

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

STUDENT,

Petitioner/Cross-Respondent,

Vs.

HUNTINGTON BEACH UNION HIGH SCHOOL
DISTRICT,

Respondent/Cross-Petitioner.

CASE NOS. SNO5-00119

&

SN05-01038

OAH NO. N2005060646

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Huntington Beach, California on July 6, 7, 8, and 11, 2005.

Student (student) was represented by her mother.

Karen Van Dijk represented the Huntington Beach Union High School District (district).

Originally, there were two separate cases pending: case number SN05-00119, filed by student; and case number SN05-01038, filed by the district. On June 22, 2005, the two cases were ordered consolidated by a California Special Education Hearing Officer. Accordingly, the consolidated cases were given one Office of Administrative Hearings (OAH) case number, case number N2005060646, when the matter of the consolidated cases was transferred to OAH.

Oral and documentary evidence was received and the matter was continued for good cause to allow the parties to submit written closing statements. The closing statements were received, read and considered and the matter was deemed submitted on August 10, 2005.

ISSUES

STUDENT'S ISSUES

Did the district deny student a free appropriate public education (FAPE) by:

1. Removing her from her placement for forty minutes in October 2004;
2. Failing to provide her with homework and make up work from her teachers— Clemens, Lambert, Shields, and Roiceman—following absences;
3. Failing to make her teachers aware that she is a student with a disability;
4. Failing to provide an instructional aide as required under “stay put” provisions;
5. Failing to adequately address her mathematics needs;
6. Failing to include positive reinforcement in her individualized education program (IEP) as an area of need;
7. Offering an inappropriate program (home schooling) where she would change to a different placement for three months;
8. Failing to consider mother’s input at the September 28, 2004, and January 10, 2005 IEP meetings;
9. Failing to include a mathematics teacher at the September 28, 2004, January 10, 2005, and March 21, 2005 IEP meetings; and,
10. Failing to include her mother at the March 21, 2005 IEP meeting.

DISTRICT'S ISSUE

1. May the district assess student pursuant to its assessment plan absent her mother's consent?

FACTUAL FINDINGS

1. Student, whose date of birth is June 22, 1988, is a 17-year-old female who meets eligibility criteria for special education services pursuant to California Code of Regulations, title 5, section 3030, subdivision (j), as a student with a Specific Learning Disability.

2. During the 2004-2005 school year student was an 11th grade student in the Special Day Class Program at Huntington Beach High School.

3. In the spring of 2004 the district conducted an "annual review assessment" of student. During the review process there was no information provided that indicated student was suffering from any significant medical issues that could adversely impact student's attendance or her ability to benefit from her educational placement.

Nonetheless, during the following semester student began missing a substantial amount of class time. For example, from the beginning of the school year through December 1, 2004, student only attended 46.3 percent of her classes. Student's grades began to "slip" and the district attributed the "slip" in student's grades to her declining class attendance. Consequently, the district attempted on multiple occasions to ascertain the nature and cause of student's absences. The district attempted to convene an IEP on November 29, 2004 to address student's attendance and to modify student's IEP to ensure that student could obtain maximum benefit from her educational program. The November 29, 2004 meeting was canceled based on mother's request. Ultimately, on January 10, 2005, an IEP meeting was held to discuss student's absences and any physical, emotional, and/or medical changes that needed to be addressed. At the IEP

mother presented the district with multiple notes from herself and various medical agencies/practitioners which suggested that student had been suffering from various physical ailments during the fall, 2004 semester. Unfortunately, none of the information mother provided identified the exact nature and extent of student's medical issues. The district did not know what educational accommodations were appropriate and did not know what to expect in terms of the extent and duration of future absences. In an attempt to address the issue of whether student's medical condition(s) impacted the appropriateness of student's current educational placement, the district presented mother with an assessment plan reflecting the district's desire to conduct a health and development assessment of student. Said assessments were, and are, necessary to gain an understanding of student's current condition(s) and need(s) so that the district can fulfill its obligation to provide an appropriate educational program to student. Mother refused, and continues to refuse, to consent to the necessary assessments.

4. Mother maintained and currently contends that if student were provided adequate make up work student's grades would not have "slipped." According to student's mother, student was not allowed to make up substantial amounts of her missed work, thus leading to the decline in student's grades. Mother's contention, however, was not supported by the evidence. At the hearing it was established that work student missed as a result of medical absences was made available to student at the administrative office. Student and/or her mother failed to retrieve the make up work from the drop box in the office. Testimony established that at the end of the academic year there were assignments in the drop box that still had not been retrieved by either student or her mother. In fact, student informed one of her teachers that she was specifically directed by her mother not to pick any work up from the office.

5. Mother believes that student was improperly removed from her class placement for 40 minutes in October 2004; however, insufficient evidence was presented

to support that belief. The evidence revealed no such removal in 2004, however, there was evidence presented that suggests such a removal may have occurred in October 2003. An October 2003 removal, however, is not relevant to these proceedings as these proceedings are specifically focused on the 2004-2005 school year. Even assuming *arguendo* student had been removed from her placement for 40 minutes in October 2004, such a short-term removal, standing alone, is insufficient to represent denial of FAPE.

6. All of student's teachers, who had a need to know, were aware that student was a special education student. Student was provided extra time to complete certain tasks, she had an instructional aide, and she was being tutored. Student's teachers knew of these accommodations and knew that student was receiving the accommodations due to special needs.

7. Student was provided an instructional aide as required under the stay put provisions. There were undoubtedly times when the instructional aide may have been unavailable; however, the evidence revealed that the aide was provided in substantial compliance with "stay put" requirement(s).

8. Student's mathematics needs were adequately addressed through the Math X class in combination with 1:1 tutoring and voluntary math tutorials. The Math X class focused on fundamental math skills within the framework of algebra instruction. Student was exposed to algebraic concepts, broken down and modified for better understanding. This combination provided student with the ability to learn basic mathematic skills while preparing her to pass the mathematics portion of the high school exit examination. In addition to the Math X class, the district provided student with 3 hours per week of 1:1 after-school tutoring, specifically focused on functional, basic, math skills.

9. Mother claims that student's IEP did not include "positive reinforcement." During the hearing mother attempted to clarify what she meant by this criticism of the IEP. It seems that mother did not believe that student's teachers were positive enough in their response to student's efforts. In other words, student's teachers did not provide enough praise in the form of positive statements to student when student exhibited academic strengths. Mother failed to establish a legal requirement for "positive reinforcement" in an IEP. Additionally, all educators who testified at the hearing agreed that "positive reinforcement" is practiced by most, if not all, teachers as a natural component of the educational process. In the instant case student presented insufficient evidence that the alleged failure to include "positive reinforcement" in the IEP violated student's FAPE rights.

10. As the second semester of the 2004-2005 school year progressed, student's absences continued being an issue. Mother informed the district that student's absences resulted from student's medical condition(s), however, mother steadfastly refused to provide the district with sufficient documentation concerning student's absences. The district continued its attempts to schedule an IEP so that student's current condition and needs could be evaluated. The district was unable to schedule an IEP in advance of student's required annual IEP meeting, which was to be convened on or before March 21, 2005, due to mother's refusal, based on advice of counsel, to attend an IEP.

11. Finally, on March 21, 2005, the district was forced to convene student's annual IEP. Mother was properly notified of the date, time and place of the IEP, however, she elected not to attend. Consequently, student's annual IEP was conducted on March 21, 2005 without mother's attendance. The district was justified in proceeding in mother's absence as student's absences, health condition, emotional condition, decline in grades, etc. had to be addressed to ensure she was receiving an appropriate

educational program. Mother was not at the IEP and there was no current medical or psycho-social information on student, so the IEP team properly concluded that they needed to conduct assessments in a variety of areas, including health and development, social/emotional, academic performance and audiology (student is hearing impaired). Mother refused, and continues refusing, to consent to the required assessments.

12. Due to student's absences and her decline in grades the district offered a plan for home/hospital placement for student. The district did not know the exact medical/emotional reasons for student's absences; however, the district was very concerned about the amount of class time student was missing and her decline in grades. The home/hospital placement was offered on a "temporary," three-month basis. The district believed that during the three-month period appropriate assessments could be completed to determine how to meet student's current educational needs in the traditional school setting. There was nothing inappropriate about this placement offer; the offer makes sense and was reasonable under the circumstances, considering student's current unknown condition and educational needs.

13. The district considered mother's input at the September 28, 2004 and January 10, 2005 IEP meetings. These IEP meetings were long and involved. There were numerous aspects of student's placement discussed and mother was very proactive, as was her advocate. There is no requirement for the district to implement every request made by a parent at an IEP meeting. IEP meetings are meant to be a team effort. The team, which includes the parent, discusses perceived needs, conditions, wishes, etc. and then reaches a determination concerning developing a plan to meet the student's right to FAPE. In the present instance, mother's input was allowed and considered, even if not implemented.

14. Prior to the September 28, 2004, January 10, 2005, and March 21, 2005 IEP meetings, student's teachers were consulted about student's progress and her math

teacher was among those who provided input concerning student's current placement and her specific needs. Although student's math teacher was not present at the September 28, 2004, January 10, 2005 and March 21, 2005 IEP meetings, the educators who were present at the IEP meetings had enough information from student's math teacher to intelligently discuss student's math needs with mother and to reach an agreement on appropriate accommodations to meet student's particular educational needs. It bears mentioning that even if student's math teacher were present at the March 21, 2005 IEP meeting, mother was not present so there would have been no opportunity to address her specific concerns in any event.

15. Student's mother removed student from her placement with the district in March of 2005 and the district has no information on her current health, emotional, psychological, or educational status.

LEGAL CONCLUSIONS

1. As set forth in Findings 4, 5, 6, 7, 8, 9, 11, 12, 13, and 14, insufficient evidence was presented to support student's contention that she was denied FAPE.

2. Both state and federal special education law require the district to conduct a reassessment of a student with disabilities at least every three years, or more frequently, if conditions warrant a reassessment, or if an assessment is requested by the student's teacher or parent. (Educ. Code § 56381, subd. (a); 20 U.S.C. § 1414, subd. (a)(2)(A).) Despite this obligation, the law requires parental consent be sought for an assessment. (Educ. Code § 56321, subd. (c); 20 U.S.C. § 1414, subd. (a)(l)(C)(i).) In an attempt to gain parental consent the district must first present an assessment plan to the student's parent and allow the parent at least 15 days to respond to the proposed plan. (Educ. Code § 56321, subds. (a)-(b).) If the parent does not authorize the district to conduct the assessment, the district may, nonetheless, assess the student if it establishes the need to conduct the requested assessment at a due process hearing. (Educ. Code §§

56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e); 20 U.S.C. § 1414, subd. (a)(l)(c)(ii.) Once consent is obtained, either through the parent or the hearing process, the student must be assessed "in all areas related to the suspected disability, including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status." (Educ. Code § 56320, subd. (f); 20 U.S.C. § 1414, subd. (b)(3)(C).)

In the present instance the district has established the need to conduct an assessment of student in conformity with the March 21, 2005 Assessment Plan. The need for assessment is based on Findings 3, 4, 10, 11, and 15. Specifically, student has missed a substantial number of class hours due to undisclosed health and emotional problems. Additionally, student was removed from her placement in March 2005 and the district has no information concerning student's current educational level and her specific needs. The district would be remiss in its obligation to ensure student received FAPE if it did not perform a current assessment of student. Furthermore, as noted in Finding 12, the district properly and appropriately determined that student should receive home/hospital placement pending the assessment and implementation of the resulting accommodations in the school setting.

3. Student's mother requested an award of attorneys' fees; however, pursuant to California Education Code section 56507, subdivision (b), reasonable attorneys' fees may only be awarded to the prevailing parent, guardian, or student by OAN if there is an agreement of the parties to payment of attorneys' fees, or by the U.S. district courts. In the present instance, there was no agreement for attorneys' fees, and student's mother did not prevail. Accordingly, the Office of Administrative Hearings lacks jurisdiction and justification to award attorneys' fees to student or her mother.

4. 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 failed to prevail on the FAPE issue or any of the associated sub-issues. The district, however, prevailed on the sole issue concerning the need for a current assessment and the sub-issue of appropriate placement while awaiting assessment results and establishment new IEP goals and recommendations.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Student's petition is denied.

The district's petition is granted. The district shall assess student in conformity with the March 21, 2005 Assessment Plan. The district shall provide written notice to mother at least five calendar days in advance of the assessment advising mother of the types, dates, times, locations and approximate duration(s) of the assessment(s). Mother shall make student available for the assessment(s) pursuant to the March 21, 2004 Assessment Plan on the dates, at the times and locations, and for the approximate duration(s) specified by the district. The assessment plan shall be completed within 120 days from the date of this decision.

IT IS FURTHER ORDERED that:

Student shall be placed in a home/hospital educational placement, as identified in the March 21, 2005 IEP, on an interim basis, while the assessment plan is completed and a current IEP is developed for student.

Dated: August 17, 2005

ROY W. HEWITT

Administrative Law Judge

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.