

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016040019

ORDER DENYING MOTION TO  
DISMISS

PROCEDURAL HISTORY

Student filed a request for due process hearing (complaint) on March 29, 2016, naming the Garden Grove Unified School District. Student alleges that her mother requested District to assess Student in the area of visual processing deficits, but that District has refused to assess her, has refused to provide an independent evaluation in the area of visual processing, and has failed to file for due process to demonstrate that Student does not require a visual processing assessment. As a remedy, Student requests an independent evaluation in the area of developmental optometry funded by District.

On April 11, 2016, District filed a motion to dismiss Student's complaint. District contends that Student's complaint is moot because Parent revoked consent for Student to receive special education and related services on April 2, 2016. District contends that since Student is now a general education student, she is not entitled prospectively to the procedural or substantive protections of the Individuals with Disabilities Education Act. District contends that since Parent revoked consent, it is not required to convene an individualized education program team meeting for Student or develop an IEP for her. Therefore, there is no reason for an independent evaluation to be conducted.

Student filed an opposition to District's motion on April 13, 2016. Student points out several circumstances where a student who has not yet been found eligible for special education or who is no longer eligible retains her right to due process.

APPLICABLE LAW AND ANALYSIS

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational

placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Under the doctrine of mootness, a court may refuse to hear a case because it does not present an existing controversy by the time of decision. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) However, mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 460.) A case may be moot when the court cannot provide the parties with effectual relief. (*MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 201, 214.) An exception to the mootness doctrine is made if a case presents a potentially recurring issue of public importance. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.)

Here, District provides no persuasive authority for its argument that Student’s request for an independent evaluation is moot. There are several situations where a school district must provide procedural due process to a child who is not yet eligible for special education, may never be eligible, or who is no longer eligible. And, there are situations where a school district must provide a remedy to a child who is not presently eligible for placement or services.

For example, a child not yet eligible for special education may be entitled to a manifestation determination hearing before her placement is changed based on conduct that violates district guidelines, even if the child is later found not to have a disability or if it is found that the conduct was not caused by a disability. Manifestation determination protections extend to students not previously identified as eligible for special education services only if the following factors are met: (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and, (2) the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability before the behavior that precipitated the disciplinary action occurred. (20 U.S.C. § 1415 (k)(5)(A).). Therefore, the child would be entitled to IDEA protections even before being found eligible and even if the ultimate decision is that the child is not, in fact, eligible for special education.

School districts are required to “seek and serve” children who may have a disability. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Department of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194.)

All referrals for special education and related services shall initiate an assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment. (Ed. Code, § 56043, subd. (a).) An IEP team meeting must be held within 60 days of receiving parental consent to the assessment plan. (Ed. Code, § 56043, subds. (b), (c).) The district must convene the IEP team meeting even if the recommendations in the district's assessment are that the child is not eligible for special education.

There is no viable argument that a child is not entitled to the IEP meetings to determine if she is eligible. There is no viable argument that the child is not entitled to contest a district's failure to find her eligible or entitled to contest a district's assessments if she believes they are not appropriate even if she has not been found eligible for special education. In each of these situations, the child (and her parents) are entitled to IDEA protections even though she has not been found eligible for special education and, indeed, may never be found eligible.

Furthermore, in an appropriate case an ALJ may grant relief that extends past graduation, age 22, or other loss of eligibility for special education and related services as long as the order remedies injuries the student suffered while she was eligible. (*Maine School Admin. Dist. No. 35 v. Mr. and Mrs. R.* (1st Cir. 2003) 321 F.3d 9, 17-18 [graduation]; *San Dieguito Union High School Dist. v. Guray-Jacobs* (S.D.Cal. 2005, No. 04cv1330) 44 IDELR 189, 105 LRP 56315 [same]; see also *Barnett v. Memphis City Schools* (6th Cir. 2004) 113 Fed.App. 124, p. 2 [nonpub.opn][relief appropriate beyond age 22].)

These are not exclusive examples of situations where a child who is not eligible or who is no longer eligible for special education is still entitled to the procedural protections of the IDEA. However, they illustrate the flaw in District's argument in the instant case that Student is not entitled to contest District's failure to provide her the requested assessment. Student may not ultimately prevail on her contention that District should have assessed her need for vision therapy, but she is entitled to a due process hearing to determine the issue.

#### ORDER

District's motion to dismiss Student's complaint as moot is denied. This matter shall proceed to hearing as presently scheduled.

DATE: April 21, 2016

DocuSigned by:  
  
A228F8201132499...

---

DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings