

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

In the Matter of:

STUDENT,

Petitioner,

vs.

ALVORD UNIFIED SCHOOL DISTRICT,

Respondent.

OAH No. N2005070955

DECISION

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Riverside, California on September 26, 2005.

Brian Allen, Educational Consultant, Advocate and Paralegal, Law Offices of David Burkenroad, appeared for petitioner Student A parent or guardian of Student was not present during the hearing, although her mother, (Mother) testified by telephone.

Nancy Finch-Heuerman, Esq., Parker & Covert, appeared for respondent Alvord Unified School District (district).

The administrative record was opened and documentary evidence and testimony was received. The matter was submitted for decision on September 26, 2005.

ISSUES

The parties present the following issues in this hearing:

1. Did the district fail to comply with the required procedural timelines for referring Student to the Riverside County Department of Mental Health and thereby deny Student a free and appropriate public education?
2. Should the district's costs be placed in issue?

FACTUAL FINDINGS

FINDINGS REGARDING DENIAL OF FAPE

1. Student was attending Loma Vista Middle School in the district during the 2004-2005 school year. She qualifies for special education services due to a diagnosis of specific learning disability.

2. On June 8, 2005, the district convened a triennial individual education plan (IEP) meeting for Student. Present at the meeting were an assistant principal, Student's special education teacher, several general education teachers, a school psychologist, a language specialist, the district's special education director, the assistant principal of the high school Student would be attending the next school year, the student and the special education advocate/consultant Brian Allen. Student's mother was not physically present at the meeting but attended by conference call.

3. At the meeting, Mr. Allen and Mother raised the issue of a referral to the Riverside County Department of Mental Health (RCDMH) for Student. The IEP team agreed that a referral to RCDMH was appropriate. At the IEP meeting, the district agreed to mail a consent form to the mother.

4. On June 14, 2005, the school psychologist mailed the consent for referral form to Mother. The instructions requested that Student's mother sign and date the form and return it to Student's case carrier at the school.

5. On June 22, 2005 the assistant principal sent a letter to Student's mother indicating that a signed copy of the IEP document had not been received and reminding her that the school would be closed for the summer on June 30, 2005.

6. On July 21, 2005, Mr. Allen called Ellen Hinkle, the district's special education director, inquiring about the status of the referral and asserting that Mother had mailed the referral form back to the school. That same day, Mr. Allen sent a letter to Ms. Hinkle asserting that the mother had already mailed the signed consent and stating "It is

my understanding according to our phone conversation that the AB 3632/ or AB 2726 referral has not been submitted in a timely manner. Too [sic] complete a comprehensive assessment to determine AB 3632 /or AB 2726 eligibility and services for Student” Also that same day, Mr. Allen sent a request for due process hearing asserting “the District is refusing to assess Student in all of her areas of suspected disabilities with regard to AB 3632 /or AB 2726 eligibility and services.”

7. After this phone call from Mr. Allen, Ms. Hinkle undertook efforts to try to locate the signed consent form. She sent someone to the school site, which was closed and locked for the summer, to look through any mail that might have been delivered to the school. She looked through her own office. She sent a person to check the district mailroom and contacted the post office to see if any school mail for had been held. The signed consent for referral form was never found.

8. The evidence regarding the signed consent form is conflicting. The school psychologist testified (and the documents support) that she mailed the consent form to Mother on June 14, 2005. Mother’s declaration states she “submitted the referral on June 12, 2005 to the school in the envelope provided.” It is not clear how the mother could mail something back to the school two days before the school mailed it to her. Mother’s telephone testimony at the hearing occurred while she was at work and was not persuasive. She was interrupted several times by work duties and did not have any of the documents before her to attempt to refresh her recollection or otherwise add credibility to her testimony. Mr. Allen testified at the hearing that he faxed the consent form to the district, but he did not send a cover letter with the form and did not maintain a record of the date in any of his files or records on this case. At best, he provided a range of dates sometime between June 12 and June 22, 2005. Mr. Allen wrote a letter, dated August 2, 2005, to the district’s attorney which states “According to the mother she submitted the referral on June 12, 2005 to the school in the envelope provided.” Petitioner’s claim that she sent the

consent for referral form to the district earlier than August 2, 2005 is not supported by the evidence.

9. The district sent a second consent for referral form to Mother on July 29, 2005. By this time, Mr. Allen, on behalf of Student, had already submitted the complaint and request for due process hearing, so the second consent form was sent through the respondent's attorney's office. Mr. Allen sent this form back to the district's attorney on August 2, 2005. Mother back-dated her signature on this second form to June 8, 2005, which was the date of the original IEP meeting. The evidence supports the conclusion that the district did not receive a signed consent form for the referral to RCDMH any earlier than August 2, 2005. The district sent the referral package to RCDMH on August 4, 2005.

10. RCDMH received the referral and is in the process of assessing Student to determine whether she qualifies for any services. The assessment is not complete and no decision has been made whether Student qualifies for any mental health services.

11. Petitioner's allegation that she was denied a free and appropriate public education is based solely on her unproven claim that the district did not make the referral in a timely manner. There was no evidence that Student's education has suffered in any way as a result of the delay in forwarding the referral to RCDMH. The evidence suggests Mr. Allen knew all along that RCDMH would not begin to assess Student until after the summer break.

FINDINGS REGARDING PLACING COSTS IN ISSUE

12. The due process hearing request was submitted July 21, 2005 on a form from "Dream Team Network-North" from an address in Yorba-Linda, California. At the same time, Mr. Allen submitted a "Consent to Accompany & Advise" form through which Mother apparently retained Dream Team Network-North and Mr. Allen's services on May 5, 2005. On July 25, 2005 Mr. Burkenroad and Mr. Allen submitted a Statement of Issues and Proposed Resolutions. The address for Mr. Burkenroad was listed as 11514 Vienna Way in

Los Angeles, California. Mr. Burkenroad's address registered with the State Bar of California is 11664 National Blvd. in Los Angeles. Attached to the Statement of Issues (and to many other documents submitted in this case) was a Declaration of David Burkenroad which authorizes Brian Allen to represent the petitioner, Mr. Burkenroad's law offices and Mr. Burkenroad in this matter.

13. The same day Mr. Allen filed the due process request, he sent the letter to the district's special education director in which he makes various factual allegations, but does not propose or even mention any method for helping Student by getting the consent form signed and returned to the district. Mr. Allen's letter appears to be a self-serving attempt to set the district up for litigation. Instead of problem-solving to help Student, Mr. Burkenroad, through Mr. Allen, filed a due process hearing request. Mr. Burkenroad apparently submitted an invoice to the district's attorney dated July 28, 2005 requesting payment of fees for his services to the student.¹

14. The request for due process hearing was made prematurely and the defect that was alleged was corrected at no harm to the student by simply providing Mother with a second copy of the consent form and having her sign and return it. Mr. Burkenroad and Mr. Allen continued to litigate this matter even after the litigation clearly became unnecessary. They presented this case for hearing with no evidence that Student has been denied a FAPE. The district has provided sufficient prima facie evidence that it could succeed in proving Mr. Burkenroad and Mr. Allen should be subject to monetary sanctions for bad faith litigation tactics. There is insufficient evidence that Mother should be subject to sanctions.

¹ A cover letter and invoice are attached as Exhibit 1 to the district's motion to place expenses in issue. There is no declaration or other testimony describing the circumstances surrounding this document.

LEGAL CONCLUSIONS

1. The Individuals with Disabilities Education Act (IDEA) provides federal funding to state and local educational agencies who must then provide educational opportunities for students with disabilities. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." (20 U.S.C. § 1400(d)).

The term "special education" means specially designed instruction at no cost to parents designed to meet the unique needs of a child with a disability including - (A) instruction conducted in the classroom, in the home, hospitals and institutions, and other settings; and (B) instruction in physical education. (20 U.S.C. § 1401(29)).

California Education Code section 56031 augments the federal definition to include "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."

A FAPE is one provided at public expense, under public supervision and direction and in conformity with an IEP which is developed for the child. (20 U.S.C. § 1401(9)). However, the obligation to provide a FAPE does not require a state to "maximize each child's potential." (Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley (1982) 458 U.S. 176, 198.)

A parent of a child with a disability may contest any action by the school district that the parent believes deprives the child of a FAPE. (20 U.S.C. § 1415(b)(6)). The educational agency must then provide the parent with an impartial due process hearing to evaluate the complaint. (20 U.S.C. § 1415(f)).

Government Code section 7576 provides that the State Department of Mental Health or a community mental health service is responsible for providing services to a student in coordination with the Department of Education if required in the IEP. The California Code of Regulations, title 2, section 60040, provides that a referral to mental health services may be made by the IEP team and provides that the referral package shall be provided within five working days of the district's receipt of parental consent for the referral.

20 United States Code section 1415(i)(B)(i)(II) authorizes an award of monetary sanctions in favor of a prevailing local educational agency against the attorney of a parent who files a complaint that is frivolous, unreasonable or without foundation or continues to litigate after the litigation clearly became frivolous, unreasonable or without foundation. 20 United States Code section 1415(i)(B)(i)(III) authorizes sanctions to a prevailing local education agency if the complaint was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. California Code of Regulations, Title 5, section 3088, subdivision (b) authorizes the presiding hearing officer to issue contempt sanctions and/or place expenses in issue. Government code section 11455.30 authorizes monetary sanctions in administrative proceedings for bad faith litigation tactics.

2. By reason of Factual Findings 1 through 14, the district offered Student a free and appropriate public education in the least restrictive environment. Student was not denied a free and appropriate public education by any act or omission of the district in relation to the referral to RCDMH. The district is the prevailing party on this issue.

3. By reason of Factual Findings 1 through 14, cause is established to place the district's expenses in issue and to order David Burkenroad and Brian Allen to show cause why monetary sanctions should not be issued against them in this matter.

Dated: October 26, 2005

/s/

ALAN R. ALVORD

Administrative Law Judge

Office of Administrative Hearing