

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2011080031

v.

VICTOR VALLEY UNION HIGH SCHOOL  
DISTRICT, DESERT MOUNTAIN SELPA  
AND SAN BERNARDINO COUNTY  
SUPERINTENDENT OF SCHOOLS,

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VICTOR VALLEY UNION HIGH SCHOOL  
DISTRICT,

OAH CASE NO. 2011080382

v.

PARENT ON BEHALF OF STUDENT.

ORDER DISMISSING SAN  
BERNARDINO COUNTY  
SUPERINTENDENT OF SCHOOLS

On August 31, 2011, Student filed an amended Request for Due Process Hearing (amended complaint) against the Victor Valley Union High School District (VVUHSD), Desert Mountain Special Education Local Plan Area, San Bernardino County Superintendent of Schools (SBCS) and San Bernardino County Education Support Services Division.

The amended complaint alleged the following issues against SBCS:

1. Did SBCS deny Student a FAPE by failing to enforce an “autism master plan” or conduct autism training for Lakeview Middle School?
2. Did SBCS deny Student a FAPE by placing him in classes with teachers and substitute teachers who lacked proper professional development, training in autism, training and credentials, and who were not “highly qualified?”
3. Did SBCS deny Student a FAPE by failure to appropriately assess Student?
4. From September 3, 2009 until October 2009, did SBCS deny Student a FAPE by placing Student in an overcrowded classroom?
5. From September 2009 until June 2010, did SBCS deny Student a FAPE because his homework and instruction did not match his textbooks?

6. From September 2009 until August 2011, did SBCS deny Student a FAPE by failing to coordinate and assist Student to meet his IEP goals or monitor and assess his progress?

7. Did SBCS deny Student a FAPE from September 2009 until June 2011 because its LEA plan is inadequate and provides inadequate professional development for teachers and principals, and because per the LEA plan, data are collected but not used to drive instruction or determine effective interventions?

On October 13, 2011, SBCS filed a Motion to Dismiss, arguing that it was not a public agency responsible for providing Student with special education services. On October 26, 2011, OAH denied the motion, finding that the amended complaint contained sufficient facts to create a triable issue as to whether SBCS was a responsible public agency.

By Prehearing Conference Order dated November 14, 2011, Student's case against SBCS was bifurcated to determine jurisdiction over SBCS as a proper party first, and proceed with substantive issues only in the event jurisdiction was determined; therefore evidence relevant to OAH's jurisdiction over SBCS as a proper party was taken on November 15, 2011, the first day of hearing; supplemental evidence was taken on the fourth day of hearing, November 28, 2011. As discussed below, based on the evidence presented at hearing, SBCS will be dismissed as a party.

## FACTUAL FINDINGS

SBCS operates special education programs, and provides special education and related services using personnel employed by SBCS, for severely handicapped students who, due to the severity of their needs, cannot be served by their home school districts. SBCS did not provide any such special education or related services to Student, however, who was never enrolled in the programs operated by SBCS. During all relevant time periods, Student's special education was provided by his home school district, VVUHSD, and not by SBCS.

SBCS' decisions regarding special education programs and related services are limited to the students within the County programs that SBCS provides. SBCS did not control, direct, or participate in VVUHSD's decisions regarding Student. SBCS did not attend any of Student's IEP meetings. SBCS had no involvement of any kind in Student's educational program, including his special education or related services, his teachers, or his placement.

The Student Services Division (SSD) is the division within SBCS that oversees the special education and related services SBCS does provide to those students within its programs. The Assistant Superintendent in charge of SSD, Sharon Bolle, testified at hearing. She is not familiar with the term "autism master plan." SSD would be the division

responsible for any such program. SBCS has no responsibilities for enforcement of anything known as an “autism master plan.” SBCS did not offer autism training to school district employees and has never been involved with autism training at Student’s school. Although SBCS is generally authorized to offer trainings to teachers and administrators, attendance is not mandatory, and SBCS has no duties regarding autism training for district personnel.

SBCS has never been involved with (1) the provision of professional development to the employees at VVUHSD or Lakeview; (2) hiring by school districts, including personnel at VVUHSD or Lakeview, except for monitoring functions as discussed below; (3) assessments that are administered by school districts, including VVUHSD or Lakeview; (4) determining the number of students in classrooms at school districts, including VVUHSD or Lakeview; (5) homework assigned or textbooks provided by school districts, including VVUHSD or Lakeview, except for monitoring functions as discussed below; or (6) coordinating or assisting students in district programs to meet IEP goals, nor to monitor or assess their progress. Its responsibility for any of these areas is limited to its own County-operated programs, in which Student was not enrolled.

SBCS does monitor school sites to see if teachers are properly credentialed, but only once every four years. SBCS does review the textbooks and materials provided by certain low-performing schools to see if these are adequate, but Student’s schools were not included in that review.

In those circumstances where SBCS provides direct programs and services to students, it is a local educational agency (LEA). In that capacity its functions are governed by a document entitled “San Bernardino County Superintendent of School Student Services Local Educational Agency Plan” (SBCS LEA Plan). The SBCS LEA Plan applies only to SBCS in its capacity as a provider of direct services. The SBCS LEA Plan does not apply to any other LEA, any school district, or to VVUHSD.<sup>1</sup>

## LEGAL CONCLUSIONS

The petitioning party has the burden of persuasion at hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, on the issue of its defense that it should not be a party to the hearing, SBCS has the burden of persuasion.

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<sup>1</sup> Student’s motion to call Gary Thomas, the San Bernardino County Superintendent of Schools, as a witness to question him regarding the SBCS LEA Plan, is denied. Student did not establish the relevance of the SBCS LEA Plan. Furthermore, Student did not comply with the ALJ’s order to make an offer of proof by providing a list of the potential questions Student wished to pose to Mr. Thomas.

Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).)

A “public agency” is defined as “a school district, county office of education, special education local plan area, . . . or any other public agency under the auspices of the state or any political subdivisions of the state providing special education or related services to individuals with exceptional needs.” (Ed. Code, §§ 56500 and 56028.5.) “Public agency” also includes an Educational Service Agency (ESA), defined as: (a) a regional public multiservice agency (1) authorized by State law to develop, manage, and provide services or programs to local educational agencies; (2) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; (b) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and (c) includes “entities that meet the definition of intermediate educational unit in section 602(23) of the [Individuals with Disabilities Education] Act as in effect prior to June 4, 1997.” (Ed. Code, §56028.5; 34 C.F.R. §§ 300.33 and 300.12.)<sup>2</sup> Prior to June 4, 1997, “intermediate educational unit” was defined as “any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to children with disabilities within that State.” (See H.R. Rep 104-614, 2d Sess., p. 56 (1996), at <<http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt614/pdf/CRPT-104hrpt614.pdf>> [as of November 29, 2011].)

Education Code section 1240 describes the general statutory duties of county superintendents. County superintendents superintend the schools in the county; maintain responsibility for fiscal oversight of school districts; visit and examine schools at reasonable intervals to observe operations and learn of problems; if funds are appropriated to do so, annually present a report to the governing board of each school district, county board of education, and county board of supervisors describing the state of low-performing schools; distribute laws, reports, circulars, instructions, and blanks for the use of school officers; annually present a report to the governing board of the school district and the Superintendent of Public Instruction regarding the fiscal solvency of any school district with a disapproved budget or that is determined to be in a position of fiscal uncertainty; keep in his or her office the reports of the Superintendent of Public Instruction; keep a record of his or her official acts, and of all the proceedings of the county board of education; enforce the course of study; enforce the use of state textbooks and instructional materials and of high school textbooks and instructional materials; preserve reports of school officers and teachers; deliver to his or her successor, at the close of his or her official term, all records, books, documents, and papers belonging to the office; submit two interim reports during the fiscal year to the county board of education; and report to the Commission on Teacher Credentialing the identity of

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<sup>2</sup> All references to the Code of Federal Regulations are to the 2006 edition.

any credentialed person who knowingly and willingly reports false fiscal expenditure data. (Ed. Code, § 1240.) County superintendents also have auditing and reporting duties relating to the public schools in the county, are required to review and approve school district budgets and ongoing expenditure patterns and to provide fiscal oversight for districts that receive emergency state loans. (Ed. Code, §§ 1241.5, 1243-45, 42127 et seq. & 41327.2.)

With regard to the duty to enforce the use of state textbooks and instructional materials, the county superintendent's duties are to monitor districts' performance and report district noncompliance. (Ed. Code, § 1240, subd. (i).)

County superintendents are also required to monitor and review school district credentialed employee assignments, either annually or every four years, and to report misassignments to the Commission on Teacher Credentialing. (Ed. Code, § 44258.9, subds. (b)-(e).)

County superintendents are authorized, but not required, to conduct teacher institutes for the professional development of teachers employed by school districts within the county, including workshops to increase understanding of disabilities. (Ed. Code, §§ 1263, 1278.) County superintendents may establish administrator training and evaluation programs to school administrators designed to improve clinical supervision skills. (Ed. Code, § 44682).

Applying the above statutes that define the duties of a county superintendent, and considering the facts presented at hearing, SBCS is not a proper party here and will be dismissed. SBCS did not provide any special education or related services to Student, who was never enrolled in the programs operated by SBCS, and who was during all relevant time periods served by his home school district, VVUHSD, and not by SBCS. SBCS did not control, direct, or participate in VVUHSD's decisions regarding Student. SBCS did not attend any of Student's IEP meetings. SBCS had no involvement in Student's educational program, including his special education or related services, his teachers, or his placement. Thus, while SBCS is a "public agency," it was not "involved in any decisions regarding" Student, and is therefore not one of the entities to whom this special education due process hearing procedure extends.

Nor is there any factual or legal basis for Student's contentions against SBCS. Student alleges a failure to enforce an "autism master plan," when there is no such plan in existence. Student alleges a failure to conduct autism training for Lakeview Middle School, when SBCS had no such legal duty. Student alleges that SBCS denied Student FAPE by placing him in classes with teachers and substitute teachers who lacked proper professional development, training in autism, training and credentials, and who were not "highly qualified," however SBCS had no participation in Student's placement and its only functions regarding teacher credentialing were to periodically monitor and report on district's performance in general. SBCS did not participate in Student's assessments. SBCS had no involvement in Student's homework, instruction or textbooks, and its only function with respect to these items was to periodically monitor and report on district's performance in general. SBCS did not participate in monitoring Student's IEP goals or assessing his

progress. Finally, the SBCS LEA Plan applies only to SBCS in its capacity as a provider of direct services to certain students in its own programs, and not to Student's program through VVUHSD. For all the above reasons, SBCS is not a proper party and is dismissed.

ORDER

San Bernardino County Superintendent of Schools is dismissed.

Dated: December 2, 2011

/s/

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JUNE R. LEHRMAN  
Administrative Law Judge  
Office of Administrative Hearings