

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

STUDENT,

Petitioner,

OAH No. N 2005080264

v.

HUNTINGTON BEACH CITY ELEMENTARY
SCHOOL DISTRICT,

Respondent.

DECISION

This matter came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, Special Education Division, at Huntington Beach, California on March 21 and 22, 2006.

Caroline A. Zuk, Esq., represented the Huntington Beach City Elementary School District (district).

Paul M. Roberts, Esq. and Kathenne Agnew, Esq. represented Student, who appeared by and through her parents.

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause until April 14, 2006, so that the parties could submit written closing arguments/briefs.

PROCEDURAL HISTORY

On August 8, 2005, Student filed a request for due process. On September 8, 2005, Student filed an amended request for due process, and a due process hearing was scheduled. On September 27, 2005, the matter was scheduled for mediation. The mediation

was unsuccessful so the matter was assigned hearing dates of March 21 and 22, 2006, and placed on calendar. On March 21, 2006, the due process hearing commenced and the 45-day period began to run. (Ed. Code § 56502, subd. (f).) The due process hearing occurred on March 21 and 22, 2006. Then, on March 22, 2006, the matter was continued for good cause, until April 14, 2006, so that the parties could submit written closing arguments/briefs. As of April 14, 2006, two days of the 45-day time period for issuing a final decision had run, leaving a balance of 43 days. On April 14, 2006, the written closing arguments/briefs were received, the matter was deemed submitted, and the remaining 43-day period for issuing a final decision commenced.

MAIN ISSUE

The following main issue was raised by the instant petition:

Whether district failed to fulfill its "child find" obligations upon receiving written referrals for assessment on March 5, 2003, and/or November 11, 2003, thus denying Student a free and appropriate public education (FAPE)?

SUB-ISSUES

If Student's child-find rights were violated then the following issues were raised in the petition:

1. Are Student's parents entitled to reimbursement for independent educational evaluations they had performed on Student during 2004?
2. Are Student's parents entitled to reimbursement of educationally related expenses they paid during 2004?
3. Is Student entitled to compensatory education?

FACTUAL FINDINGS

1. Student, whose date of birth is November 30, 1995, is a ten-year-old female.

2. Student attended general education classes at Huntington Christian School, a private school, from Kindergarten (2001-2002) through Third grade (2004-2005).

3. During the 2002-2003 school year, while Student was in the First grade, Student's parents became aware that Student was having difficulty keeping on task and with her social interactions. As Student progressed into Second and then Third grade she faced increased demands, both academically and socially. It seemed to Student's parents that Student's behavioral problems increased due to the increased educational and social pressures. Consequently, Student's parents sought help for Student. As part of the help seeking process, Student's parents had Student assessed by Dr. William Young, a psychiatrist.

4. Dr. Young assessed Student on March 4, 2003. That day, Student arrived at Dr. Young's office and waited in the waiting room for 90 minutes before being administered the Conners' Continuous Performance Test-II, a computerized test which assesses features of Attention Deficit Hyperactivity Disorder (ADHD). The test lasted 14 seconds.

5. After administering and interpreting the Conners' Continuous Performance Test- II, Dr. Young wrote a prescription, noting that he was "consulting with [student] for possible ADHD." The prescription also stated: "Please IEP with WiPSi [sic] for possible R.S.P. program." (District Exh. 11.)

6. On March 5, 2003, as a result of Dr. Young's prescription and the recommendations contained therein, Student's mother hand delivered a copy of the prescription, along with a letter, to Hawes Elementary School which, based on Student's residence, was/is her "home" district school. The letter states:

Dear Principal Ayres:

Good Morning! Enclosed please find registration papers for my daughter, [Student]. I am registering her for the fall semester-to be entering second grade. . .

Currently, [Student] is attending Huntington Christian School. I have noticed behavior issues recently and have been consulting with Dr. Young, a psychiatrist, regarding these issues. He has written me a prescription to give to Hawes to have [Student] tested. Explaining that I go to my "home" school (Hawes) in my district to have this administered. Mrs. Campbell suggested filling out my registration papers along with this prescription and your school psychologist would contact me.

I did not get a name for the psychologist who would call-so I am addressing this letter to you in the hopes you will forward this to the proper school professional.

I am not sure whether [Student] will remain at Huntington Christian or not, but as I understand it, that makes no difference as to the help she is able to receive through your program.

I thank you in advance for your assistance and look forward to hearing from Hawes as soon as possible. . . I hope you can understand my urgency to get her an appointment. (District Exh. 12.)

In addition to the prescription, Student's mother also delivered a copy of the Conners' Continuous Performance Test-II administered to student by Dr. Young.

7. Student's mother's March 5, 2003 letter, the prescription written by Dr. Young and student's test results on the Conners' Continuous Performance Test-II were forwarded to Hawes' school psychologist, Dr. Lori Williams. After reviewing all of the information provided her, Dr. Williams was unsure about any diagnoses. Dr. Williams had the prescription, the letter, and the one page computer printout reflecting Student's performance on the 14

second Conners' Continuous Performance Test-II (Conners' Test); however, Dr. Williams had no detailed written evaluation concerning Student. Consequently, Dr. Williams felt she needed more information before she could make a determination regarding how to proceed.

8. On March 11, 2003, the district completed a "Referral for Assessment" form.

9. On March 12, 2003, Dr. Williams called Student's mother to obtain additional information. Dr. Williams was concerned about the validity of the Conners' Test and she needed more information about suspected areas of need. During the brief March 12, 2003 telephone conversation, Student's mother told Dr. Williams that she decided to have Student continue her schooling at Huntington Christian School and that she did not want the district to assess Student; instead, she would obtain private assessments. Dr. Williams told Student's mother that she needed more information if Student's mother wanted her to proceed with a district assessment plan and Student's mother should call back if she changed her mind and wanted the district to pursue action.

10. Student's mother did not contact the school again until November 18, 2003. Sometime shortly before November 18, 2003, Dr. Epstein, a University of California at Irvine (UCI) Medical Group doctor, diagnosed Student as suffering from autism. Consequently, on November 18, 2003, Student's mother hand-delivered a UCI Medical Group/Medical Center form letter that stated, in pertinent part: "I am writing this, as recommended by Marc Lerner, M.D./Robin Epstein M.D., to request that my child be referred for an educational assessment and an IEP, so we can better understand his [sic] academic difficulties." (District Exh. 20.)

11. On November 24, 2003, in response to the November 18, 2003 request for assessment (Finding 10), the district completed a West Orange County Consortium for Special Education Parent Consent for Assessment form. (District Exh. 21) According to the

district, the assessment plan form, along with parent rights were sent to Student's parents at their home address¹.

12. Student's mother never received the November 24, 2003 Parent Consent for Assessment form/assessment plan or the copy of Student/parental rights notification from the district.

13. Neither Student's parents nor district personnel initiated any further contact concerning Student's parents' November 18, 2003 assessment request.

14. Student's parents believed that their failure to receive a response from the district evidenced an intentional act by the district to ignore their assessment request. Consequently, Student's parents proceeded to obtain private assessments and provided/funded Psychotherapy and Occupational Therapy (OT) for Student. The dates of the assessments, psychotherapy and OT along with a description of the services provided and/or identification of the providers, and the associated costs are as follows:

- a. February 16, 2004 -- a Neuro-Psycho-Educational evaluation by Dr. Christine Majors, at a cost of \$3,875.00;
- b. February 20, 2004 – a Speech and Language evaluation by Speech and Language Pathologist Judy Segal, at a cost of \$1,000.00;
- c. April 14, 2004 – an Audiological assessment by Abramson Audiology, at a cost according to proof;
- d. June 7, 2004 – a Neuro-Psycho-Educational assessment by Dr. Christine Majors, at a cost of \$3,875.00;

¹ There are no copies of any "cover letter," that would typically have accompanied documents such as the November 24, 2003 Consent for Assessment and the included parental rights notification, in any of the district's files concerning student. Based on the evidence presented during the instant hearing, it is not possible to determine if the consent form was actually mailed to Student's parents, as intended.

- e. September 5, 2004 – a Social Skills evaluation by Circle of Friends, at a cost of \$150.00;
- f. December 11 and 23, 2004 Psychological evaluations by Dr. Kristen Iverson, at a cost according to proof².
- g. Psychotherapy services from Dr. Kristen Iverson from September 4, 2004 through December 16, 2004, at a cost of \$750.00; and,
- h. Occupational Therapy (OT) services provided by Irvine Therapy from February 16, 2004 through November 18, 2004, at a cost of \$17,250.00.

15. All the assessments, evaluations and services described in Finding 14, above, were reasonable and necessary to determine and address Student's unique educational needs.

16. In a letter, dated October 11, 2004, Student's attorney again requested services from the district and provided the district with the reports for the evaluations and assessments described in Finding 14, above.

17. On October 18, 2004, Dr. Lori Williams, on behalf of the district, responded to student's attorney's October 11, 2004 letter.

18. Student's mother responded to the district's October 18, 2004 letter within eight days from receipt of the letter and the district scheduled an IEP for Student on December 16, 2004.

19. The IEP was held, as scheduled, on December 16, 2004 and after that date the district provided Student with a FAPE.

20. No competent expert testimony was presented to support Student's claim that she would benefit from any type of compensatory education/services. In fact, the evidence revealed that Student is doing well in her current program and that some of her current services may be reduced and/or eliminated.

² Invoice/bill and evidence of payment.

LEGAL CONCLUSIONS

1. The Federal Individuals with Disabilities Education Act (IDEA), as amended in 1997, and State law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities, including children with disabilities who are not enrolled in a public school program, who require special education and related services. (20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125; Ed. Code §§ 56300 and 56301.) The obligation set forth in this statutory scheme is often referred to as the “child-find” or “seek and serve” obligation. Under State law, the school district must establish written policies and procedures for a continuous child-find system. (Ed. Code §56301.) The policies and procedures must include written notifications to all parents of their rights and the procedure for initiating a referral for assessment. (Id.) Identification procedures shall include “systematic methods of utilizing referrals of Students from teachers, parents, agencies, appropriate professional persons, and members of the public,” (Ed. Code §56302.) All referrals for special education and related services shall initiate the assessment process and must be documented. (Cal. Code Regs., tit. 5, §3021(a).) Pursuant to California Education Code section 56301, a district must give parents “a copy of their rights and procedural safeguards . . . upon initial referral or parental request for assessment ” A district’s failure to provide parents with a copy of their rights constitutes a violation of federal and state law. (20 U.S.C. § 1415; Ed. Code § 56301.) The notice of rights and procedural safeguards provided by the district must contain a written explanation of all the procedural safeguards under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), and the rights and procedures contained in Chapter 5 of the California Education Code section 56500 et. seq. (Ed. Code § 56321. The purpose of these requirements is to ensure that parents are aware of their rights and have sufficient information to take the necessary steps in securing a free and appropriate public education for their child.

2. As reflected in Finding 6, Student's mother originally requested an assessment on March 5, 2003. In response, the district's representative acted reasonably in contacting Student's mother for more information to aid the district in determining necessary actions. In response to the district's inquiry, Student's mother indicated she was no longer interested in pursuing services through the district, at public expense. Rather, Student's mother indicated she would be pursuing private provision of services. (Findings 8 & 9.) Accordingly, the district did not violate its child-find duties nor deny Student a FAPE on or about March 5, 2003. This is so because, a parent's request for an assessment does not mandate that districts automatically conduct assessments. As explained in *ClayT. V. Walton County School District* (M.D. Ga. 1997) 952 F.Supp. 817, 822, ". . . in order to establish that the school violated the identification requirements of the IDEA, Plaintiff must show that the school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate" In the present instance the district did not overlook clear signs of disability and did not act negligently.

3. As established by Findings 10 and 11, the district did know that there were clear signs of disability when Student's mother notified them on November 18, 2003, that Student had been diagnosed with autism. The district intended to respond appropriately by sending student's parents a consent for assessment form and information concerning parental rights; however, Student's parents never received the correspondence or the enclosures. The district then violated its child-find obligations by negligently failing to follow-up on its correspondence to Student's parents when no response was received within a reasonable time.

4. Student's parents acted reasonably by obtaining assessments and services when the district failed to act on its child-find obligations. It was only through Student's parents' actions that Student received necessary services until the district began providing services in December of 2004. Pursuant to California Education Code section 56329,

subdivision (b), Student's parents have the right to obtain, at public expense, independent educational assessments of Student from qualified specialists, as defined by regulations of the board, if Student's parents disagree with an assessment obtained by the district or if the district fails to provide necessary assessments. Pursuant to California Education Code section 56329, subdivisions (c), if the district establishes, at a due process hearing, that it appropriately assessed a student, then the student's parents are not entitled to independent educational assessment at public expense. Conversely, if the district fails to prove it appropriately assessed the student, then the student's parents are entitled to have the student's assessments, if appropriate, paid for at public expense. California Education Code section 56320 defines "appropriate" assessments. In the present instance, the district failed to appropriately assess Student. Student's parents did obtain appropriate assessments; therefore, the district must reimburse Student's parents for the costs of the assessments described in Finding 14.

5. Under both state law and the IDEA, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code § 56000.) The term "FAPE" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specifically designed instruction at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The facts of the instant case, considered in their entirety, reveal that, from November 18, 2003 through December 16, 2004, the district failed to provide Student a FAPE. Thus, Student's parents were forced to pay for the appropriate private services described in Finding 14, and are entitled to reimbursement for those services.

6. As noted in Finding 19, Student has been provided a FAPE since December 16, 2004 to the present. Student's request for some form of compensatory education shall be denied. Compensatory education is only required to remedy past denials of a FAPE by helping a student catch-up with missed educational opportunities. In the present instance, as

set forth in Finding 20, Student is progressing well and insufficient evidence was presented to establish the need for any compensatory education.

7. California Education Code section 56507, subdivision (d), requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, Student prevailed on the major issue and two of the three sub-issues.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The district shall reimburse Student's parents for all expenses described in Finding 14 within 60 days from receipt of adequate proof of the expenditures³.
2. Student's request for compensatory education is denied.

Dated: May 18, 2006

ROY W. HEWITT

Administrative Law Judge

Special Education Division

Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.

³ Invoices or bills and evidence of payments (e.g. cancelled checks, receipts.)