

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. N 2005100440

DECISION

Administrative Law Judge, Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in San Juan Capistrano, California, on July 17 through July 20, 2006.

Petitioner, Student, was represented by Tim Jon Runner and Jillian Bonnington, Education Advocates. Mother attended the hearing on behalf of Student. Step-father also attended one afternoon of the hearing.

G.R. Roice represented the District. Kim Gaither attended the hearing on behalf of District.

PROCEDURAL HISTORY

On October 15, 2005, Petitioner initially filed a request for due process hearing on behalf of Student. After a series of motions and amended filings, Petitioner's request for a due process hearing was amended and deemed sufficient on November 5, 2005. As a result of the Resolution Conference on November 15, 2005, the parties reached an interim agreement to seek a mental health evaluation. The parties requested that the matter be continued to March 2006. All pending dates were taken off calendar, and the matter was scheduled for trial setting conference on March 6, 2006. Pursuant to the stipulation of the parties, the due process hearing was continued to July 17, 2006.

At the commencement of the hearing, Petitioner made two oral motions. Petitioner requested that the District produce witnesses, Ms. French, Ms. Harris, and A. Martin, all of whom were the subjects of personal subpoenas which were served on the District's Custodian of Records on July 11, 2006. The motion was denied subject to Code of Civil Procedure Sections 1987 and 1988. A motion for continuance was then made. No good cause having been presented, the motion was denied.

The hearing took place through July 20, 2006. The record remained open until August 9, 2006, for receipt of written closing briefs from each representative. The matter was submitted and the record closed on August 14, 2006.

ISSUES

For the years 2002-2003, 2003-2004, 2004-2005, and 2005-2006, did the District provide Student with a Free and Appropriate Public Education (FAPE)?

1. Did the District fail to fulfill its child find obligations from September 2002 through March 2006?
2. Did the District fail to comply with procedural requirements necessary to properly assess Student in its 2002 assessment?
3. Did the District fail to assess Student in all areas of suspected disability in 2002?
4. Was Student eligible for special education and related services from September 2002 to the present?

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is 16-years-old and resides within the jurisdictional boundaries of the District.

Did the District fail to fulfill its "Child Find" obligation?

2. Under "Child Find" a school district has an affirmative, ongoing duty to identify, locate, and evaluate all children who have suspected disabilities. The District shall be deemed to have knowledge that a child is a child with a disability if the behavior or performance of the child demonstrates the need for such services.

2002-2003 School Year¹

3. Student had a history of difficulty focusing on school work, but was generally successful in her early school years. Mother reported that Student was disorganized and struggled with completing her homework. No evidence was presented, however, to indicate Student exhibited any symptoms of depression or ADHD while at school. Throughout elementary school, Student maintained good grades and peer/teacher relationships.

4. In August 2002, Student began seeing Dr. Terry Schenk. Dr. Schenk diagnosed Student with depression and ADHD, inattentive type, however this information was not shared with the District. Student's first quarter of the eighth grade resulted in grades ranging from A to D+. Student's report card comments referenced problems with late, incomplete, and missing homework. There were no negative behavioral reports. There were no overt signs of any suspected disabilities. Petitioner failed to establish that the District had a duty to initiate a referral for special education. There was no violation of the District's "Child Find" obligation in the 2002-2003 school year.

2003-2004 and 2004-2005 School Years

5. No assessments were conducted by the District in the 2003-2004 or 2004-2005 school years. Student's grades continued to range from A to F. Student continued to be a perfectionist, and would not complete or turn in homework assignments. In 2003, Paul Corona, MD., placed Student on antidepressants, however this information was not shared with the District. Neither of Student's treating doctors recommended or requested a reassessment. None of Student's teachers indicated any problems with Student other than the completion of homework. Mother did not seek a reassessment of Student in 2003 or 2004. Based upon the information regarding Student, available to the District at the time, there was insufficient reason to suggest that Student was in need of special education and services between 2003 and 2005. Petitioner was unable to establish that the District had failed in its "Child Find" obligation.

2004-2005 School Year

6. By the 2004-2005 school year, Student's attendance and truancy became issues. In spite of Student's attention problems and drop in school attendance, Student passed the California High School Exit Examination (CASHEE) in the 10th grade with well above average scores. Student's 10th grade classroom performance ran the gamut from F to A+.

7. Between February 2003, and May 2005, Student had 28 disciplinary incidents, primarily regarding attendance issues. In response to Student's escalating problems, the

¹ As noted below, Student's mother expressly requested an assessment on September 27, 2002. Thus, the child find obligation of district relates only to the brief period before the request and the period beyond the fall of 2002.

District placed Student on a behavioral contract in April 2005. It is unknown whether the behavior intervention would have been successful for Student. Shortly after the plan was initiated, Mother removed Student from school, and placed her in a private facility in Utah. It is also unclear how many times Mother communicated with administrators or teachers during this period. However, neither party recalled discussing reassessment or a need for special education. The District made efforts to address Student's discernable problems with the behavioral contract. Given the District's obligation to consider available resources in the regular education program prior to making a special education referral, the District acted appropriately. There was no violation of the District's "Child Find" obligation in the 2003-2004 school year.

2005-2006 School Year

8. In May 2005, Student was unilaterally placed by her parents in the Aspen Wilderness Program in Utah. Mother notified the District that she removed Student from school. She did not request a reassessment of Student or special education services for Student at that time.

9. On June 24, 2005, Jeremy A. Chiles, Ph.D., a licensed clinical psychologist, prepared a psychological evaluation of Student. This evaluation was not shared with the District until Student's reassessment in 2006.

10. Student completed the Wilderness Program. On July 22, 2005, Student then transferred to the Aspen Ranch Academy (Aspen), a therapeutic residential center. Student remained in this placement for eight months, until her discharge on March 2, 2006. At no time while at Aspen did Student's therapists or teachers suggest that she receive special education or services. Petitioner failed to establish that the District had any information regarding Student during her stay in Utah. There was no violation of the District's "Child Find" obligation in the 2005-2006 school year.

Did the District fail to comply with procedural requirements necessary to properly assess Student in its 2002 assessment?

11. Generally, a proposed assessment plan shall be given to the parent of the pupil, in writing, within 15 days of the referral for assessment. On September 27, 2002, Mother requested, in writing, that the District assess Student for possible learning disabilities. The final assessment plan was not prepared until October 31, 2002. Student was assessed by the District on November 19, 2002, and the IEP team meeting held on November 22, 2002. The assessment plan was not prepared within the statutory 15 days. Although this was a violation of the procedural timeline, it resulted in no loss of services to Student.

12. The District is required to have the assessment conducted by persons knowledgeable in the areas of suspected disability. The assessment materials must assess specific areas of educational need. Moreover, psychological assessments, including

individually administered tests of intellectual or emotional functioning, must be administered by a credentialed school psychologist.

13. Phil Stein, Ph.D., prepared the psycho-educational evaluation. Dr. Stein has been a licensed school psychologist for the District for over 20 years. Dr. Stein specializes in emotionally disturbed children and has extensive experience with the educational classification of emotionally disturbed (ED). Dr. Stein possessed all required licensing and education to perform special education assessments and render opinions on test results.

14. Dr. Stein administered the Wechsler Intelligence Scale for Children III, Wechsler Individualized Achievement Test, and Woodcock-Johnson Psycho-educational Test Battery-III. Four of her teachers rated Student on the Conner's Teacher Rating Scale-Revised (CTRS) and the Attention Deficit Disorder Evaluation Scale (ADDES). Student also took the Berry Test of Visual-Motor Integration. Student's school records were reviewed. Student and her mother provided background information. Dr. Stein observed in the classroom. Student's assessment was multi-disciplinary and included information from multiple sources. There were no issues raised regarding the testing being discriminatory or conducted other than in Student's primary language. The District met all statutory requirements for assessment.

Did the District fail to assess Student in all areas of suspected disability in 2002?

15. A student must be assessed in all areas related to the suspected disability. Mother stated in her letter requesting an assessment, that Student, among other things, was having problems finishing tests and was overwhelmed by homework. Mother also reported a family history of non-specific learning disabilities. Mother signed the assessment plan which indicated Student's academic achievement, social/adaptive behavior, psycho-motor development, communication development, intellectual/cognitive development would be tested. Additional testing would also encompass attentional scales for ADHD. Neither Mother nor Student reported any health issues or physical disabilities. Accordingly, all areas of suspected disability were addressed in the assessment.

Was Student eligible for special education and related services from September 2002 to the present?

16. In general, a child with a disability is one with mental retardation, hearing impairments, speech or language impairments, visual impairments, autism, traumatic brain injury or other health impairments, serious emotional disturbance or specific learning disabilities.

2002-2003 School Year

17. The 2002 assessment revealed that Student is highly intelligent. She had friends and got along with both peers and teachers. The CTRS results noted nothing significant on social/emotional issues. The ADDES results were generally in the average

range, with only one score “at risk.” Further, there had been no reports, observations or recommendations suggesting a need for special education from Student’s teachers, therapists or doctors.² Student was observed and interviewed by Dr. Stein, who specifically looked for signs of depression. Dr. Stein found Student to be very popular and in no sense dysphoric.

18. On November 22, 2002, an Individualized Education Program (IEP) Meeting was held. The proper parties were present. The IEP was attended by Dr. Stein, Mother, Student, a special education teacher, and two of Student’s regular education teachers. Based upon all results of the assessment, Student was found ineligible for special education. Given that Student was ineligible for special education, the District was not required to prepare goals and objectives or offer services to Student. Both Student and Mother consented and signed the IEP.

19. No evidence was presented to suggest that Student’s test results were inaccurate or misinterpreted. Upon review of Student’s scores and data, two additional clinical psychologists, Dr. Terry Tibbetts and Dr. Walter Ernsdorf, opined that Student’s assessment data and scores did not support a finding of depression in 2002. Student was well-liked, participated in class, and was capable of good grades. Her educational performance supported the ability for success in school. Student did not qualify for special education in 2002-2003.

2003-2004 School Year

20. Mother indicated that Student’s difficulties with school assignments were ongoing. Academically, Student’s progress was similar to the year before. Her grades continued to fluxuate and her attendance declined, but there were no requests to reassess Student during the 2003-2004 school year. Student remained ineligible for special education and services.

2004-2005 School Year

21. In April 2005, Student was placed on a behavior plan to deal with her truancy issues. No request for reassessment was made at that time. In May 2005, Student was removed from school and sent to Aspen. Again, no request was made of the District to reassess Student.

22. In June 2005, Student was assessed by Dr. Jeremy Chiles, a clinical psychologist in Utah. In his evaluation, Dr. Chiles indicated that Student’s lack of confidence and internal sadness was consistent with Depressive Disorder Not Otherwise Specified (NOS). Student’s distractibility, daydreaming, and lack of focus were consistent with ADHD, Inattentive Type. None of this information, however, was shared with the District until the 2006 assessment. Further, Dr. Chiles did not detect any learning disabilities

² The only other observation was that Student employed an irregular pencil grip which adversely affected her digital dexterity. This observation though noted, was insufficient to recommend further OT/PT assessment.

in Student's core academic areas nor did he make any recommendations for special education or services for Student while at Aspen. The District was not required to reassess Student, and Student remained ineligible for special education and services.

2005-2006 School Year

23. In October 2005, while Student was still at Aspen, Mother requested that the District reassess Student. Student's suspected disabilities were primarily in the area of social/emotional functioning and ADHD. An assessment plan was prepared on December 15, 2005. Mother signed the assessment plan, and Student was assessed on February 10, 2006, when she returned from Aspen. The assessment was performed by Michael Tincup, Ph.D., lead school psychologist for the District.³

24. The 2006 assessment reported that Student was in good health, and her vision and hearing were within normal limits. There is no mention of any health, developmental or medical issues which might have been considered additional or related areas of suspected disability.

25. Dr. Tincup's assessment referenced and considered Dr. Chile's 2005 evaluation. Student and her parents directly provided substantial information contained in the Chiles evaluation. Dr. Chiles also administered standardized testing. In essence, Dr. Chiles opined that Student had a history of social difficulties and trouble being accepted. Although she was very intelligent, Student viewed this as less important than behaviors directed to elicit attention and praise from others. Student's difficulties with her self-concept, low self-esteem and risk taking behaviors were consistent with an identity problem. Her lack of confidence and internal sadness were consistent with Depressive Disorder Not Otherwise Specified (NOS). Student's distractibility, daydreaming, and lack of focus were consistent with ADHD, Inattentive Type. Dr. Chiles did not discern any learning disabilities in Student's core academic areas.

26. The 2006 assessment also referenced and considered Student's clinical record and Discharge Summary from Aspen. While at Aspen, Student's chemical dependence was the primary focus of her treatment. Student underwent weekly individual therapy, group therapy twice a week, and biweekly equine therapy. Student's secondary problems included Depression and ADHD. As Student's drug addiction became less acute, the depression/ADHD issues became more focal, though they did not increase in intensity.

27. The Aspen diagnosis of depression indicated Student had a flat affect which, combined with her history, made it probable that she suffered from dysthymia, a low-level chronic depression. There was no treatment plan for Student's dysthymia. Neither Student's long-term goals, nor her short-term objectives/therapeutic interventions made any reference to a need for special education. The only stated objective was to improve academic

³ The February 10, 2006 assessment was previously determined to be procedurally valid under Case No. N2006030599.

performance which would be evidenced by better grades and positive teacher reports. Likewise, Student's ADHD objectives did not reference any recommendation for special education services. Student's Discharge Summary noted that Student had completed the Aspen program and created a Relapse Prevention Plan for herself. She had resolved much of her family conflict. Her progress in school was on track. Her depression, however, was still of concern due to her flat affect.

28. As part of his assessment, Dr. Tincup administered a shortened version of the Wechsler Abbreviated Scale of Intelligence (WASI) which correlated with other tests and confirmed prior test results indicating Student's above average intelligence. Student was given the Woodcock Johnson, which specifically looks for attention problems. Student's composite scores were generally above average. On the subtests, Student scored relatively weak on auditory attention and peer cancellation.

29. Student's social/emotional functioning was evaluated on the Behavioral Relating Scales (BASC II). The test consisted of questionnaires which were presented to three of Student's teachers at Aspen, Student's parents, and Student herself. Although Student's scores were of concern in areas relating to her home life, her test results were consistently average regarding school. The teachers reported nothing serious in the classroom setting. Student herself presented an acceptable score. Nothing was reported as clinically significant.

30. Considered in their totality, the 2006 assessment results indicated that Student is of above average intelligence. Her classroom achievement was above average, as was evidenced by her most recent GPA at Aspen. Student's BASC results and the Aspen teachers' observations provided no evidence of serious interpersonal problems. The remainder of the tests indicated some areas of deviation, primarily in the home setting. These variations, however, were not pervasive in all areas, nor were they consistent.

31. On March 1, 2006, an IEP meeting was held, in which it was determined Student was ineligible for special education. Mother, through a letter prepared by her advocate, disagreed with the District's finding of ineligibility. The advocate contended that the District's 2006 assessment was contrary to the findings of the medical and educational professionals who had treated Student in the past. Without referring to specific findings, the advocate contended that a comparative analysis indicated a significant difference in the assessment findings related to depression.

Discussion of Clinical Diagnoses

32. Dr. Terry Schenk has been a licensed psychologist for over 21 years. She began treating Student as part of family therapy in August 2002, and continued to do so until July 2003. Thereafter, Dr. Schenk had limited contact with Student until her return from Aspen in 2006. In 2002, Dr. Schenk diagnosed Student as dysthemic with ADHD, inattentive type. She never tested Student or had her evaluated for either depression or ADHD. Dr. Schenk believes Student's depression disorder has been circular. Through the

years, student has been dysthemic, increasing to major depression, returning to dysthemia. Dr. Schenk opined that in 2002, Student's dysthemia impacted her education. As school work became more demanding, it was harder for her to keep up, which contributed to her depression. Student's relatively good grades were due to Student's high intelligence and ability to mask her depression.

33. Dr. Schenk noted that Student, upon her return from Aspen, was happier, more focused, motivated and grounded. She emphasized, however, that Student was not out of the woods. It was Dr. Schenk's opinion that placement in regular high school would be a major mistake. Any fragile sense of esteem would be destroyed, and the pressure and demands would be too much for Student to handle. In developing her current opinion, Dr. Schenk did not review Student's Aspen records or her current grades.

34. Paul Corona, M.D., briefly treated Student in 2003. Dr. Corona diagnosed Student with moderate depression and prescribed an antidepressant. He did not see her again until April 2005, when he diagnosed Student with depression and ADHD.

35. Dr. Corona recommenced treating Student upon her return from Aspen. Dr. Corona explained that Student's current medications are managing both her depression and ADHD. With these areas currently under control, Student has no other medical issues. Dr. Corona stated that Student's depression is basically a chemical and medical problem. He does believe, however, the depression and ADHD have impacted her education, as Student is easily distracted and unable to focus. As a result, she is not fulfilling her potential.

36. Dr. Corona does not believe Student is ready to return to the regular high school setting. He would prefer Student to continue with the home/hospital teaching he requested by letter on February 28, 2006. Dr. Corona stated a concerned about recurrent drug abuse if Student returned to the regular high school program. Relapsing into illicit drug abuse would exacerbate Student's mood disorders. Dr. Corona also believes Student's ADHD would be best served in a smaller classroom setting than offered by the District.⁴

37. Dr. Patricia Gaston conducted an AB3632 assessment of Student for Orange County Mental Health. Dr. Gaston has been a licensed psychologist for the County of Orange for 22 years. She prepared a written assessment of Student which was issued on March 23, 2006. This assessment found that Student was not currently manifesting symptoms which would appear to require mental health services. Dr. Gaston indicated that, even if Student had qualified for special education, she would not have recommended mental health services. When assessed, Student was doing very well and not struggling in school.

⁴ It should be noted that Dr. Corona recommended home/hospital teaching at parent's request. He had not examined Student since 2003, nor had he reviewed her records or grades. He was also unaware of the OCMH Assessment.

Educational Criteria for Emotionally Disturbed Classification

38. Dr. Terry Tibbetts has degrees in psychology, behavioral psychology, and social work. He has a Ph.D. in clinical psychology and a J.D. in law. He has been instrumental in providing clarity to the operational definition of “emotionally disturbed” (ED) within the Education Code.⁵ Defining ED in an educational definition is far more restrictive than the criteria for diagnosing emotional disturbance in a mental health definition. One may be clinically depressed and still not qualify as ED. In order for depression to qualify as ED, it must be a generally pervasive mood observed over a long period of time, and it must adversely affect educational performance in school.

39. Dr. Tibbitts indicated that clinical depression is a true mood disorder which would present itself in apathy, fatigue, hopelessness, inattention, suicidal thoughts, and the loss of all interest in the environment around oneself. In school, one would be unable to summon up the motivation to partake of education. Dysthemia, on the other hand, is not a severe disorder. Dysthemia is more of a neurotic depression which presents as a chronic feeling of low level depression or irritation. It is not self-destructive or life impairing. Depression NOS is a catchall classification for everything that one cannot prove. With NOS, one does not meet the criteria for clinical depression, but may appear to have some symptoms of depression.

40. Dr. Tibbitts reviewed the 2006 Assessment. He concluded that nothing in this assessment would support a finding of ED. Dr. Tibbitts noted that the evaluator walked through the five statutory criteria⁶, and explained why Student did not qualify for ED. Student’s problems were not pervasive; they were not to a marked degree; and they did not have an adverse impact on Student’s educational performance. Bad grades alone were not determinative of ED.

41. Dr. Tibbitts also noted that Student’s ADHD also would not qualify her for special education under Other Health Impairment (OHI). ADHD, alone, is not a handicapping disability. In order for a child to qualify there must be another disability along with ADHD.

42. Dr. Walter Ernsdorf has been a school psychologist for the District for 21 years. He was involved in the development and on-going coordination of the Severely Emotionally Disturbed Program for the District’s high schools. He has assessed seriously emotionally disturbed students for over 10 years. Dr. Ernsdorf’s descriptions of major depression, depression NOS and dysthemia were similar to Dr. Tibbitt’s definitions. He also noted the differences between a medical diagnosis of depression and the educational definition necessary for a qualification as emotionally disturbed.

⁵ In 1986, Dr. Tibbetts compiled *Identification and Assessment of the Seriously Emotionally Disturbed Child-A Manual for Educational and Mental Health Professionals* for the California State Department of Education.

⁶ (34 C.F.R 300.7(c)(4)(i); 5 C.C.R. § 3030, subd. (i).)

43. In his opinion, Student's depression, regardless of whether defined as depressive disorder NOS or dysthemia, did not meet the clinical level of depression necessary for a finding of ED. Simply making a general diagnosis of depression was not enough to qualify for special education. Dr. Ernsdorf did not find Student's depression to be intense. It was not overtly observable or debilitating. It was not pervasive in all domains. It did not adversely affect Student's educational performance. Student's grades were not uniformly poor. Much of her performance was linked to attendance and completing assignments.

44. Dr. Ernsdorf acknowledged that Student's parents reported extreme emotional problems with Student. The reports from the teachers at Aspen, however, did not convey significant emotion problems. As a result, Dr. Ernsdorf concluded that with Student's behavior only manifesting at home, the depression was not pervasive. Student was able to appropriately function in other aspects of her life. Dr. Ernsdorf also noted that, if Student's prescribed medications for depression and ADHD were successful, the symptoms previously reported would not require special education.

LEGAL CONCLUSIONS

Applicable Law

1. 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.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

2. "Child find" refers to the affirmative, ongoing obligation of states and local school districts to identify, locate and evaluate all children with disabilities residing within the jurisdiction who either have or are suspected of having disabilities and need special education as a result of those disabilities. (20 U.S.C. § 1412(a); 34 C.F.R. § 300.125(a); 34 C.F.R § 220(a); Ed. Code, § 56301.) IDEA includes a "child find" mandate that all children with special education needs be evaluated and that their needs be identified and special education services be provided where applicable. (20 U.S.C. § 1412(a)(3).) Identification procedures shall include systematic methods of utilizing referrals of pupils from teachers, parents, agencies, appropriate professional persons, and from other members of the public. (Ed. Code, § 56302.) A district's duty is not dependent on any request by the parent for special education testing or referral for services. The duty arises with the district's knowledge of facts tending to establish a suspected disability and the need for IDEA special education services. Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. (Cal. Ed. Code, § 56303.)

3. A state or LEA shall be deemed to have knowledge that a child is a child with a disability if [among other things]...the behavior or performance of the child demonstrates the need for such services. (20 U.S.C. § 1415(k)(8)(B)(ii).)

4. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532(f); Ed. Code, § 56320.)

5. The student must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (34 C.F.R. §300.532(g); Ed. Code, § 56320, subd. (f).)

6. If an assessment for the development or revision of the IEP is to be conducted, the parent or guardian of the pupil shall be given, in writing, a proposed assessment plan within 15 days of the referral for assessment not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral, unless the parent or guardian agrees, in writing, to an extension. (Ed. Code, § 56321, subd. (a).)

7. California Education Code section 56320, subdivision (g), requires that the assessment be conducted by persons knowledgeable of the suspected disability. The assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532(d); Ed. Code, § 56320, subd.(c).) Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd. (b)(3), and 56324.) Assessments must be conducted by persons competent to perform assessments, as determined by the school district, county office, or special education local plan. (20 U.S.C § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.532 (c)(1)(ii); Ed. Code, § 56322.)

8. Once the child has been referred for an individual assessment to determine whether the child is an individual with exceptional needs and to determine the educational needs of the child, these determinations shall be made, and an individualized education program (IEP) meeting shall occur, within 60 days of receiving parental consent for the assessment (Ed. Code, § 56302.1, subd.(a).)

9. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (Id. at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed.(*Ibid.*)

10. An individual with exceptional needs is one who has been identified by an IEP team as a person with an impairment which requires instruction, services, or both which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (a).) In general, a child with a disability is one with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury or other health impairments, or specific learning disabilities, who by reason thereof, needs special education and related services. (20 U.S.C. §§ 1401(A)(3)(i) and (ii); 34 C.F.R. § 300.7.)

11. A pupil whose educational performance is adversely affected by a suspected or diagnosed ADD or ADHD and demonstrates a need for special education by meeting the eligibility criteria in categories of other health impairments (OHI), serious emotional disturbance (SE) or specific learning disabilities (SLD), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

12. A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations. That term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. (20 U.S.C. §1401; 34 C.F.R. §§ 300.7(c)(10)(i) and (ii); Cal. Code Regs., tit. 5, § 3030, subd. (j); Ed. Code, § 56337.)

13. Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is either due to chronic or acute health problems and adversely affects a child's educational performance. (34 C.F.R. §§ 300.7(c)(9)(i) and (ii); Cal. Code Regs., tit. 5, § 3030, subd. (f).)

14. Pursuant to 34 Code of Federal Regulations, section 300.7(c)(4)(i) and California Code of Regulations, title 5, section 3030, subdivision (i), eligibility for special education under the classification of serious emotional disturbance requires that the student exhibit one or more of the following characteristics over a long period of time and to a marked degree, which must adversely affect educational performance:

1. An inability to learn which cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
4. A general pervasive mood of unhappiness or depression;
5. A tendency to develop physical symptoms or fears associated with personal or school problems.

15. If a pupil with ADD or ADHD is not found to be eligible for special education and related services, the pupil's instructional program shall be provided in the regular education program. (Ed. Code, §56339, subd. (b).)

16. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d at 877, 892.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f).)

17. The U.S. Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. ___, [163 L. Ed 2d, 387].)

Determination of Issues

A. In the years 2002-2003, 2003-2004, 2004-2005, did the District fail to seek out, locate and identify Student pursuant to its "child find" obligation?

18. Prior to September 27, 2002, although Mother noted a lack of focus and difficulty with homework, Student exhibited no evidence of a suspected disability in the classroom. Student's therapist may have suspected that Student had a depression disorder and ADHD, however this information was withheld from the District. Based upon Factual Findings 3 and 4, and Applicable Laws 2 and 3, the District did not fail in its "Child Find" obligation for the 2002-2003 school year.

19. A child is not automatically eligible for services under the IDEA as a result of having been identified through the child find process. Child find is simply a screening process and used to identify those children who are potentially in need of special education and related services. Children so identified must still undergo evaluation to confirm eligibility. Pursuant to Factual Findings 17, 18, and 19, in 2002, the District completed an assessment of Student and held an IEP meeting, in which it found Student ineligible for special education. Although the District may be the “gatekeepers of education” with a continuous obligation to maintain a system of “child find,” the District is not required continually assess a student where there is no indication of a disability. Pursuant to Factual Finding 5, other than a drop in grades, no evidence was presented to suggest that Student needed to be reassessed in 2003-2004 or 2004-2005.

20. As indicated in Factual Findings 6 and 7, as of the 10th grade, the primary concern of the parties stemmed from Student’s poor grades and corresponding attendance problem. The District placed Student on a Behavioral Contract. Pursuant to Applicable Law 2, this was an appropriate action on behalf of the District. In spite of these problems, Student was still able to perform academically above average in some areas, as evidence by Factual Finding 6. None of Student’s teachers suggested a reassessment. Mother did not request a reassessment in any of her contacts with the District until October 2005. The District did not fail in its child find duties for the 2004-2005 school years.

21. Pursuant to Factual Finding 22 and 25, Dr. Chile’s evaluation did not make significant findings of depression or ADHD. Further, Dr. Chiles did not make any recommendations for special education or services. Pursuant to Factual Finding 29, while at Aspen, none of Student’s teachers noted any behavior that indicated Student needed to be evaluated for special education. Student received no services or accommodations while at Aspen. When Mother made a request for reassessment in October 2005, pursuant to Factual Finding 23, the District did so as soon as Student returned from Utah. Petitioner presented no evidence that the District failed in its child find duties for June 2005 through February 2006.

B. Did the District comply with procedural requirements for the 2002 Assessment and IEP?

22. Based upon Factual Finding 13 and Applicable Law 7, Dr. Stein was qualified to assess Student’s educational eligibility in all areas of Student’s suspected disabilities. Dr. Stein possessed all required licensing and education to perform special education assessments and render opinions on test results.

23. Based upon Factual Finding 14, and Applicable Laws 5, 6 and 7, the type of tests administered by the District were appropriate. Student was assessed as requested by her mother. Student’s suspected areas of disabilities were the social/emotional areas associated with depression and her inattentiveness traits connected with ADHD. Student’s assessment was multi-disciplinary and included information from multiple sources. There were no issues

raised regarding the testing being discriminatory or conducted other than in Student's primary language.

24. Petitioner contends that the District did not assess Student in all areas of suspected disabilities, and failed to offer services to meet Student's unique needs in its IEPs. Pursuant to Factual Finding 15, Student was assessed in all areas requested by Mother. There was no evidence presented to suggest that Student had suspected disabilities in any other domains which would have qualified Student in the categories of SLD or OHI. Further, the IEP is only required to provide services if the student is deemed eligible for special education. This was not the case for Student.

25. Pursuant to Factual Finding 11, Mother requested an assessment of Student on September 27, 2002. The assessment plan was not completed by the District until October 31, 2002. This was a procedural violation of California Education Code Section 56321, subsection (a). The violation however was not a denial of FAPE. Student was ineligible for special education, and suffered no loss of services as a result of this delay.

C. Did Student Qualify as a Child with a Disability?

26. Based upon Factual Findings 22, 23, 25, 26, 27, 32, and 34, Student has, at times, exhibited symptoms of mild depressive behavior, loosely defined as either dysthymia or depressive disorder NOS. Although Dr. Schenk believed Student at some time exhibited severe depression, no evidence was presented to substantiate such belief. Based upon Finding 35, Student's depression is currently successfully managed on medication.

27. Based upon Factual Findings 22, 23, 25, 26, 27, and 32, Student has exhibited symptoms of ADHD, inattentive type. Student has difficulty maintaining focus, is preoccupied with perfection, and struggles to complete homework. Based upon Finding 35, Student's ADHD is currently successfully managed on medication.

28. California Code of Regulations, title 5, section 3030 contains five indicators of children at risk for ED. Even if a child exhibits symptoms of one or more of these indicators, the regulation still requires that the symptoms be exhibited over a long period of time, to a marked degree, and must adversely affect educational performance. The evidence supports Dr. Stein's conclusion in that Student was highly intelligent and in no sense dysphoric in 2002. Three highly qualified psychologists, Dr. Stein, Dr. Tibbitts, and Dr. Ernsdorf, agreed that Student's assessment results did not support findings of depression or ADHD in 2002. Based upon their review of the 2002 Assessment and school records, each of them concluded Student was ineligible for special education. Petitioner relied on the testimony of Dr. Schenk and Dr. Corona, neither of whom evaluated Student or reviewed her school performance. Additionally, Petitioner was unable to sufficiently correlate the diagnoses of Drs. Schenk and Corona with the statutory indicators required to make a finding of ED.

29. In Factual Finding 3, 4, 5, 6, 7, 29, and 31, Mother's descriptions of Student's ongoing behavior in 2003, 2004, and 2005, may have qualified as symptoms of mild depression and ADHD. Those symptoms however, were insufficient to meet statutory requirements of ED pursuant to Applicable Laws 11, 12, 13, and 14. Petitioner was unable to establish that in 2003, 2004, or 2005, Student's symptoms of depression were pervasive or to a marked degree. The only evidence presented was Student's declining grades and attendance. This alone was unpersuasive. Given that Student stopped seeing both Dr. Schenk and Dr. Corona in 2003, there was no relevant clinical or medical evidence presented to clearly define the level or pervasiveness of Student's depression.

30. While at Aspen in 2005, both Dr. Chiles's evaluation and Student's Aspen records reference some form of depression in Student. In spite of these observations, no academic interventions or services were recommended for Student while at Aspen. None of the records from Aspen reported any behavioral or social difficulties with Student connected to her education. No testimony was presented by any of Student's teachers to suggest that Student's depression or ADHD had adversely affected her academic performance. In fact, Student's grades clearly improved. In Factual Finding 27, Student's therapist noted in the Discharge Summary that Student's depression was still a concern due to her flat affect, but Student's progress in school was on track.

31. The 2006 Assessment was conducted upon Student's return from Aspen. The evidence supports the 2006 IEP determination that Student was ineligible for special education. Pursuant to Factual Findings 29, Student was specifically tested in the areas of social/emotional functioning and attention problems. Student's WASI scores confirmed Student's above average intelligence. The BASC scores reported no significant social/emotional problems except at home. None of Student's teachers reported any academic problems. Student's grades improved at Aspen and have continued to improve. Upon review of the 2006 Assessment, Dr. Stein, Dr. Tibbetts, and Dr. Ernsdorf all concurred that Student did not qualify for special education. Additionally, Student was independently evaluated by Orange County Mental Health. As indicated in Factual Finding 37, Student did not qualify for services, but even if she qualified for special education, Dr. Gaston, would not have recommended mental health services at that time. Petitioner's own witnesses did not rebut the assessment. In Factual Finding 33, Dr. Schenk reported that Student, upon her return from Aspen, was happier, more focused, motivated and grounded. In Factual Finding 35, Dr. Corona indicated that Student's depression and ADHD are controlled by medication.

32. Although Student may have had ADHD symptoms, and a mild depression disorder, she did not meet the relevant special education criteria required by 34 Code of Federal Regulations, section 300.7(c)(4)(i) and California Code of Regulations, title 5, section 3030. Student was not eligible for special education in 2002-2003, 2003-2004, 2004-2004, or 2005-2006.

ORDER

For the school years 2002-2003, 2003-2004, 2004-2005, and 2005 through March 1, 2006, there has been no denial of FAPE. Student did not qualify for special education.

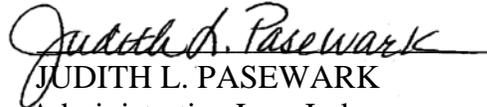
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The District has prevailed on all issues.

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 90 days of receipt of this Decision. (Ed. Code, §56505, subd. (k).)

Dated: September 5, 2006


JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings