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

In the Matter of : CAPISTRANO UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH NO. N2006030599

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in San Juan Capistrano, California on June 8 and 9, 2006.

Petitioner, Capistrano Unified School District, was represented by G. Robert Roice. Kim Gaither attended the hearing on behalf of the District.

Student was represented by Tim Jon Runner, Education Advocate. Student's mother attended the hearing on behalf of Student.

Student made an oral motion at time of hearing to introduce the declarations of additional witnesses, Terry Schenk, Ph.D., and Paul Corona, M.D. Respondent's motion regarding Dr. Corona, was denied. Dr. Corona had not been listed as a potential witness in any pre-hearing documents. The declaration of Dr. Schenk was also deemed inadmissible as it was submitted without notice, and she was not subject to cross examination. Dr. Schenk had been listed as a potential witness and would have been allowed to testify by telephone. Dr. Schenk did not testify.

The record remained open until June 26, 2006, for receipt of written closing briefs from each representative. The matter was submitted and the record closed on June 27, 2006.

ISSUE

Whether the District is required to publicly fund a psycho-educational Independent Educational Evaluation (IEE) which has been requested by the parents.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is 16 years old and resides within the jurisdictional boundaries of the District.

2. Student has a history of difficulty focusing on school work, but she was generally successful in her early school years. In the eighth grade Student's grades began to decline. She complained of stress, and was placed on antidepressants. Student was assessed for special education in 2002, and was found ineligible.

3. Student also began using illicit drugs in the eighth grade. Student's drug abuse began with marijuana and progressed to daily methamphetamine use. In spite of Student's attention problems, drug usage, and drop in school attendance, Student passed the California High School Exit Examination in the 10th grade with well above average scores. Student's 10th grade classroom performance ran the gamut from F to A+.

4. Towards the end of the 10th grade, Student's drug addiction became increasingly evident, which resulted in her parents placing her in the Aspen Wilderness Program in Utah. After completion of the Wilderness Program, Student transferred to the Aspen Ranch Academy (Aspen), a therapeutic residential center. Student remained in this placement for eight months. Student subsequently returned home, and at the request of her parents, was assessed by the District on February 10, 2006.

5. On March 1, 2006, an IEP meeting was held, at which Student was found to be ineligible for special education. Student's parents, through a letter prepared by their representative, disagreed with the District's findings, and requested that the District pay for an IEE. The parents contended that the District's February 10 assessment was contrary to the findings of the medical and educational professionals who had treated Student in the past. Without referring to specific findings, the parents contended that a comparative analysis indicated a significant difference in the assessment findings related to depression. In their view, the scatter of results therefore justified an IEE. The District disagreed.

6. Student did not return to residential classes at Aspen, nor did she return to public school classes. Student is currently receiving Home/Hospital teaching from the District at the request of Student's medical doctor. According to her mother, Student is doing "okay" on completing assignments at home, although she still has difficulty scheduling and completing assignments, especially essays. She is also currently employed in a grocery store.

February 10, 2006 Assessment

7. Student's parents requested an assessment of student for special education, primarily in the area of social/emotional functioning. Mother signed an Assessment Plan, which led to the February 10, 2006, assessment.

8. No allegations were made regarding the testing and assessment materials being racially, culturally, or sexually discriminatory. The assessment was performed in Student's primary language. Student did challenge the assessor's qualifications to administer the tests as well as the limited areas of suspected disabilities tested.

9. The assessment was performed by Michael Tincup, Ph.D., the lead school psychologist for the District. Dr. Tincup received his doctorate in psychology in March 2003, and has worked for the District since December 2000. Dr. Tincup is credentialed by the State of California in school psychology. This credential authorizes him to conduct psycho-educational assessments for purposes of identifying special needs.

10. Dr. Tincup prepared a Psycho-educational Evaluation of Student which relied on information obtained from Student's prior school records; Student's previous Psycho-educational Evaluation prepared in 2002, by Phillip Stein, Ph.D.; a Psychological Evaluation prepared in June 2005, by Jeremy A.Childes, Ph.D.; Student's Clinical Records and Discharge Summary from Aspen prepared by Scott Peterson, MSW; and Behavioral Relating Scales (BASC II) provided by three of Student's teachers at Aspen, Student's parents and Student herself. Dr. Tincup personally interviewed and observed Student during the assessment process. He also spoke with her mother.

11. Dr. Tincup's assessment reported that Student was in good health, and her vision and hearing were within normal limits. Neither Student nor her mother mentioned any health, developmental or medical issues which might have been considered additional or related areas of suspected disability.

12. Dr. Tincup administered a shortened version of the Wechsler Abbreviated Scale of Intelligence (WASI) which correlated with other tests and confirmed prior test results indicating Student's above average intelligence. Dr. Tincup administered the Woodcock Johnson, specifically looking for attention problems. Student's composite scores were generally above average. On the subtests, student scored relatively weak on auditory attention and peer cancellation. Dr. Tincup concluded Student had a relative weakness in attention.

13. Student's social/emotional functioning was tested on the BASC II. The test consists of questionnaires which were presented to three of Student's teachers at Aspen, Student's parents, and Student herself. Although Student's scores were clinically significant in areas at home, she was consistently average at school. The teachers reported nothing serious in the classroom setting. Student's own questionnaire presented an acceptable score. Nothing was reported as clinically significant. In Dr. Tincup's opinion, the results did not support serious emotional/social problems across the board, in all domains.

14. Considered in their totality, Dr. Tincup's assessment results indicated that Student was of above average intelligence. Her classroom achievement was above average, as was evidenced by her most recent GPA at Aspen. Student's BASC II results and the Aspen teachers' observations provided no evidence of serious interpersonal problems. The remainder of the tests indicated some areas of deviation, primarily in the home setting. These variations however, were not pervasive throughout domains, nor were they consistent enough to be considered clinically sufficient for a determination of serious emotional disturbance.

15. Student was also referred to Orange County Mental Health for an AB3632 Assessment. A written assessment was issued March 23, 2006. This assessment found that Student was not currently manifesting symptoms which would appear to require mental health services. In rejecting the request for mental health services, the assessment reported as follows:

> The parents wish to support her with services consistent with those outlined by Aspen Ranch. These include addressing Student's substance abuse history and helping her continue to recognize situations that might put her at risk for again abusing substances and to develop and implement coping strategies to help her manage the stress in her life without resorting to maladaptive means of coping.

Psychological Information from Aspen

16. On June 24, 2006, Jeremy A. Childes, Ph.D., a licensed Clinical Psychologist, prepared a Psychological Evaluation of Student at the request of Student's parents. Substantial information contained in the assessment was gleaned directly from Student and her parents. Standardized testing was administered. Dr. Childes concluded that in her attempts to fit in and be valued, Student turned to substance abuse. Her lack of confidence and internal sadness were consistent with Depressive Disorder Not Otherwise Specified (NOS). Student's distractibility, daydreaming, and lack of focus were consistent with Attention Deficit Hyperactivity Disorder (ADHD), Inattentive Type. Dr. Childes did not evidence any learning disabilities.

17. The Aspen treatment plan contained in Student's clinical records indicated Student's primary problem was chemical dependence. Secondary problems included Depression and ADHD. Neither the long-term goals nor the short-term objectives and therapeutic interventions referenced a need for special education.

18. Scott Peterson was one of Student's therapists at Aspen. He began providing Student with weekly, individual psychotherapy one month before she left Aspen. Mr. Peterson prepared the Discharge Summary based upon his personal observation and professional interaction with Student. Mr. Peterson noted that Student's depression was still of concern due to her flat affect, however her progress in school was on track.

LEGAL CONCLUSIONS

Applicable Law

19. A child with a disability has the right to a free appropriate public Education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

20. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532(f); Ed. Code, § 56320.)

21. The student must be assessed in all areas related to the suspected disability including, if appropriate, health and development, 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. (34 C.F.R. §300.532(g); Ed. Code, § 56320, subd. (f).)

22. Tests and other evaluation materials used must be selected and administered so as not to be discriminatory on a racial or cultural basis and are administered in the child's native language or other mode of communication. (34 C.F.R. § 300.532(a)(1)(i); Ed. Code, § 56320 subd. (a).)

23. California Education Code section 56320, subdivision (g), requires that the assessment be conducted by persons knowledgeable of the suspected disability. The assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532(d); Ed. Code, § 56320, subd.(c).) Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd. (b)(3), and 56324).) Assessments must be conducted by persons competent to perform assessments, as determined by the school district, county office, or special education local plan. (20 U.S.C § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.532 (c)(1)(ii); Ed. Code, § 56322.)

24. The personnel who assess the pupil shall prepare a written report or reports, as appropriate, of the results of each assessment. The report shall include, but not be limited to, all of the following:

1. Whether the pupil may need special education and related services;
2. The basis for making the determination;
3. The relevant behavior noted during the observation of the pupil in

an appropriate setting;

4. The relationship of that behavior to the pupil's academic and social functioning;
5. The educationally relevant health and development and medical findings, if any….

25. Students whose educational needs are due primarily to limited English proficiency; a lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural or economic factors are not individuals with exceptional needs. (34 C.F.R. § 300.7(c)(4)(ii); Ed. Code, § 56026, subd. (e).)

26. A parent is entitled to obtain an Independent Educational Evaluation (IEE) of a child. (20 U.S.C § 415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502 (a)(3)(i).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (34 C.F.R. § 300.502(b)(1); Ed Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. (34 C.F.R. § 300.02 (c)(1); Ed. Code, § 56329, subd. (c).) An IEE obtained at private expense must be considered by the district in any decision concerning a FAPE for the child. (34 C.F.R. § 300.502 (c)(1); Ed. Code, § 56329, subd. (c).)

27. The U.S. Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (Nov. 14, 2005, No. 04-698) ____ U.S. ___, [126 S. Ct. 528, 2005 U.S. Lexis 8554].)

Determination of Issues

A. Was Dr. Tincup qualified to assess Student?

28. Pursuant to Factual Finding 9, Dr. Tincup was qualified to assess Student's educational eligibility in all areas of Student's suspected disabilities. Dr. Tincup possessed all required licensing and education to perform special education assessments and render opinions on test results. Although Dr. Tincup was the sole person responsible for the preparation of the assessment, he was not the only participant or sole assessor. Pursuant to Factual Findings 10, 11, and 12, Dr. Tincup solicited information from several other sources and people, including Student and her parents. Dr. Tincup did not provide a medical diagnosis, but rather an educational evaluation. Orange County Mental Health provided a mental health assessment. Pursuant to Finding 15, mental health services were deemed unnecessary as Student was not manifesting symptoms which would require mental health services.

B. Were the components of the assessment appropriate?

29. Pursuant to Factual Findings 10, 11, 12, 13, and 16, the type of tests administered by the District were appropriate. Student was assessed as requested by her parents. Student's suspected areas of disability were the social/emotional areas associated with depression and her inattentiveness traits connected with ADHD. Comprehensive testing does not require the District to reinvent the wheel. Based upon Student's history and recent prior testings, Student's intelligence levels were not at issue, nor were other areas of disability suspected. Furthermore, pursuant to Factual Finding 8, the testing was not discriminatory, and was conducted in Student's primary language.

30. Pursuant to Factual Finding 8, Student's assessment was multi-disciplinary and included information from multiple sources. Although Dr. Tincup did not directly communicate with Student's teachers, he did solicit information from them regarding their observations of Student in a classroom setting while Student was at Aspen.[1] Pursuant to Factual Finding 13, those teachers reported nothing significant in the areas of behavior or social functioning. No evidence was presented to refute the BASC II data received from the teachers at Aspen, nor was there any evidence presented that the teachers who participated in the BASC II protocol were unqualified or unfamiliar with Student's academic progress and classroom demeanor. Student's academic grades were above average. Further, Dr. Tincup personally observed Student and conversed with her during the assessment.

C. Did the District consider Student's exceptional needs/ADHD?

31. Pursuant to Factual Findings 10, 12, 16, and 17, the issue of ADHD was addressed in the assessment. Dr. Tincup reported that Student had a relative weakness in attention. Dr. Childes concluded that Student's lack of focus was consistent with ADD/ADHD, however no learning disabilities were noted. Student's clinical records from Aspen acknowledge ADHD, but contain no special education recommendations or any reference to providing special education services while at Aspen. Mr. Peterson's discharge summary reflects that Student progress in school was on track.

D. Did the District consider Student's exceptional needs/depression?

32. The District acted at the request of Student's parents to specifically address depression as a suspected area of disability. Pursuant to Factual Findings 10-18, the District did so. Student did not present sufficient evidence to contradict the appropriateness of the specific tests and the manner in which they were administered.

[1] It is noted that Dr. Tincup did not send the BASC protocols directly to the Aspen teachers, but rather had Student's mother communicate with Aspen and forward the BASCs. No evidence was provided however, to suggest the teachers' test results were tainted or invalid.

The District has met its burden of proof as to the appropriateness of its assessment of Student.

ORDER

The Assessment of Student, dated February 10, 2005, is determined to be appropriate, and accordingly the District is not required to fund the IEE requested by Student's parent.

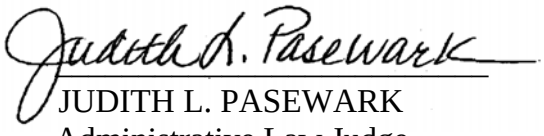
PREVAILING PARTY

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. Capistrano Unified School District has prevailed on all issues.

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 90 days of receipt of this Decision. (Ed. Code, §56505, subd. (k).)

Dated: July 13, 2006



JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings