

MAILED

SEP 23 2010

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION SEATTLE-OAH

IN THE MATTER OF

SEATTLE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2010-SE-0059

RECEIVED

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

SEP 27 2010

OFFICE OF PROFESSIONAL PRACTICES

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Seattle, Washington, on August 23-24 and September 8, 2010. The Parent of the Student¹ whose education is at issue appeared and represented herself. The Seattle School District (District) was represented by Kevin F. O'Neill, senior assistant general counsel. Also present for the District was Michael Sanford, special education supervisor.

The record closed effective the last day of the due process hearing; September 8, 2010. Pursuant to prior order, the due date for a written decision in the above matter is thirty (30) days after close of record. Therefore, the due date for a written decision in the above matter is **October 8, 2010**.

STATEMENT OF THE CASE

Procedural History

The Parent filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on June 15, 2010, which was assigned Cause No. 2010-SE-0059. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered June 17, 2010. Prehearing conferences were held by telephone on July 8, 26, and 29, 2010. A Prehearing Order was entered July 9, 2010. A Readiness Prehearing Conference was held by telephone on August 16, 2010.

Evidence Relied Upon

Exhibits Admitted: Parent's Exhibits P1 - P20, P22-P23, P24 pp. 1-26 and pp. 32-33, and P25 - P35; District's Exhibits D1 - D32.

Witnesses Heard: the Parent, Tiffany Kuhn, District school psychologist, Terri Majjika, District occupational therapist; and Ananda Dorje, District speech language pathologist.

¹ In the interest of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parent(s)," and "Student."

ISSUES

As set forth in the Prehearing Order entered July 9, 2010, the issues for the due process hearing are:

- (1) Whether the District denied the Student a free appropriate public education (FAPE) from June 15, 2008, through June 15, 2010, by failing to provide the Student with a dedicated 1:1 instructional aide (IA);
- (2) And, whether the Parent is entitled to her requested remedies:
 - i. Provision of a dedicated 1:1 IA for the Student during the school year;
 - ii. Provision of a dedicated 1:1 IA for the Student for after-school activities during the school year for two years;
 - iii. Provision of a dedicated 1:1 IA for the Student for non-Extended School Year periods during the summer, Monday through Friday, during normal business hours for two years.
 - iv. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

General Background

1. In July 2001, the Student was determined eligible for special education and related services under the category of Health Impaired due to severe developmental delays associated with spastic quadriplegic cerebral palsy, secondary viral encephalitis and a history of seizures. P11, p.1.
2. The District conducted a three-year reevaluation of the Student. The reevaluation determined the Student remained eligible to receive special education services, and recommended the Student continue in his existing educational program. A reevaluation meeting was held on November 16, 2006. The Parent attended the meeting as a participant and agreed with the recommendation. Exhibit D1.
3. On November 15, 2007, the District held an individualized education program (IEP) meeting. The IEP team included the Parent. The team developed an IEP for the Student. Under the Present Levels of Performance section, the IEP noted the Student;

[R]equired a classroom which provides small group instruction, 1:1 instruction, repetition, and individual assistance with [the Student] in a variety of settings, and a classroom with 1 adult to 2 students to support and facilitate the delivery of instruction and services and to meet his needs . . . [The Student] also requires 1:1 time to receive position changes through the day . . . [The Student] needs 1:1 assistance to be successful in the inclusion environment, which he thrives in socially.

D2, p.3.

4. The Parent disagreed with the educational placement in the IEP. D2, p.22. In part, the Parent wanted the IEP team to consider assigning a dedicated, 1:1 IA to the Student. D2, p.30. The team agreed to reconvene to discuss the Parent's request. D2, p.28.

2008-2009 School Year

5. On October 28, 2008, the District sent the Parent an Invitation to Attend Meeting notice, informing the Parent that a meeting to conduct an annual review the Student's IEP was scheduled for November 13, 2008. D8, p.1.

6. On October 29, 2008, the Parent wrote to the IEP team members, asking for their support in requesting a 1:1 IA for the Student. The letter identified examples of what a 1:1 IA might be able to do to support the Student in communicating. D6.

7. The Parent attended the IEP meeting on November 13, 2008. The team developed an IEP for the Student. Under the Present Levels of Performance section, the IEP noted the Student;

[N]eeds a special education classroom that provides the following; small group instruction, repetition, and individual assistance with self-help needs . . . [The Student] benefits from opportunities throughout the day to be with typically developing peers to the greatest extent possible . . . During time with typically developing peers in a general education classroom, as well as having typically developing peers in a self-contained classroom, [the Student] (sic) response time to his peers is shorter than his response time to adults in a self-contained special education classroom.

D8, p.3.

8. The IEP determined the Student would spend 150 minutes per week in a general education classroom to address his social and behavioral goals and objectives. The IEP determined the staffing in the Student's self-contained classroom would be 2 shared IAs with one special education teacher serving a total of eight students, including the Student. D8, p.17.

9. During the IEP meeting, the team members attempted to take a "vote" to decide whether the team would include a dedicated 1:1 IA in the Student's IEP. Three of the team members voted to support inclusion of a 1:1 IA in the IEP. Other team members agreed to support the team's decision. One team member wanted time to observe the Student. P25, p.1.

10. The IEP team did agree the Student should be accompanied by the same staff person during the 150 minutes per week the Student was scheduled to be in a general education classroom.

11. The Parent disagreed with the special education services determined in the IEP. D8, p.18. The Parent wanted the IEP team to include provision of a dedicated 1:1 IA for the Student as part of his IEP.

12. On November 13, 2008, the District sent the Parent a Prior Written Notice, informing her that the District was refusing her request to change the Student's educational placement by assigning a dedicated IA to the Student. The Notice stated that current evaluation data did not support the change in placement requested by the Parent. The Notice stated the District proposed;

[C]onducting additional assessments of the Student, and will be systematically collecting data regarding the actual amount of direct intervention/supervision/instruction/prompting the Student needs . . . Once additional data is gathered, the Student's IEP team will meet to consider if his needs can be met in his current educational placement, or if a change in placement is warranted . . . A meeting to review new data is scheduled for 11/21/08 at 8:00 am.

D7, p.4.

13. On November 18, 2008, the District sent the Parent an Invitation to Attend Evaluation/Reevaluation Meeting. The invitation identified a meeting to be held on November 21, 2008, to "[d]etermine parent's request for a 1:1 aide; determine if there is enough support within the classroom to meet [the Student's] IEP goals." D7, p. 1.

14. The Student's IEP team, including the Parent, met again on November 21, 2008. During the course of this meeting, the Parent was informed that a third IA already working in the Student's classroom would be permanently assigned to the classroom.

15. In an undated Individual Documentation of Reevaluation Assessment Results: School Psychologist form, Tiffany Kuhn, District school psychologist, described her observations of the Student on October 23, November 5, and November 6, 2008.

16. The IEP team agreed the Student requires "consistent, predicable adult support during the entire school day, but does not require the very restrictive placement of the assignment of a dedicated instructional assistant to work with him in addition to the classroom staff and services providers that he is already working with." D9, p. 8.

17. On December 8, 2008, the District sent the Parent a Prior Written Notice, informing her that the District was refusing to change the Student's educational placement by assigning a dedicated IA to the Student. The notice stated that current evaluation data did not support the change in placement requested by the Parent. P7, p.4.

18. On December 9, 2008, the District sent the Parent an Evaluation Amendment Form. The form stated;

Based on data, the team recommends that the evaluation/reevaluation report dated 11/16/06 not be amended. No changes in areas of SDI are requires (sic); please refer to attached summary to document information regarding additional support within the classroom.

D9, p.5.

19. In response to an email from the Parent, on December 12, 2008, Joan Bell, District special education supervisor, wrote the Parent a letter. P7. Ms. Bell included with her letter a copy of the Student's class schedule, indicating the staffing in the Student's self-contained classroom was now 4 IAs and one special education teacher for seven students, including the Student. P7, p.3.

20. Ms. Bell wrote to the Parent again on January 9, 2009. Ms. Bell's letter stated that "[i]n general there is no such thing as an IEP team 'vote.' If a team cannot reach consensus, it is up to the District to propose a course of action." Ms. Bell's letter again confirmed the student/staff ratio in the Student's class was seven students to five staff. D10.

21. After receiving Ms. Bell's correspondence, the Parent requested mediation with the District to try to resolve her dispute over the District's refusal to assign a dedicated 1:1 IA to the Student.

22. The Parent and the District entered into mediation on February 4, 2009. The Parent and the District agreed the Student would continue in his classroom with the current staffing as written in his current IEP, and the Student required personal assistance at all times but did not require a dedicated 1:1 IA at that time. The Parent and the District agreed all IAs working with the Student would be trained to use his communication device. The District agreed to continue a 1:2 teacher/student ratio in the Student's class through the end of September 2009. D11, pp.3-6.

23. The Student's November 13, 2008, IEP set out the Student's goals and objectives for a one-year period, essentially from November 2008 through October 2009. The Student's progress towards his IEP goals was assessed in March 2009. Out of twenty-two goals, the Student made little or no progress on six goals, some progress on eight goals, significant progress on two goals and met one goal. Four goals were not assessed in March. D13.

24. The Student's progress towards his IEP goals was assessed again during May and June 2009. Out of twenty-two goals, the Student made little or no progress on seven goals, some progress on nine goals, significant progress on one goal and met five goals. D13.

25. The Parent does not disagree with the appropriateness of the Student's IEP goals and objectives, or the progress reported towards meeting the goals and objectives.

26. The Student was absent from school on forty days and arrived late to school on an additional twenty-five days during the 2008-2009 school year. D31.

2009-2010 School Year

27. During the 2009-2010 school year, there were six students, including the Student, one special education teacher and three IAs assigned to the Student's self-contained classroom.

28. Concerned with the training and experience of new staffing in the Student's classroom after a visit to the classroom, the Parent renewed her request for a dedicated 1:1 IA for the Student in an email on September 9, 2009, to John Clough, District special education administrative supervisor for preschool/elementary. P23, p.45.

29. By letter dated November 1, 2009, the Parent again requested a dedicated 1:1 IA for the Student, identifying how the Student's disabilities and resultant medical fragility warranted a 1:1 IA. P16, p.1.
30. On November 9, 2009, three-year reevaluation and IEP meetings were held at the District. The Parent was present as a member of both the reevaluation and IEP teams.
31. The reevaluation summary concluded;
- [T]he Student requires specialized instruction throughout the school day. [The Student]'s level of attention and engagement increases during individual interactions with staff and peers. He responds well when interacting with different adults and peers on a 1:1 basis . . . [The Student] requires a consistent adult to accompany and assist him during inclusion time.
- D20, p.5.
32. The Parent disagreed with the reevaluation summary, and requested a dedicated 1:1 IA for the Student. D20, p.7.
33. The District members of the IEP team agreed that while the Student required a District staff member to provide 1:1 support at all times, and the staff member must be knowledgeable about the Student's communication device, the staff member providing 1:1 support did not have to be the same staff member all the time.
34. A new IEP was developed for the Student at the IEP meeting, maintaining the same placement for the Student as the prior IEP. P12. The Parent disagreed with the special education services identified in the IEP, asserting the Student required a dedicated 1:1 IA and more time in general education classes. P12, p. 20.
35. The Parent agreed with the goals and objectives in the new IEP for the Student. P12, p.20.
36. The Student's November 9, 2009, IEP set out the Student's goals and objectives for a one-year period; November 2009 through October 2010. The Student's progress towards his IEP goals was assessed in March 2010. Out of twenty-seven goals, the Student made little or no progress on four goals, some progress on thirteen goals, significant progress on two goals and met one goal. Seven goals were not assessed in March. P17.
37. An IEP meeting was held on May 25, 2010, to consider amending the Student's IEP. The Parent participated as a team member. The Student's IEP was amended to include extended school year (ESY) services, and time spent in general education classes was increased from 150 to 240 minutes per week to work on the Student's social and behavioral goals. Exhibit D25, p.2.
38. The Parent renewed her request for a dedicated 1:1 IA for the Student at the IEP meeting. The District offered to obtain an independent educational evaluation (IEE) by a non-District evaluator to determine any need for a dedicated 1:1 IA for the Student. The Parents declined the offer, stating

they did not disagree with the three-year reevaluation, but rather with John Clough's interpretation of the reevaluation. The Parent acknowledged the Student had a good year and definitely made progress. D26, p.4.

39. The Student's progress towards his IEP goals was assessed again during June 2010. Out of twenty-five goals, the Student made little or no progress on eight goals, some progress on seven goals, significant progress on five goals and met two goals. Three goals were not assessed in June. P17.

40. The Parent does not disagree with the Student's reported progress towards meeting the goals and objectives in his IEP for 2009-2010.

41. On June 15, 2010, the Parent filed a Request For Due Process Hearing.

42. On June 17, 2010, the District sent the Parents a Prior Written Notice, informing the Parents that it was proposing to change the Student's IEP to reflect the increased time in general education classes, to add present levels of performance and to provide ESY services. The notice also informed the Parents the District was not agreeing to provide the Student with a dedicated 1:1 IA. P19.

43. The Student was absent from school on forty-one days and arrived late to school on an additional forty-eight days during the 2008-2009 school year. D31.

44. Ananda Dorje, District speech and language pathologist (SLP), provided SLP services to the Student from the spring of 2003 through the 2004-2005 school year, and then again from the 2007-2008 school year through the present time. During the 2008-2009 and 2009-2010 school years, the Student missed significant amounts of SLP services Mr. Dorje was ready and able to provide due to his absenteeism and tardiness.

45. Terri Majika, District occupational therapist (OT), has provided the Student with OT services as part of his IEP goals and objectives for the last five years. During the 2008-2009 and 2009-2010 school years, the Student missed substantial amounts of OT services Ms. Majika was ready and able to provide due to his absenteeism and tardiness.

46. Tiffany Kuhn was the District school psychologist assigned to coordinate and in part conduct the Student's most recent three-year reevaluations in 2006 and 2009. Ms. Kuhn also participated in the reevaluation meetings and IEP meetings during the 2008-2009 and 2009-2010 school years.

47. Mr. Dorje, Ms. Kuhn and Ms. Majika all opined, and the Parent agreed, that it is more likely than not that the Student would have made even more progress towards his IEP goals and objectives but for his substantial absenteeism and tardiness over the last two school years.

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CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. §1401 *et seq.* (Individuals with Disabilities Education Improvement Act IDEA, sometimes referred to as IDEA, formerly Education for All Handicapped Children Act EHA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) §300 *et seq.*, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387, 44 IDELR 150 (2005). The party seeking relief in this case is the Parent. The Parent therefore has the burden of proof to establish by a preponderance of credible evidence that the District denied the Student FAPE when it denied the Parent's request for a 1:1 IA.

3. A student determined eligible to receive special education and related services is entitled to a free appropriate public education (FAPE). FAPE means special education and related services that have been provided to the student at public expense and without charge, that meet State educational standards, and that are provided in conformity with the student's individualized education program (IEP). 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; WAC 392-172A-01080. "Special education" means specially designed instruction, at no cost to parents, to meet the unique needs of the student. 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; WAC 392-172A-01175. The Student has been determined eligible to receive special education and related services, and therefore the District is obligated to provide him with FAPE. The issue in this case is whether by denying the Parent's request for a dedicated 1:1 IA the District denied the Student FAPE?

4. There is both a procedural and a substantive test to determine if a school district has complied with the IDEA and provided a student FAPE. Reviewing courts must inquire;

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 (1982). "If a violation of the IDEA is found in either regard, the court shall 'grant such relief as [it] deems appropriate.'" *Hacienda La Puente Sch. Dist. of L.A. v. Honig*, 976 F.2d 487, 492 (9th Cir. 1992). In this case, the Parent has not alleged any procedural violation of the IDEA. The only issue raised in the Complaint is whether by denying the Parent's request for a dedicated 1:1 IA the District denied the Student FAPE? This is an allegation of a substantive violation of the IDEA.

5. The second prong of the *Rowley* test to determine whether a district has substantively complied with the IDEA and provided FAPE is whether the IEP was reasonably calculated to enable a student to receive educational benefit. *Rowley*, at 207. The standard is met if a district provides

personalized instruction with sufficient supportive services to permit a student to benefit from the instruction. *Id.* at 189. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (1999, 9th Cir.). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

6. A district is not obligated to provide the best instruction. FAPE does not mean the absolutely best or potential-maximizing education for the individual child. Districts must provide "a basic floor of opportunity" through a program 'individually designed to provide educational benefit to the handicapped child.'" *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987), citing *Rowley*, 458 U.S. at 201. FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 160 (4th Cir. 1991), *affd.* 510 U.S. 7 (1993).

In the Ninth Circuit, educational progress is not only measured by a student demonstrating competence in the academic setting, but also by the progress a student makes on the central goals of the IEP. *County of San Diego v. Calif. Special Education Hearing Office*, 93 F.3d 1458, 1467 (1996, 9th Cir.). Educational needs are to be construed to include not only a student's ability to score well on a test, but also "the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (1996, 9th Cir.).

7. After careful review and deliberation, it is concluded the District did not deny the Student FAPE by refusing the Parent's request for a dedicated 1:1 IA. The Parent does not disagree with the appropriateness of the goals and objectives in either of the Student's two IEPs in effect during the period at issue in this case. Nor does the Parent disagree with the Student's progress towards those goals and objectives as assessed by the District. The evidence is clear that despite missing substantial instructional time due to absenteeism and attendance, the Student made more than minimal or trivial progress in his educational placement during the period at issue. It can only be speculated how much progress the Student could have achieved had his attendance been more consistent. Based upon the District's evaluations of the Student and the Student's progress, the IEP teams determined the Student required consistent and predicable adult support during the entire school day to receive an educational benefit. This determination was reasonably calculated to provide educational benefit at the time the IEPs were developed.

8. The Parent asserted the Student requires a dedicated 1:1 IA in order to better serve the Student and make progress towards the goals and objectives in his IEPs. Assuming for the sake of argument this assertion is correct, and the Student would make more or quicker progress towards his IEP goals and objectives if he had a dedicated 1:1 IA, does not alter the legal conclusion in this case. The District is not legally obligated to provide an educational program to maximize the Student's potential. *Gregory K.*, *supra*. The District fulfills its legal obligation under the IDEA to provide FAPE if the Student derives more than minimal or trivial progress in his placement, considering the Student's unique characteristics. *Florence County Sch. Dist. Four*, *supra*.

9. Having concluded the District provided the Student FAPE through the IEPs in effect during the period at issue, it is not necessary to determine if any of the Parent's requested remedies are appropriate.

10. All arguments made by the parties have been considered. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

The Seattle School District did not deny the Student a free appropriate public education from June 15, 2008, through June 15, 2010, when it denied the Parent's request for a dedicated 1:1 instructional aide. The Parent's requested remedies are denied.

Signed at Seattle, Washington on September 23, 2010.



MATTHEW D. WACKER
Administrative Law Judge
Office of Administrative Hearings

Final Decision

Further Appeal Rights: Information About Your Right To Bring A Petition For Reconsideration And Your Right To Bring A Civil Action

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. Jan

Parent



Kevin F. O'Neill, Senior Assistant General Counsel
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PO Box 34165, MS 32-151
Seattle, WA 98124-1165

cc: Administrative Resource Services, OSPI
OAH/OSPI Caseload Coordinator