

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

In the matter of:

STUDENT,

Petitioner.

vs.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. N 2005090593

DECISION

Martha J. Rosett, Administrative Law Judge (ALJ), for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on December 5 and 6, 2005, at the offices of the Los Angeles Unified School District in Los Angeles, California.

Petitioner Student (Student) was represented at the hearing by his attorney, Jeff Lasley of the Law Offices of ADAMS, ESQ. Student's mother was also present at different times during the hearing. Respondent Los Angeles Unified School District (District) was represented at the hearing by its attorney, My T. Huynh. Also present throughout the hearing were Special Education Administrator Jose Gonzalez, Associate General Counsel Donald Irwin, and Paralegal Rita Turner from the District.

Petitioner called Dr. Delaina Martinez, Psy. D., and his mother as witnesses. The District called school psychologist June Bartczak, Assistant Principal La Vida Theus, and school nurse Maria Paraiso as witnesses.

Oral and documentary evidence was received and arguments were presented. The record was then closed and the matter was submitted for decision.

ISSUE

The sole issue to be determined is whether or not Petitioner is entitled to reimbursement for the cost of an independent psycho-educational assessment, performed by Delaina A. Martinez, Psy.D., on or about August 3, 2005.

FACTUAL FINDINGS

1. On September 15, 2005, a request for a due process hearing was filed on behalf of Student. Student asserted that he was denied a free, appropriate public education (FAPE) for the 2004-2005 school year due to the District's failure to design an educational program to meet his unique and individual needs. Student also asserted that the District failed to conduct appropriate assessments and failed to assess him in all areas related to his suspected disability. Student contended that his parents are entitled to reimbursement for fees incurred for a private psycho-educational assessment performed by Delaina Martinez, Psy.D., on or about August 3, 2005.

2. A telephonic prehearing conference was held on November 28, 2005. The parties agreed that the sole issue to be tried at the due process hearing was whether Student is entitled to reimbursement for the cost of the independent psycho-educational assessment. The other issues set forth in the original due process complaint were resolved through a settlement agreement. Ruling on a motion to dismiss was deferred to the outset of hearing.

3. At the hearing, on December 5, 2005, the ALJ denied the District's motion to dismiss Student's claim for reimbursement, because there existed triable issues of fact as to whether or not parents expressed disagreement with the March 2005 assessment and were entitled to a publicly funded independent educational evaluation (IEE).

4. Student is an eleven- year-old pupil who lives within the jurisdictional boundaries of the Los Angeles Unified School District. Student has attended 118th Place Elementary School since 2002. He is now in the fifth grade.

5. On September 25, 2002, the District held an individualized education program (IEP) meeting, at which time the District determined that Student was eligible for special education as a student with Other Health Impairment (OHI). Student's health impairments include ear and sinus infections and asthma, which have resulted in numerous hospitalizations and absences. Student continues to be eligible for special education under the OHI classification, as well as under the additional eligibility of Specific Learning Disability (SLD), with the identification of auditory processing disorder and attention/concentration issues, as set forth in more detail below.

6. In the fall of 2004, Student's mother requested that an IEP meeting be convened, because she was concerned about Student's academic progress. On December 9, 2004, an IEP meeting was held, which was attended by Student's mother; Jean Virtue, Student's educational therapist from Kaiser Permanente; June Bartczak, school psychologist; Lavada Theus, school administrator; Student's special education teacher; and his general education teacher. The team reviewed assessments and reports prepared by the school psychologist. Student's mother and Kaiser therapist, Ms. Virtue, expressed disagreement with the psychologist's assessment, which focused on Student's original identification as OHI. They expressed concern that Student was not adequately assessed for a suspected auditory processing deficit and wanted student's eligibility to include the classification of Specific Learning Disability (SLD). The IEP team agreed to re-evaluate Student.

7. On February 11, 2005, school psychologist June Bartczak completed her Triennial Psychoeducational Assessment of Student. Ms. Bartczak performed the initial assessment of Student in September of 2002 and the assessment forming the basis for the December 2004 IEP. She also has been seeing the Student regularly since 2002 for

counseling and other services. Ms. Bartczak performed a whole new battery of tests in order to re-evaluate Student in February of 2005. In the instant hearing, Ms. Bartczak established her qualifications to perform psychoeducational assessments. She described the methodology and results of her re-evaluation, as set forth in more detail in her report. Student was assessed in all areas of suspected disability, including in health and development, language function, cognition, academic performance, and social and emotional status. Assessment methodologies included standardized tests, classroom observations, a review of records and interviews with school personnel and family members. Ms. Bartczak concluded that Student meets the criteria of a student with a Specific Learning Disability due to an auditory processing disorder, which is the primary cause of the discrepancy between his ability and academic achievement. Ms. Bartczak also found that Student continues to demonstrate an educational disability in the form of health impairments other than orthopedic (Other Health Impairment). Ms. Bartczak made some recommendations for Student's educational program, but referred the matter back to the IEP committee for appropriate programming and placement.

8. On March 16, 2005, the District held another IEP meeting to discuss the results of the re-evaluation of Student. Present at the March meeting were the parents, Kaiser educational therapist Jean Virtue, school administrator Lavada Theus, Ms. Bartczak, Student's teachers, and the school nurse. Student's eligibility was re-classified as Specific Learning Disability. Instructional supports and accommodations were offered based on the results of the re-evaluation.

9. At the March 16, 2005 IEP meeting, Parents expressed disagreement with the instructional setting, stating that Student might benefit from a Non-Public School setting. Page 10 of the March 16, 2005, IEP addresses "Parent Participation and Consent." On that page, boxes were specifically marked indicating that Parent disagreed with the instructional setting, due to Student's "needs not being met." However, parents did not mark boxes indicating disagreement with the assessment, eligibility, and /or specific

instruction and services. In other words, Parents did not express written disagreement with the assessment at the time of the March 16, 2005, IEP meeting. They did not make a written request for an IEE. The only disagreement expressed by the parents was with the educational setting, which included having Student mainstreamed in a lower grade math class, and that they wanted Student considered for a Non-Public School setting.

10. Prior to the March 16, 2005, IEP meeting, Parents had received and read a procedural rights packet from the District. Parents were aware of the process to obtain an IEE. On August 3, 2005, Parents obtained an independent assessment by Dr. Martinez.

11. Dr. Delaina Martinez, Psy.D., testified at the hearing, and established her qualifications to perform psycho-educational assessments. Her independent assessment was based primarily upon a review of the assessments performed by the school district and additional information provided to her by the Kaiser therapist and Parents. Dr. Martinez adopted the District's assessment of Student as SLD due to an auditory processing disorder. In addition to reviewing the tests performed by the school psychologist, Dr. Martinez administered one additional test: the Bender Gestalt II. She met with Student for 45 minutes and met with his parents for 45 minutes. She spent an additional 6 1/2 to 7 hours reviewing the District's reports and Student's private educational therapist's report. Dr. Martinez did not observe Student in the classroom setting, nor did she interview teachers, the school psychologist or the Kaiser educational therapist. She offered no critique of Ms. Bartczak's testing, evaluation, or diagnosis of Student. Indeed, most of her analysis was predicated upon findings from the school's assessments. Dr. Martinez did offer additional recommendations for services and assistive devices.

12. No probative evidence was presented that parents expressed verbal or written disagreement with the psycho-educational assessment performed by the District which formed the basis of the March 16, 2005, IEP. No probative evidence was offered that

parents requested that an independent psychoeducational assessment be performed at public expense prior to obtaining the assessment.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The Individuals with Disabilities Education Act (IDEA), seeks to ensure that all children with disabilities have available to them a Free Appropriate Public Education. (20 U.S.C. § 1400 (d)(1)(A)) Under the IDEA, school districts must create an Individualized Education Program (IEP) for each disabled child. (20 U.S.C. § 1414(d)) If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. (20 U.S.C. §1415(f)) The IDEA leaves to each State the responsibility for developing and implementing educational programs for disabled children, but imposes significant requirements in the discharge of that responsibility. (*Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, (1982) 458 U.S.176, 183.) The statute establishes a cooperative process between parents and schools. *Rowley, supra* at 205-206. The central vehicle for this collaboration is the IEP process. (*Schaffer v. Weast*, (2005) 546 U.S._____[126 S.Ct.528, 532].)

Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child, must be included as members of the IEP teams, and have the right to examine any records relating to their child. In addition, parents have the right to obtain an independent evaluation of their child. (20 U.S.C. §1415(b) (1).) Under federal regulations, parents and guardians have the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. (34 C.F.R. §300.502(b)(1).)

California's Education Code Section 56329, subdivision (b), provides that a parent or guardian has the right to obtain an independent educational assessment at public expense, from a qualified specialist, as defined by the regulations of the District, if the

parent or guardian disagrees with an assessment obtained by the District, in accordance with Section 300.502 of Title 34 of the Code of Federal Regulations. (Ed. Code §56329 subd. (b).)

Section 300.502(b) of Title 34 of the Code of Federal Regulations, in turn, provides that:

- (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.
- (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either --
 - (i) Initiate a hearing under § 300.507 to show that its evaluation is appropriate; or
 - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.
- (3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
- (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation. (34 U.S.C. § 300.502(b).)

DISCUSSION

2. It was not established by Student that the parents disagreed with the District's second assessment or requested an independent evaluation at public expense, based upon factual findings 9, 10, 11 and 12 above. Although the parents disagreed with the first

set of assessments the District performed in developing the December 2004 IEP, Parent never expressed disagreement about the second assessment performed by the school psychologist which formed the basis for the March 16, 2005, IEP. On the face of the March 2005 IEP document, the parents expressed disagreement with Student's placement only, and did not mark the applicable box indicating disagreement with the assessment. Their verbal disagreement with the March 16, 2005 IEP had to do only with the educational setting and placement, and not with the assessment. Finally, it was not established by Student that prior to obtaining the independent assessment, Parent requested that the District fund an independent assessment of Student. Therefore, under Education Code Section 56329, subdivision (b), and 34 C.F.R § 300.502(b), there is therefore no statutory basis for awarding Student reimbursement for the costs of the assessment performed by Dr. Martinez.

3. Even assuming that a proper request was made for an IEE, the assessment met all the requirements set forth in California Education Code Section 56320. The request for reimbursement is still denied.

ORDER

Student's request for reimbursement for the private, independent psycho-educational assessment performed by Dr. Martinez on August 3, 2005 is hereby denied.

PREVAILING PARTY

The following findings are made in accordance with this California Education Code section 56507 subdivision (d): The District prevailed on all issues heard.

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. (Cal. Ed. Code § 56505, subd. (k).)

February 27, 2006



Martha J. Rosett

Administrative Law Judge

Office of Administrative Hearings

Special Education Division