

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

In the Consolidated Matters of:

STUDENT,

Petitioner,

v.

OXNARD UNION HIGH SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2007040834

STUDENT,

Petitioner,

v.

OXNARD UNION HIGH SCHOOL DISTRICT
and VENTURA UNIFIED SCHOOL DISTRICT,

Respondents.

OAH CASE NO. N2007090415

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Oxnard, California on January 14, 2008 to January 18, 2008. Student (Student) was represented by her mother

(Mother). Student's father (Father) was present on January 15, 2008 and January 16, 2008. Oxnard Union High School District (District) was represented by Vivian Haun, Attorney at Law. Kimberly Tresvant (Tresvant), Director of Special Education for District was present each day of hearing. Justin Shinnfeld, Attorney at Law, represented Ventura Unified School District (Ventura USD) on the first day of hearing. Riccardo Narjari, Director of Special Education for Ventura USD was present the first day of hearing.

Mother filed a due process hearing request on April 13, 2007, in OAH case number N20070400834. On September 13, 2007, she filed a second due process hearing request in OAH case number N20007090415. OAH ordered the cases consolidated on October 17, 2007.

On January 10, 2008, District filed a motion to quash a subpoena for Student's records on the grounds that service was improper and that the records had already been provided to Mother on one occasion. District provided a declaration from its custodian of records identifying all of Student's records that had been provided to Mother. On January 14, 2008, the ALJ deemed that the declaration proved compliance with the subpoena, such that the motion was moot.

Ventura USD filed a motion to be dismissed as a party on January 10, 2008. The motion was granted on January 14, 2008, during the first day of hearing, on the ground that Student was not the responsibility of Ventura USD as of November 9, 2005. Mother did not seek any special education services from Ventura USD. Mother wanted Student to remain a general education student in Ventura USD. On November 9, 2005, she requested that Ventura USD place student on home/hospital status pending her recovery. Pursuant to Education Code sections 48207 and 56167(a) both special education and general education students that are placed in a hospital or other residential health care facility are deemed to be residents of the District in which the hospital is located. The special education responsibility for these students belongs to the special education local plan

area (SELPA) in which the hospital or facility is located. Here, Student ceased to be the educational responsibility of Ventura USD on November 9, 2005, after suffering a life threatening seizure and subsequently being moved to Cottage Hospital in Santa Barbara. On December 20, 2005, she became the responsibility of District when she was released to Care Meridian, a congregate living facility, in Oxnard, California.

Testimony began on January 14, 2008, and concluded on January 18, 2008. The record remained open until February 8, 2008, for the submission of closing briefs. Briefs were submitted and the record was closed on February 8, 2008. The parties stipulated to March 10, 2008, as the decision due date.

ISSUES

1. Did District deny Student a free appropriate public education (FAPE) by failing to provide prior written notice to Mother or obtain her consent before initially assessing Student before convening the December 1, 2006 Individualized Education Plan (IEP) meeting and implementing the IEP?
2. Did District afford Mother the opportunity to participate in the IEP process?
3. Did the District deny Student a FAPE in the December 1, 2006 IEP by offering a placement in the special day class for the severely handicapped at Oxnard High School?
4. Did the District deny Student a FAPE in the December 1, 2006 IEP by failing to provide a one-to-one aide to Student during bus transportation to and from school?

FACTUAL FINDINGS

1. Student is a seventeen-year-old girl diagnosed with anoxic encephalopathy resulting from a seizure and cardiac arrest on November 9, 2005. She is a resident of Care Meridian, a congregate living facility in Oxnard, California. She is eligible for special education and related services as a student with traumatic brain injury and secondarily as having an orthopedic impairment.

2. Student was born on August 21, 1990. She was a typically developing child until sometime in 1996 when she began suffering seizures. Her parents attribute the onset of the seizures to injuries sustained from a car accident. Over the course of several years, Student's doctors tried different medications without complete success. Student continued to have breakthrough seizures. By early 2004, Student was on a medication regimen of Zonegram two times per day. The medication seemed to control the seizures.

3. Student's parents separated in 1998 and then finalized their divorce in December of 1999. From September 28, 1999 to January 8, 2004, the parents shared joint physical and legal custody of Student and her sister. Student and her older sister spent 75 percent of time with Mother and 25 percent of time with Father. Mother brought a motion for modification of child support and visitation on January 8, 2004. At that time, the Ventura County Superior Court ordered Student to move from Mother's home in Arroyo Grande in San Luis Obispo County to Father's home in the city of Ventura effective January 11, 2004. In addition, the court ordered that Father had the right to make final medical decisions. Neither parent was to take Student to a medical appointment without prior written notice and consent of the other unless emergency care was needed. Mother was given visitation rights similar to those that Father had prior to the order changing residence.

4. Student was in the 8th grade in general education classes in Arroyo Grande at the time of the change of residence. Student transferred to Ventura USD on January 11, 2004, as a result of the move and remained in general education classes from January 11, 2004, until her injury on November 9, 2005.

5. During an emergency medical appointment for treatment of a respiratory infection in October of 2005, Mother learned from Student that Father, in conjunction with pediatric neurologist Dr. Goldie, had discontinued Student's seizure medication. Father was told by Dr. Goldie that Student would grow out of the seizures and that Student could

be weaned off of her seizure medication. Because Mother was not aware that the medication regimen had been stopped, she had continued giving Student the dosage of Zonegram. Student had been instructed by her Father not to tell Mother about the medication change. Mother contacted Father and voiced her objection to the medication change.

6. On November 9, 2005, three months after Student stopped taking her seizure medication, she had a massive seizure that left her unconscious. Student had respiratory and cardiac arrest following the seizure. Student was transported to Cottage Hospital in Santa Barbara from Ventura late in the day on November 9, 2005. On November 9, 2005, Mother notified Ventura USD of Student's condition and asked that her school record be "frozen" pending her return to school and that she be placed on home/hospital status as a general education student pending her recovery.

7. Student remained at Cottage Hospital until she was released on December 20, 2005, to Care Meridian in Oxnard, California. Care Meridian was the only facility in Ventura County that could serve Student's needs and was a ten-minute drive from Father's place of employment. Student became the responsibility of District for special education purposes upon her placement at Care Meridian.

8. As a result of the seizure, Student was rendered completely incapacitated. She had no spontaneous body movements and became wheelchair bound. Student receives her food through a gastrointestinal feeding tube, and cannot hold her head up independently, talk, or maintain eye contact. Student wears diapers and must be lifted from her bed to a wheelchair by use of a Hoyer lift. When she was first admitted to Care Meridian she had seizures and vomiting. Since that time, she has stabilized and the seizures are rare. Her vomiting has been eliminated with medication. Student has severe neurological impairment and is not expected to fully recover from her injuries. She is expected to remain dependent on others for daily activities for the remainder of her life.

9. Student was in general education classes until November 9, 2005 and did not receive any educational services after November 9, 2005. In August of 2006, without consulting Mother, and on the advice of Care Meridian staff, Father approached the District about the possibility of Student attending school.

10. On October 2, 2006, Father signed an assessment plan provided by the District. The assessment plan was comprehensive and provided for assessment in pre-academic/academic achievement, social/emotional behavior, self-help/adaptive skills, psychomotor development, language/speech/communication development, health, and vocational/prevocational needs. District admits that it did not advise or consult Mother about its intent to assess Student for special education and did not seek her consent for the initial assessments or the initial IEP meeting.

11. Father did not hold sole legal or physical custody of Student and did not have exclusive rights to make educational decisions for Student when he consented to the assessment plan on October 2, 2006. District did not have or request any documentation from Father of his sole authority to make educational decisions. Father admitted that he misled the District about his authority to make educational decisions for Student. His intent was to keep Mother from being involved in the process. Father was concerned that Mother would not agree to the assessments or attendance at school.¹ Student's parents

¹ Care Meridian staff took their cues from Father because the Superior Court had given Father final authority on medical issues. Throughout the assessment period, which lasted several months, very little was said to Mother about the prospect of Student attending school. When a physical therapist informally raised the possibility of Student attending school outside the facility, Mother expressed concern and disagreement to such a plan. The therapist immediately advised her that that no such plan existed and assured her that she would be consulted and be part of any decisions. Mother was allowed to visit

had equal rights to participate in and make educational decisions for Student at all times until December 11, 2007. During the four-month long process of assessments and the IEP on December 1, 2006, District employees knew that Student's parents were divorced. School registration forms completed by Father provided an address for Mother. District did not attempt to contact Mother to provide notice or request consent until after the initial IEP was conducted on December 1, 2006.

12. District's employees were anxious to provide services to Student and saw her as someone in extreme need. District's conduct, although well meaning, deprived Mother of any meaningful opportunity to make decisions concerning Student's education.

13. An initial IEP meeting for Student was held on December 1, 2006. Attending the IEP were Father, special education teacher Nancy Lee Burdick (Burdick), assistant principal Yvonne Peck (Peck), school psychologist Betty Del la Cruz-Bernard (De la Cruz-Bernard), speech and language pathologist Doreen Brown (Brown) and school nurse Diane Garcia (Garcia). At the IEP meeting, the team determined that Student was eligible for special education under the category of traumatic brain injury with a secondary eligibility of orthopedic impairment. The IEP team agreed to a placement in the severely handicapped special day class at Oxnard High School for part of the school day and the provision of related services including bus transportation to and from school. At the end

Student on a visitation schedule. By design, District's assessments were scheduled on days that Mother was not in the facility visiting Student. During a Thanksgiving celebration gathering for residents and their families at Care Meridian, Brandy Freeman, the assistant director of nursing, advised Mother that Student would be attending school. Freeman did not offer any further details and Mother was unable to obtain any additional information from her. Until that time, Mother was under the impression that Student was on home/hospital status with the Ventura USD as she had requested on November 9, 2005.

of the IEP meeting, Father requested that Peck mail a copy of the IEP to Mother.

14. When contacted by Peck after the IEP meeting on December 1, 2006, Mother orally expressed her objection to the IEP and subsequently objected in writing. She specifically requested that the IEP not be implemented and that she be given an opportunity to participate in an IEP before services and placement commenced on January 2, 2007. Peck refused her request and the December 1, 2006 IEP was implemented. She told Mother that the only way to make any changes to the December 1, 2006 IEP was to hold another IEP meeting. Mother agreed to participate in an IEP meeting for that purpose. On March 16, 2007, an IEP meeting was finally held. Before the meeting, Garcia faxed a note to Student's physician at Care Meridian and asked that he initial the note to confirm that Student was medically stable and did not require additional assistance for her bus ride to and from school. Dr. Scott Richardson, Student's neurologist was also contacted by Garcia and provided authorization on a prescription form for Student to attend school.

15. Present at the March 16, 2007 IEP meeting were Mother, Father, Bernard-De la Cruz, Garcia, Burdick and Peck. Mother was given an opportunity to state her concerns and was then advised that no changes would be made to the IEP. She was specifically advised that Student would not be removed from special education, no home hospital services would be provided, bus transportation would be continued and a one-to-one aide would not be provided for bus transportation despite her concerns for Student's health. The meeting was a formality and did not entail any serious consideration of Mother's concerns or of exiting Student from special education as Mother requested. When she complained, Mother was advised by Peck to file a due process complaint.

16. Tresvant, the District special education director, testified that District personnel believed that under the circumstances, a due process complaint would be filed by one of the two parents no matter what decision was made. Therefore, District opted to

implement the December 1, 2006 IEP and continue providing the placement and services listed in the IEP because the District had determined doing so to be in the best interests of Student.

17. District's failure to include Mother in the initial December 1, 2006 IEP meeting deprived her of the ability to decline special education placement and services at the outset. Instead, she was forced into a situation of attending a subsequent March 16, 2007 IEP meeting and arguing that Student should not be in special education to an IEP team that was already committed to a certain placement and services that had been implemented for nearly three months. The March 16, 2007 IEP meeting did not provide serious consideration of Mother's concerns. District failed to afford Mother meaningful participation in the IEP process thereby denying Student a FAPE.

LEGAL CONCLUSIONS

1. Student has the burden of persuasion on all issues. (*Schaeffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

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

ISSUE ONE

3. In her first issue, Mother contends that District violated her rights as a joint legal and physical custodian, under the Individuals with Disabilities Education Act (IDEA) by not providing her with prior written notice of its intent to assess Student and conduct an initial IEP meeting. Mother further contends that as a joint legal and physical custodian of Student, her consent was required for the initial assessment, initial IEP meeting and

implementation of the IEP. District admits that it did not give Mother prior written notice of its initial assessment or initial IEP of Student. District contends that, as a matter of law, the District was not required to obtain the consent of both parents before beginning its initial special education assessments of Student; and that the consent of Father was sufficient to hold the initial IEP meeting and to implement the IEP. District also contends that it was unaware of Mother's involvement with Student until the end of the December 1, 2006 IEP meeting when Father requested that a copy of the IEP be mailed to Mother.

4. For purposes of the IDEA, the term parent means a biological or adoptive parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. (20 U.S.C. § 1401(a)(23); 34 C.F.R. § 300.30(a)(1) & (b).) When a judicial decree or order identifies a specific person or persons as having the authority to make educational decision on behalf of a child, that person is determined to be the parent for purposes of the IDEA (34 C.F.R. § 300.30(b).) In a situation where the parents of a child are divorced, the parental rights established by IDEA apply to both parents, unless a court order or state law specifies otherwise. (*Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed.Reg. 46568 (August 14, 2006).)

5. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors that lead to a deprivation of educational benefits, such as failure to have the proper composition of the IEP team during the IEP process, are analyzed by determining whether: 1) a procedural violation occurred and 2) whether the procedural violation resulted in a deprivation of educational benefits to the student. (*M. L., et. al., v. Federal Way School District* (9th Cir.

2004) 394. F.3d 634, 653 [concurring opn. of Gould, J.].) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

6. Written notice must be given to the parents of a child with a disability a reasonable time before a public agency proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a FAPE to the child. (14 U.S.C. § 1415 (b)(3); 34 C.F.R. § 300.503(a).) A public agency that is responsible for making a FAPE available to a child with a disability must obtain informed consent from the parent before conducting an initial evaluation and before the initial provision of special education and related services to the child. (34 C.F.R. §§ 300.300(a)(ii) & (iii); 300.300(b)(3) & 300.505(a); Ed Code, § 56321.)

7. A public agency must ensure that the IEP team for each child with a disability includes the parents of the child. (34 C.F.R. § 300.321(a)(1); Ed. Code, § 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 meeting or are 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. The notice provided to parents must indicate the purpose, time, and

location of the meeting and who will be in attendance. It must also inform the parents of the participation of other individuals on the IEP team who have knowledge or special expertise about the child. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56304 & 56341.5.) In developing each child's IEP, the IEP team must take into consideration the concerns of the parents. (34 C. F. R. § 300.324(a); Ed. Code, § 56341.1, subd. (a)(2).)

8. Here, Mother had joint legal and physical custody of Student and rights equal to Father. Father placed District in an untenable position once it discovered that it proceeded without notice to Mother and without her consent. District compounded the wrong by implementing the December 1, 2006 IEP over the objection of Mother. While District's motives were to serve Student, its actions violated the spirit and letter of the IDEA. The District's failure significantly infringed upon Mother's rights. In conclusion, the District violated Mother's procedural rights under the IDEA when it failed to provide prior written notice to Mother and failed to obtain Mother's consent prior to conducting assessments, prior to holding the initial December 1, 2006 IEP team meeting and prior to implementing the IEP. (Factual Findings 1 through 9; Legal Conclusions 1 and 3 through 8.)

ISSUE TWO

9. Mother's second contention is that she was deprived of her right to participate in the IEP process. She further contends that the deprivation was not cured by the subsequent March 16, 2007 IEP team meeting because her concerns were not seriously considered. District contends that Mother was afforded the opportunity to participate in the IEP process when it convened a second IEP meeting on March 16, 2007.

10. The 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(a); Ed. Code, § 56500.4.) 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 Bd. of Educ.* (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].)

11. Mother did not want Student placed in special education and did not want Student to be transported to school by bus. She wanted her daughter educated in a home/hospital setting. Holding the December 1, 2006 IEP without consent and implementing the IEP over objection, District deprived Mother of the opportunity to participate in the process and placed her at a disadvantage in attempts to undo the special education placement and services that had been implemented. District personnel knew that Student's parents were divorced and had Mother's address. The subsequent IEP meeting held three months later on March 16, 2007, did nothing to remedy the error because Mother had the unequivocal right to refuse consent to the December 1, 2006 IEP without having to make her argument to the IEP team. In conclusion, during all relevant time periods, the District denied Mother the opportunity to participate in the IEP process. (Factual Findings 9, 11 through 18; Legal Conclusions 1, 10 and 11.)

ISSUE THREE AND FOUR

12. Because the ALJ determined that FAPE was denied by the District when it failed to provide prior written notice and obtain informed consent of Mother and failed to afford her the opportunity to participate in the IEP process as set forth above, it is not necessary to reach Issues Three and Four, which set forth Mother's alternative contentions that the placement and services implemented under the December 1, 2006 IEP were not appropriate.

ORDER

All assessments conducted of Student by District shall be expunged from Student's records and Student is to be removed from special education. District is to provide prior written notice to and obtain the consent of the person or persons that have the right to make educational decisions for Student before conducting new assessments, conducting any IEP meetings or providing special education placement and services.

PREVAILING PARTY

Pursuant to 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, Student prevailed on all issues.

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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

March 6, 2008

A handwritten signature in black ink, appearing to read "Glynda B. Gomez", is written over a horizontal line.

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings

Special Education Division