

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

In the Consolidated Matter of:

STUDENT,

Petitioner,

v.

SAN DIEGO UNIFED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006020294

SAN DIEGO UNIFED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006040313

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this consolidated matter in San Diego, California on July 17-21, 2006.

Student was represented by attorney Ellen Dowd. Student's father (Father) was also present.

San Diego Unified School District (District) was represented by attorneys Sandra Woliver and Sarah Sutherland. Also attending was Amy Perez of the District's Special Education Legal Office.

On February 9, 2006, Student filed with OAH a request for due process hearing. On April 6, 2006, District filed with OAH a separate request for due process hearing

These matters were consolidated for hearing at the Prehearing Conference on June 12, 2006, upon stipulation of the parties. The record of this due process hearing was opened on July 17, 2006. Testimony concluded on July 21, 2006, and the record remained open for closing briefs. Student requested an extension of time on August 3, 2006, which was granted to both parties for good cause shown. The parties submitted closing briefs, the record was closed, and the matter submitted on August 22, 2006.

ISSUES

1. From May 4, 2004, through the end of the 2005-2006 school year, did the District fail to offer Student a free, appropriate public education (FAPE) by failing to find him eligible for special education services under the category of serious emotional disturbance?
2. Is Student's father (Father) entitled to reimbursement for placement of Student at a Non-Public School (NPS) in Utah for the 2005-2006 school year?
3. May the District conduct an assessment of Student, absent parental consent, as outlined in the March 10, 2006 assessment plan?

FACTUAL FINDINGS

Background Facts

1. When Student was either two or three years old, Student's parents separated, and Student became the subject of a long drawn out and bitter custody battle between Student's mother (Mother) and Father. Student attended a sectarian private school from kindergarten to eighth grade. Mother had physical custody. Student's relationship with Father was extremely poor. Eventually, Father lost visitation rights and his only contact with Student was by telephone.

2. For the 2003-2004 school year, Student transferred to the District and enrolled at Gompers Secondary School. Student was placed in the eighth grade at the request of Mother.

3. Student had a history of tardiness during the first semester of the 2003-2004 school year which was also marked by poor grades. Student's first semester grades at Gompers were: U.S. History/Geography-C; English-D; Algebra-F; Physical Education-F; and Science-F.

4. Student was in therapy in 2003 with Barbara Perry, a therapist referred by the Family Court division of the Superior Court, for depression. Student was prescribed medication for about one year.

School Year 2003-2004-May 6, 2004 IEP Team Determination of Student's Eligibility

5. On January 23, 2004, Mother served upon the District a written request for assessment to determine whether Student had a learning disability because of his poor academic performance.

6. An Assessment Plan was prepared by the Gompers school psychologist, Ana Mercado, on behalf of the District, to assess Student's eligibility for special education in the area of specific learning disability. Mother signed the Assessment Plan form on March 3, 2004. On May 4, 2004, a Referral for Special Education form was prepared which listed Referral Reasons through checked boxes for Reading, Written Language and Math. The boxes for Spoken Language, Organizational/Attention and Social/Emotional were not checked.

7. In conducting the assessment, the District administered the following tests: the Wide Range Assessment of Memory and Learning, Beery Test of Visual-Motor Integration, Test of Visual-Perceptual Skills, Matrix Analogies Test SS 125, Kaufman Test of Educational Achievement, Woodcock-Johnson Psycho-Ed Battery-R, Behavior Assessment System (BASC) and the Sentence Completion Inventory.

8. Student tested in the average to above-average ranges in the sensory motor functioning and processing areas and below average in visual-motor integration where he was at a level of an eight year, one month old child. Student was in the 95th percentile in the Matrix Analogies Test SS which measures intellectual functioning. Student's scores on the Kaufman Test of Educational Functioning were at 12.9 in Mathematics, 10.0 in Reading, 6.2 in Spelling, and a Battery Composite of 9.7, all of which were in the average range. In the Woodcock-Johnson, Student scored in the average range in all areas.

9. The BASC was completed by Student, Mother, and Gino Scalo, Student's Social Studies teacher. In the Self-Report by Student, all indexes were within the acceptable range. Areas which were in the "clinically significant" range were Locus of Control and Relations with Parents. In the Parent Rating Scales, all indexes were within the acceptable

range with Conduct Problems and Attention Problems in the clinically significant range and the areas of Somatization, Withdrawal, Social Skills and Leadership in the at-risk range.

10. Student had difficulties in completing the Sentence Completion Inventory which Ms. Mercado administers for the purpose of building a rapport with the student. Student had difficulty in relating his feelings or discussing himself. Student also indicated that he was suffering from an inability to sleep.

11. During the assessment, Student informed Ms. Mercado that he had been seeing a therapist for over one year and was on medication to “hype him up.” Student told Ms. Mercado that he was abused by Father verbally and physically starting at the age of four or five. Student informed her that he did not desire to re-establish a relationship with Father. Student also said that his relationship with his Mother was strained. Student related that both parents had contacted Child Protective Services to claim that the other parent was abusing him.

12. Mother informed Ms. Mercado that she was concerned about discipline with Student because he was hanging out with a bad crowd, smoking “pot,” refusing to do his chores, was out joy riding, playing with fire, sometimes slept with her, and was habitually late for school even though Student resided a block from school. Additionally, Mother stated that Student often suffered headaches and dizziness. Ms. Mercado also conferred with Barbara Perry, Student’s therapist, who informed her that Student was in therapy because of depression.

13. Ms. Mercado, in her psychoeducational report, recommended that Student was not eligible for special education services because his test results indicated that Student’s academic skills for reading, math, spelling, and written language were within the average to above average range which resulted in no discrepancy between ability and achievement. Ms. Mercado found that Student’s delay in visual-motor integration did not affect his academic skills, and Student’s poor academic performance was a result of lack of motivation, fear and sadness. At the May 6, 2004 IEP meeting, the IEP team adopted Ms. Mercado’s finding of non-eligibility. Ms. Mercado explained through her testimony that she did not assess in the area of emotional disturbance because she did not suspect at the time that Student had emotional problems, and that she lacked information that he was depressed.

14. The District’s designated expert was Dr. Peter Penman. Dr. Penman holds a Master’s degree in Education and Counseling as well as his doctorate in Counseling Psychology. He holds licenses in Psychology, Educational Psychology and as a Marriage, Family and Child Counselor. Dr. Penman previously worked for the District as a teacher, school counselor, school psychologist and chief school psychologist in the Serious Emotional Disturbance Program of the District in 1986. He currently consults for the District in its Due Process Office evaluating due process filings. Additionally, Dr. Penman is on the faculty of Chapman University in its School Psychology Program. Dr. Penman opined that if a school psychologist knew that a student who was being assessed for severe learning disability was being treated by a private psychologist for depression and was prescribed medication, the

psychologist should assess in the area of serious emotional disturbance. He also opined that if a school psychologist had information only that a student suffered from sadness and a lack of motivation, the psychologist conducting the assessment should gather more information as to the causes of the sadness and lack of motivation, depending upon the circumstances. Dr. Penman's testimony is highly credible and is deserving of significant weight.

15. Following the IEP meeting, Student received his grades for the second semester of the 2003-2004 school year at Gompers which were D in U.S. History/Geography and F's in all his other subjects. Student attended summer school and received a C in Math and B in English. Student was then promoted to the ninth grade at San Diego High School (SDHS).

16. A friend of Mother referred Student to Dr. Marilyn Kennedy, a clinical psychologist from Thousand Oaks. Dr. Kennedy holds a B.A. in Sociology and Psychology from Western Reserve University, an M.S. in Social Work and M.S.W. in Psychiatric Social Work from Harvard University and a Ph.D. in Psychology and Organizational Development from the University of Cincinnati. Dr. Kennedy has worked with troubled youths for many years and served on the Board of Governors at Rancho San Antonio Boys Town of the West. Dr. Kennedy provided treatment to Student and his family from May 22, 2004 through December 8, 2004, on sixteen occasions. Student's symptoms included an inability to focus, loss of energy, sleep difficulty, hyperactivity, flat affect, ruthlessness and a sense of worthlessness. Dr. Kennedy diagnosed Student as suffering from Major Depressive Disorder. Dr. Kennedy then referred Student to a colleague, Earl P. Petrus, a psychiatrist, who saw Student on June 7, 2004 and November 20, 2004. Dr. Petrus diagnosed Student with Major Depressive Disorder and Oppositional Defiant Disorder. Dr. Petrus prescribed Wellbutrin to Student for his depression. Following the end of her treatment of Student, Dr. Kennedy retained contact with Student and his family in a supportive relationship outside of therapy.

17. At the hearing, Dr. Kennedy expressed her professional opinion that Student was suffering from a clinically crippling depression which had been debilitating over many years and was adversely affecting Student's education. Dr. Kennedy's testimony is highly credible and is deserving of great weight.

School Years 2004-2005 and 2005-2006 and District's child find obligation

18. In the fall 2004, Student continued to do poorly in school, became truant and was engaging in the same behavior as before. Father conferred with Isabel Lopez, the school psychologist at SDHS, about Student's school problems. At this meeting, Ms. Lopez informed Father that Student was failing all his courses, was truant and not participating in school including failing to do homework. Father informed Ms. Lopez that Student was in therapy with Dr. Kennedy. Father received numerous subsequent telephone calls from SDHS regarding Student's absences from school.

19. In spring 2005, Student entered Connections, a dropout recovery program operated by the District. In order to be eligible for Connections, the individual must be absent from school for 25 consecutive days. Connections is a short-term program of 20 weeks, although a student can remain in Connections past 20 weeks by waiver.

20. Ron Zappala, the Connections' Coordinator/Chief Counselor, and Richard Sison, Student's case manager, spoke with Father regarding Student's behavior and attendance problems at Connections. Additionally, Mr. Zappala and Mr. Sison had frequent contact with Dr. Kennedy regarding Student. Connections staff informed Dr. Kennedy that Student's academic performance was not appropriate, he was not working up to his potential, was unable to concentrate and was sleepy. Dr. Kennedy informed Connections staff about the severity of Student's depression which was causing his restlessness, hyperactivity, and his brooding orientation which was interfering with his ability to learn. Although Connections staff said that they would contact her about Student's educational problems, Dr. Kennedy never heard back from Connections.¹ Thus, District personnel were aware, in spring 2005, that there was a connection between Student's mental health problems and his poor academic performance including truancy.

21. In spring 2005, Dr. Kennedy consulted with parents, counsel for Father and a court-appointed counsel for Student in the Family Court custody case. Upon Dr. Kennedy's recommendation, the parents and Student's counsel stipulated to a change of custody from Mother to Father in April 2005. An order granting the stipulation was entered by the Superior Court on May 11, 2005.

22. In late spring/early summer 2005, Student was arrested for stealing a car and entered the juvenile justice system. Connections staff were aware of Student's arrest.

23. Because Student was refusing to take his medication, was in trouble in the community, and was not able to be controlled, Dr. Kennedy recommended to Father that Student be placed in a private placement where he would be in a "suitable environment" such as the Provo Canyon School (Provo). Dr. Kennedy appeared at a special Juvenile Court hearing where Father sought permission to place Student at Provo, a secured adolescent residential treatment facility and school. In August 2005, the Court issued an order granting Student's placement at Provo as a condition of Student's probation.

24. On September 1, 2005, Connections, on behalf of the District, received a letter from Allan Roth, Educational Consultant acting on behalf of Student, which gave notice that

¹ Mr. Zappala testified that he only spoke to Dr. Kennedy regarding Student's behavior and placement in a private facility in Utah. Mr. Zappala stated that Dr. Kennedy never mentioned that Student suffered from depression. Mr. Zappala did acknowledge that Dr. Kennedy did have contact with Mr. Sison, the case manager. District failed to call Mr. Sison to contradict the testimony of Dr. Kennedy. Dr. Kennedy's testimony was detailed as to her communications with Connections staff. Based on demeanor of the witnesses, the lack of detail in Mr. Zappala's testimony, and the detailed testimony of Dr. Kennedy, the Administrative Law Judge finds Dr. Kennedy's testimony on this point credible.

Father intended to place Student in an unilateral placement and seek reimbursement from the District.

25. Student remained at Connections while awaiting admission to Provo. During this time, Father attempted to arrange financing to cover Provo's monthly tuition. In October 2005, Connections expelled Student. On December 14, 2005, Student traveled by escort to Provo.

26. Provo provides residential treatment for adolescents with behavioral and emotional problems. Approximately one month after Student's admission, Dr. Jennifer Morrill, a psychological resident, conducted a psychological assessment of Student. Dr. Morrill utilized the following assessment instruments: clinical interview, chart review, Wechsler Intelligence Scale for Children-Fourth edition (WISC-IV), Millon Adolescent Clinical Inventory (MACI), Minnesota Multiphaseic Personality Inventory-Adolescent (MMPI-A), Piers-Harris Children's Self-Concept Scale-Second edition, Rotter Incomplete Sentences Blank, and the Kinectic-House-Tree-Person Drawing (K-H-T-P). Dr. Morrill diagnosed Student with (1) Major Depressive Disorder, Chronic, Moderate; (2) Polysubstance Abuse; (3) Physical Abuse of a Child, Victim; (4) Conduct Disorder; and (5) Rule out Posttraumatic Stress Disorder under Axis I. Under Axis II, Student was diagnosed with Features of Antisocial Personality Disorder. Axis III was noncontributory while Axis IV was severe psychosocial stressors from constant conflict between Mother and Father, severe physical punishment, negative interactions with Father, involvement with negative peers, and academic problems. Dr. Morrill noted that Student's then current level of dysfunction was extreme and that he was a danger to himself.

27. Dr. Morrill is of the opinion that Student clearly qualifies for special education under the category of serious emotional disturbance as a handicapping condition. In a report dated February 1, 2006, she determined: "Specifically, he displays inappropriate behaviors and feelings, as well as a pervasive mood of depression" and that "he has displayed these behaviors and symptoms for several years, they exist to a marked degree in that they are evident in all life settings, including school, home and with peers, and his educational performance is clearly being adversely affected as he doesn't even attend school." Dr. Morrill also noted that Student's "emotional and behavioral difficulties have interfered with many opportunities for academic and vocational growth." (Provo Canyon School, Psychological Assessment of Student, February 1, 2006.)

28. Student's therapist at Provo is Jennifer Morgan Smith, who is also the supervising therapist at Provo. Ms. Smith received a B.S. in Psychology from Brigham Young University and an M.A. in Human Development and Family Relations from the University of Connecticut. She is a licensed Marriage and Family Therapist. Ms. Smith has been working with troubled teens at Provo for eight years. Ms. Smith stated that Student has made slow but steady progress while at Provo. Academically, Student has shown great improvement in English and Pre-Algebra. His performance in History has been "up and down" while he has demonstrated great interest in Art. Ms. Smith opined that Student was getting an educational benefit at Provo and that Student would return to his old habits,

including refusing to attend school, if removed from a secured residential school which offers a structured environment. Because of her experience and knowledge of Student, Ms. Smith's testimony is deserving of significant weight.

District's Assessment Plan:

29. At the resolution meeting following the filing of Student's petition for due process hearing, District submitted a plan to assess Student. The assessment plan was developed by Amy Perez, a diagnostic research teacher with the District, Dr. Penman and Dr. Jill Weckerly, a school psychologist with the District. The District proposes to assess Student for eligibility for special education in the areas of emotional disturbance and other health impairment. The plan calls for the following tests to be administered: Wechsler Memory Scales-Third Edition, Delis Kaplan Executive Functioning Scales (DKEFS), clinical interviews of Student and his parents, the MMPI-A, the MACI, Adolescent Symptom Inventory, and the Thematic Apperception Test (TAT). Dr. Peterman opined that the tests selected in the District's assessment plan are validated tests for the specific purpose for which they are used. Dr. Peterman further opined that proposed tests were appropriate to assess Student. Student offered no evidence to the contrary other than Father objects to the necessity of the District's assessment, which repeats some of the testing done at Provo.

30. Father testified that he had incurred costs of \$5,000.00 to escort Student to Provo. Student produced invoices from Provo for the cost of attendance in the amount of \$61,920.00 through July 2006. Also, Father testified that he expected to receive an invoice for August 2006 in the amount of \$8,370.00. Thus, Student is seeking the total sum of \$75,290.00 as reimbursement for expenses he incurred attending Provo.

31. The District has failed to make an offer for placement of Student for the 2006-2007 school year.

LEGAL CONCLUSIONS

Applicable Law

1. The United States Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. ___, [126 S. Ct. 528, 2005 U.S. Lexis 8554].) Accordingly, Student has the burden of proof as to Issues 1 and 2, and the District has the burden of proof as to Issue 3.

2. 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 IDEA.

Special education is defined in pertinent part as 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); Ed. Code, § 56363.) Special education related services include in pertinent part psychological services as may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. 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.) A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.*, at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

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, subd. (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. 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.)

7. For a student to qualify to receive special education services under the category of serious emotional disturbance, he or she must satisfy one of the five criteria set forth in California Code of Regulations, title 5, section 3030, subdivision (i) (hereinafter,

section 3030(i)). Section 3030(i) requires a student to show the existence of a serious emotional disturbance over a long period of time, to a marked degree, and such that it affects a student's academic performance. A serious emotional disturbance is defined as: (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; and (5) A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., § 3030, subd. (i).)

8. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S. Ct. 1996, 85 L. Ed. 2d 385].) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S. Ct. 361, 126 L. Ed. 2d 284].)

9. Both state and federal law make it clear that before conducting an assessment, the District is required to secure parental consent. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, §§ 56321, 56501, subd. (a)(3).) If parents wish their child to receive special education and related services, they must allow the responsible educational agency to assess their child. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F. 2d 1307, 1315.)

10. The proposed assessments must meet the statutory requirements set forth in Education Code section 56320 et seq. Education Code section 56321 sets forth the requirements for a proposed plan, notice to parents, and parental consent to the assessment. (Ed. Code, §§ 56320, subd. (g), 56322.) The tests and assessment materials must be validated for the specific purpose for which they are used, and must be selected and administered so as not to be racially, culturally, or sexually discriminatory, must be provided and administered in the student's native language or other mode of communication unless not clearly feasible, and must be administered by "trained personnel in conformance with the instructions provided by the producers of such tests." (Ed. Code, § 56320, subds. (a), (b).)

11. When a parent obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to providing FAPE. (Ed. Code, § 56329, subd. (c).) "If a student's parents want him to receive special education under the IDEA, they must allow the school [district] itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation." (*Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F. 3d 176, 178)

Determination of Issues

A. *From May 4, 2004, through the end of the 2005-2006 school year, did the District violate the IDEA and fail to offer Student a FAPE by failing to find him eligible for special education under the category of serious emotional disturbance?*

12. Based upon Legal Conclusion paragraph 7 and Factual Findings 3, 4, 10, 11, 12 and 13, Student met the eligibility requirements of special education under the category of severe emotional disturbance under the fourth criteria (a general pervasive mood of unhappiness or depression) on May 4, 2004, in that Student (1) suffered from and was being treated for depression, (2) was receiving medication for his depression, (3) was chronically tardy for school, (4) had a history of parental abuse, (5) had poor relations with both parents, (6) acted out of control and was unable to be disciplined by parents, (7) took illegal drugs, (8) inappropriately slept with his mother occasionally, (9) suffered from headaches and dizziness, and (10) was failing three courses. Student's pervasive unhappiness and depression had been demonstrated over a long period of time (Factual Findings 3, 4 and 12),² to a marked degree (Factual Findings 3, 4 and 12),³ which effected Student's academic performance. (Factual Findings 3, 13 and 15)

13. Based upon Legal Conclusion paragraphs 1, 2, 3, 4, 5, 7 and 12 and Factual Findings 9, 10, 11, 12, 13 and 14, the District failed to provide Student with FAPE and violated the IDEA on May 4, 2004, in that (1) the District's school psychologist failed to conduct a proper assessment when she failed to assess Student for severe emotional disturbance although she was in possession of sufficient information to indicate that this was a suspected area of disability, and (2) the District would have found Student eligible for special education had the District performed a proper assessment which included assessing for severe emotional disturbance.

14. Based on Legal Conclusion paragraphs 7 and 12 and Factual Findings 3, 4, 10, 11, 12, 15, 16, 17, 18, 20, 22, 23, 26 and 27, Student was and is eligible for special education under the category of severe emotional disturbance under the fourth criteria since May 4, 2004 in that Student (1) has been suffering from a clinically crippling depression to a marked degree and over a long period of time which has adversely affected Student's educational performance, (2) is being and has been prescribed medication for his depression, (3) has been receiving poor and failing grades, (4) has been a discipline problem in that Student refuses to conform to rules, engages in drug use, has inappropriate friends, and engages in criminal

²A "long period of time" is defined as a minimum of six months following extensive and comprehensive efforts at behavioral intervention and change, or a shorter duration may be appropriate for certain conditions such as Major Depressive Episode. (California State Department of Education, Identification and Assessment of the Seriously Emotionally Disturbed Child: A Manual for Educational and Mental Health Professionals (1986), p. 8 (hereafter "Manual"))

³ The term "to a marked degree" comprises two separate components. The first component is "pervasiveness" which is that inappropriate behaviors are present across almost all domains (school, home and community). The second is "intensity" which refers to the demonstration of negative behaviors in an overt, acute and observable manner primarily related to the individual's condition. (Manual, p. 9)

activity, (5) has been experiencing sleep problems, and (6) has been experiencing loss of energy and flat affect, inability to focus and hyperactivity.

15. Based upon Legal Conclusion paragraphs 1, 2, 3, 4, 5 and 14 and Factual Conclusions 16, 17, 18, 20, 22, and 23, the District failed to provide Student with FAPE and violated the IDEA for the 2004-2005 and 2005-2006 school years in that (1) the District failed to meet its child find obligations and conduct a follow-up assessment of Student for severe emotional disturbance although the District was in possession of sufficient information to indicate that this was a suspected area of disability, and (2) that the District would have found Student eligible for special education had the District conducted a reassessment in this the area of severe emotional disturbance.

B. Is Student's father entitled to reimbursement for the costs of placement of Student at an NPS in Utah?

16. Based upon Factual Findings 24 and 28 and Legal Conclusions 8, 12, 13, 14 and 15, the District failed to provide Student with a FAPE under the IDEA and Provo is providing an appropriate education to Student pursuant to the IDEA. Thus, Father is entitled to reimbursement for the costs of having Student transported and escorted to Provo as well as the costs of attending Provo through the 2005-2006 school year.⁴

C. May the District conduct an assessment, absent parental consent, as outlined in the March 10, 2006 assessment plan?

17. Based upon Legal Conclusion paragraphs 1, 3, 9, 10 and 11 and Factual Finding 29, and that Student has offered no evidence that the March 10, 2006 Assessment Plan fails to meet any statutory requirements or was in any manner insufficient, the District has met its burden of proof on this issue and the District is entitled to conduct an assessment of Student.

ORDER

1. Within 45 days from submission of appropriate proof of payment, the District shall reimburse Father for the cost of the private placement in the amount of \$66,920.00.

2. The District shall provide written notice to Student's parents and Provo at least 10 working days in advance of the assessment advising parents of the types, dates, times, and approximate duration of the assessment. Father shall make Student available for the assessment pursuant to the March 10, 2006 Assessment Plan on the dates and at the times and for the approximate duration specified by the District. The Assessment Plan shall be completed within 60 days from the date of this decision.

⁴ The award does not include the August cost of attending Provo which is part of the 2006-2007 school year and is not an issue in this hearing.

3. Within 60 days of the date of this decision, the District shall convene an IEP team to hold a meeting and develop a legally sufficient IEP which shall make an offer of FAPE to reflect the findings of this decision.

PREVAILING PARTY

Pursuant to 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 following findings are made in accordance with that statute:

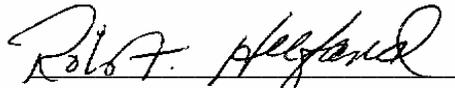
1. Regarding Issues 1 and 2 (Student's Petition (OAH Number N2006020294)), Student prevailed.

2. Regarding Issue 3 (the District's Petition (OAH Number N2006040313)), the District prevailed.

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: August 30, 2006


ROBERT F. HELFAND
Administrative Law Judge
Special Education Division
Office of Administrative Hearings