

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012010159

ORDER DENYING MOTION TO
DISMISS

On February 10, 2012, the San Diego Unified School District (SDUSD) filed a motion to dismiss, asserting that it had already complied with the alleged child find request for Student, whose resides in La Mesa-Spring Valley School District (LMSV), but attends a private school within SDUSD, and that she is not entitled to direct services from SDUSD. On February 14, 2012, Student filed an opposition to the motion, asserting that a triable issue existed as to SDUSD's child find duty and Student's parents are entitled for reimbursement for privately obtained services caused by SDUSD's child find failure. On February 17, 2012, the Office of Administrative Hearings issued an order requesting additional information before a ruling may be made on the pleadings as to SDUSD's child find obligation because LMSV had found Student eligible for special education services and whether reimbursement for privately obtained services was an available remedy if SDUSD violated its child find obligation. On February 23, 2012, Student submitted the requested additional information, and the District submitted its additional information on February 24, 2012.

APPLICABLE LAW

The Individuals with Disabilities Education Act (IDEA) places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a) (2006).)¹ This duty is commonly referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivision (a).² The IDEA and the California Education Code do not

¹ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

² Instead of the term "evaluate," which is found in the IDEA, the Education Code uses the term "assess."

specify which activities are sufficient to meet a school district's child find obligation, and there is no requirement that a school district directly notify every household within its boundaries about child find. However, California law obligates the SELPA to establish written policies and procedures for use by its constituent local agencies for a continuous child find policy. (Ed. Code § 56300, subd. (d)(1).) The school district must actively and systematically seek out "all individuals with exceptional needs, from birth to 21 years of age," including children not enrolled in public school programs, who reside in a school district or are under the jurisdiction of a SELPA. (Ed. Code, § 56300.) The school district's duty for child find is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196. ("*Cari Rae S.*"); *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

The law also provides that child find shall apply to parentally-placed private school children, defined as children who are enrolled by their parents in private school. (34 C.F.R. § 300.131; Ed. Code § 56170.) The IDEA regulations and the Education Code specify that child find for children enrolled by their parents in private school is the responsibility of the district of location (DOL) of where the district in which the private school is located. (34 C.F.R. § 300.131, Ed. Code § 56171.) The purpose of this child find activity is to ensure the equitable participation of parentally-placed private school children in services that a school district may provide to children who attend private school in the district, as well as an accurate count of those children. (Office of Special Education Programs, *Letter to Eig*, January 28, 2009, 52 IDELR 136 (*Letter to Eig*).)³ A student in a parentally-placed private school may file a due process complaint based on a DOL's failure to comply with its child

³ The IDEA imposes other obligations upon school districts regarding parentally-placed private school students. Such students are not entitled to the same special education services as students enrolled in public schools, rather, they receive services based upon an equitable apportionment of available funds. (34 C.F.R. §§ 300.132 and 300.133.) School districts must hold timely and meaningful consultations with private school representatives and representatives of parents of parentally-placed private school children with disabilities regarding, *inter alia*, child find, and about resources the school district has available to private school students with disabilities. (34 C.F.R. § 300.134.) When the timely and meaningful consultation has occurred, the school district must obtain a written affirmation that it has occurred signed by the representatives of the participating private schools. (34 C.F.R. § 300.135.) Parents have no standing to request a due process hearing based upon a school district's violation of the "meaningful consultation meeting" requirements. (34 C.F.R. § 300.140 (a).) Rather, private school representatives may file a compliance complaint with the state. (34 C.F.R. § 300.140 (c).) However, since "meaningful consultation" meetings can involve the dissemination of child find information and materials to private school representatives, evidence regarding these meetings is relevant as to whether a school district has met its child find obligations.

find obligations. (34 C.F.R. § 300.140(a).) Again, however, neither the IDEA nor the Education Code specify which activities are sufficient to meet a school district's child find obligation, and there is no requirement that a school district directly notify every household within its boundaries about child find.

The DOL is charged with assessing the child and holding an IEP team meeting to consider the assessment and to determine whether the child is eligible for special education. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46593 (August 14, 2006) (hereafter Comments to Regulations.)) If the IEP team finds the child to be eligible for special education, then the district of residence (DOR), which is the district in which the child resides, is charged with convening an IEP meeting to offer a FAPE to the child. (34 C.F.R. § 300.201; Comments to Regulations, *supra*, 46593.) If, however, the parent expresses the intention to keep the child enrolled in the private elementary or secondary school located in another school district, the DOR has no obligation to make FAPE available to the child. (Comments to Regulations, *ibid.*) If parents request an assessment from the DOR, rather than the DOL, the DOR may not refuse to conduct the assessment and determine the child's eligibility for FAPE because the child attends a private school in another school district. (*Letter to Eig, supra.*) Though the United States Office of Special Education Programs of the United States Department of Education (OSEP) does not recommend it, parents can theoretically request assessments from both school districts. (Comments to Regulations, *supra*, 46593.) The Comments to the Regulations also state that the DOL is responsible for conducting reevaluations as part of its child find duties. (Comments to Regulations, *ibid.*)

Until they were amended effective October 2006, the regulations implementing the IDEA provided that child find for parentally-placed private school children was the responsibility of the DOR. (34 C.F.R. § 300.451(1999).) Education Code section 56171 also so provided, until October 10, 2007. On that date, Education Code section 56171 was amended to provide, in conformity with the October 2006 federal regulations, that the responsibility of child find for such privately placed students was the DOL.

The child find activities a school district undertakes for parentally-placed private school children must be similar to the activities undertaken for the school district's public school children, and must be completed in a time period comparable to that for student attending public school in the school district. (34 C.F.R. § 300.131(c) & (e); Ed. Code, § 56301, subds. (c)(1) & (3).) The U.S. Department of Education (ED) has elaborated upon the meaning of "similar" activities in this context, stating that "similar" activities would generally include, but are not limited to, such activities as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at community activities, and creating direct liaisons with private schools. (Comments to Regulations, *supra*, 46593.) The ED has also elaborated upon the definition of "comparable" time period as meaning that the school district's child find activities must be conducted within a reasonable period of time, without undue delay, and may not be delayed until after the school district conducts child find for public school children. (*Ibid.*)

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Cari Rae S.*, *supra*, 158 F. Supp. 2d at p. 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031).)

DISCUSSION

SDUSD asserts that OAH should dismiss the complaint because SDUSD does not have a child find duty because LMSV had already found Student eligible for special education services. In this case, the issue is not SDUSD's child find duties to conduct an initial evaluation for special education services as the DOL, but its legal obligation to conduct a reevaluation since Student is already eligible to receive special education services in her DOR, LMSV. SDUSD's motion to dismiss fails to acknowledge that its child find duties as the DOL also include conducting reevaluations. (Comments to Regulations, *supra*, 46593.) Student in the complaint, opposition to the motion to dismiss and requested additional information establishes a triable issue that SDUSD did not comply with its legal obligations under 34 Code of Federal Regulations, part 300.131 to reevaluate Student.

Further, in support of its position that it does not have a child find duty because this duty rests on LMSV as the DOR, SDUSD relies on *Student v. San Francisco Unified School District* (2011) Cal.Ofc.Admin.Hrngs. Case No. 2011020678. However, that case is distinguishable because it involved the DOR's (San Francisco Unified School District) obligation to assess student, who attended a private school in a different school district. This decision found that the DOR had its own independent duty to assess for special education eligibility after parents requested an assessment, along with the DOL who eventually assessed student. Because the assessment obligations are independent for DORs and DOLs, SDUSD as the DOL has its own child obligations, and whether it satisfied its obligation is an issue for hearing.⁴

Finally, as to the requested relief for parental reimbursement, the IDEA and implementing regulations do not explicitly bar parental reimbursement for out-of-pocket costs caused by a DOL's failure to comply with its child find duties. (34 C.F.R.

⁴ This order does not address LMSV's obligation to assess Student and convene an annual IEP team meeting. (See *Student v. San Mateo Unified High School District and San Mateo County Mental Health* (2008) Cal.Ofc.Admin.Hrngs. Case No. 2007110023.)

§ 300.140(b).) Because the hearing procedures in 34 Code of Federal Regulations, parts 300.504 through 300.519 apply, a reasonable argument exists that parental reimbursement exists as an available remedy, which is best determined after a full evidentiary hearing. Therefore, the SDUSD's motion to dismiss because Student seeks parental reimbursement is denied.

ORDER

SDUSD's Motion to Dismiss is denied. The matter shall proceed as scheduled.

Dated: February 27, 2012

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings