

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

BERKELEY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008090779

DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on March 17, 2009, in Oakland, California.

Emily Sugrue, Attorney at Law, appeared on behalf of Berkeley Unified School District (District). Also present on behalf of the District was Special Education Manager Elaine Eager.

Student's mother (Mother) appeared on behalf of Student. Also present on behalf of Student was Student's grandmother.

The Amended Request for Due Process hearing was filed on October 23, 2008. On December 15, 2008, OAH granted a continuance. The hearing convened and concluded on March 17, 2009, at which time the record was closed and the matter was submitted for decision.

ISSUE¹

Did the District fail to assess Student pursuant to a signed assessment plan from January 2003 to November 21, 2005, and from April 7, 2008, to the present?

PRELIMINARY MATTERS

CONTINUANCE REQUEST

At the commencement of the due process hearing, Mother requested a continuance so that she could obtain records and prepare for hearing. Student's request was denied because Student failed to establish the requisite good cause. (Ed. Code, § 56505, subd. (f).) As of the hearing date, the matter had been pending for almost five months. Mother had ample time obtain any documents she wished to introduce and to prepare for hearing during that period. Moreover, Mother failed to adequately explain why she waited until the hearing to request a continuance.²

¹ By order dated March 12, 2009, it was determined that Student was permanently barred from raising the issue of whether the District failed to assess Student for the period beginning November 21, 2005, and ending April 7, 2008. Accordingly, the issue at hearing was whether the District failed to assess Student before and after that period.

² Mother participated in a prehearing conference on March 12, 2009, and did not request a continuance. The order following the prehearing conference states that any motion filed after that date must be supported by a declaration signed under penalty of perjury establishing good cause as to why the motion was not made prior to the prehearing conference.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is 18 years old.³ She resides with her mother within the geographical boundaries of the District. Student attends a nonpublic school called Seneca.

STATUTE OF LIMITATIONS

2. At the hearing, the District asserted that Student's claim that the District failed to assess Student pursuant to a signed assessment plan for the period prior to November 21, 2005, was barred by the statute of limitations.

3. The statute of limitations requires a party to file a due process hearing request within two years of the date upon which the party "knew or had reason to know of the facts underlying the basis of the request," absent some exception to the general rule. One exception to the general rule is that a student may raise claims older than two years if the district made specific misrepresentations that it had solved the problem at issue.⁴ If a party files too late *and* an exception does not apply, claims outside the two-year period cannot be heard and decided at a due process hearing.

4. The evidence established that Mother knew as of November 21, 2005, that the District was required to assess her child pursuant to an assessment plan and hold an individualized education program (IEP) team meeting to discuss the results within 50 days of receipt of consent. Indeed, Mother signed an assessment plan on November 17,

³ The evidence did not establish Student's grade level.

⁴ The other exception, related to whether the district failed to give parent required notices, was not raised by Student and will not be addressed.

2005, which states in unambiguous language that an IEP team meeting “will” be held within 50 days to discuss the assessment results.⁵ Accordingly, Mother knew that the District was required to complete its assessment and hold an IEP team meeting no later than January 2006.

5. Student was required to file a request for a due process hearing challenging the District’s alleged failure to timely complete assessments and hold IEP team meetings no later than January 2008. Because Student filed the instant due process hearing request in October 2008, all claims prior to January 2006 – and specifically from January 2003 to November 21, 2005 – are barred unless an exception to the general rule applies.

6. Mother asserted in her due process hearing request that the District misrepresented to her that it had assessed Student.

7. There was no evidence that the District ever misrepresented to Mother that it had assessed Student. Accordingly, no exception applies and all claims prior to November 21, 2005, are barred by the two-year statute of limitations.

DID THE DISTRICT FAIL TO ASSESS STUDENT PURSUANT TO A SIGNED ASSESSMENT PLAN AFTER APRIL 7, 2008

8. Local educational agencies (LEAs), like the District, are required to complete an assessment and hold an IEP team meeting to discuss the assessment results within 60 days after receipt of parental consent.

⁵ A district was previously required to hold an IEP team meeting to discuss the completed assessment within 50 days of receipt of signed consent. The law subsequently changed to 60 days. For purposes of this decision, the 60-day timeline is applicable.

9. In the present matter, Mother alleges that the District failed to complete assessments for which she consented after April 7, 2008.

10. The evidence established that District personnel completed a proposed assessment plan on June 20, 2008.⁶ The District sent the assessment plan to Mother via email that same day, along with an IEP team meeting notice and a statement of procedural safeguards.

11. In the June 20, 2008 assessment plan, the District proposed to assess Student in the following areas: academic achievement; social and emotional development; general ability; and vocational ability. The District also proposed to refer Student for a mental health re-assessment.

12. Mother testified that she signed the assessment plan and returned it to the District on June 30, 2008. Elaine Eager, the District's manager of special education, testified persuasively that the District never received a signed assessment plan from Mother. It was not established that the District ever received a signed assessment plan from Mother.

13. Regardless, on July 18, 2008, Mother sent the District a letter in which she expressly rescinded her consent to assess her child. Therefore, even assuming *arguendo* that District received a signed assessment plan from Mother on or after June 30, 2008, because Mother rescinded her consent to the evaluation, the District was no longer permitted to assess Student pursuant to the June 20, 2008 assessment plan. Accordingly, the District did not fail to assess Student pursuant to a signed assessment plan.

⁶ Although the District submitted numerous assessment plans to Mother for several years prior to April 7, 2008, the evidence established that there was only one assessment plan submitted to Mother for her consent after April 7, 2008.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) District requested the hearing and therefore bears the burden of proof.

STATUTE OF LIMITATIONS

2. A request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, subd. (I).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: (1) Specific misrepresentations by the LEA that it had solved the problem forming the basis of the due process hearing request; or (2) The withholding of information by the LEA from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

3. As determined in Factual Finding 4, Mother knew as early as January 2006 that the District was obligated to complete its assessment. Accordingly, the statute of limitations began running, at the latest, at that time. Mother was therefore required to file a due process hearing request challenging the District's failure to timely assess no later than January 2008. Because Mother did not file until October 2008, absent some exception, Student's claims are time-barred. Student failed to meet her burden of

demonstrating by a preponderance of the evidence that an exception to the statute of limitations applies. There was no evidence that the District ever made specific misrepresentations to Mother that it had solved the problem forming the basis of the due process hearing complaint.

4. Student's claims prior to November 21, 2005, are barred by the statute of limitations. (Factual Findings 1-7; Legal Conclusions 1-4.) Because Student's claims are time-barred, this decision does not address the merits of Student's substantive claims that the District failed to timely assess Student prior to November 21, 2005.

DID THE DISTRICT FAIL TO ASSESS STUDENT PURSUANT TO A SIGNED ASSESSMENT PLAN AFTER APRIL 7, 2008

5. The process for assessment begins with a written referral for assessment by the parent, teacher, school personnel, or other appropriate agency or person. (Ed. Code §§ 56302, 56321, subd. (a); Cal. Code Regs., tit. 5, § 3021.) Within 15 calendar days of referral (with exceptions not applicable here), the parent or guardian must be given a written assessment plan which explains, in language easily understood by the general public, the types of assessments to be conducted. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (b).) The parent or guardian then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c).) The LEA has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f), 56302.1.)

6. Based on Factual Findings 8 through 14, the District did not fail to timely assess Student pursuant to the June 20, 2008 assessment plan. First, the District never received a copy of the signed assessment plan from Mother and therefore could not begin the assessment. As discussed above in Legal Conclusion 2, the District must

receive signed consent before it assesses Student. Second, even if Mother did provide written consent to the District on or about June 30, 2008, she revoked consent in mid-July 2008. Because she revoked consent, the District was not permitted to assess Student.

ORDER

All Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: District prevailed.

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. (Ed. Code, § 56505, subd. (k).)

Dated: April 16, 2009

/s/
TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings