

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. N2006051005

DECISION

Administrative Law Judge Jacqueline Jones, Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on July 20 and 21, 2006, in San Juan Capistrano, California

Petitioner, (Student), was represented by advocate Mark Lopez, J.D., Ph.D., School Watch/SENTRY. Also present on Student's behalf was his mother.

Capistrano Unified School District (District), was represented by attorney Jennifer C. Brown, Esq., Rutan & Tucker, LLP. Also present as the District's designated representative was Tracey Artinger, a psychologist at Niguel Hills Middle School.

On May 25, 2006, Student filed a request for mediation and due process hearing. On June 5, 2006, Student filed an amended mediation and hearing request with OAHSED.

Oral and documentary evidence were received, the record was left open, and the matter was continued for good cause until August 21, 2006. Upon receipt of the written closing arguments, the record was closed on August 21, 2006, and the matter was submitted.

ISSUE

1. Whether District failed to fulfill its "child find" obligations during the 2004-2005 school year?
2. Whether District failed to fulfill its "child find" obligations during the 2005-2006 school year?

3. Whether District failed to assess student for special education after Mother's November 3, 2005, request?
4. Whether District failed to give Mother a copy of the procedural safeguards notice?

CONTENTIONS OF THE PARTIES

Student contends that the District through its "search and serve" policies should have known the Student was a candidate for special education services due to his academic and behavioral problems during the 2004-2005 and the 2005-2006 school years. The District's contention is that the appropriate child find policies and procedures were in effect during the relevant time periods.

Student contends that the District failed to insure that Mother received a notice of procedural due process rights after Mother requested an assessment on November 3, 2005. The District contends that IDEA procedural rights were not given because a special education assessment was not being initiated or refused by the District.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is a 14-year-old boy who resides with his Mother within the geographical boundaries of the District.

Factual Background

2. The District has written policies and procedures to identify, locate and evaluate children with disabilities. The Niguel Hills Middle School staff receives regular training on how to identify children with disabilities, special education issues and the referral process.

3. In March 1999, Saddleback Valley Unified School District determined that Student was eligible for special education services based on the disability category of other health impairment. The Student's educational performance was adversely affected by a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).

4. Student was exited from special education on March 11, 2002, by Saddleback Valley Unified School District.¹ Student was determined to be no longer eligible for special education services.

¹ When Student was in the seventh grade Niguel Hills Middle School psychologist Artinger reviewed the Student's file and was aware of Student's prior special education eligibility.

5. Student takes a prescribed medication, Concerta, for ADHD. Student receives counseling from Richard de Forest, Licensed Clinical Social Worker.

Child-Find During the 2004-2005 school year.

6. The child find obligation applies to children who are suspected of being a child with a disability and there is reason to believe that special education services are necessary to address the disability.

7. For the 2004-2005 school year, Student attended the seventh grade at Niguel Hills Middle School as a general education student. Student was taught by six different teachers. Student's grades were As, Bs ,Cs and four Ds. Three of the Ds were in Industrial Technology (an elective course) and one of the Ds was in Social Science. Student had no failing grades. Mr. Kashima was Student's Social Science teacher. Mr. Kashima has his master's degree in Social Studies and has taught at Niguel Hills Middle School for four years. Mr. Kashima described Student as a great student at the beginning of the year, earning an A. As the curriculum got more difficult, Student's grade declined and then, by the end of the school year, Student's grade in Social Studies went back up to a C+. Mr. Kashima described Student as making academic progress and showing growth in responsibility. Mr. Kashima did not suspect that Student had a learning disability. Mr. Kashima indicated that no special education referral was made.

8. Ms. Lovett was Student's teacher for English. Ms. Lovett has a bachelor's degree in English Literature and has been a teacher for almost 17 years. Student received an A and three Bs in Ms. Lovett's class. Ms. Lovett described Student as making academic progress while in her class. Ms. Lovett did not suspect that Student had a learning disability and did not make a referral for special education.

9. Student did have some behavior problems which included threatening a teacher, kicking another student and mentioning the thought of bringing a gun to school. Student was referred for counseling with a program called PRIDE.

10. District administered the Capistrano Objectives for Reaching Excellence (CORE) tests to all students including Student to promote accountability and to precisely identify pupil academic growth during the school year. Student scored in the 69th percentile in Language, 94th percentile in Mathematics and 77th percentile in Reading.

11. Mother did stay in close contact with the teachers via phone calls and email.² Mother worked closely with both the Student and the teachers.

12. Student was promoted to the eighth grade at the end of the 2004-2005 school year.

² On July 6, 2006, Student served 12 Subpoena duces tecum's on District requesting email correspondence between instructors, administrator's and Student's Mother. None of the responses that were received were offered into evidence. The District substantially complied with the request. There was no prejudice to the Student. Mother indicated that she had copies of every email produced by the District pursuant to the records request. There is no indication that the District acted in bad faith regarding compliance with the document request. As a result, Student's request for sanctions is denied.

13. Student failed to establish that the District had a duty to initiate a referral for special education. Student performed at grade level standards and advanced to the eighth grade without the need for special education and related services.

Child-Find During the 2005-2006 school year

14. For the 2005-2006 school year (eighth grade) Student was taught by seven different teachers in six subject matters. Student earned As, Bs, Cs and three Ds. Student had no failing grades. Student's grades were average. Ms. Patterson was Student's teacher for Algebra. Ms. Patterson has been a teacher for 16 years and has a master's degree in Administration. Ms. Patterson has served as the Chairperson of the Mathematics Department at Niguel Hills Middle School. Ms. Patterson indicated that Student's mathematic skills were acceptable and that he made academic progress in Algebra. Ms. Patterson did not suspect that Student had a learning disability. Ms. Patterson credibly indicated that she did not see any need to refer Student for special education services.

15. Mother had telephone conversations and email communications with Academic Advisor Roberta Busch in October and November 2005, regarding Student's declining grades and behavior problems. Ms. Busch recommended that a request for special education be put in writing. Ms. Busch told Mother what to put in the letter. Mother requested, in writing, a special education assessment³ concerning Student on November 3, 2005. On that same day, Mother hand delivered the request for special education assessment to Niguel Hills Middle School addressed to the attention of Roberta Busch, Academic Advisor.

16. Student failed to establish that the District had a duty to initiate a referral for special education and related services during the 2005-2006 school year.

Failure to Assess

17. Under California law all referrals for special education and related services shall initiate the assessment process and shall be documented.

18. On November 14, 2005, a Student Study Team (SST) meeting was held at Niguel Hills Middle School. Mother was present. Teachers Mittleman, Briggs, Erickson, Steidle, Benson and Gaspar were present. Assistant Principal Rios and school Psychologist Artinger were also present.

19. Ms. Artinger brought a CUSD Individualized Education Program Assessment Plan to the meeting.⁴ Mother never saw the document. No assessment plan was offered to Mother.

³ California law refers to the "assessment" of a pupil (Ed. Code, § 56320) while federal law refers to the "evaluation" of a child (20 U.S.C. § 1414 (a)). These terms mean the same thing. (See express reference to "§ 1414 of Title 20 of the United States Code" in Education Code § 56320.)

⁴ The form indicates that the document was created on November 14, 2005, at 9:32 a.m.

20. At the SST meeting, Ms. Artinger reviewed Student's academic records and discussed Student's performance in class with Student's teachers. Ms. Artinger explained to Mother the difference between a Section 504 evaluation⁵ and a special education assessment. Ms. Artinger reviewed Student's academic performance, teacher input and standardized test scores with Mother. Ms. Artinger suggested a less intrusive Section 504 assessment be conducted. Ms. Artinger testified that Mother agreed to the less intrusive assessment and that Mother withdrew her request for a special education assessment. However, Mother testified that there was no discussion of the difference between a special education assessment and a 504 assessment and that she never declined a special education assessment. Mother was very credible in concurring with Ms. Artinger that test scores and teacher comments were reviewed. Mother's memory was clearer than Ms. Artinger. Mother's explanation of what happened at the meeting was more credible because Mother was confident, calm and straightforward while testifying while Ms. Artinger was guarded, forgetful and hesitant with her testimony. Based on the testimony the Mother is the more believable witness. The District did not have consent to waive the special education assessment and therefore failed to assess.

Failure to give Procedural Safeguards Notice

21. Under California law, upon initial referral for assessment parents shall be given a copy of their rights and procedural safeguards. A district's failure to give Parental rights is a violation of federal and state law. District acknowledges that no rights were given to Mother.

22. Student was suspended on May 1, 2006, for bringing alcohol on campus in violation of Education Code section 48900, subdivision (c). An SST meeting was convened on May 23, 2006. At the May 23, 2006, SST meeting, another request for a special education assessment was made by Mother. An assessment plan was provided and signed by Mother.

Current Status

23. The District conducted an Individual Education Program (IEP) meeting on June 19, 2006, to review the results of the assessment. Student was found not eligible for special education. The IEP team considered Student's eligibility under the criteria of other health impaired, serious emotional disturbance and specific learning disability. The District offered to reconvene an SST meeting upon Student entering the ninth grade.

LEGAL CONCLUSIONS

Applicable Law

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000 et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parent,

⁵ A 504 evaluation is an evaluation to determine whether a child with a disability needs accommodations based on his or her educational needs. If the child is found eligible, the child is then protected from disability discrimination under Section 504 of the Federal Rehabilitation Act.

that meet state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401 (9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401 (29).) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401 (26).) California provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) This right to FAPE arises only after a student is assessed and determined to be eligible for special education.

2. The IDEA places an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state. (20 U.S.C. § 1412 (a)(3).) California specifically obligates the District to actively and systematically seek out "all individuals with exceptional needs." (Ed. Code, § 56300, et seq.) Under the regulations relating to the pre-July 1, 2005 version of the IDEA, this "child find" obligation applies to, among others, "children who are suspected of being a child with a disability... and in need of special education, even though they are advancing from grade to grade." (34 C.F.R. § 300.125 (a)(2)(ii) (2000).) In performing its obligations under child find with respect to a particular child, the District shall refer a pupil for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized." (Ed. Code, § 56303.)

3. The child find duty is triggered when the local education agency (LEA)-in this case the Respondent District-has reason to suspect a disability, and reason to believe that the disability can be addressed by special education. The LEA must respond within a reasonable time after obtaining notice of the potential disability and need for special education services. (*Dept. of Ed. v. Cari Rae S.* (Dist. Ha. 2000) 158 F. Supp. 2d 1990, 1993-1194.)

4. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

5. Under California law all referrals for special education and related services shall initiate the assessment process and shall be documented. When a verbal referral is made, staff of the school district, special education local plan area, or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if the individual requests such assistance. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) Upon initial referral for assessment, parents shall be given a copy of their rights and procedural safeguards. (Ed. Code, § 56301, subd. (a).) A districts's failure to provide parents with a copy of their rights constitutes a violation of federal and state law. (20 U.S.C. § 1415; Ed. Code, § 56301.) The purpose of these requirements is to ensure that parents are aware of their rights and have sufficient information to take the necessary steps in securing a free and appropriate public education for their child.

6. A school district must insure that a full and individual initial evaluations are conducted for each pupil being considered for special education and related services (1) to determine if the child is a “child with a disability” and (2) to determine the educational needs of the child. (34 C.F.R. § 300.320.) Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).))

7. Student, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast*) (2005) 543 U.S. 1145 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Determination of Issues

Issue 1: Whether District failed to fulfill its child find obligations during 2004-2005 school year?

1. Based upon Factual Findings, paragraphs 6, 7, 8, 9, 10, 11, 12 and 13, and Applicable Law, paragraphs 1, 2, 3, 4 and 7, District did not violate its child-find duties of identification during the 2004-2005 school year. Although Student had some Ds, the majority of his grades were either average or above average. Nothing in the Student’s grades or behaviors indicated that special education services were needed.

Issue 2: Whether District failed to fulfill its child find obligations during 2005-2006 school year?

2. Based upon Factual Findings, paragraphs 14, 15 and 16 and Applicable Law paragraphs, 1, 2, 3, 4 and 7. District did not violate its child-find duties of identification during the 2005-2006 school year. Student’s grades were average. Nothing in the Student’s grades or behaviors indicated that special education services were needed. At the point the Mother made the request for referral, the District’s child find obligation ended and the obligation to assess began.

Issue 3: Whether District failed to assess student for special education after Mother’s November 3, 2005, request?

3. Based upon Factual Findings, paragraphs 17, 18, 19 and 20 and Applicable Law paragraphs 5, 6, and 7, when Mother made the November 3, 2005 initial request for an assessment the District should have assessed. The District failed to do the assessment which they were required by law to do.

Issue 4: Whether District failed to give Mother a copy of the Procedural Safeguards Notice?

4. Based upon Factual Findings, paragraph 21 and in Applicable Law paragraphs

And 7, the District should have provided Mother with a copy of rights and procedural safeguards. The District's failure to provide Mother with a copy of her rights constitutes a violation of federal and state law. However, no remedy exists in this case for the Mother. A psycho educational assessment took place on June 19, 2006, whereby the Student was found not eligible for special education. As a result, Student is not eligible for the protections of IDEA. No remedy is awarded.

5. As of June 19, 2006 Student was found not eligible for special education. Student is not eligible for the protections of IDEA. There is no remedy for the failure to assess. There is no remedy for the failure to provide procedural rights.

ORDER

All of Student's requests for relief are denied.

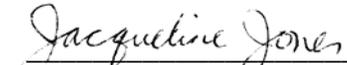
PREVAILING PARTY

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 following findings are made in accordance with this statute: The District prevailed on Issues One and Two and the Student prevailed on Issues Three and Four.

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: September 7, 2006



JACQUELINE JONES
Administrative Law Judge
Office of Administrative
Special Education Division