

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

RIALTO UNIFIED SCHOOL DISTRICT,

Petitioner.

vs.

STUDENT,

Respondent.

OAH CASE NO. N 2005090655

DECISION

On October 10, 2005, this matter was consolidated with the matter of student, Petitioner vs. Rialto Unified School District, respondent; OAH number N2005080197.

The consolidated matters came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, Special Education Division, at Rialto, California on December 19, 20, 21, and 22, 2005. On the first day of hearing, December 19, 2005, petitioner, student, moved, through her parents, to withdraw her petition in case number N2005080197. The motion was granted and the petition in case number N2005080197 was dismissed, with prejudice. Consequently, the two cases were severed, the hearing in the instant matter proceeded, and this decision deals exclusively with case number N2005090655¹.

¹ A separate dismissal order shall issue in case number N2005080197.

Gail Lindberg, Program Manager for the East Valley Special Education Local Planning Area, represented the Rialto Unified School District (Petitioner/District).

Student was represented by her parents.

Oral and documentary evidence was received and the matter was submitted on December 22, 2005.

PROCEDURAL HISTORY

On September 26, 2003, the District filed a request for mediation and due process, and a due process hearing was scheduled for October 21, 2003. On October 2, 2003, the parties agreed to take the matter off-calendar. There followed a series of scheduled due process hearings and agreements of the parties to take the matter off-calendar and extend the 45-day time limit for issuing a final decision. Eventually, on December 19, 2005, the due process hearing commenced and the 45-day period began to run. (Ed. Code § 56502, subd. (f).)

ISSUES

The parties stipulated that the following issues should be considered within the context of the instant petition:

1. Did the District appropriately assess Student?
2. Should Student be placed in Big Springs, a non-public school?
3. If Student is placed at Big Springs should the District pay transportation expenses for student's travel to and from Big Springs?
4. Is Student entitled to some form of compensatory education?
5. Are Student's parents entitled to reimbursement of their payments for provision of private interventions and independent assessments?
6. Who prevailed on the foregoing issues?

7. Are Student's parents entitled to reimbursement for their expenses in responding to the District's petition, including the cost of photocopying documents, the cost of mailings, reimbursement for lost wages, and/or witness expenses?

FACTUAL FINDINGS

1. Student, whose date of birth is October 8, 1996, is a nine-year-old female.

2. Student has been receiving special education and related services from the District since October 1999 based on the eligibility categories of speech and language and "other health impaired" (OHI). Student's eligibility is supported by her medical history. That history is as follows: Student was born prematurely at 25 weeks' gestation and was dependent on a respirator for several months. As a result, Student's developmental progress was delayed in multiple areas. Student exhibited residual mild motor encephalopathy, resulting in mild diplegia (altering of her gait), possible oral motor dyspraxia, and fine motor delays that affected student's communicative skills and delayed her academic progress, even at the pre-kindergarten level. In 2000, student was diagnosed as having probable mild cerebral palsy. Electroencephalogram (EEG) testing revealed abnormal activity that may be the cause of student's history of "staring spells." Subsequently, it was determined that student may be suffering from epileptic seizures and anti-seizure medications were prescribed.

3. In 2002, Student petitioned for a due process hearing. The relevant focus of that hearing was whether Student was adequately assessed in all areas of suspected disability. In a decision, dated October 30, 2002, a California Special Education Hearing Officer found that the District had conducted extensive testing in most areas identified as areas of suspected disabilities; however, the Hearing Officer ordered that the district further assess student in the following areas: feeding disorder; auditory processing; and her at-risk status for dyslexia. It was further ordered that the district reassess student in the area of speech and language.

4. The District complied with the order described in Finding 3, above. After all required assessments were conducted an Individualized Education Program (IEP) meeting was held on January 14, 2003, and the assessment results were discussed. As a result of the assessments the IEP team determined that Student had a severe discrepancy between ability and achievement as a result of an auditory processing disorder.

5. Even after all assessments were completed in compliance with the October 30, 2002 order, student's parents were not satisfied and requested further assessments. On September 26, 2003, in response to Student's parents' request(s) for further assessments, the District filed a request for a due process hearing to determine whether the district's evaluations were appropriate, and a due process hearing was scheduled for October 21, 2003. On October 2, 2003, the parties agreed to take the matter off-calendar. There followed, a series of scheduled due process hearings and the agreements of the parties to take the matter off-calendar. Eventually, on December 19, 2005, the instant due process hearing commenced to determine the appropriateness of the district's evaluations. Nonetheless, even after the district filed for a due process hearing, Student's parents elected to obtain several independent assessments, including: a speech and language evaluation by Nancy Lazerson in October of 2003; a psychoeducational evaluation by Timothy Lange in April of 2004; neurological evaluations by Drs. Fernando Miranda and Andrew Yellen in August and September of 2004; a psychoeducational evaluation by Leslie Huscher in June and July of 2005; and an evaluation by Big Springs in June of 2005. Student's parents are now requesting reimbursement for the costs of these independent evaluations.

6. Since complying with the October 30, 2002 order, the district has conducted the following assessments: A language, speech and hearing assessment on March 7 and 14, 2003; an occupational therapy assessment on March 25, 2003; a pediatric occupational therapy outpatient evaluation on November 5, 2003; an occupational therapy assessment

on February 10, 2005; a language, speech and hearing assessment on February 2 and 3, 2005; an adapted physical education assessment on January 24, 2005; and a psychoeducational triennial assessment on February 7, 8, 9, and 10, 2005.

7. On February 22, 2005, Student's triennial IEP meeting was held. Student's parents signed the IEP document indicating their approval of the goals and objectives; however, on an addendum, dated February 22, 2005, Student's parents indicated; "I agree with IEP EXCEPT that [Student] should be placed at "Big Springs School." (District exhibit 1.) "Big Springs School" is a non-public school that Student's parents believe is better suited to meet student's unique needs, primarily in the auditory processing area.

8. From 2002 through the present, Student's parents have been dissatisfied with student's academic progress. They are concerned that Student is not performing at her grade level, academically. Currently, Student is in the fourth grade and is performing academically at the first grade level. Student's parents believe that if Student's special education needs had been adequately assessed and if student were truly in an appropriate program she would have made better academic progress. The experts, however, disagree with student's parent's beliefs. Student's past and present teachers appeared at the hearing and testified that student is making progress on her IEP goals and objectives. While it is true that student is behind her peers academically, that is to be expected of a special education student in a full inclusion, regular education, setting. Student's current teacher did express concern over student's full inclusion in a general education class during student's current, fourth grade year. The teacher's concern is based on the fact that the student population in the fourth grade class increased from 20 students to 34 students, and student's teacher believes student will be overwhelmed by that number of students and the associated activities. The district's psychologist and the Speech and Language Pathologists who testified at the hearing agreed. According to the psychologist and the Speech and Language Pathologists, student has been properly assessed in all

areas of suspected needs/disabilities. With the exception of student's placement, her current IEP is appropriately designed to meet her unique needs. Once student is placed in either Big Springs or a district Special Day Class (SDC), her current IEP will be appropriate to provide student with a Free Appropriate Public Education (FAPE).

9. During past IEP meetings the District recommended that Student be placed in a District SDC. Student's mother; however, visited one of the district's SDC's and, based on her observations, she disagreed with a SDC placement. Instead, she insisted that the District consider placing Student at "Big Springs." Eventually, the District sent a representative to Big Springs to determine if Big Springs would be an appropriate placement. As a result of the school visit and an evaluation of student done by Big Springs, the District concedes that Big Springs would be an appropriate placement; however, the District believes it can also meet student's needs in one of the district's own SDCs.

10. Student presented no expert testimony or other adequate evidence to refute the district's evidence that all of its past assessments were appropriate and that the District evaluated Student in all areas of suspected disabilities.

11. No evidence was presented concerning any need for compensatory education.

LEGAL CONCLUSIONS

1. As set forth in Findings 2, 3, 4, 6, 8, and 10, Student has been appropriately assessed/evaluated in all areas of suspected needs/disabilities.

2. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a Free Appropriate Public Education (FAPE). (20 U.S.C. § 1400; Ed. Code § 56000.) The term "Free Appropriate Public Education" 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).) Up until student reached the fourth grade level the district's program provided her with a FAPE; however, as set forth in Findings 7, 8, and 9, the parties agree that Student's placement in a full-inclusion, regular education fourth grade class will not meet student's unique needs. Student needs to be either in a district SDC or Big Springs in order to receive a FAPE. Since either setting is appropriate, the ALJ concludes that Student should be placed in one of the two appropriate settings as soon as reasonably possible. Selection of the placement shall be left to the discretion of the District.

3. If the District elects to place Student at Big Springs then the District shall pay for the costs associated with the Big Springs placement, including transportation costs.

4. As noted in Legal Conclusion 2, student has been provided a FAPE; therefore, there is no basis for student's claim that the District must provide some form of compensatory education. 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, since student was provided a FAPE, there is nothing to compensate for. Additionally, as set forth in Finding 11, no evidence whatsoever was presented concerning any need for compensatory education.

5. Title 34, Code of Federal Regulations, section 300.502, provides that parents of a child a disability have the right to obtain an independent educational evaluation of their child at public expense if the parents disagree with an evaluation obtained by the public agency. Pursuant to title 34, Code of Federal Regulations, section 300.502, once a parent requests an independent evaluation the public agency must either initiate a hearing under title 34, Code of Federal Regulations, section 300.507, to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public

expense, unless the agency demonstrates in a hearing under section 300.507 that the evaluation obtained by the parent did not meet agency criteria. In the present instance, as set forth in Finding 5, when student's parents expressed disagreement with the district's evaluations/assessments, the district initiated a due process hearing under title 34, Code of Federal Regulations, section 300.507, to show that its evaluations were appropriate; accordingly, until a decision issues concerning the appropriateness of the District's evaluations, the District is not obligated to provide any independent educational evaluations at public expense. By obtaining the independent evaluations while the current case was pending, Student's parents assumed the risk that they would not be reimbursed for their expenses. Since the district's evaluations/assessments have been found appropriate, student's request for reimbursement for the private interventions and evaluations is denied.

6. 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, the district prevailed on all issues.

7. There is no legal basis for ordering reimbursement of student's parents' expenses in responding to the district's petition, including the cost of photocopying documents, the cost of mailings, reimbursement for lost wages, and/or witness expenses. In any event, student is not entitled to litigation expenses because she was not the prevailing party: she failed to prevail on any of the issues involved in the instant proceedings.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The District's petition is granted.
2. The District shall exercise its discretion in placing student in either Big Springs or a district SDC. Said placement shall occur within 30 days from the effective date

of this decision. If the District elects to place student at Big Springs then the District shall pay for the costs associated with the Big Springs Placement, including transportation costs.

3. Student's requests for compensatory education and reimbursement are denied.

Dated: January 31, 2006

ROY W. HEWITT

Administrative Law Judge

Office of Administrative Hearings Special
Education Division

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.