

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

TORRANCE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009101033

ORDER DENYING MOTION TO
DISMISS

On October 9, 2009, Barbara Dixon, attorney for Student, filed a Request for Due Process Hearing¹ (complaint), against the Torrance Unified School District (District). On October 23, 2009, Sharon A. Watt, attorney for District, filed a Motion to Dismiss alleging that the issues raised Student's complaint were moot as the District agreed to the Student's requested remedy. On October 27, 2009, Student filed an opposition. On October 28, 2009, District filed a reply to Student's opposition.

APPLICABLE LAW

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), 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 Office of Administrative Hearings (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

¹ A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

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.)

DISCUSSION

Student's October 9, 2009, complaint raised three issues concerning assessment of Student by District. On October 26, 2009, OAH issued an order on a separately filed Notice of Insufficiency (NOI). The order found Student's third issue to be insufficiently pled. This instant order will address the motion to dismiss as applied to Student's remaining issues.

Student asserts that she has voiced a disagreement with District's assessments of Student, and has requested an independent educational evaluation (IEE). Student further asserts that District's assessments failed to assess her in all areas of suspected disability because information existed that warranted assessing for disabilities which may lead to eligibility for special education under the categories of Autistic-Like, or Other Health Impaired.

As a remedy Student sought an independent assessment conducted by an "appropriately licensed and experienced assessor." Student requested an IEP meeting be held within 20 days of the completion of the IEE, to review the IEE, and make any changes to Student's IEP. Student reserved her right to seek compensatory education. For the IEE, Student requested that the assessor "explore" eligibility for special education under the following areas:

- a. Autism Spectrum Disorder, including high functioning autism and Asperger [*sic*] Syndrome
- b. Other Health Impairment due to attention deficits, with a co-morbid condition of conduct disorder
- c. Specific learning disability due to attention, under a response to intervention [RTI] model
- d. Emotional Disturbance.

On October 19, 2009, District filed a response to the complaint in which it was willing to fund an IEE of Student, provided the assessor's qualifications met "District standards." District stated the assessment would determine Student's qualification for special education "as autistic, other health impaired due to attention deficits, emotional disturbance, and/or learning disabled as the result of attention deficits." District further stated that the IEE would assess whether Student has "maladaptive behaviors."

However, District specifically disagreed that the IEE would determine whether Student had a conduct disorder. District further disagreed with the use of RTI as part of the IEE. Finally, District stated it would hold an IEP meeting within 30 days of the completion

of the assessment. Based upon the response to the complaint, District now moves to dismiss the complaint.

District's contention is that by agreeing to fund an IEE, in its response, a dispute no longer exists. With respect to the areas of disagreement, District first asserts that "RTI is not an evaluation." District next asserts that the difference of 20 days to hold an IEP versus 30 days to hold an IEP is insignificant. Finally, District asserts that conduct disorder is not a category for eligibility, District has agreed to assess maladaptive behaviors, and therefore, the difference between what Student has requested and what District has offered is insignificant. District puts forth no argument on Student's request to reserve the right to seek compensatory education following the IEE.

Here, the Student seeks an "appropriately licensed and experienced assessor." District has offered an assessor who "meets District standards." In her opposition to the motion, Student points out that the person Student may feel is appropriately qualified may not meet District standards, and vice versa. In its reply to the opposition, District states it meant that the assessor's qualifications comply with the requirements of "agency criteria," as set out in the IDEA. (34 C.F.R. § 300.502(e) (2006).) At this point, there is a request by the Student, and an offer by the District, however, there is no agreement. There remains a live controversy as to who is "appropriately licensed and experienced," and meets "agency criteria."

District states that because RTI is not an evaluation, the fact that it refuses to utilize RTI in its assessment proposal is irrelevant, as it is a legal remedy to which Student is not entitled. In support of its position District cites to two Office of Special Education Programs (OSEP) letters. (*Letter to Zirkel* (OSEP 2008) 52 IDELR 77; *Letter to Combs* (OSEP 2008) 52 IDELR 46.) District's reliance on this authority is misplaced. Neither letter states that RTI is not a process for evaluation of a specific learning disability, or that it cannot be used as part of comprehensive evaluation. In fact, the law requires that states allow RTI to be used as a process of evaluating the existence of a specific learning disability. (34 C.F.R. § 300.307(a)(2) (2006); Ed. Code, § 56337, subd. (c); *Letter to Zirkel* (OSEP 2007) 47 IDELR 268.) There is live controversy of whether Student's IEE should utilize RTI.

As discussed above, a case is moot if there is no existing controversy by the time of decision. District's position is that its response to the complaint eliminated the controversy raised by the complaint. Based upon the discussion above regarding the issues of who is qualified to conduct the IEE, and whether RTI may be used as part of the IEE, the District's response to the complaint did not resolve the issues raised in the complaint. A live controversy exists, and the case is not moot.²

ORDER

² For purposes of this motion, OAH need not reach the issues of Student reserving her right to compensatory education, or whether Student is entitled to an assessment for conduct disorder, or whether the IEP following the IEE be held within 20 days or within 30 days.

GOOD CAUSE APPEARING, District's Motion to Dismiss is denied. The matter shall proceed as scheduled.

It is so ordered.

Dated: October 27, 2009

/s/

BOB VARMA
Administrative Law Judge
Office of Administrative Hearings