

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ANAHEIM CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013040142

DECISION

On May 21, 2013, Judith L. Pasewark, Administrative Law Judge (ALJ) from the Office of Administrative Hearings(OAH), Special Education Division, presided at the due process hearing on this matter.

Lauri A. Arrowsmith, Esq., represented Anaheim City School District (District). Sherry Blakely, the Director of Student Services for the District, attended on behalf of the District.

Parent represented Student (Student, sometimes, Parent or Mother). On March 22, 2013, OAH granted Parent's request for a continuance request. Parent participated in the telephonic Prehearing Conference held on May 8, 2013. On May 9, 2013, OAH served a true copy of the Order Following Prehearing Conference on Parent via U.S. mail and GSO overnight delivery. Mother did not comply with the ALJ's orders as contained in the Order Following Prehearing and did not file a witness list or exhibit list as requested by the ALJ. This matter was scheduled to begin hearing on May 21, 2013, at 9:30 a.m. Parent did not appear for the hearing. The hearing was delayed. Ms. Blakely checked to see if Parent had contacted the District to indicate she was delayed. Parent made no contact with the District or OAH, therefore the hearing began at 9:45 a.m. to allow the District to present its case. Student did not attend the hearing.

STATEMENT OF PROCEDURE

The District filed its Request for Due Process Hearing on April 2, 2013. The matter was continued on April 22, 2013 at Parent's request, to the current hearing date of May 21, 2013. On May 21, 2013, Parent did not appear for the hearing, therefore, the District proceeded with a default hearing. The District's documentary evidence, Exhibits 1 through

17, were identified and moved into evidence. Testimony was taken, and the hearing was completed and submitted on May 21, 2013. Decision on this matter is due on June 16, 2013.

ISSUES

The sole issue presented by the District is whether the District may assess Student pursuant to the Assessment Plan dated March 28, 2013.

FACTUAL FINDINGS

Background:

1. Student, currently a fifth grader, began attending school within the District at the beginning of the 2012-2013 school year. At that time she was not eligible for special education, having been exited by her prior district of residence in 2012.

2. On June 15, 2010, Student became eligible for special education and related services during her residence in the Alvord Unified School District (Alvord). Alvord developed an individualized education program (IEP) to comport with Student's eligibility of emotional disturbance. Mother consented to the IEP.

3. According to the educational records received by the District, Student subsequently moved to the Fullerton School District (Fullerton). On May 2, 2011, Fullerton held a 30-day IEP meeting, which included an extensive behavioral assessment.¹ Due to Student's disruptive behaviors, Fullerton determined Student continued to qualify for special education and related services under emotional disturbance. Fullerton prepared a formal IEP, however, Mother did not consent to this IEP.

4. Student relocated to the Garden Grove Unified School District (Garden Grove) for the 2011-2012 school year. Garden Grove held a 30-day IEP meeting on September 15, 2011, based upon the Alvord 2010 IEP. Garden Grove also found Student eligible for special education and related services under emotional disturbance. There is no signature page attached to this IEP, however the notes reflect (1) Mother attended this IEP meeting; (2) the 2010 goals and resource specialist program (RSP) consultation were accepted on an interim basis only; and the IEP team would meet again prior to December 3, 2011.

5. On December 2, 2011, the Garden Grove IEP team reconvened, and exited Student from special education. The IEP notes reflect that Student's general education teacher and resource specialist reviewed Student's completion of her 2010 goals and her present levels of performance (PLOP). The IEP team determined that Student had made

¹ Mother had previously consented to the assessment on February 18, 2011, and the assessment was completed on April 4, 2011.

excellent progress and her behaviors were being adequately addressed in the general education classroom. Therefore, when Student transitioned into the District in December 2012, she had been exited from special education, and no longer had an IEP or behavior plan.

Student's Need for Assessment:

6. Upon her enrollment in the District at Sunkist Elementary School (Sunkist), Student continued to have behavioral issues. Tara Iwanaga, Student's classroom teacher at Sunkist, credibly testified at the hearing. Student had behavioral issues. Student hit other students, used profanity, was argumentative, and had difficulty controlling her temper. Ms. Iwanaga indicated Student's behaviors were not typical of children her age. Student was aggressive and her outbursts were not easy to redirect. Ms. Iwanaga indicated that "she had never seen anything like it, Student would get *so angry*."

7. Ms. Iwanaga kept a behavior log on Student. The log indicates Student has falsely accused staff of hitting her. She has a history of "HUGE" outbursts during class time. Nothing will calm her down. As one example, during a spelling test, Student carried on yelling profanities, and verbally threatening other students. This tirade lasted six to eight minutes and disrupted the entire class. She has a history of baiting and bullying other children, sometimes reducing them to tears. Student is combative, defiant and hostile with Ms. Iwanaga, to the extent Ms. Iwanaga reported in the log that she (Ms. Iwanaga) was very nervous and stressed because she, did not know if Student was going to hit her. In parent conferences with Mother, Mother has indicated that she has taught Student to stand up for herself and aggressively retaliate. Student's behavior, however, is more than advocating for herself. Student baits others and gets in their space. Her behaviors occur across all school environments.

8. Alejandro Ramirez, the Principal at Sunkist, credibly testified at the hearing.² As Principal, Mr. Ramirez is responsible for student discipline. Student's discipline record is of concern to him. Student's behaviors can quickly escalate "from zero to sixty" over little things. Student is disruptive, and loud. She becomes aggressive when she feels she is right. The District has submitted into evidence 14 complaints written by other students regarding Student's bullying behaviors, racial slurs, and threats. The other children feel threatened and are afraid of her. Based upon the complaints and reports of her classmates, Student shows a pattern of intimidation. Mr. Ramirez concurs with Ms. Iwanaga that Student's behavior is not like that of typical peers.

9. Mr. Ramirez also reviewed Student's records from Garden Grove. In addition, he spoke with Mr. Chang, the Principal at Student's prior elementary school in that district. Mr. Chang indicated that Student had received special education and related services while attending his school, due to her inappropriate behaviors. Her aggressive behaviors at school were significant. According to her exit IEP however, Student no longer had difficulty

² Mr. Ramirez also has experience as a classroom teacher.

completing her work, making friends, working in groups, and maintaining her ability to remain calm in the general education classroom under normal circumstances. The IEP noted that Student still had difficulty adjusting to changes, and her behavior should still be monitored in those situations.

10. On March 5, 2013, Student and another classmate were suspended for fighting.³ The tension between the girls had been growing, and in response to an inappropriate comment, Student hit the other student in the face with a closed fist three times before the teacher could intervene. Mr. Ramirez met with Mother to discuss Student's suspension, at which time Mother exhibited racial bias, accusing Mr. Ramirez of taking sides because the other child was of the same ethnicity as he is. The relationship between Mr. Ramirez, the District and Mother further disintegrated. Mother on a later occasion made additional racial comments regarding the ethnic demographics of Sunkist.

11. On March 22, 2013, Mr. Ramirez was again called to Student's classroom to deal with one of Student's tirades, which also required the intervention of the school psychologist. Student continued to be uncooperative and tried to leave the area. At that time, Mr. Ramirez blocked her exit with his arm. When Mother arrived later in the day to discuss the incident, she accused Mr. Ramirez of "touching Student" and requested that the police be called. At this time, the only point of contact between Parent and the District is through the office of Pupil Services. Based upon all information collected, as well as upon his own experiences with Student, Mr. Ramirez believes Student has difficulty with social interaction and anger escalation, which require assessment.

12. Kristin Cinco, the District's Program Specialist for Mental Health Services, also credibly testified. Ms. Cinco was previously a school psychologist for the District. As program specialist, her duties include evaluating students for special education, including assessing emotional disturbance, as well as assessing all other areas of need. It is noted that Student is very bright and has been transferred to the District GATE program for gifted students.

13. Ms. Cinco reviewed all of Student's prior assessments and IEP's. She noted a common theme throughout the documents is Student's inability to control her temper, build social relationships, and complete her school work. These are the same behaviors Student exhibits within the District. While Garden Grove exited Student from special education, they did not conduct an exit assessment. Further, Student continued to exhibit a similar pattern of behaviors even after exiting special education.

14. Based upon her meeting with Mother, as well as the information provided to her by the District, on March 28, 2013, Ms. Cinco prepared a written request to assess Student for special education and related services. Attached to the letter was an Assessment

³ The other student involved in this altercation was no angel either. Both students had been previously counseled regarding making inappropriate racial comments and how to appropriately handle such remarks by reporting them to responsible adults.

Plan, which requested parental consent to assess Student in (1) academic achievement; (2) language and communication development; (3) psycho-motor development; (4) health, vision and hearing; (5) self-help (adaptive functioning); (6) social/emotional behaviors status; (7) functional behavioral assessment (FBA); and (8) observations, review of records, and other memory and processing assessments as determined by the school psychologist⁴ On April 1, 2013, Mother returned the executed Assessment Plan to the District, indicating she did not consent to the assessments. Ms. Cinco explained to Mother that: (1) it was unknown if Student qualified for special education, but the District suspected Student had unique needs which would qualify her for services; (2) even if Student qualified for special education and services, Mother could still refuse to accept special education and refuse to implement an IEP and services; and (3) even without special education eligibility, the assessment could assist the District in determining how to better serve and educate Student. Nevertheless, Mother does not want the label of “emotional disturbance” for Student, and has steadfastly refused to consent to assessment.

15. As previously indicated, Student has been placed in a high academic GATE program. She remains unable to interact with the other students. If her maladaptive behaviors continue, she cannot continue her education in the GATE setting. Based upon the above factual determinations, it is clear the District has a reason to suspect a disability, and the District must be given the opportunity to assess Student to determine eligibility for special education and related services.

LEGAL CONCLUSIONS

Burden of Proof:

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387], the party who files the request for due process has the burden of persuasion at the due process hearing. In this matter, the District has the burden of proof on its issue.

Statutory Framework:

2. 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.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State’s educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

⁴ The processing assessments are requested in lieu of cognitive assessments in light of *Larry P. by Lucille P. v. Riles* (9th Cir. 1984) 973 F. 2d 969.)

Child Find:

3. A local district must seek out children who could be IDEA eligible and evaluate them for special education eligibility. This is known as “child find” or “search and serve.” “The purpose of the child-find evaluation is to provide access to special education. (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F. 3d 773, 776.) Child find is a both a federal and state mandate to ensure that all children with disabilities, regardless of the severity of their disability, and who are in need of specialized education and related services, are identified, located and evaluated. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(2006); Ed. Code § 56301, subd. (a).) Even when a parent interferes with the child find process, the district must fulfill its affirmative child find obligation. (*M.J.C. v. Special Sch. Dist. No. 1*, (D. Minn. 2012) 10-4861 JRT/TNL; 58 IDELR 288.)

4. Further, the threshold for suspecting a child has a disability is relatively low. A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194-1195; *E.S. v. Konocti Unified School Dist.* (N.D. Cal. 2010) 10-CV-02245 WL 4780257.) For instance, incidents of bullying, whether the child is a victim or a perpetrator, can be a sign that the child is a child with a disability and in need of special education and related services. (*Rose Tree Media Sch. Dist.* (SEA PA 01394/10-11 JS (2010);111 IDELR 6194. Education is more than academics and involves emotion and social progress. (*M.C. v. Central Regional S.D.* (3rd Cir. 1996) 81 F. 3d 389 cert. den. (1996) 117 S. Ct. 176.)

Assessment:

5. Before any action is taken with respect to an initial placement for special education, the school district must assess the student in all areas of suspected disability. (Ed. Code, § 56320.) The law requires parental consent before the student can be evaluated. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321.) The process of initial referral begins with a written request or referral for assessment. (Ed. Code, § 56302; Cal. Code Regs., tit. 5, § 3021.) The parents must be provided a written assessment plan to which they have at least 15 days from receipt to sign. (Ed. Code, § 56312.) A school district’s obligation to provide services does not arise until the parents have made the student available for assessment. (*Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176.)

Parental Consent to Assessment:

6. The school district proposing to conduct an initial evaluation to determine whether a child qualifies for special education and related services must, after providing notice, obtain informed consent from the parent of the child before conducting the evaluation. (34 C.F.R. § 300.300 (1)(i).) The school district must make reasonable efforts to obtain informed consent from the parent for an initial evaluation. (34 C.F.R. § 300.300 (a)(1)(ii).)

7. If the parent of a child enrolled in public school does not provide consent for initial evaluation, or the parent fails to respond to a request to provide consent, the school district may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards [including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516], if appropriate. (34 C.F.R. § 300.300 (a)(3)(i).) However, the school district will not be considered to be in violation of the requirement to make a free appropriate public education available to the child because of the failure to provide the child with special education and related services for which the parent refuses or fails to provide consent. (34 C.F.R. § 300.300 (b)(3)(ii).)

Analysis:

8. Pursuant to Legal Conclusions 3 and 4, the District has mandated duties under both federal and state requirements for child find.

9. Pursuant to Factual Findings 6 through 11, Student has exhibited sufficient maladaptive and aggressive behaviors to trigger the District's child find obligation. When coupled with the review of Student's prior educational records at Alvord, Fullerton, and Garden Grove, it becomes apparent that Student's current behaviors are a continuation of her prior behavioral patterns which supported findings of special education eligibility in each of Student's three prior school districts. (Factual Findings 2, 3, 4, 10, and 13.) As a result, the District had a reasonable suspicion that Student may be a child in need of special education and related services. (Legal Conclusions 3 and 4)

10. The District complied with the requirement to provide Mother with a written Assessment Plan, which listed all areas of suspected disability it sought to assess. Further, Ms. Cinco discussed the Assessment Plan and its ramifications with Mother. Mother has steadfastly refused to consent to the Assessment Plan. (Legal Conclusion 5; Factual Finding 14.)

11. When a parent refuses to provide a school district with consent to assess her child, the school district may seek to override the parental consent requirement. (Legal Conclusions 6 and 7.) In this matter, although the District is not required to seek "parental override" through the filing of this Request for Due Process Hearing (Legal Conclusion 7), it is justified in doing so. Student's behaviors in the general education setting are aggressive towards other students and staff, and present a general disruption of the education of others in the classroom. Further, Student's current elective placement in the GATE program may be jeopardized without assessment of Student's behaviors in particular. (Factual Findings 6 through 10, and 15.)

ORDER

The District's request is granted. The District may assess Student pursuant to the Assessment Plan dated March 28, 2013, without parental consent.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) The District has prevailed on its one issue.

RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a) (2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b) (2006); Ed. Code, § 56505, subd. (k).)

Dated: June 13, 2013

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings