

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ORANGE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010021086

ORDER DENYING MOTION TO  
DISMISS

Student filed a request for due process hearing on February 26, 2010. Student alleged that he was denied a FAPE for the 2008-2009 school year because he was not assessed in, and provided related services to address, all areas of suspected disability. Student also alleged that he was denied a FAPE for the 2009-2010 school year because of procedural defects at the November 16, 2009 IEP team meeting and because the District did not offer Student a program in the least restrictive environment at that time. As a remedy, Student seeks, in part, parental reimbursement for a unilateral placement in a residential facility where Student enrolled after November 16, 2009.

On April 9, 2010, District filed a motion to dismiss the due process hearing request on the ground that Student's parents withdrew their consent to special education on November 16, 2009 pursuant to title 34 Code of Federal Regulations, part 300.300(b)(4), which provides:

If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency--

(i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec. 300.503 before ceasing the provision of special education and related services;

(ii) May not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Sec. Sec. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under Sec. Sec. 300.320 and 300.324 for the child for further provision of special education and related services.

Specifically, District provided evidence of a written withdrawal of parental consent on November 16, 2009, and a subsequent prior written notice letter from the District to parents notifying parents that at their request, Student was withdrawn from special education. District contends that because Student withdrew from special education, he is not entitled to due process hearing protections as a matter of law. No opposition was received from Student. As discussed below, although District has demonstrated that the scope of Student's claims and remedies may be limited to the time period prior to the November 16, 2009, withdrawal of consent, dismissal is not appropriate.

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 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].) Under the above statutes, there is no requirement that a student already be eligible for special education prior to filing a due process hearing complaint.

Further, the language of title 34 Code of Federal Regulations, part 300.300(b)(4)(iii) & (iv) provides that when a parent withdraws consent, a district is relieved of its duty to "further" provide FAPE. Thus, the regulation relied on by District in its motion applies prospectively only. This conclusion is further bolstered by 34 Code of Federal Regulations, part 300.9, which defines consent. That regulation provides that, "If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked)." (34 C.F.R. § 300.9(c)(2).)

Although District may raise the issue of withdrawal of consent as a defense at hearing to any liability after November 16, 2009, it is not entitled to a motion to dismiss the matter in its entirety. Accordingly, the motion to dismiss is denied.

It is so ordered.

Dated: April 20, 2010

/s/

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RICHARD T. BREEN  
Administrative Law Judge  
Office of Administrative Hearings