

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019120864

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

DECISION AFTER
PARTIAL REMAND

APRIL 2, 2020

Irvine Unified School District filed a due process hearing request with the Office of Administrative Hearings on August 22, 2018, naming Student, OAH 2018080860. The Office of Administrative Hearings will be referred to as OAH. Irvine Unified School District will be referred to as Irvine. Student filed a due process hearing request with OAH on August 23, 2018, naming Irvine, OAH 2018080938. Student filed an amended complaint on September 6, 2018. The cases were consolidated on September 6, 2018.

Administrative Law Judge Cole Dalton conducted a hearing in the consolidated cases in November and December 2018. OAH issued a Decision in the consolidated cases on February 19, 2019.

On December 5, 2019, the United States District Court partially vacated the OAH Decision and remanded the case to OAH. The remand order defined the issues on remand stating "the ALJ is free to determine whether the education [of Student] at Prentice was actually a modified education, and if so, whether that fact changes the determination that 'no evidence was presented that modified curriculum would provide a meaningful education benefit consistent with Student's low average cognitive abilities.'"

On December 23, 2019, OAH set a prehearing conference for December 30, 2019, and scheduled hearing dates for January 7, 8, and 9, 2020. The prehearing conference is referred to as PHC. Student filed a motion to vacate the hearing dates and set a briefing schedule, or, alternatively, to continue the hearing dates. Irvine opposed the motion to vacate hearing dates because it wanted to introduce evidence acquired after the hearing in the consolidated cases. The motion was heard at the PHC on December 23, 2019.

Administrative Law Judge Cole Dalton conducted the PHC on December 23, 2019, and determined the issues on remand did not require a hearing. The parties were ordered to file opening briefs by February 21, 2020, and reply briefs by March 2, 2020. The parties were ordered to address the limited issues on remand and cite to specific portions of the administrative record in support of their positions. The parties timely filed their opening and reply briefs. The matters for remand were submitted for decision on March 2, 2020.

ISSUES ON REMAND

1. Did Prentice provide Student modified curriculum or, instead, a curriculum with accommodations during the 2018-2019 school year?
2. Did Prentice's 2018-2019 curriculum for Student impact OAH's determination that no evidence was presented that modified curriculum would provide meaningful educational benefit consistent with Student's low average cognitive abilities?

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 with respect to 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).) At hearing, each party had the burden of proof as to their respective issues. [Therefore, each party has the burden of proof on the issue for limited remand.] Relevant to the limited remand, both parties bear the burden of proof on the issue of whether Irvine's offer of modified curriculum in the June 2018 individualized educational program, called IEP, offered Student a FAPE. 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).)

In June 2018, the parties attended a series of IEPs, resulting in an offer of FAPE to Student for the 2018-2019 school year. Parents rejected the offer and timely notified Irvine of their intent to unilaterally privately place Student at Prentice, a certified nonpublic school, beginning in the summer of 2018. Student continued her placement at Prentice throughout the 2018-2019 school year.

ISSUE 1: DID PRENTICE PROVIDE STUDENT MODIFIED CURRICULUM OR CURRICULUM WITH ACCOMMODATIONS DURING THE 2018-2019 SCHOOL YEAR?

Irvine contends that Student's experts, Dr. Giti and Dr. Wiest, defined modified curriculum as instruction that corresponds to a grade-level lower than the student's chronological age. Irvine argues that, since Student repeated sixth grade at Prentice, her curriculum was modified because it corresponded to a grade-level lower than Student's chronological age. Since OAH found that Prentice offered an appropriate education to

Student using modified curriculum, Irvine argues that OAH should have found it offered a FAPE using modified curriculum.

Student argues that Irvine's definition of modified curriculum went beyond the grade-level of materials used to educate a child. Student argues, at Irvine, modified curriculum meant use of alternate assessments to test on alternate achievement standards based on curriculum that would not allow a child to earn a regular high school diploma. Student contends she received accommodations at Prentice, but not modified curriculum.

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 District v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School District RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].) An IEP is constructed only after careful consideration of a child's present levels of achievement, disability, and potential for growth. (20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).)

Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (34 C.F.R. § 300.39(a)(1).) Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the child's unique needs resulting from the disability and ensuring the child's access to general education curriculum so that the child can meet educational standards that apply to all children within the jurisdiction of the public agency. (34 C.F.R. § 300.39(b)(3).)

General education curriculum means the same curriculum used for nondisabled children. (34 C.F.R. § 300.320(a)(1)(i).) The same curriculum as for nondisabled children means curriculum that is based on a state's academic content standards for the grade in which the child is enrolled. (Office of Special Education and Rehabilitative Services *Dear Colleague Letter* (Nov. 16, 2015) U.S. Dept. of Education.) An IEP can be designed to enable a child to be involved and make progress in the general education curriculum based on their grade level content standards even where they demonstrate academic skills significantly below grade level. (*Ibid.*) An IEP that focuses on ensuring a child is involved in the general education curriculum will necessarily be aligned with the State's content standards. (71 Fed.Reg. 46540, 46662 (Aug. 12, 2006); see also, 71 Fed.Reg. 46579.)

Neither state nor federal law defines the specific terms "modified curriculum" or "curriculum with accommodations." The terms "modified" and "alternate" academic achievement standards mean standards addressing students with the most significant cognitive disabilities who take alternate assessments. (34 C.F.R. § 300.160.) Alternate assessments apply to those children with disabilities who cannot participate in regular assessments, even with accommodations, provided in their IEPs. (*Ibid.*)

The District Court determined that Student's expert, Dr. Giti, defined modified curriculum as instruction lower than grade-level instruction that corresponds to the student's chronological age. When Student began attending Prentice she repeated the sixth grade. During her sixth grade year at Prentice, Student used textbooks appropriate for children younger than Student. For example, Student used a third grade-level math textbook. Based upon these determinations, the District Court found that Student was likely taught at Prentice with modified curriculum based upon her chronological age, which was the age of children in seventh grade.

The District Court also determined OAH's finding, that Student made progress at Prentice in sixth grade general education curriculum with accommodations, was inconsistent "insofar as the *general education* at Prentice was a *modified curriculum* education" based on Student's seventh grade level age. The District Court noted evidence that lower grade level curriculum was used to fill in gaps in Student's learning and build up a foundation. However, the District Court found filling in the gaps with a lower grade curriculum did not change the fact that, under Dr. Giti's definition, Student's education at Prentice seemed to be modified.

The remand order requires OAH to determine whether Prentice provided Student with modified curriculum or curriculum with accommodations. The totality of the evidence leads to the conclusion that modifying curriculum means changing what a child is required to learn over the course of their educational career. Curriculum with accommodations means changing how material is presented to a child.

Student's education at Prentice does not fit within the definition of modified curriculum established through testimony from Irvine witnesses and Dr. Giti. Both Irvine and Student witnesses acknowledged confusion over use of the terms modifications and accommodations. Irvine school psychologist Benson and Student's expert Dr. Giti

explained that many educators use the word modified when they really mean accommodated.

Dr. Giti explained that focusing on a child's foundational skills or addressing gaps in learning does not necessarily mean modifying curriculum. Educators often use lower than grade-level text to help a child access grade-level standards. The evidence demonstrated that such interventions are used on a temporary basis for remediation.

By contrast, modified curriculum is used throughout a child's education to address significant cognitive disabilities. Children with significant cognitive disabilities are not expected to close the gap between their skill level and grade-level academics and are not on track to earn a regular high school diploma.

Prentice was a certified nonpublic school, accredited to offer regular high school diplomas. Prentice offered Student, during the 2018-2019 school year, an education allowing her to remain on the path to earning a regular high school diploma. Prentice did not provide Student with alternate curriculum, which would lead to a certificate of completion.

Prentice provided Student with specially designed instruction by adapting, as appropriate, the content, methodology, and delivery of instruction to address the Student's unique needs resulting from her disability. Prentice provided Student with an opportunity to access general education curriculum to meet educational standards that apply to nondisabled children. Prentice provided Student with grade level material from grades lower than Student's chronological age to fill in gaps in her learning.

Dr. Giti recommended use of modified curriculum only after all other possible interventions were provided and a child did not make progress in the general education curriculum. Consistent with federal regulations, Dr. Giti explained that modified

curriculum was meant for children with the most significant cognitive disabilities. Modified curriculum was not necessary for children with low average cognition.

Student's education at Prentice does not fit the definition of modified curriculum established by the federal regulations. Modified or alternate curriculum is a special education intervention, by definition. Modified or alternate curriculum is used to teach functional life skills and daily living skills to students with severe cognitive disabilities. Students on modified or alternate academic achievement standards are assessed using alternate assessments. Alternate assessments determine what a child knows, not a child's progress toward State educational standards. Education through modified or alternate academic achievement standards leads to a certificate of completion, not a regular high school diploma.

Repeating one's grade level does not fit within the definition of modified curriculum. Retention is a general education intervention. The decision to promote or retain is based on a student's grades and other indicators of academic achievement, primarily levels of proficiency in reading, English language arts, and mathematics. (Ed. Code, § 48070.5, subds. (a), (b), (c). The goal of retention is to provide retained students with remedial instruction to meet grade level expectations and advance from grade to grade.

Parents, here, consulted with Prentice staff regarding reasons for Student's retention and opportunities for remediation, consistent with Education Code section 48070.5. The decision to retain Student was based upon her academic needs in addition to socialization skills and maturity level.

The District Court adopted several of OAH's findings regarding Student's ability and achievement, relevant here. The District Court determined that Student's experts, Dr. Giti and Dr. Weist, credibly explained results from private and Irvine assessments, which demonstrated that Student functioned in the low average range of cognition. Further, Dr. Giti credibly opined that children with low average cognition, such as Student, are capable of progress using non-modified curriculum. Student had "holes" in early foundational skills that needed to be addressed. Student could access general education curriculum using accommodations rather than modifications. Several Irvine witnesses corroborated Dr. Giti's opinions. Specifically, none of Student's sixth-grade teachers at Irvine, including Ms. Eaton, Ms. Kelly, and Ms. Lopez, testified that Student required modified curriculum to access her education.

The evidence established that Student's independent educational program included accommodations to allow Student to access the general education curriculum. Prentice did not use modified curriculum that placed Student on a non-diploma track during the 2018-2019 school year.

Prentice provided Student with sixth-grade curriculum with supports and services designed to address her unique needs. OAH awarded the remedy of tuition reimbursement based upon a finding that Irvine did not offer FAPE, and Prentice provided Student with an appropriate education, which was proper under the IDEA.

ISSUE 2: IF PRENTICE PROVIDED STUDENT WITH MODIFIED CURRICULUM DURING THE 2018-2019 SCHOOL YEAR DOES THAT CHANGE THE DETERMINATION THAT NO EVIDENCE WAS PRESENTED THAT MODIFIED CURRICULUM WOULD PROVIDE MEANINGFUL EDUCATIONAL BENEFIT CONSISTENT WITH STUDENT'S LOW AVERAGE COGNITIVE ABILITIES?

Irvine contends that Prentice offered Student modified curriculum, in the same way that Irvine offered Student modified curriculum. OAH determined Student's education at Prentice was appropriate. Therefore, OAH should have also determined that Irvine offered Student a FAPE.

Student contends that whether Prentice provided her with modified curriculum has no bearing on whether Irvine offered a FAPE. Student argues that finding an appropriate education for purposes of a reimbursement remedy is a different standard than finding a FAPE under the IDEA.

When a FAPE dispute arises, a parent may choose to remove their child to a private placement and seek reimbursement from the school district at a due process hearing. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479; *Florence County School District Four v. Carter* (1993) 510 U.S. 7, 12-16 [114 S.Ct. 361].) A parent may obtain reimbursement for a unilateral private placement where the parent shows the school district violated the IDEA and the private placement was proper under the IDEA. (*Carter*, at 15-16.) To qualify for reimbursement, parents need not show the private placement furnished every special service necessary to maximize their child's potential. They need only demonstrate the placement provided educational instruction specially designed to meet the unique needs of an eligible child, supported by such services as necessary to permit the child to benefit

from the instruction. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2019) 635 F.3d 1155, 1159.)

The remand order requires OAH to determine whether Student's education at Prentice was a modified education, and if so, whether that fact changes OAH's determination that "no evidence was presented that modified curriculum would provide a meaningful educational benefit consistent with Student's low average cognitive abilities." The District Court agreed with OAH's finding that Student could make appropriate progress in the general education curriculum with appropriate supports and services. However, the District Court determined that finding does not necessarily mean that a modified curriculum was improper, especially if Student received a modified curriculum at Prentice.

The answer here is twofold. First, Student did not receive a modified or alternate curriculum from Prentice during the 2018-2019 school year. Second, even if she had, Student's education at Prentice had no bearing on whether Irvine offered her a FAPE.

The District Court agreed with OAH's findings that Student functioned in the low average range of cognition. Student was not among those children with the most significant cognitive disabilities who required modified or alternate academic achievement standards. Offering Student curriculum that takes her off of a diploma track aims too low. The IDEA does not contemplate that school districts will offer IEPs reasonably calculated to confer minimal educational benefit. (*Endrew F., supra*, 580 U.S. ___ [137 S.Ct. 988, 997].)

A school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Andrew F., supra*, 580 U.S. ____ [137 S.Ct. 988, 999].) The IEP must be constructed after careful consideration of the child's present levels of achievement, disability, and potential for growth. (*Ibid.*)

Here, Student demonstrated her potential for growth at Prentice using appropriate supports and services to meet her unique needs. The evidence did not demonstrate that Student reached her learning capacity. Rather, Student continued to develop academically and socially at Prentice during the 2018-2019 school year. On the other hand, Irvine developed IEPs taking Student off of diploma track, which aimed to confer minimal educational benefit in light of Student's circumstances.

Irvine's position of conflating determination of remedies with a FAPE lacks merit for several reasons. First, the description of Prentice as an appropriate educational private placement by Parents supports the award of an equitable remedy. The equitable remedy at issue was compensatory education in the form of tuition reimbursement. Tuition reimbursement may be awarded for parental private placements considered appropriate, also referred to as proper, under the IDEA. (*Carter, supra*, at 12-16; *School Comm. of Burlington v. Department of Education of Mass.* (1985) 471 U.S. 379, 369 [105 S.Ct. 1996, 2002].) Irvine cites no legal authority that turns equitable remedies in an OAH decision into support for a school district's offer of FAPE. Private schools are not tasked with providing disabled children with a FAPE, unless the private placement is being offered by a local educational agency within an IEP. (*Carter, supra*, 510 U.S. 7, 12-16.) Here, Irvine did not offer Student placement at Prentice in any IEP at issue during the hearing.

Second, finding a private placement appropriate for purposes of awarding equitable remedies does not equate with "a decision in favor" of Student's choice of

private placement. The facts in *Carter* align with the facts of this case. Parents, in *Carter*, filed a due process hearing request to challenge the school district's IEP, believing it did not offer a FAPE. Subsequently, parents unilaterally placed their child in a private school specializing in educating children with disabilities. The Supreme Court upheld a lower court's finding in favor of parents. The Supreme Court held that parents need not show the private placement offered their child a FAPE under the IDEA, in order to obtain reimbursement. (*Carter, supra*, at pp. 12-16.) In so doing, the Supreme Court distinguished between finding that private placement offered a FAPE and finding the private placement was an appropriate education for purposes of reimbursement. The Supreme Court reasoned, citing *Burlington*, that it would be inconsistent with the IDEA's goals to "forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." (*Id.* at p. 14.)

Third, Student's first amended complaint did not allege the issue of whether Prentice provided Student with a FAPE. Irvine's issue in the consolidated cases was whether Irvine offered Student a FAPE. Irvine did not offer Prentice. Therefore, whether Prentice provided a FAPE was not heard or decided. It follows that OAH did not make a determination that Prentice offered Student a FAPE.

In contrast, whether a unilateral private placement offered a FAPE was squarely at issue in *Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635. In *Clovis*, parents unilaterally placed the student in Kingsview, an acute psychiatric hospital. *Clovis* refused to pay Kingsview's costs, opting to look for another residential placement. The student filed a request for due process hearing to determine whether she was entitled to residential placement at Kingsview, as a FAPE

under the IDEA, at Clovis' expense. After a decision in the student's favor, the parties appealed. During the appeal process, the courts found that Kingsview was the student's stay put placement based upon the administrative decision in her favor on the issue of FAPE. In *Clovis*, whether the student's choice of private placement offered a FAPE was squarely at issue and, therefore, was a matter heard and decided in favor of the student. Such is not the case in this matter.

The education offered by Prentice was not a modified curriculum. Student's education at Prentice had no bearing on the determination that no evidence was presented that modified curriculum would provide a meaningful educational benefit consistent with Student's low average cognitive abilities. Student's education at Prentice had no bearing on the determination of whether Irvine offered Student a FAPE. The type of educational program Prentice provided to Student was only relevant to the remedies available if Student prevailed.

CONCLUSIONS AND 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.

1. ISSUE 1: Prentice did not offer Student modified curriculum, instead, Prentice provided a curriculum with accommodations during the 2018-2019 school year. Student prevailed on Issue 1.
2. ISSUE 2: Prentice' 2018-2019 curriculum provided to Student did not impact OAH's determination that no evidence was presented that modified curriculum would provide meaningful educational benefit consistent with Student's low average cognitive abilities. Student prevailed on Issue 2.

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/

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings