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

In the Matter of : STUDENT, Petitioner, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N2006051005

DECISION

Administrative Law Judge Jacqueline Jones, Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on June 23 and July 19, 2006, in San Juan Capistrano, California.[1]

Petitioner, (Student), was represented by advocate Mark Lopez, J.D., Ph.D. School Watch/SENTRY. Also present on Student's behalf was his mother.

Capistrano Unified School District (District) was represented by attorney Jennifer C. Brown, Esq., Rutan & Tucker, LLP. Also present as the District's designated representative was Mary Hilsabeck, an assistant in the District Compliance Legal Division.

On June 5, 2006, Student , by and through his Mother, filed with OAHSED a request for an expedited hearing pursuant to 20 United States Code sections 1415 (f)(1)(A), 1415 (k)(3) and 1415 (k)(4)(B), and 34 Code of Federal Regulations parts 300.510-511.

Testimony concluded, oral closing arguments were made, the record was closed and the matter was submitted on July 19, 2006.

[1] Capistrano Unified School District's Motion to Dismiss was heard on June 23, 2006. The Motion was denied. The parties requested a continuance of the hearing which was granted by Administrative Law Judge Jacqueline Jones.

ISSUE

Whether District had a "basis of knowledge" that the Student was a child with a disability before April 28, 2006?

FACTUAL FINDINGS

1. Student entered District during the 2004-2005 school year. Student is a 14- year-old boy. Student was in the eighth grade at Niguel Hills Middle School on April 28, 2006.

2. In March 1999, Saddleback Valley Unified School determined that Student was eligible for special education services based on the disability category of other health impairment. The Student's educational performance was adversely affected by a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).

3. Saddleback Valley Unified School District found Student no longer eligible for special education services on March 11, 2002.

4. Mother claims Student remains eligible for special education and related services under the category of ADHD. Student takes a prescribed medication, Concerta, for ADHD.

5. Between February 10, 2005, and April 28, 2006, Student engaged in a pattern of misbehavior at Niguel Hills Middle School. During this period, Student's poor behavior was escalating and his academics were declining. On February 10, 2005, Student's actions were perceived as a threat to his teacher. On March 17, 2005, Student kicked another student. On May 23, 2005, Student mentioned bringing a gun to school while at a school open house. Student was referred to a counseling program called PRIDE. The Orange County Sheriff's Smart Team investigated Student's comments about bringing a gun to school. The investigation included searching the Student's home and computer. On March 17, 2006, Student made a disrespectful statement to a teacher in class.

6. On April 28, 2006, Student was accused of bringing alcohol to school which is a violation of the student code of conduct and Education Code section 48900, subdivision (c). Student was suspended on April 28, 2006. Student remains suspended. Student faces an expulsion hearing on August 1, 2006.

7. Mother had telephone conversations and email communications with Academic Advisor Roberta Busch in October and November 2005, regarding Student's declining grades and behavior problems. Ms. Busch recommended that a request for special education be put in writing. Ms. Busch told Mother what to put in the letter. Mother requested, in writing, a special education assessment concerning student on November 3, 2005. On that same day, Mother hand delivered the request for special education assessment to Niguel Hills Middle School addressed to the attention of Roberta Busch, Academic Advisor.

8. On November 14, 2005, a Student Study Team meeting was held at Niguel Hills Middle School at around 10:00 a.m. Mother was present. Teachers Mittleman, Briggs, Erickson, Steidle, Benson and Gaspar were present. Assistant Principal Rios and school psychologist Artinger were also present.

9. The meeting was arranged because Mother was requesting a special education assessment. Mrs. Artinger brought a CUSD Individualized Education Program Assessment Plan to the meeting.[2] Mother never saw the document. The problems identified by the SST team included underachievement in academic classes, organization issues, student unfocused, and missing work in English and Math. The following interventions were agreed to: teacher change in Algebra 1A from Mr. Erickson to Ms. Patterson and a writing/screening assessment by Mrs. Artinger. Mrs. Artinger suggested a 504 evaluation.

10. A 504 evaluation is an evaluation to determine whether a child with a disability needs accommodations based on his or her educational needs. If the child is found eligible, the child is then protected from disability discrimination under Section 504 of the federal Rehabilitation Act.

11. Mrs. Artinger's memory concerning the meeting was not clear. Mrs. Artinger does not remember if special education eligibility was discussed with Mother. Mrs. Artinger wrote on the District Individualized Education Program Assessment Plan: "Parent declined 11/14/05 per SST Requested 504 eval instead." Mrs. Artinger wrote the above information on the document in May 2006, approximately six months after the meeting.

12. Mother's demeanor while testifying was calm. Mother had a good recollection of facts. Mother's credibility was much more consistent with the facts than the District's. Mother never declined the special education assessment. Mother expected District to help the Student. Mrs. Artinger made the determination to do the 504 assessment instead of the special education assessment.

LEGAL CONCLUSIONS

Applicable Law

1. Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(I)(II); Ed. Code, § 48915, subd. (a).) These protections extend to students not previously identified as eligible for special education services only if the following factors are met: (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and, (2) the school district had knowledge, or is deemed to have had knowledge,

[2] The form indicates that the document was created at "11/14/05" at 9:32 a.m.

that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A).)

2. The "basis of knowledge" or "deemed" knowledge exists when one or more of the following has occurred, (1) the parent of the child expresses concern in writing to personnel of the appropriate educational agency that the child is in need of special education; (2) the parent of the child has requested an evaluation; or (3) the teacher of the child or other personnel expresses concern about the behavior of the child to the director of special education or other personnel of the local educational agency. (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. § 300.527(b).)

3. Student, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 543 U.S. 1145 [126 S.Ct. 528, 163 L.Ed.2d 387].)

4. Under California law all referrals for special education and related services shall initiate the assessment process and shall be documented. When a verbal referral is made, staff of the school district, special education local plan area, or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if the individual requests such assistance. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

Determination of Issues

1. Based upon Factual Findings, 7, 8, 9 and 12, and Applicable Law, 1 and 2, District had a basis of knowledge that student is a child with a disability within the meaning of 20 United States Code section 1415 (k)(5)(B)(ii) and 34 Code of Federal Regulations section 300.527(b)(3), in that the parent of the Student requested an evaluation to determine whether her son was eligible for special education and related services before the misconduct which precipitated the disciplinary change in placement.

2. As discussed in Applicable Law 2, there is a deemed basis of knowledge if the parent of the child has requested an evaluation of the child pursuant to 34 Code of Federal Regulations part 300.530-536. Based upon Factual Findings 7 and 9, Mother requested a special education evaluation of the Student on November 3, 2005. Mother's testimony was very credible in describing how Roberta Busch assisted her in writing this request. The request was in writing, which accords with the procedure in California Code of Regulations, title 5, section 3021. Although District claimed that it never received the request for a special education assessment, Mrs. Artinger testified that she was told by Roberta Busch that Mother had made such a request. District did not rebut this testimony by calling Roberta Busch as a witness. Instead of performing the special education assessment requested by Mother, Mrs. Artinger elected to do a 504 evaluation. Since the District had a basis of knowledge before the incident that led to the disciplinary action, the Student was entitled to the protections of the IDEA and cannot be subjected to disciplinary action without a manifestation determination.

ORDER

1. Immediately terminate the current discipline proceedings.

2. If the District wishes to pursue disciplinary action against the Student, the District must hold a manifestation determination before further disciplinary action can be taken.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The Student prevailed on the issue 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. (Ed. Code, § 56505, subd. (k).)

Dated: July 31, 2006

Jacqueline Jones

JACQUELINE JONES
Administrative Law Judge
Special Education Division
Office of Administrative Hearings