

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011081125

ORDER DENYING MOTION TO
DISMISS

In August 2011, the Newport-Mesa Unified School District (District) filed a due process hearing request (complaint), naming Student and Student's parents (Student). The District's complaint seeks an order permitting the District to assess Student in accordance with the District's assessment plan.

On September 23, 2011, Student filed a motion to dismiss the District's complaint. On September 28, 2011, the District filed an opposition to that motion.

Student seeks to dismiss the complaint because Student is currently attending a private school. Student maintains that the law does not permit a school district to bring a due process complaint to compel an assessment of a child when the child's parents are not seeking special education services from that district.¹ Student relies upon the following section of the federal regulations:

(i) If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation . . . the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and

(ii) The public agency is not required to consider the child as eligible for services under §§ 300.132 through 300.144.

(34 C.F.R. § 300.300(d)(4) (2006).)

¹ Student raises other arguments in the motion to dismiss, but those arguments involve factual disputes that are not properly the subject of a motion to dismiss.

In the comments to that regulation, the Department of Education stated, in part:

There are compelling policy reasons why the Act's consent override procedures should be limited to children who are enrolled, or who are seeking to enroll, in public school. Because the school district has an ongoing obligation to educate a public school child it suspects has a disability, it is reasonable for a school district to provide the parents with as much information as possible about their child's educational needs in order to encourage them to agree to the provision of special education services to meet those needs, even though the parent is free, ultimately, to reject those services. The school district is accountable for the educational achievement of all of its children, regardless of whether parents refuse the provision of educationally appropriate services. In addition, children who do not receive appropriate educational services may develop behavioral problems that have a negative impact on the learning environment for other children.

By contrast, once parents opt out of the public school system, States and school districts do not have the same interest in requiring parents to agree to the evaluation of their children. In such cases, it would be overly intrusive for the school district to insist on an evaluation over a parent's objection. The Act gives school districts no regulatory authority over private schools. Moreover, the Act does not require school districts to provide FAPE to children who are home schooled or enrolled in private schools by their parents.

(71 Fed.Reg. 46635 (August 14, 2006).)

The District does not contest Student's statement of the law, but questions whether Student's parents have truly chosen to "opt out" of the public school system and provide a private school placement at their own expense. Instead, the District contends that Student's parents placed Student in private school because of a dispute with the District about the District's offer of a free appropriate public education (FAPE) for Student. The District is concerned that Student's parents will seek reimbursement from the District for that private placement.

The District is correct that Student's moving papers are equivocal on this issue. For example, at one point Student's papers state:

The parents are tentatively requesting NO services from the District for the 2011-2012 school year because they do not agree with the District's interim placement offers of 5/26/11 and 8/29/11. [A footnote to this sentence in the moving papers added: "Unless something changes and they have to come back to the district."]

That statement is far from an unequivocal declaration that Student's parents have chosen to opt out of the public school system and to place Student privately at their own

expense. In addition, Student's parents have attached no declarations under penalty of perjury to their moving papers to support a claim that they are choosing to opt out of the public school system.

If Student's parents have chosen to opt out of the public school system and are not seeking public reimbursement for their private placement, then they are correct that the District's assessment case should not go forward. Therefore, it is appropriate to give Student another chance to file a motion to dismiss with the appropriate paperwork. The current motion is denied, but it is denied without prejudice. Student's parents shall be permitted to file another motion to dismiss. Any subsequent motion should include a declaration signed under penalty of perjury containing a clear statement of the intent of Student's parents regarding Student's private placement and the funding for that placement.

ORDER

The motion to dismiss is denied without prejudice. All dates currently set shall remain on calendar.

IT IS SO ORDERED.

Dated: September 29, 2011

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings