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

In the Matter of: POWAY UNIFIED SCHOOL DISTRICT, Petitioner, and STUDENT, Respondent.	OAH NO. N2005120371

DECISION

James R. Goff, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 16, 17, 18 and 19, 2006, in Poway, California.

Emily Shieh, Esq., Assistant Director, Special Education Department of the Poway Unified School District, represented Poway Unified School District (PUSD or District).

Student was represented by his Father. Student, his Mother, and a neighbor made a brief appearance at the hearing on May 17, 2006, but withdrew prior to the commencement of the proceedings for the day. Father withdrew on the morning of May 19, 2006, after making opening and closing remarks regarding Student's case. Father indicated that there was an emergency that required his attention. Before he left he was advised that if he was not present that the taking of evidence would conclude when PUSD finished presenting its case. [1] The hearing continued until its conclusion without Father reappearing. Also present during the hearing was a Russian translator to assist the Father.

On December 8, 2005, PUSD filed its request for a due process hearing. Originally the case was set for hearing on January 6, 2006. However, it was continued on January 3,

[1] Father offered no information regarding when if, ever, he could return to the hearing, or if he wanted to return. On Thursday evening Father left the hearing for an "emergency" involving his wife having to go to work, someone needed to be at home to supervise Student. Father was advised that in the future he should make appropriate arrangements for supervision of Student to avoid disrupting the hearing. Father did not request a continuance of the hearing.

2006, when the Office of Administrative Hearings (OAH) set a trial setting conference in response to a request for a continuance of the due process hearing from the District. On February 17, 2006, OAH set the due process hearing for April 25, 26, 27 and 28, 2006. On April 18, 2006, Student requested a continuance to obtain new counsel. Over the objection of PUSD, OAH ordered the due process hearing continued to May 16, 17, and 18, 2006. During the course of the hearing it was necessary to extend the hearing to May 19, 2006. Pursuant to the request of the parties, the record was left open to accommodate written final arguments. The record was closed and the case was submitted for decision on May 26, 2006.

ISSUE

The issue at the hearing was whether PUSD had the right to refer Student for an assessment by Children's Mental Health in order to gather information crucial to providing Student with a free appropriate public education (FAPE).

FACTUAL FINDINGS

1. Student's parents emigrated from Russia in 1989. He was born prematurely that same year in the United States. Student is a resident in the Poway Unified School District. Student presently lives with his parents and his younger brother in Poway. Student was identified as a special-needs child during the preschool period. He attended a nursery program in Chicago, Illinois, between the ages of three and six. Severe behavioral disruptions led to his enrollment at the Jewish Children's Bureau (JCB), a private school for profoundly emotionally disabled children. He was assessed in the category of Emotional/Behavior Disorder (EBD). Student completed first through third grade in Chicago. Parents then moved to the San Diego area. Student was reevaluated. His present primary handicapping condition was changed from EBD to Autism (Asperger's).

2. In October 2002, Student enrolled at Meadowbrook Middle School in the 7th grade at PUSD. Parents refused special education services offered through the Resource Specialist Program (RSP). In such circumstances best practices requires a reevaluation of Student. Parents refused to consent to the reevaluation and PUSD filed for a due process hearing. As a result, *Poway Unified School District v. [Student]*, (June 3, 2003) SEHO Case SN03-00481, was rendered that permitted PUSD to conduct its assessment.

3. On August 13 and 14, 2003, PUSD school psychologist Kay T. Rosell conducted an assessment of Student. She determined that notwithstanding his prior history of severe behavioral disruptions Student did not show evidence of Emotional Disturbance (ED), but did show signs of Autism. She determined that Student was speech impaired, but he did not evidence a Specific Learning Disability (SLD).

4. An IEP meeting extending over two dates was conducted to review the assessment results for Student. The meeting began on December 4, 2003 and was extended

to January 29, 2004. Parents, Student and Mr. Rubio (Educational Consultant) attended the meetings with a Russian language interpreter. Ms. Rosell discussed her assessment results. Father indicated his disagreement with the testing process. The speech and language pathologist reported that Student had pragmatic language delays and a fluency disorder. Student's special education teacher indicated that Student's academic testing reflected a range from one percentile to 86 percentile. Student displayed difficulty with reading comprehension and writing tasks. Ms. Rosell reported that Student's results were similar to prior testing. The IEP team determined that Student qualified for special education services under the category of Autism Spectrum Disorder. Father said he did not agree that Student had any comprehension delays and did not need special education services. Father indicated he wanted counseling and speech therapy discontinued. The IEP recommended speech/language therapy twice a week for 25 minutes each. Counseling services to assist Student were recommended for once a week for 30 minutes. The IEP had attached a Behavior Support Plan (BSP) to help Student get to class on time, to effectively transition between classes and complete his assignments.

At the continued IEP meeting on January 29, 2004, the IEP team took up Student's performance in general education classes. Father essentially disagreed with the teachers' evaluations. The team recommended RSP with designated instruction and services (DIS) in counseling and speech/language for Student's 8th grade 2003-2004 school year. Parents did not agree to the IEP.

5. On October 22, 2004, parents withdrew Student from the 9th grade at PUSD for home schooling.

6. Father wrote a letter dated November 4, 2004, to PUSD in which he alerted the District to the fact that Student had suffered a "major nervous breakdown recently."

7. Student enrolled again in PUSD on March 22, 2005. When PUSD attempted to establish an interim placement for Student's 9th grade on March 17, 2005, Father refused to sign the interim placement because he did not believe that Student needed special education services. Parents refused to provide a medical release for Student.

8. The IEP team met on April 6, 2005, the parents were present. Student's primary disability was indicated to be Autistic (Aspergers). Parents requested a non-public school (NPS) placement. PUSD and the parents had been unable to get Student to attend class. They got him to school on occasion but not into a class. Student's teachers were unable to provide grades because he had not attended class. Student's DIS services provided for under the 2002 interim IEP had not been implemented because of his lack of attendance. Parents told the IEP team that Student's emotional/behavior status had declined significantly over the past year. The parents told the team that Student demonstrates many obsessive-compulsive behaviors. The IEP team recommended an NPS placement on acceptance. The team discussed a referral to Children's Mental Health (CMH) for an assessment of Student's emotional psychological status. The professionals at CMH review the Student's records, interview the Student, his parents and his teachers to determine his level of functioning. The

purpose is to determine whether a mental disability interferes with his educational program. CMH works under a 60 day timeline in providing its report to the parents and the IEP team. Typically, CMH recommends one of four possible courses of action: no action, outpatient counseling, daycare, or residential placement. All of its recommendations are voluntary. The IEP team provided parents with the referral materials to sign. The IEP team indicated that the October 16, 2002, interim IEP would be implemented until Student was accepted by an NPS. Parents refused to sign the referral to CMH. Father expressed that psychiatry is not a science and the parents knew more than anyone else what was best for Student.

9. Sierra Academy (Sierra), a NPS in San Diego accepted Student on April 19, 2005. On May 3, 2005, around 1:20 p.m., Student refused to enter the motor-lab at Sierra. Mark Wilson, assistant to the occupational therapist at Sierra attempted to convince Student to enter the room. Mr. Wilson informed the Student that the former was going to take Student's hand and help him into the room. When Student refused, Mr. Wilson took Student's hand and tried to guide Student into the room. When they neared the door, Student turned on Mr. Wilson and then Mr. Wilson took Student to the floor. Student attempted to kick and to strike Mr. Wilson with his fists, but the blows were blocked. When Student became passive he was returned to class. Student was later suspended for one day.

10. On May 25, 2005, the IEP team met to discuss placement. Father told the team that parents took Student to the hospital where he was prescribed medication. Father would not disclose the nature of the medication, but said that Student was still taking the medication. The director at Sierra informed the IEP team that it had not been able to do an assessment of Student as a result of his many absences. Father expressed his disagreement on how Sierra operates. Other NPS options were discussed pending the CMH referral. Home hospital placement was discussed. Father expressed interest in a referral to the Learning Center or a public high school. The IEP team presented Father with another copy of the CMH referral application. Father wanted Student to work on a schedule designed by Father. PUSD and Sierra recommended to Father the Student enter into an Off Campus Independent Study (OCIS) contract for the remainder of the year. Father rejected the OCIS proposal. District personnel advised Father that if the CMH referral was not completed PUSD might have to resort to a due process hearing. Father rejected CMH.

11. On May 31, 2005, Kristy Gallagher, Student's teacher at Sierra, observed Student karate chop another student on the stairs and keep on walking. Ms. Gallagher prepared an incident report for action by the director of Sierra.

12. PUSD made several attempts to encourage execution of the CMH referral sending several copies of the referral package. On August 29, 2005, the program specialist sent a letter with a copy of the referral package. On October 24, 2005, the school psychologist sent another copy of the referral package. In this letter PUSD reminded the parents that Student had not attended Sierra or a PUSD school during the 2005-2006 school year. This was Student's 10th grade school year. The letter requested an IEP meeting for Student and suggested a conference call if parents were not able to attend any of the proposed meeting dates.

13. The IEP team met on February 1, 2006, for the Student's annual review. The meeting extended over February 9, 2006; February 27, 2006; March 6, 2006; and March 9, 2006. On February 1, 2006, the team discussed Student's performance and new information. The BSP was revised to address Student's attitude that school work was not beneficial for him and his inability to work with his peers. Student was still not attending school. Father requested that Student remain at Sierra. The meeting was continued to February 9, 2006. At the next meeting, Father presented a private psycho educational report for the IEP team to consider. Alternative placements were discussed. Sierra reported that Student had attended a one hour class on February 7, 2006. He arrived at Sierra on February 8, 2006, after school had concluded for the day and went home. The IEP meeting was extended to March 6, 2006.

14. On February 21, 2006, Ms. Gallagher observed Student leaving school. She observed a verbal exchange between Student and his father at the latter's car. She observed Student run 150 yards from the school toward a stream. Student lay down on the bridge over the stream. Student repeatedly said he wanted to kill himself. When Student's father approached, the Student ran down the bank of the stream Student lay down in the stream. Student repeated his threats to kill himself. He laid down face first into the stream, Ms. Gallagher pulled him out. Student then picked up huge rocks but put them down when directed by Sierra staff. The staff was able to calm Student and return him to school. The incident was reported to PUSD.

15. On February 23, 2006, Ms. Gallagher, during class, was grabbed on the hand and arm by Student. He was admonished "no touching, hands off." This seemed to work for awhile. Later, Student resumed grabbing Ms. Gallagher's hand and arm with more strength. When Student quit grabbing at Ms. Gallagher, he turned on another student, grabbing her arm. When he was taken to the director's office, he began grabbing at the director and Ms. Gallagher. As a result of these incidents an emergency IEP meeting was noticed for February 27, 2006.

16. On February 27, 2006, the IEP team met to discuss the behavioral incidents at Sierra. Father arrived at the meeting but indicated that he was not prepared to participate. Father was given a new revised BSP. The new plan incorporated references to the new behaviors of grabbing of staff and other students, running away from school, and the threats of self harm.

17. When Father indicated that he was ill, the IEP team meeting was put over from March 6, 2006, to March 9, 2006. The director at Sierra informed the IEP team that Sierra was not able to meet Student's needs. The director reported on four separate incidents involving Student and that he had been suspended for three separate days as a result of the incidents. In one instance Student grabbed the front of Ms. Gallagher's blouse and pulled it out. A similar incident occurred with regard to the school psychologist. On another occasion Student grabbed the director of Sierra around the neck. He had also punched her twice in the stomach with his fists. As a result of his lack of attendance and his aggressive behavior, Student was getting no educational benefit from the Sierra placement. The team considered other possible NPS placements for Student. The team reiterated its desire that the

CMH referral be activated. Father took home another copy of the referral packet, but did not sign the referral.

18. Sierra has provided PUSD formal notice that it cannot continue as a placement for Student. No other NPS has been willing to accept Student. PUSD has been contacted by doctors seeking information regarding Student, but because of Father's objection neither institution has been able to provide the other with information regarding Student's psychological/emotional well-being. Student has threatened the lives of his parents, his teachers and the director at Sierra. PUSD is unable to provide an explanation for Student's behavior. The BSP has been unsuccessful in controlling Student's behavior.

CONCLUSIONS OF LAW

1. A child must be assessed by a school district in all areas related to the suspected disability (Ed. Code, §§ 56320, subd. (f); 56381, subd. (f)), including, if appropriate, health and social and emotional status. (34 C.F.R. § 300.532(g).) A district's evaluation is held to a standard provided in the statute of "reasonableness." (*Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 205-207 [73 L.Ed.2d 690, 102 S.Ct. 3034].) The IDEA does not prescribe substantive goals for evaluation, but provides only that it be "reasonably calculated to enable the child to receive educational benefits." (*Id*. at 206-207.) Any assessment must be conducted by persons knowledgeable of the student's disability. (Ed. Code, § 56320, subd. (g).) The school district must present a written plan to the student's parents encompassing the areas it seeks to assess. (Ed. Code, § 56321, subd. (a).) The school district cannot perform an assessment without parental consent. (Ed. Code, § 56321, subd. (c).) If a parent refuses to provide consent for a school district assessment, the school district can request a due process hearing to compel compliance with an assessment. (Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e).)

2. The scope of the administrative hearing mandated by 20 U.S.C. § 1415(b)(2), is limited to the due process request filed to obtain the hearing. Thus, the hearing is limited to determining the necessity and appropriateness of PUSD's referral to CMH.

3. Here, Student's parents have refused to give consent to PUSD's requested referral for an assessment by CMH. If the parents do not consent to the assessment plan, a school district can override the lack of parental consent if it establishes at a due process hearing the need to conduct such an assessment. (Ed. Code, §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e); 20 U.S.C. § 1414(a)(1)(C)(ii); *Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178; *P.S. v. The Brookfield Board of Education* (D. Conn. 2005) 353 F.Supp.2d 306, 314, fn. 5; *Herbin v. District of Columbia* (D.D.C. 2005) 362 F. Supp.2d 254, 265.) In *P.S.*, the court relied on *Dubois v. Connecticut State Board of Education* (2nd Cir. 1984) 727 F.2d 44, 49, in determining that "[A] school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."

4. In compliance with Government Code section 7576, subdivision (b), a local education agency, such as PUSD, may initiate a referral for assessment of the social and emotional status of Student. (See also, Ed. Code, § 6331, subd. (a).) In that regard an IEP team may refer Student, who is suspected of needing mental health services to a community mental health service if Student meets all of the criteria in Government Code section 7576, subdivision (b)(1-5). Here, PUSD and the IEP team with Father objecting have sought to obtain the mental health referral to CMH. PUSD need only establish "reasonable cause to believe" that Student was in need of mental health services and that he was in need of special education. (*Hoffman v. East Troy Community School District* (E.D. Wis. 1999) 38 F.Supp.2d 750, 763.) PUSD met the reasonable cause standard in showing a need for a mental health referral and compliance with the statutory criteria found in Government Code section 7576, subdivision (b)(1-5). The evidence established that Student had been assessed by school personnel, which met the criteria in Government Code section 7576, subdivision (b)(1). Although the second criterion required parental consent, that requirement can be satisfied by the determination in this proceeding that parental consent has been unreasonably withheld. Thus, the second criterion was satisfied. (See Govt. Code, § 7576(b)(2).) The third criterion has multiple subparts. It was established by the evidence that Student has emotional or behavioral characteristics that: (A) have been observed by qualified educational staff in educational and other settings; (B) impeded the Student from benefiting from educational services; (C) are significant as indicated by their rate of occurrence and intensity; and, (D) are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling. (See Govt. Code, § 7576(b)(3).) The fourth criterion was established showing that Student's functioning, including cognitive functioning, was at a level sufficient to enable Student to benefit from mental health services. (See Govt. Code, § 7576(b)(4).) And finally, the evidence showed that PUSD, pursuant to section 56331 of the Education Code, has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to Student pursuant to section 56363 of the Education Code, or behavioral intervention as specified in section 56520 of the Education Code, as specified in the IEP and IEP team had determined that the services do not meet the educational needs of Student. (See Govt. Code, § 7576(b)(5).)

5. Additionally, Student must permit PUSD to conduct necessary and appropriate assessments if he intends to seek the benefits of IDEA. In *S.F. v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, the court refused to order compliance with the School District's assessment plans "when parents refuse consent, privately educate the child, and expressly waive all benefits under IDEA." (See also, 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.505(a)(1)(ii).) Until Student's parents waive all claims under IDEA, they must comply with the reasonable and necessary assessment requests of PUSD. Although Student's parents have at times indicated their rejection of special education services and Student has had a spotty attendance record at school, there is no evidence that Student is being privately educated and does not intend to return to school. Student's Father agreed to a continued non-public school placement for Student as provided for in the IEP. The seriousness of Student's behavior, the unexplained nervous breakdown, parents' reference to obsessive-compulsive behaviors, parents indication to District that Student's health had been

in decline, the lack of any apparent explanation for his recent conduct and the need for planning for his return to school justify the requested assessment. This conclusion is supported by the Factual Findings 1, 3, 4, 6 through 11, and 13 through 18.

ORDER

Accordingly, PUSD's proposed referral to CMH is appropriate and necessary, if parents wish to have special education and related services made available for Student, Student and his parents are ordered to comply with the referral for assessment by CMH and to make Student available for the ordered assessment.

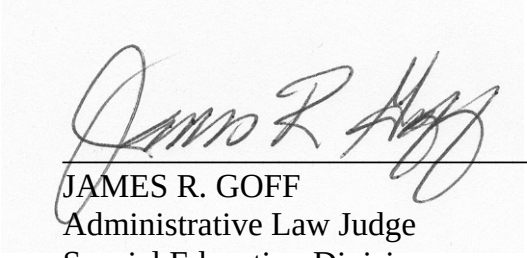
PREVAILING PARTY

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: *The District prevailed on all issues heard and decided.*

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. California Education Code section 56505, subdivision (k).

Dated: June 1, 2006



JAMES R. GOFF
Administrative Law Judge
Special Education Division
Office of Administrative Hearings
8001 Irvine Center Drive, Suite 417
Irvine, CA 92618