

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

In the Matter of:

STUDENT,

Petitioner,

vs.

SAN DIEGO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH No. N 2005090094

DECISION

Elizabeth Feyzbakhsh, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 12, 2005, in San Diego, California.

Student's mother represented her son. Both Student's mother and Student were present throughout the hearing. Amy Bozone, Assistant General Counsel, represented district San Diego Unified School District.

The following witnesses testified at the hearing: Leslie McDonald, Lynn B. Aung, Caroline Jackson, Student's mother, and Student.

Oral and documentary evidence was received. The parties presented oral closing arguments and on December 12, 2005, the matter was closed and submitted.

ISSUE

Is Student entitled to monetary compensation for the failure of San Diego Unified School District to educate him?

CONTENTIONS OF THE PARTIES

Student's mother is concerned about her son's academic abilities. Student is having difficulty filling out simple applications for employment. Student's mother contends that San Diego Unified School District failed to educate her son and that, as a result, his reading is at a third grade level and his writing is at a second grade level. Student's mother does not claim that her son was denied a Free and Appropriate Public Education (FAPE) in any given year; but rather that her son is not now educated and therefore the school district failed. She wants San Diego Unified School District to "rehabilitate" her son educationally. She initially requested that Student be enrolled in a reading program through Lindamood Bell or Sylvan Learning Center. Thereafter she decided that these programs were unacceptable because if Student were to get hospitalized and become unable to attend, he would be dropped from the program. She would prefer financial compensation so that she can help him on her own.

District, San Diego Unified School District, contends that Student is entitled to no compensation because appropriate Individual Education Plans (IEP's) were implemented for Student, and Student failed to take advantage of his educational opportunities. District further contends that Student remains eligible for special education services but that he is not currently enrolled in school.

FACTUAL FINDINGS

Background Facts

1. Student is a 21 year old special education student who currently does not attend any school. He resides with his mother. Student is a kind and shy young man who enjoys interacting with his family and with disabled and non-disabled peers alike. He suffers from Sickle Cell Anemia, Asthma, Attention Deficit Hyperactivity Disorder (ADHD), Learning Disability, Emotional Disturbance, and mild Mental Retardation.

2. Student was enrolled in the District from kindergarten through April 2002, at which time he began attending Mount Miguel High School in Grossmont Unified School District. He attended Mount Miguel for approximately six weeks, until the end of the 2001-2002 academic year. Student withdrew from Grossmont Unified School District on August 25, 2002.

Student and his mother moved to Arizona in August 2002, where he attended a school called "Lifeskills." They moved back to the San Diego area and became residents of the Grossmont Unified School District in September 2005.

3. Student is not currently attending school and is not employed. He babysits his younger son and volunteers at the local recreational center. Student's mother does not want her son to receive further services from Grossmont Unified School District because she thinks it is too late. She has worked hard to keep her son out of trouble. He doesn't use

drugs and has no criminal record. She does not want to put him back on a high school campus because she doesn't want him to get teased. Student does not want to go to school now. He does not want to be on a campus with kids. He testified that if he were given a program, he would not attend.

4. Student has received special education services from the District as a result of his multiple disabilities since the age of seven. When he was younger, he was prescribed Ritalin for his ADHD. He was taken off of Ritalin in the year 2000.

5. According to Student's mother, Student was demoralized throughout the years because the other children picked on him. Student's mother claims that his learning deficits should have been addressed in his earlier years. She claims that Student was given no programs. She further claims that there were reading programs offered to other students that were not offered to her son, but gave no specific information regarding those programs.

She testified that Student was skipped over and that, although he received failing marks, he was continually passed on to the next grade. She feels that his problems should have been addressed in earlier years. Student's mother believes that her son began "clowning around" in the tenth and eleventh grade because he was unable to do the work and would rather be seen as a clown than someone unable to do the work.

Student's Medical Condition

6. Student missed a lot of school, but Student's mother claims that he was often sick due to his Sickle Cell Anemia and that he should have had home tutoring or home hospital care. Student's mother could not indicate specific dates that should have been considered sick days. Student testified that his Sickle Cell Anemia was very painful. When he would have a crisis it would sometimes be so painful that he had to crawl around the house. Sometimes they would last for three weeks at a time. He told the teachers that it was hard for him. He testified that he did the best he could. Student admitted that he didn't do his work in class while he attended Junipero Serra High School. He further admitted that many of his absences were not because he was ill, but rather, because he stayed up late at night and would be unable to get up for school in the morning. He did not go to his "mainstream" classes because he would get insulted or teased.

7. On April 6, 2001, a Nurse Assessment Report was completed. The report indicated that Student suffered from Sickle Cell Anemia, ADHD, and Asthma. The nurse noted that Student continued to miss an excessive number of school days, some due to tiredness and some not. The nurse further noted that Student continued to have trouble focusing and that he had stopped taking Ritalin. The report indicates that Student's parents intended to restart Ritalin immediately. The report indicates that the Sickle Cell Anemia has not been a significant problem in more than two years, that he has not had medications for ADHD in two years, and that his Asthma has not been a significant problem as long as his inhaler is used.

8. A Social Security Hearing decision found that Student's Sickle Cell Anemia had mostly resolved itself by 1997.

9. A psychological Assessment Report was completed on February 4, 1998. In that report Student was noted to have a history of lack of motivation and manipulation. Student did not meet with the psychologist very often. The psychologist noted that ideas and strategies have been implemented to help him behave more appropriately but that the plans were "stymied by non-attendance and appointments not met."

10. According to Lynn Aung, a home-hospital plan is only appropriate where a student is physically unable to attend school. They are usually provided on a temporary basis, such as thirty to sixty days and there needs to be a medical certification of inability to attend school. She testified that Student's medical condition did not warrant a home-hospital program.

Student's Individual Education Plans

11. Student's mother attended all the IEP meetings and voiced her concerns to the IEP team. She stated that she was unable to read the IEP's herself. Student's attendance was addressed at many IEP team meetings and at a parent/teacher conference.

12. An IEP team meeting was held on April 28, 1999, when Student was in the eighth grade. He was eligible for special education due to his emotional disability. The IEP was consented to by both Student and his mother. At that time, his level of educational performance indicated that very little learning had occurred in the previous year because of "chronic off task behavior, not minding our business, put downs and unwillingness to complete work correctly and habitual tardies." Other difficulties included not following directions, very poor impulse control, verbal outbursts and an inability to know when to stop clowning around and get down to business. A more structured and supportive environment was recommended for Student as he moved from junior high to high school. The District recommended that Student be placed in a Special Day Class. He was also given preferential seating, an assignment notebook, extended time for completing tests and assignments, frequent breaks, increased verbal response time, and directions communicated in a variety of ways.

13. An IEP dated March 16, 2000 described Student as a likable, kind, and well groomed 15 year old ninth grader attending Bell Junior High School. At that time it was noted that very little learning had occurred in the previous two years and the levels of educational performance were virtually identical to those noted the previous year. Both Student and his mother consented to this IEP. Student was given supports and accommodations identical to those provided in the previous year.

14. An IEP was completed on April 6, 2001, and was consented to by Student and his mother. At that time, Student was attending a Special Day Class at Junipero Serra High School. His levels of educational performance noted that he started the year off on a good

note with attendance and grades but as the year progressed, Student's attendance dropped and as did his grades. It was noted that teachers tried to help Student with his grades but that he would not complete the assignments or take them home. It was further noted that his first term grades were poor due to his lack of attendance and failure to complete assignments. A parent-teacher conference was held. Student's attendance record was discussed as was the requirement for him to have better attendance to improve his grades. His teachers reported that his lack of attendance was at a critical level. It was further reported that when Student did attend class, he refused to complete his work and spent his time socializing with his friends. It was recommended that Student continue in his Special day class with similar supports and accommodations to the prior year.

15. The IEP team also met to formulate transitional goals for Student. At that time Student indicated that he was interested in graduating high school and attending college and "it was decided to consider alternative placement and bring in additional participants to assist in developing a plan at a future meeting."

16. An IEP team meeting was held on March 20, 2002 to develop the ITP. The team emphasized developing work incentive options on campus leading toward workability options. The IEP goals emphasized academic areas including reading comprehension, math and written expression. Attendance and grades were discussed. The team agreed that a behavior support plan should be developed to address attendance and socialization. Additionally, there was to be a referral for the student learning center.

17. An IEP team meeting was held on June 10, 2002. Student's mother agreed with the goals and objectives of the IEP and she agreed to the placement and service recommendations. The goals and objectives emphasized improvement in attendance and improvement in reading. He remained in the Special Day Class with supports and accommodations similar to the prior year. The team noted that although Student has Sickle Cell Anemia, he has been healthy for the past two years.

18. An IEP team meeting was held on March 20, 2003. Student's mother consented to the IEP. It was noted that Student had difficulty staying on task and completing assignments. The team felt that he was capable but that missing and incomplete assignments coupled with disruptive behavior had resulted in failing grades. The team noted that Student's reading level had improved to grade seven. The team noted that although Student has Sickle Cell Anemia, he has been healthy for the past three years. The team further noted that absences and trancies were an issue. The goals and objectives focused on improving attendance and completion of work. The activities focused on Student exploring vocational opportunities.

Evaluations and Testing

19. A psychological evaluation was conducted on May 9, 2001 as part of Student's triennial evaluation. At that time he was in tenth grade and participating in the Emotionally Disabled Special Day Program. The report indicated that Student was not

cooperative during the testing process and that he used avoidance behaviors to avoid the testing. His academic functioning was found to be well below grade level, six to seven years below grade and age placement for reading and math was even weaker. Lynn B. Aung, the school psychologist concluded that Student exhibited outbursts of angry behaviors including verbal threats and that his academic skills were affected by this behavior. She recommended continuation of the Emotionally Disabled Special Day classroom because he could receive accommodation and monitoring in that environment.

20. Student took the Stanford Diagnostic Reading Test in 2001 as a tenth grader. He scored significantly below grade level in all areas. He scored a 3.0 overall, which indicates that he was reading overall at a third grade level. He scored a 4.0 in reading vocabulary, indicating a fourth grade vocabulary level. He scored a 2.5 in reading comprehension, indicating a second grade, fifth month comprehension level. He scored a 4.2 in scanning, indicating a fourth grade, second month, scanning level.

Student's Attendance

21. The academic year consists of approximately one hundred and eighty days of school. Student's attendance record for the 2000-2001 academic year indicated a total of forty-nine missed school days. Eighteen absences were due to illness, two were excused, and twenty-nine full day absences were unverified. Many more absences were noted for individual periods throughout the day. Student had a total of forty-nine unverified absences from period one, thirty-eight unverified absences from period two, thirty-six unverified absences from period three, thirty-six unverified absences from period four, thirty-two unverified absences from period five, and forty-six unverified absences from period six.

22. Student's attendance record for the 2001-2002 academic year indicated that there were thirty-six full day absences. Ten absences were due to illness, one absence was excused, twenty days were unverified and five days were for suspensions. Again, many more absences were noted for individual periods throughout the day. Student had twenty-nine unverified absences and five tardies from period one, twenty-four unverified absences and twenty-five tardies from period two, twenty-five unverified absences and eight tardies from period three, twenty-two unverified absences and two tardies from period four, twenty-six unverified absences and four tardies from period five, and twenty-five unverified absences from period six.

23. Leslie Mc Donald, has been the Dean of Students at Junipero Serra High School since January of 2002 and was the in school counselor for the Spring 2002 semester. Leslie McDonald testified that attendance goes hand in hand with academic success. During the times when Student's attendance was regular, his grades were higher. When the absences started to become more frequent, the grades began to drop. Student was not a disciplinary problem although he did have some disciplinary issues and his discipline seemed to be escalating.

Student's Disciplinary Record

24. Student's Assertive Discipline Record from 2000-2001 consisted of three entries. The first occurred on January 12, 2001 when Student was sent to tardy sweep and gave the teacher the wrong name. His Parent was called and he was given two days of detention. The second entry was on March 27, 2001, when it is noted that Student was tardy twice during the day and has had numerous tardies and period absences throughout the school year. He was also disruptive in one class, so the parent was called and he was assigned two days of Saturday school. Third, on May 30, 2001 Student was kept out of sixth period for two days because he was extremely disruptive in that class.

25. Student's Assertive Discipline Record from 2001-2002 consisted of five entries. This record is corroborated by the Reports on Suspension. (exhibit H) On September 29, 2001 he received two referrals from the same teacher for being disruptive. He became upset for being asked to leave a computer and he threw the teacher's papers on the floor. He was suspended for two periods. On October 31, 2001, Student was sent home at his parent's request after Student was flying a balloon in class and refused to give it to the substitute teacher. Thereafter he was defiant to the Dean when asked for his cell phone. On November 29, 2001, Student was suspended for three days for kicking another student and he was transported home by the police. On March 7, 2002, Student was suspended for three days after he threw a chair across the room because he was angry after being told he could not use a computer because he had been viewing inappropriate websites. Lastly, on March 21, 2002, Student was counseled for minor disruption of the classroom.

Student's Report Cards

26. Student's report cards from 1999-2002 were submitted into evidence. They indicate grades ranging from "B" to "F". Student received his best marks during the first marking period of 2000. Each marking period is six weeks in duration and there are six marking periods per year. The third and sixth marking periods indicate the final grades received in a given course. During the first marking period of 2000, Student received the following marks: Algebra 1- "C", Physical Education-"C", English 3-"C", Life Science-"C", Mlt. St. Skl.- "B", Comp. App/Bus 1-"D". During that period of time, Student only missed four days of school and they were all excused. After that point, Student's attendance dropped and so did his grades.

Appropriateness of Student's Placement

27. Lynn B. Aung was employed as a school psychologist at Junipero Serra High School during the 2000-2001 school year. She conducted a three year re-evaluation of Student. She administered the Woodcock Johnson Test of Cognitive abilities. Student was sensitive to the testing process and uncooperative at times. He was quiet and that it was difficult to get information from him. She determined that he qualified for special education services due to his Emotional Disability, although she disagreed with the ADHD diagnosis and thought maybe ADD was more appropriate. She testified that the Emotionally Disabled

Special Day Class was the appropriate placement for Student because the most of the classes are small and structured. Only the elective classes are mainstreamed. She testified that he could best be monitored in that class and that the classroom is specifically designed for emotionally disabled students. She testified that the classes were taught at his level, that he could sit close to the teacher and he was given extra time for tests. However, the text books were at a tenth grade level.

28. Lynn Aung testified that she believed the IEP's in place for Student were appropriate. The goals appropriately addressed his behavioral problems. She testified that she believes this placement was appropriate and that in her professional experience, students with Student's diagnoses can do well in the type of program he was given.

29. Caroline Jackson is a special education teacher. She has been teaching school at Junipero Serra High School for ten years. She taught English and Social Studies to Student while he attended Junipero Serra. In her opinion, ED Special Day Class was an appropriate placement for Student. There are usually approximately ten students per class. Her English class typically had ten to twelve students and her World Studies class would have five or six students. She would work individually with students although she doesn't specifically recall working individually with Student. Her students have varying ability levels but that Student was on the same level as other students in her classes. Although the text books were at a higher level than her students that the teachers would break down the chapters for the students and teach at the students level. She taught her lessons at a level that Student could handle. According to Jackson, the biggest problem Student had was his attendance. He often arrived late and had little motivation to get started. He would be talking to other students and preferred to talk than to do the work. She was available for after school tutoring but that Student never came in. Student did not complete his work.

LEGAL CONCLUSIONS

General Applicable Law

1. The purpose of the Individual Disability Education Act (IDEA) is to ensure that all children with disabilities have available to them a Free and Appropriate Public Education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. (20 U.S.C. § 1400(d).)

2. The term "special education" in federal law means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29). California Education Code section 56031 augments this definition to include "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."

3. A Free Appropriate Public Education (FAPE) is one provided at public expense, under public supervision and direction, and in conformity with an IEP which is developed for the child.(20 U.S. C. § 1401(8).)

4. The obligation to provide a FAPE does not require a state to “maximize each child’s potential” (*Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 198). School District’s are required to provide access to an education which is sufficient to confer some educational benefit upon the child.(*Westchester County v. Rowley* (1982) 458 U.S. 176, 198).

Determination of Issues

5. The issue presented in this case is whether Student is entitled to monetary compensation for the failure of the District to educate her son. Student is not entitled to monetary compensation for the failure of San Diego Unified School District to educate her son, therefore Student’s request is denied.

6. The district provided Student with a free and appropriate public education that emphasized special education and related services designed to meet his unique needs and prepare him for employment and independent living. Student’s mother is incorrect in her contention that the school district failed her son. Appropriate IEP’s were developed for Student and all the appropriate parties were present and participated in the IEP process, including Student and his mother. Student was placed in a Special Day Class specifically designed for students like him. He was mainstreamed for his elective courses only. Student’s failure to attend his classes made it impossible for him to succeed in school. Student’s mother claims that Student’s excessive absences were due to illness but could provide no specific dates when Student’s unverified absences should have been excused. Student himself testified that he missed school not because he was ill, but because he stayed up too late the night before and was too tired to go to school.

7. Student did not uphold his responsibilities with regard to his education. At the very least, attendance at the programs provided is necessary for those programs to be successful. The district provided access to an education sufficient to confer some educational benefit upon him. The school district set appropriate goals and benchmarks for Student. But, in order for any goals or benchmarks to be met, Student had to attend school and make an effort to learn. In addition to attendance, Student had to do the assignments. He did not. Over and over again his teachers indicate that he was not attending school and, when he did attend, he did not do his schoolwork. Student’s teacher indicated that she was available after school for tutoring but that Student never came in. She was also available during school for one to one teaching but Student was not interested in getting the extra help available to him. Student had time during class to complete assignments but chose not to do so.

8. Even now, Student does not want to commit to an educational program that can drop him for non-attendance. There is no evidence to support the conclusion that this refusal to commit to school is based on any medical condition.

ORDER

The petitioner's complaint is denied and all requests for relief are denied based on the conclusions of law 5 to 8.

Prevailing Party

1. 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 District prevailed on all issues 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: _____

ELIZABETH FEYZBAKHS
Administrative Law Judge
Office of Administrative Hearings
Special Education Division