

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

In the Matter of:

OAH No. N 2006020392

MANTECA UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

DECISION

Administrative Law Judge Charles Marson, Office of Administrative Hearings, Special Education Division, heard this matter on March 23, 2006, in Manteca, California.

Petitioner Manteca Unified School District (District) was represented by Jennifer Rowe, attorney at law. Respondent Student was represented by Bob Varma, attorney at law. Janice Callanan, the District's Director of Special Education, and the Student's mother (Mother) were present. Student was not present.

The District called the following witnesses: Janice Callanan, its Director of Special Education; Debbie Ruger, the principal of Student's school; and Paul Ouellette, the school psychologist at Student's school.

Student's only witness was his Mother.

Oral and documentary evidence were received, closing arguments were made, the record was closed, and the matter was submitted on March 23, 2006.

ISSUE

May the District conduct a reassessment of Student pursuant to its reassessment plan of January 20, 2006, without the consent of Student's parents?

FACTUAL FINDINGS

1. Student is 13 years old and dyslexic. He and his parents reside within the geographical jurisdiction of the District, and until recently he attended the District's Brock Elliot Elementary School (Brock Elliot).

2. In August 2004 the District assessed Student to determine whether he was eligible for special education. The assessment measured intellectual development, visual perception and processing, auditory processing, social and emotional problems, and academic accomplishment. The assessment disclosed a severe discrepancy between Student's abilities and his academic achievement, and a processing deficit in the area of attention. The assessment found Student eligible for special education under the category of specific learning disability. The assessment did not reveal anxiety or emotional problems.

3. On August 24, 2004, with the participation of Student's parents, the District formulated an Individualized Education Program (IEP) for Student. The IEP notes that the group "[d]iscussed the availability of counseling on campus." That discussion concerned Student's difficulties generally, not to any specific emotional problem, and referred to a counseling service available to all students, not just to special education students. Student's parents did not claim at the time that Student suffered from anxiety. A service plan was completed and the IEP was reviewed with Student's parents, who signed and consented to it. Pursuant to that IEP, Student began receiving 90 minutes a day of Resource Specialist Program (RSP) services to address deficits in the areas of mathematics, writing, and reading comprehension.

4. On August 15, 2005, the District reassessed Student's academic performance and learned that he had not met his academic IEP goals. On September 12, 2005, the District assessed Student for dyslexia. The report on the September 12 assessment states that Student has a moderate level of dyslexia and identifies deficits in short-term memory. It recommends additional RSP time, tutoring, mathematics, language arts and

phonological awareness, and training for self-esteem. Under the last category the report states: "Counseling has been offered at Brock Elliot by the IEP team and the parents are advised to fully utilize this opportunity to help [Student] develop those [self-esteem] skills now."

5. Student's IEP team met on August 24, September 6 and October 14, 2005. Student's parents did not claim at the time that Student suffered from anxiety. In its proposed IEP of October 14, 2005, the District offered Student a program consisting of 90 minutes per day in the Resource Specialist room. Student's parents did not consent to the IEP.

6. Student suffered from anxiety while attending Brock Elliot in the 2004- 2005 and 2005-2006 school years. The causes and severity of his anxiety are in dispute. Student's mother attributes the condition to harassment by students and poor treatment of Student by at least two teachers, and believes that the condition is sufficiently serious to justify Student's withdrawal from school, at least in part. The District attributes the condition primarily to Student's frustration with his difficulty in completing core course work, and believes that the condition is less severe in this academic year than in the previous year. It is unnecessary to resolve this dispute here.

7. On January 3, 2006, Student filed a request for a due process hearing, alleging that the District had denied him a free appropriate public education (FAPE).¹

8. In the afternoon of January 12, 2006, Student was sent by a teacher to the school's office because he looked ill. Student's mother, who was present, sent him home. He has not attended Brock Elliot since.

¹ Student v. Manteca Unified School District, OAH No. N2006010033, is not consolidated with this matter. It is scheduled for hearing beginning on April 24, 2006. Official notice is taken of the date the Request for Due Process Hearing was filed.

9. On January 13, 2006, Student's attorney wrote to the district announcing that Student would no longer attend Brock Elliot, that Student's parents intended to provide him an alternative placement, and that the parents reserved their right to seek reimbursement for that alternative placement from the District.

10. On January 20, 2006, the District wrote to Student's parents, stating that a unilateral placement would be significantly more restrictive than Student's current placement, that the District's current assessment did not indicate the need for such a placement, and that therefore "conditions warrant a reassessment of [Student's] present levels of functioning, eligibility, and areas of educational need." A proposed reassessment plan accompanied the letter. Student's parents have not consented to the proposed reassessment.

11. The parents plan to place Student in the Valley Oaks School for Dyslexia, a placement that would be more restrictive than Student's placement at Brock Elliot.

12. On January 24, 2006, a resolution session was held on Student's due process complaint that heightened the District's concern for Student's emotional condition. Student's parents stated that Student's anxiety was causing him to experience nightmares, sleeplessness, and headaches. They also described two incidents of alleged mistreatment of Student by teachers, which they claimed contributed to his anxiety. The District was previously unaware of these specific claims, although it knew generally of some harassment of Student by other students.

13. On February 7, 2006, Student's family physician Herleen Kelly, M.D., wrote a letter "To Whom It May Concern." In the letter Dr. Kelly stated that Student had been examined for stress related matters, and that he "has increasing levels of stress when he is in school." It also stated that Student had been home schooled since January 19, 2006, and had shown marked improvement in his condition. Dr. Kelly recommended that Student remain in home study "until he is appropriately placed in a dyslexic school." The District did not receive this letter until it was disclosed in Student's evidence packet shortly before

this hearing. The recent receipt of the letter also heightened the District's concern for Student's emotional condition.

14. Dr. Kelly's letter of February 7, 2006, is the most recent evidence of Student's current placement and instruction. There is no evidence showing that Student is being home schooled at present, or that he is enrolled in any school. His parents have not disenrolled him from Brock Elliot. Since his withdrawal, Student has not been receiving the curriculum and services he would have been receiving at Brock Elliot five days a week, six hours a day, nor has he received any special education services from Brock Elliot. His absence may have caused him to regress academically, fall substantially behind his peers, or miss essential instruction. His extended absence during the school year is potentially more damaging than a similarly lengthy absence during summer vacation, when students do not receive instruction or services.

15. On February 14, 2006, the District requested this due process hearing, seeking an order allowing it to reassess Student pursuant to its January 20, 2006, reassessment plan. The District currently seeks to reassess Student in the areas of academic achievement, psychomotor development, intellectual development, social and emotional behavior and status, and health. Although the January 20, 2006, reassessment plan also proposes reassessment in the areas of language development and occupational therapy, the parties have stipulated that reassessments in those areas are not needed at this time. The District does not propose to reassess Student in the areas of dyslexia or memory, which were assessed in August and September 2005.

16. Student's mother opposes reassessment because she believes that the District has sufficient information to understand Student's dyslexia, that the parties simply disagree on an appropriate placement, that Student's recent problem with stress is not a new medical or educational condition warranting reassessment, and that the problem is simply the physical manifestation of his current inappropriate placement.

18. Three knowledgeable school officials testified credibly that conditions warrant reassessment of Student. They were Janice Callanan, the District's Director of

Special Education; Debbie Ruger, the principal at Brock Elliot School; and Paul Ouellette, the school psychologist at Brock Elliot. All three are well credentialed. Director Callanan and Principal Ruger have substantial experience in teaching special education students. Psychologist Ouellette has evaluated between 600 and 800 students for eligibility for special education.

LEGAL CONCLUSIONS

1. Under the federal Individuals with Disabilities Education Act (IDEA) and California law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d)(1)(A); Cal. Ed. Code § 56000.) When, as here, the parties dispute whether a FAPE has been offered or provided, the district has a continuing obligation to offer a FAPE to a student even though he has been unilaterally withdrawn from its school. (20 U.S.C. § 1412(a)(10)(A), (C); 34 C.F.R. § 300.403 (1999).) The District may also have an ongoing obligation under California Code of Regulations, title 2, section 60040, to consider a referral of Student to a community mental health service.

2. Reassessment of a student eligible for special education must be conducted at least every three years, or more frequently if the local educational agency determines that conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381(a)(1), (2).)

3. A reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code § 56321(c).) To obtain consent, a school district must develop and propose to the parents a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code § 56321(a).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.505(b)(1999); Ed. Code §§ 56321(c), 56501(a)(3), 56506(e).) Accordingly, to proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided

an appropriate written reassessment plan² to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment.

4. A parent who wishes that her child receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; see also, *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58.) In *Andress v. Cleveland Independent. School Dist.* (5th Cir. 1995) 64 F.3d 176, 178, the court concluded that "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule."

5. Conditions now warrant reassessment of Student by the District. As determined in factual findings 2, 3, 4, 5, 6, and 8, above, the District cannot judge the appropriateness of a more restrictive placement of Student without reassessing him. The parents' unilateral removal of Student from Brock Elliot, and their plan to place him in a school for the dyslexic, show that they believe Student requires a more restrictive placement. The District's obligation to offer Student a FAPE, including an appropriate placement, is continuing.

6. As determined in factual findings 2, 3, 4, 5, 6, 8, 12 and 13, above, the District cannot evaluate Student's anxiety or related emotional problems, or determine why he is so afflicted, or how his anxiety is best treated, without reassessing him. It cannot know whether the condition has improved since his withdrawal from school, whether that

² The parties have stipulated that the District's January 20, 2006 assessment plan comports with California Education Code sections 56321 and 56329.

improvement is temporary or ongoing, or whether his anxiety stems only from his attendance at Brock Elliot or might result from placement in any school.

7. As determined in factual findings 2, 3, 4, 5, 8, 13 and 14, above, the District cannot measure Student's present level of academic performance without reassessing him. For all that appears in the record, Student has now missed almost three months of instruction and related services. The District currently knows nothing about the quantity, quality, or subject matter of any home schooling Student may have received, or if it has continued to the present.

ORDER

1. The District is entitled to reassess Student in accordance with its January 20, 2006 reassessment plan.
2. The District shall notify Student's parents in writing of the date and place of the reassessment at least fifteen calendar days before the reassessment occurs.
3. Student's parents shall make him reasonably available for the reassessment.

IT IS SO ORDERED THIS DAY: April 11, 2006.

CHARLES MARSON

Administrative Law Judge Special

Education Division Office of

Administrative Hearings