

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2012060357

ORDER DENYING MOTION TO
DISMISS

On June 7, 2012, Parent on behalf of Student (collectively, Student), filed a Request for Due Process Hearing (complaint), naming Santa Monica-Malibu Unified School District as the respondent.

On June 29, 2012, District filed a Motion to Dismiss (Motion), contending since the Student did not consent to any aspect of the initial Individualized Education Program (IEP), including eligibility, the District cannot be held liable for the failure to provide Student with special education and related services. District's motion relies upon title 34 Code of Federal Regulations part 300.300(b)(3)(ii).

On July 5, 2012, Student filed opposition to the Motion.

APPLICABLE LAW

Although OAH will grant motions to dismiss allegations that are, from the face of the complaint, outside of OAH jurisdiction, such as claims that are beyond the statute of limitations, or allegations regarding improper parties, or section 504 claims, special education law does not provide for motions for summary judgment or for summary adjudication of issues.

Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) A school district will not be considered to be in violation of the requirement to make a FAPE available to a child because of the failure to provide the child with the special education and related services for which the parent refused to or failed to provide consent. (20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa); 34

C.F.R. § 300.300(b)(3)(ii) (2006).¹ A school district may not use a parent's refusal to consent to one special education service or activity referred to in part 300.300(b) to deny the parent or child any other service, benefit, or activity of the public agency, except as required by part 300.300. (34 C.F.R. § 300.300 (d)(3).)

DISCUSSION

District's Motion is unmeritorious for at least two reasons. First, District's interpretation of 34 C.F.R. part 300.300(b)(3)(ii) is erroneous. The law does not preclude a parent from withholding consent to an IEP, including an initial IEP, when, as here, the parent contends that the IEP does not offer a FAPE. Indeed, part 300.300(b)(3)(ii) specifically reiterates the mandate that the school district is required to provide a FAPE, a mandate which is the foundation of the IDEA and its implementing regulations. Therefore, Student's refusal to consent to the initial IEP on the grounds that it did not offer her a FAPE does not preclude her from filing a complaint to assert her right to a FAPE. This conclusion is further supported by 34 C.F.R. part 300.300 (d)(3), which implicitly acknowledges that a parent's right to refuse to consent to services (such as those that the parent alleges do not provide a FAPE), does not relieve the school district from providing other services (such as those that provide a FAPE).

Second, District's motion relies upon facts outside of the complaint, such as that Student did not agree with the IEP team's finding that she was eligible for special education services. Student does not so allege in her complaint. Rather, Student's complaint is grounded upon her assertion that she is eligible for special education placement and services, but that the IEP team did not offer her a FAPE. Under these circumstances, the Motion, at best, raises an issue of fact as to Student's position regarding her eligibility for services, which transforms the Motion into a motion for summary judgment or summary adjudication of issues. As was mentioned above, special education law does not authorize such motions.

ORDER

District's Motion to Dismiss is denied. The matter shall proceed as scheduled. All

¹All references to the Code of Federal Regulations are to the 1986 edition.

dates are confirmed.

IT IS SO ORDERED.

Dated: July 12, 2012

/s/

ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings