended the June 12, 2019 meeting and responded to Parent's additional questions about the assessment sessions and her recommendations. Tomkins also shared that she updated her report with Parent's input from the meeting on May 7, 2019. Hughes, who was in attendance at all meetings, discussed Student's current communication skills and levels in the school setting, with and without his adaptive devices.

At the close of the June 2019 meeting, Poway team members were prepared to present an IEP offer and go over the proposed goals one-by-one. The Poway and TERI members offered to compare each proposed goal with the prior goals to determine which goals Parent believed needed adjustment. Parent requested more time to review the assessments and goals before he consented to them.

Parent also raised concerns of bias regarding Poway's psychoeducational evaluation, as he had previously requested Fouts-Doig be removed as case manager. Poway agreed to fund an independent psychoeducational assessment. The IEP team agreed to reconvene once the independent evaluation was completed, which would

give Parent more time to consider the offer of FAPE. Parent agreed to “move forward” to focus on the details of the proposed annual classroom goals by the next meeting.

The independent psychoeducational assessment was completed by Robert M. Gray, Ph.D. Poway sent Parent written notice of an IEP meeting to review the assessment on October 24, 2019. The IEP team reconvened on October 24, 2019. Mori, Slavik, Tompkins, Young, and Cicchelli did not attend. The latter two were excused with Parent’s consent. During the meeting, Parent indicated he would not sign the consent form as to the excusal of Tompkins and Slavik. Tompkins and Slavik were not required members at the October 24, 2019 IEP team meeting. (See 34 C.F.R. § 300.321(a).) Gray presented his report by telephone during the meeting. The IEP team reviewed the report with Dr. Gray. The IEP team questioned Gray and concluded his findings aligned with Poway’s psychoeducational assessment. The meeting ended without Parent consenting to the May 7, 2019 IEP document.

On November 1, 2019, Poway provided Parents with prior written notice, via email and certified mail, return receipt requested, reiterating the formal offer of FAPE and requesting Parents’ consent. Parent did not consent to the May 7, 2019 IEP, as finalized on October 24, 2019. During four IEP meetings, the IEP team reviewed Student’s assessments, placement, present levels of performance, goals, and services. Parent’s questions and concerns were addressed in May 7, May 23, June 12, and October 24, meetings and documented in the meeting notes. Parent attended all four meetings and meaningfully participated in each meeting.

While Parent did not excuse Tompkins and Slavik from the fourth meeting, each of those assessors was present at two other meetings, and Parent extensively questioned them. The failure of those two assessors to attend the last meeting was not a procedural violation. Poway provided Parent with a copy of the final IEP offer and

meeting notes. Poway met the procedural requirements of title 34 Code of Federal Regulations § 300.501(b) & (c) and Education Code, §§ 56304, 56341.

PARENT'S PARTICIPATION IN DEVELOPING STUDENT'S IEP

Parent contends that Poway interfered with his participation by failing to allow him to observe Student for more than 30 minutes, once per day, because he was unable to verify the accuracy of school staff reports about Student's progress at TERI.

The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed involvement of parents" is central to the IEP process. (*Id.*) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882); *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].). A procedural violation results in a denial of FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).

According to Parent, the reports from TERI staff were suspect because the reported behavior was substantially different from Parent's observations of Student's behavior at home. TERI staff reported that Student was making progress in the areas of toileting, communication, and use of his iPad. Parent claimed that at home, Student

often did not access his iPad to communicate and had difficulty toileting. Parent also stated Student needed more prompting at home than was reported at school.

Parent requested that he be permitted to observe Student all day at TERI so he could verify the accuracy of school staff's reports and to determine if Student was making progress. TERI representatives told Parent he could observe Student for 30 minutes, one time per day. TERI was located in Oceanside, California. Parent worked and resided in San Diego. According to Parent's testimony, the commuting time between TERI and Parent's residence or workplace did not justify only one 30-minute observation per day. Parent did not observe Student at TERI because of the long commute and 30-minute time limit.

Patricia Friedman was the non-public school director at TERI. Friedman oversaw the operation at TERI, supervised the teachers and instructors, and participated in Student's IEP development. Friedman testified at the hearing. TERI's procedure required parents to "pre-arrange" any visits, and limit observation to 30 minutes per visit. At the hearing, Friedman claimed she was usually "flexible" but conceded she did not offer Parent more than a 30 minute, one-per-day window. According to Friedman, this policy was in place for the safety of the staff, parents, and students. Many of the TERI students had behavior needs, additional "bodies" in the classroom would have been disruptive, and Parent's presence might have impacted Student's behavior or change his performance.

Poway and TERI permitted its assessors' observations longer than three hours. For example, occupational therapist Dalby was permitted two observations, with one as long as two hours. Poway psychologist Fouts-Doig observed Student on two occasions, with one observation one-and-a-half hours in length. Diaz was permitted a three-and-one-half hour observation when she was doing the functional behavior assessment.

Tompkins was allowed one hour to observe Student to complete her speech and language evaluation.

Although Parent elected not to observe for the 30-minute window, his reasoning was understandable. Parent's objections to the offer of FAPE were related to the disparity between what he saw at home, versus what TERI and Poway staff observed at the school. An observation for longer than 30 minutes could have permitted Parent more input in the IEP process so that Parent could verify the accuracy of TERI staff's reports, for himself. Poway's limitation on Parent's observations impeded Parent's participation in the IEP process.

In a District-filed case conducted under Education Code, section 56505, a hearing officer shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. (Ed. Code, § 56505, subd. (j).)

Parent was contacted by Poway's evaluators and invited to participate in the assessment process. Parent responded to requests for information from some assessors and not from others. Poway provided all of the assessment reports to Parent before the first May 7, 2019 IEP meeting, as well as subsequent amendments. Parent attended every IEP team meeting. He asked questions, obtained an independent educational evaluation, asked to have an assessor return to answer further questions and one assessor updated her report to include Parent's input. Each session was suspended and reconvened to ensure Parent participation.

The final IEP team meeting was held over from June 2019 to October 2019 to allow Parent to go over the proposed goals and review the findings of the then-pending independent neuropsychological evaluation by Gray. Parent was given opportunities at all the IEP team meetings to raise objections and concerns, and the notes of the IEP team meetings reflect that the IEP team took those suggestions seriously and implemented many of them. After the final session in October of 2019, the IEP team gave Parent additional time to consider the proposed offer, raise any concerns, or to consent to the IEP.

Although Poway limited Parent's access to observe his child at TERI by not allowing Parent time commensurate with the time allowed assessors to conduct assessments, this limitation alone did not interfere with Parent's ability to meaningfully participate in the formulation process of the individualized education program.

GOALS

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are

being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; see also Ed. Code, § 56345; 20 U.S.C. § 1414(d)(1)(A)(i).) An examination of the goals in an IEP is central to the determination of whether a student received a FAPE. "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. 2011, No. 7:10-cv-01873-JMC) 57 IDELR 128 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress]). The IEP must contain a description of how the child's progress toward meeting the annual goals described will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 20 U.S.C.A. § 1414(d)(1)(A)(iii).

Student's present levels of performance were documented in the IEP along with the proposed goals and Student's baseline in each goal area. Student's present levels of

performance were reviewed by qualified Poway and TERI staff, including Felix, Friedman, Fouts-Doig, Slavik, Mori, Dalby, Diaz, Tompkins, Hughes, and Munro.

Under the category of "Preacademic and Academic Functional Skills," Student was beginning to recognize symbols, learning to match symbols to school locations, and beginning to use symbols to convey his wants and needs. Student was able to hold a writing utensil and make marks on the page when requested to draw a symbol. In group sessions, Student often needed redirection from his one-on-one aide.

In communication and social skills, Student was considered a social student and liked to share things with peers and staff. He would often get their attention by a tap on the arm or by saying, "Oh, look!" Student relied upon multiple communication modalities to convey his wants and needs. Student was beginning to use picture symbols to communicate his wants and needs. When asked his name, Student was starting to select his name from an adaptive access device independently.

Under the category of Gross and Fine Motor Development, Student had made great strides to complete gross motor tasks such as running, jumping, throwing, kicking, and catching. With light prompting, Student could be instructed to use both of his hands. Student liked vocational tasks and will often request to do them in his free time, including watering, hanging up clothes, and using the shredder. TERI staff commonly used these tasks as rewards to Student for good behavior. Student had increased his independence with many self-care needs, such as toileting, hand washing, and preparing his lunch. He was familiar with his daily schedule and arrived at school, ready to change into his school shoes and to begin the day.

The May 7, 2019 IEP document offered ten goals. Each of the ten goals provided the Student's current baseline and provided a stair-stepped objective throughout the year to meet each annual goal.

- Goals one, seven and ten addressed Student's occupational therapy and pre-vocational needs;
- Goals two and nine addressed Student's daily living and behavior needs;
- Goals three through six addressed Student's speech and communication needs; and,
- Goal eight addressed Student's functional replacement behavior.

In goal number one, Student was required to complete four matching, fine motor, and visual-motor integration tasks with no more than two gestural prompts per task, on four out of five consecutive school days, as measured by teacher data. Goal number two required student to follow one-step directions, for example "put in" or "give me," without displaying targeted behaviors with 80% accuracy across three consecutive days as measured by teacher data.

In goal number three, after being shown a symbol, Student was expected to identify the symbol and then physically go to the object depicted by the symbol in eight of ten opportunities over three consecutive days. As an example, Felix testified that Student would be shown a symbol for "outside," and Student would be required to identify the symbol and then go the location outside. At the time of the October 24, 2019 IEP meeting, Student was capable of matching "outside" over three consecutive days.

Goal number four required Student to find an exemplar from a superordinate category using any modality, eight out of ten opportunities across three consecutive

data collection sessions. For example, Student could select a "reward" category and then would select a preferred video or activity within that category. Goal number five required student to acquire eight different vocabulary symbols in the context of daily functional activities across three consecutive data collections.

Goal number six required Student to open his adaptive device and retrieve his personal information when asked, "What is your name," including retrieving an ID card and verbally saying his name 80% of the time. Goal number seven required student to participate in structure-movement and heavy-work breaks, such as playing with the weighted ball play. This activity was to occur throughout the day to assist him with sensory and emotional regulation, on at least two occasions per day for ten minutes each, as measured by the teacher and occupational therapy data. In goal number eight, Student would increase his use of functional communications to request a break from a baseline of 0% of opportunities to 20% of opportunities as measured by teacher data.

Goal number nine required student to decrease instances of targeted behaviors by 20% from the current baseline of one-and-a-half-day average as measured by teacher data. Goal number ten required students to complete three novel four-step chores and daily living tasks with 80% accuracy, per task, across three consecutive days as measured by the teacher and occupational therapy data.

Parent contends that the goals offered by Poway in the May 7, 2019 IEP were "dumbed down" or vague. Although Poway and TERI reported Student had mastered the prior objectives in 21 goals, Parent was not seeing those goals translate to Student's conduct at home. Parent thought that the proposed goals were not measurable, and that Student still needed constant prompting at home. Parent cited goal number three as an example. Parent questioned that choosing a location or shape was not explicitly defined in the IEP and that there was no way of adequately measuring whether Student

was achieving the goal. Parent felt that the goals would not be measurable and capable of being implemented if Poway placed Student at another school. The evidence did not support Parent's contentions.

Teacher Felix was responsible for creating many of the goals. Felix had been familiar with Student since September of 2018. Felix held a master's degree in education and applied behavior therapy and was a board-certified behavior analyst. Student was in a separate room with his one-on-one aid, and Felix saw him three times during the day. She also visited Student whenever he suffered a seizure.

Felix relied upon Student's existing goals, assessments, and data to work on his progress. Based upon Felix's observations, the 2019 assessments completed for the triennial review were accurate depictions of Student's current levels. Her practice was to prepare draft goals, send them to parents, and request input before IEP meetings. She followed that practice before each of Student's 2019 IEP team meetings. She did not recall receiving any feedback from Parent on the draft goals.

When preparing the goals in the proposed May 7, 2019 IEP document, Felix collaborated with Slavik, Hughes, and TERI Director Friedman. Felix opined that the proposed goals in the 2019 IEP were appropriate since they were all premised upon Student's present levels of performance contained in the baselines. The proposed goals were intended to make Student independent. Felix opined that the goals were not too easy for Student, and if achieved, would provide Student with measurable success.

Friedman, TERI's director, opined that the goals were measurable, and will challenge Student. In proposing the goals, the IEP team relied upon the baselines where Student was currently functioning and offered goals he could meet over the next year. In her opinion, the goals were not "dumbed down." The purpose of the goals was to

build off of Student's existing skills and teach him different locations, including areas outside of school. Friedman opined that Student would be more compliant if he knew where he was going, or how to ask for a break.

Hughes, TERI's speech and language pathologist, worked on the goals for Student. Hughes had a master's degree in clinical competence in speech and language, a Ph.D. in communication science, and was credentialed in California, Ohio, Iowa, and Indiana. Hughes' primary expertise was autism and communication, and she had assessed over 500 students and attended approximately 700 IEP meetings. She provided direct speech and language services and supervised the language and speech service providers at TERI. Hughes observed him during speech therapy and in other locations on campus and worked with Student at least once a week.

Five of the ten goals offered in the May 7, 2019 IEP document impacted Student's speech and communication needs. Hughes opined that these goals were appropriate based upon the four IEP team meeting and the results of the speech and language and psychoeducational assessments. She also reached this opinion based upon her first-hand experience working with and observing Student. Based upon Student's current performance levels, if he met the proposed goals, they would cause Student to show improvement in both academic and communication skills. Hughes credibly opined that the speech goals offered Student enough rigor to provide benefit.

Occupational therapist Dalby was involved in discussing and developing goal numbers one, seven, and ten. In her opinion, these goals were appropriate. Her view was based on Slavik's March 2019 assessment report as well as her observations of Student's progress. Dalby opined that the goals set in the May 2019 IEP were not "too easy." She opined the proposed goals were more challenging than Student's prior goals

and were structured in a way to allow Student to meet those goals within one year of implementation.

Lisa Dreyer was one of four special education directors at Poway and the director for Poway's Self Education Local Plan Agency. She was brought into the 2019 IEP process in the Spring of 2019 to act as an interim case manager, move the matter forward, and make sure the IEP was implemented. During the various IEP meetings, Parent did not explicitly disagree with any goal. She also noted that Parent did not claim the goals were either too easy or too challenging during the IEP meetings. Despite her efforts to have Parent consent to the IEP, Parent did not reach out at any point to explain why he objected to any particular goal.

Poway proved that the ten proposed goals were appropriate and measurable. Poway was not required to draft IEP goals in a manner that Parent found optimal. While certain areas were not overly defined, such as the specific shape or what location Student would correctly identify, the goals were sufficiently clear and unambiguous for the staff and providers to measure. All ten goals were based upon Student's present levels of academic achievement and functional performance. The IEP included appropriate objective criteria evaluation procedures and schedules for determining whether the annual goals were being achieved and stated how Student's progress toward the goals would be measured. Student had a reasonable chance of attaining each goal within a year.

SUBSTANTIVE REQUIREMENTS

PLACEMENT

In determining the educational placement of a child with a disability, a school district must ensure that:

- The placement decision is made by a group of persons including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- Placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services that he or she needs; and,
- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

To conclude whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

- "The educational benefits of placement full-time in a regular class";
 - "the nonacademic benefits of such placement";
 - "The effect [the student] had on the teacher and children in the regular class";
- and,

- "The costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

Here, no one contends that Student should be placed, either full time or part-time, in a regular general education class. Hughes opined that TERI was the appropriate placement. She believed at the time of the offer of FAPE, Student was making measurable progress. Student required intensive support for behavior and communication. TERI had staff who were very knowledgeable about Student and in the areas of speech, communication, occupational therapy, and education. The level of staff training was exceptional. TERI provided Student with the structure he required.

Gray's independent evaluation report corroborated the testimony of Poway's witnesses. In his evaluation, Gray observed that Student demonstrated a much higher capacity to complete many functional tasks and applied skills in his structured school setting than in clinical examination settings. Gray opined that Student required comprehensive intervention services targeting his seizure control, and behavioral and

functional goals. Gray concluded that the structured program at TERI was actually enhancing Student's abilities. He recommended continued placement at TERI with intensive services, including maintaining a one-on-one aide. He observed that TERI staff was flexible and willing to modify the curriculum to meet Student's needs.

Concerning the non-academic benefits, Student was very social and regularly interacted with his peers and staff. Student was a happy and vibrant child and showed the capacity to learn and improve in the program at TERI. The IEP contained goals, which could be implemented at TERI, to have Student more involved in community outings and group activities.

Parent did not propose an alternative, less restrictive placement. Parent was concerned with the placement of Student at TERI because he was not allowed to observe Student beyond 30 minutes per day. Parent disputed the accuracy of the reports by TERI staff regarding Student's progress. For example, Student's dependence on stickers since third grade as a reward for being on task indicated to Parent that Student was not making progress.

Parent was concerned about Student's safety during a seizure. Parent informed the IEP team that Student preferred a couch or bed to lie down when he had a seizure. TERI did not have either. Parent offered to purchase a couch or bed for Student to use at school, but the school turned down the offer. Munro agreed to look at protocols related to Student's seizures to ensure that he was adequately protected. Munro recommended a new, larger beanbag chair for Student to provide a comfortable resting place for Student to recover. The team agreed to order the chair and added it to the list of accommodations.

Director Friedman of TERI defined the least restrictive environment as an environment that met Student's needs with appropriate supports and did not impose unnecessary supports. Friedman observed that TERI was one of the more restrictive programs in San Diego county. However, it was less restrictive than a residential treatment center. In her opinion, Student benefited from a small classroom with a one-on-one aide and thrived with structure. Student made significant progress since starting at TERI. She pointed to the fact that when he first began attending TERI, he refused to get on the bus at least 50 percent of the time. By the October 2019 meeting, he was getting on the bus almost 100 percent of the time. His attendance at school increased, and he made tangible progress on his goals.

The overwhelming evidence established that Student progressed and thrived at TERI. There was no evidence of a less restrictive environment that could meet Student's needs. The teachers and staff at TERI were attentive to Student's diverse educational needs, were able to address Student's needs, and to implement his IEP. Poway offered an appropriate placement in the least restrictive environment for Student.

RELATED SERVICES

In line with all of the assessments, Poway also offered appropriate support services to Student. Parent did not contest the services offered.

The IEP team reviewed Student's services during all four meetings. Poway offered:

- Specialized Academic Instruction for 1,500 minutes per week;
- Individual speech and language services for 60 minutes per week;
- Individual occupational therapy services for 30 minutes per week;
- Occupational therapy consultation to staff for 270 minutes per year;

- Adapted physical education consultation for 150 minutes per year;
- Health and training for staff by Poway nurse for 15 minutes per year;
- Transportation and accompanying services, including aides and behavior training to be faded out as needed; and,
- Extended school year for 2020 for 11 weeks at TERI.

In addition to the speech, language, and adapted physical education services, Poway had also been providing Student with occupational therapy services. Janice Dalby was a registered occupational therapist with a Bachelor of Science degree in occupational therapy. Dalby was the President and Director of K.I.D.S. Therapy Associates, Inc., and held that position since 2003. Dalby provided Student with occupational therapy services at TERI since he began attending in 2018, and she was familiar with the assessment report created by Slavik. She was also a member of the IEP team and participated in the May and June 2019 IEP meetings.

When Student first began attending TERI in 2018, he did not use his right hand consistently. After receiving occupational therapy services at that time, he was able to use his right hand in an assistive manner, such as pushing a wagon or pulling a wheelchair. Student could functionally grasp a writing tool and hold and use scissors, but he could not use a writing tool to draw shapes or other diagrams. Student scribbled. Dalby opined that Student was making outstanding progress and that the recommended services and goals in the May 7, 2019 IEP, which impacted occupational therapy, were appropriate for Student's current level of ability.

Each of the examiners indicated what additional educational services they believed Student needed to progress and meet the proposed goals. The recommended categories of service were also intended to address Student seizures and his ability to recover from those seizures during the school day. The IEP team discussed and offered

extended school year services. The IEP team recommended Student participate in the extended school year because his on-task behavior had improved during the school year, and the school break might affect his on-task behavior, including regression and recoupment of his interfering behaviors. The IEP described the days and dates of the extended school year and the special education and related services Poway offered Student.

The evidence established the services and level of support were sufficient to enable Student to make progress appropriate in light of Student's circumstances. The May 2019 IEP presented a coherent, formal, written offer specifying the placement Poway offered and the additional assistance to supplement a placement, consistent with the requirements of title 20 United States Code Section 1415(b)(1)(C). The placement and services Poway offered Student in the May 2019 IEP constituted a FAPE in the least restrictive environment.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Poway School District's May 7, 2019 individualize education program offered Student a free appropriate public education. Poway School District prevailed on the sole issue in this case.

ORDER

Poway may implement the May 2019 IEP without parental consent.

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.

/s/

Brian H. Krikorian
Administrative Law Judge
Office of Administrative Hearings