

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

In the Matter of:

STUDENT,

Petitioner,

vs.

YUCAIPA-CALIMESA JOINT UNIFIED
SCHOOL DISTRICT

and

SAN BERNARDINO COUNTY
DEPARTMENT OF BEHAVIORAL
HEALTH,

Respondents.

OAH NO. N 2005070683

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Yucaipa, California on September 2 and 6, 2005.

Student (student) was represented by advocate Jillian Bonnington.

Ms. Gail Lindberg, program manager for the East Valley Special Education Local Plan Area, represented the Yucaipa-Calimesa Joint Unified School District (district).

Scott M. Runyan, Esq. represented the San Bernardino County Department of Behavioral Health (DBH).

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause to allow the parties to submit written closing arguments/briefs. The parties' written arguments/briefs were received, read, and considered, and the matter was deemed submitted on September 27, 2005.

During the continuance period, from the date the parties rested their cases, September 7, 2005 until the matter was deemed submitted on September 27, 2005, petitioner filed the

following motions: a motion for reconsideration of the denial of petitioner's motion for a "stay put" order; and a motion for sanctions against the district. Those motions and the briefs filed by respondents in opposition were read and considered. The rulings on the motions follow:

1. Petitioner's motion for reconsideration of her "stay put" request is denied. Petitioner's original motion for a "stay put" order was heard, and denied, by ALJ William O. Hoover on July 29, 2005. Petitioner then filed a motion for reconsideration of ALJ Hoover's order. That motion for reconsideration was heard on the record, and denied, by ALJ Hewitt on the first day of the hearing, September 2, 2005. Petitioner's current motion for reconsideration of ALJ Hoover's and ALJ Hewitt's rulings was filed on September 14, 2005. This, petitioner's third attempt to obtain a "stay put" order, also fails. The basis for denial of petitioner's current motion for reconsideration will become evident from the facts, conclusions, and order resulting from the instant due process hearing.

2. Petitioner's motion for sanctions against the district is also denied based on petitioner's failure to present competent evidence that district representatives engaged in any bad faith actions during the instant litigation.

PROPOSED ISSUES

1. Was petitioner provided with a Free and Appropriate Public Education (FAPE) from June 6, 2005 through the present?

2. Did respondents properly implement and fund student's Individualized Education Plan (IEP) as described in the June 6, 2005 and June 27, 2005 IEP documents?

3. Did respondents offer services and instruction designed to meet student's unique needs?

4. Is the district obligated to fund student's current placement if DBH is statutorily prohibited from funding the placement?

INTRODUCTION

The reason the previous section is titled "proposed issues" is because all of the issues delineated by petitioner really hinge on one, key issue. All parties agree on the relevant underlying facts. The key issue is whether, given the facts of the instant case, respondents are statutorily prohibited from funding student's current placement. If so, then respondents have not "denied" student a FAPE because, they have no discretion to "deny" funding the placement. If, however, respondents are not statutorily prohibited from funding petitioner's current placement then DBH is ready and willing to fund petitioner's placement, retroactive to June 6, 2005.

ISSUE

1. Are respondents statutorily prohibited from funding student's current placement?

FACTUAL FINDINGS

1. Student, whose date of birth is May 4, 1989, is a 16-year-old female.
2. Student attended school in the district during the 2002-2003 and 2003-2004 school years. During these periods student was not identified as a special education student.
3. Student's parents are currently separated and student's mother has sole legal and physical custody of student.
4. In 2004, student's mother relocated student to Arizona. Student's parents remained in California. On December 19, 2004, student's mother placed student at Youth Care, Inc. (Youth Care) due to student's emotional instability. Youth Care is a Delaware corporation located in, and doing business in, Draper, Utah. Youth Care is a group home/residential care facility that provides in-house care for mentally disturbed youths.
5. Student's mother contacted the district to inquire about special education services that may be available to student since student's parents live within district boundaries. On February 17, 2005, the district sent its school psychologist to Utah to conduct a psycho educational assessment of student. Upon completion of the assessment the district concluded that student was eligible for special education under the category of emotional disturbance (ED), but did not qualify as a student with a specific learning disability (SLD).
6. On March 18, 2005 an Individualized Education Program (IEP) team was convened to discuss student's needs. As a result of the meeting, the district offered to place student at the district's Yucaipa High School in a Special Class for ED students. Student's mother disagreed with the placement and requested an AB2726 residential placement¹. The district informed mother that DBH needed to conduct an assessment before an AB2726 placement could be offered. Student's mother signed an authorization form allowing release of information to DBH and the district referred the matter to DBH.
7. DBH conducted an assessment of student, as requested.
8. On June 6, 2005, the IEP team again met to discuss student's situation. The IEP team agreed that "residential care under AB2726 is appropriate at this time." (Petitioner's Exhibit 2.) Student's mother was adamant in her assertion that student's current placement at Youth Care is an appropriate placement for student. DBH was receptive to mother's request; however, DBH needed proof that Youth Care is a nonprofit entity. This request was based on

¹ This refers to a mental health services placement.

DBH's belief, as will be discussed in the Legal Conclusions section of this decision, that DBH was statutorily prohibited from funding placements in out-of-state "for profit" entities. As stated in student's June 6, 2005 IEP, "[DBH] has made [student] eligible for AB2726 as of this date 6/6/05. Once Youth Care provides information to DBH regarding funding for placement and their non-profit status, DBH will make it effective today." (Petitioner's Exhibit 2.) The IEP also states: "The District offer of FAPE for educational placement for the 30 days interim until the next IEP meeting is the NPS placement." (Petitioner's Exhibit 2.) Due to the uncertainty of Youth Care's profit/non-profit status, other placement options were discussed at the IEP meeting. The following alternative placements were suggested: Provo Canyon, a Utah placement; Cinnamon Hills, a Utah placement; and an in-state, California placement. Student's mother refused to consider any of the suggestions. Instead, student's mother insisted that student remain in her current placement at Youth Care.

9. On June 27, 2005, a "follow-up" IEP team meeting was held. Again, Youth Care's profit/non-profit status was discussed. In fact, Youth Care's profit/non-profit status was the key discussion. All parties agreed that Youth Care was an appropriate placement for student unless its profit/non-profit status precluded funding. Consequently, DBH again requested documentation of Youth Care's profit/non-profit status.

10. Ultimately, it was established that Youth Care is a "for-profit" entity that provides direct services to student. Youth Care has a business relationship with Aspen Solutions, Inc. (Aspen Solutions), a non-profit, California corporation. Youth Care and Aspen Solutions are associated through a "Management Agreement," dated January 1, 2003. That agreement reflects that Aspen Solutions "is engaged in the business of providing certain management and administrative services to providers of health care services." (Petitioner's Exhibit 3.). Youth Care is such a "provider of health care services" and Aspen Solutions has contracted with Youth Care to: provide administrative coordination and support to Youth Care; establish bookkeeping and accounting systems for Youth Care, including preparation, distribution and recordation of all bills and statements for services rendered by Youth Care; and prepare cost reports. Aspen Solutions is responsible for recruiting, hiring, and compensating its employees, employees who are responsible for performing Aspen Solutions' previously listed responsibilities. Aspen Solutions has no role in hiring Youth Care employees and Youth Care, not Aspen Solutions, is responsible for the "supervision of all Youth [Care] staff with regards to therapeutic activities..." (Petitioner's Exhibit 3). Aspen Solutions plays no part in the daily activities at Youth Care. Aspen Education Group Vice President Ruth Moore's testimony established that: "the finance department of Youth Care sets rates for services. The management fee charged by Aspen Solutions is a percentage for each facility. The amounts collected can vary although the percentage is standardized across the facilities." Aspen Solutions plays no role in Youth Care's rate setting and does not mandate that services billed through Aspen Solutions be provided by Youth Care on a non-profit basis.

11. By letter, dated July 7, 2005, DBH notified mother that DBH can not fund student's placement at Youth Care because Youth Care is a "for-profit" entity and DBH is prohibited by California Code of Regulations, title 2 (Regulations), section 60100, subdivision

(h) and California Welfare and Institutions Code (Code) section 11460, subdivision (c), subsections (2) and (3), from funding a “for-profit” placement.

12. Other county agencies in California have made AB2726 placements at Youth Care. In fact, there are several agencies that currently have such placements at Youth Care. There was no evidence that Youth Care’s “profit/non-profit” status was ever considered by the California county agencies that currently fund AB2726 placements at Youth Care. In the present instance, when DBH originally requested information concerning Youth Care’s profit/non-profit status, it received documents concerning Aspen Solutions. Those documents reveal that Aspen Solutions is a non-profit corporation.

LEGAL CONCLUSIONS

1. California Government Code sections 7570 through 7588 shifts responsibility for certain services from local education agencies to other state agencies, such as DBH in the present instance, to provide services, such as occupational therapy, physical therapy, nursing services, mental health services, and residential placements. In pertinent part, Regulations section 60100 provides:

(h) Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil’s needs and only when the requirements of subsections (d) and (e) have been met. Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3). For educational purposes, the pupil shall receive services from a privately operated non-medical, non-detention school certified by the California Department of Education. (Emphasis added.)

Code section 11460, subdivision (c), subsection (3), provides:

State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, shall only be made to a group home organized and operated on a nonprofit basis. (Emphasis added.)

As set forth in Findings 4 and 10, Youth Care is an out-of-state group home/residential care facility that operates on a profit basis. It is not operated on a nonprofit basis. Accordingly, DBH and district are prohibited from funding student’s Youth Care placement. Code section 11460(c)(3) states that reimbursements for placements “shall only be made to a group home organized and operated on a nonprofit basis.” The statute uses the mandatory term “shall;” consequently, there is an absolute prohibition against funding Youth Care, a group home organized and operated on a profit basis.

2. Petitioner asserts that based on the business relationship between Youth Care and Aspen Solutions, Youth Care falls within Aspen Solutions' non-profit status; thereby avoiding the Code's funding prohibition. Petitioner highlights the fact that similar placements at Youth Care have been, and currently are, funded by other California county agencies; therefore, such placements must be permissible. Petitioner's assertion lacks merit. As set forth in Finding 5, while it is true that other California county agencies have placed individuals at Youth Care, it seems that the placements were made without a full understanding of Youth Care's status and its true relationship with Aspen Solutions. DBH discovered, as set forth in Finding 10, that Aspen Solutions and Youth Care are distinct legal entities; Aspen Solutions merely acts as Youth Care's bookkeeper. Code section 11460(c)(3) states in pertinent part that agencies, such as DBH and the district, may only make payments to "a group home organized and operated on a nonprofit basis." Youth Care is the group home/residential facility, not Aspen Solutions. Youth care is the entity providing services to student, not Aspen Solutions. Youth Care's profit/nonprofit status is what is important, not Aspen Solutions'. Youth Care is "for profit" and cannot magically become "nonprofit" by virtue of its management agreement with Aspen Solutions. Consequently, the determinations that DBH and district are absolutely prohibited from funding student's current placement, and that petitioner's "stay put" requests were properly denied are, and were, appropriate.

3. As indicated by Finding 4, mother unilaterally elected to place student in the current Youth Care placement. Mother and her advocate knew, as early as June 6, 2005, that DBH was concerned about Youth Care's profit/nonprofit status and its effect on respondents' abilities to fund the placement (Finding 8). Nonetheless, mother elected to continue with the placement. By doing so, she assumed the risk that she would not be reimbursed for costs of the placement. Additionally, because DBH and district are statutorily prohibited from funding the Youth Care placement, they are equally prohibited from making any retroactive reimbursements to mother for the placement.

4. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) In the present instance, DBH and the district have worked in good faith to develop an appropriate program for student. DBH is ready and willing to fund an appropriate placement. In fact, DBH is ready and willing, but unable, to fund student's current placement at Youth Care. Consequently, respondents have not denied student a FAPE because there is no current IEP in effect with which to conform, and respondents are diligently pursuing other reasonable alternatives to student's Youth Care Placement. Student's mother is encouraged to work with respondents to find an appropriate placement by considering other, viable alternatives.

5. Petitioner asserts that if DBH fails to fund student's current placement, then the district should fund the placement under the "single line of authority" doctrine. It is unnecessary to discuss the "single line" doctrine because, district, like DBH falls within the

purview of Regulations section 60100 and Code section 11460. Accordingly, both DBH and district are statutorily barred from funding student's placement at any out-of-state "for-profit" residential facility.

6. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, respondents prevailed on the controlling issue and all sub-issues.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is denied.
2. The parties shall continue to engage in the IEP process and diligently pursue placement alternatives to Youth Care.

Dated: November 2, 2005

ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.