

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH NO. N 2005110583

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner

v.

STUDENT,

Respondent.

OAH NO. N 2006030758

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard these matters on April 19-20, 2006, in Los Angeles, California.¹

Mother represented her son, Student.

¹ The parties agreed to concurrently present their cases. Therefore, the ALJ will deem the cases to be CONSOLIDATED.

Sam Paneno, Attorney at Law, represented Los Angeles Unified School (District). Lisa Kendrick, the District's Due Process Specialist, was also present.

The following witnesses were called: Student, Mother, Father, Ms. Kendrick, School Psychologist Kristen Kennedy, Courtney Bullock, Student's computer class teacher, and Cassandra Etter, Student's special education teacher.

Oral and documentary evidence were received. The record was held open for the filing of closing briefs by 5:00 p.m. on April 28, 2006. The briefs were timely filed; the record was closed and the matter was submitted on April 28, 2006.²

ISSUES

1. If Student is eligible for special education and related services, can Student's parents exit Student from special education and related services?³

2. Is the District entitled to an order compelling Student's parents to make Student available for a comprehensive assessment in all areas of suspected disability due to current circumstances, and based on the fact that Student has not been fully assessed since the assessments that occurred for the triennial individualized education plan (IEP) dated October 18, 2004?

FACTUAL FINDINGS

Student is eligible for special education and related services

1. Student, who turned 14 years old on February 17, 2006, has been receiving special education and related services as a child with a specific learning disability (SLD). He resides in the District and attends a District special education class. He was first determined to be eligible for special education and related services in October 2001.

2. The assessments conducted for the triennial IEP on October 18, 2004, found that the manifestations of Student's disability include difficulties in reading, written language, math, and oral expression, due to disorders in the areas of visual processing, auditory processing, and attention, as well as a sensory motor skills deficiency. Mother

² OAH typically calculates the decision due date in consolidated cases by using the later date. But in this matter, the decision due date will be calculated from March 22, 2006, the date the District's case was filed, because that date results in an earlier due date (Monday, May 15, 2006, using the 45-day statutory time limit for the issuance of decision, plus the eight-day continuance for the filing of closing briefs).

³ The Prehearing Conference Order issued by OAH on March 10, 2006, used the phrase "remove Petitioner from special education and related services." (Emphasis supplied.) However, the filings of the parties and the focus of the hearing as to Issue 1 was whether Student's parents could "exit" him from special education. Therefore, the ALJ has clarified the issue accordingly.

consented to the IEP dated October 18, 2004, but refused consent to the AB3632 referral⁴ recommended by the IEP team.

3. On October 31, 2005, the IEP team found that Student remained eligible for special education and related services based on his SLD. As a result of this determination, Student was to receive a number of accommodations, including one-to-one support, preferential seating, and the use of assistive software (word processing and a dictionary/thesaurus program). But Mother did not consent to the IEP. Thereafter, no change in eligibility has been established.

4. The testimony of Ms. Etter, Student's special education teacher for the last two school years (2004-2005 and 2005-2006), established that Student lacks self-control, as evidenced by his "chronic" nail-biting (both fingers and toes – to the point that his fingers sometimes bled, and he once told Ms. Etter that he had bitten his toenail when she asked him why he was limping), the fact that he eats the mucus he pulls from his nose, and he pulls his hair out to the point that, at one time, he had a bald spot the size of a half-dollar coin.

Can the Student's parents exit him from special education and related services?

5. Mother is sorry she signed the original consent form that placed Student in the special education program. She thought the special education program would help Student, but it only made him angry. His anger has grown. Every day he blames her for giving consent, which hurts her. He promised that he would do better in school if he were exited from the special education program. She did not consent to a referral of Student to the Los Angeles County Mental Health Department; she has not consented to any assessment since she asked the District to exit Student from the special education program. Student's Father is distressed because of Student's apparent stress from being in the special education program.

6. Ms. Etter's testimony established that, if Student were removed from the special education classroom, he would likely fail; his frustration would be "enormous." She does not believe that he would be able to access the general education curriculum; his delays would subject him to ridicule and make him the focus of other students; and he would likely regress.

Is the District entitled to an order compelling Student's parents to make Student available for a comprehensive assessment in all areas of suspected disability?

7. Ms. Etter believes Student is in "desperate pain" and has undiagnosed areas of disability, potentially including autism. She fears for his safety and the safety of other students. She has done everything that she knows to do. Ms. Etter believes Student requires a comprehensive assessment.

⁴ Mental health services provided to, inter alia, special education-eligible students (under the Individuals with Disabilities Education Act, IDEA), are frequently referred to by the Assembly bills that created the law that governs the interagency responsibilities for the provision of such mental health services (AB3632 and AB2726).

8. District first sent a comprehensive reassessment plan to Mother on January 20, 2006. The District proposed to use standardized tests to assess Student in the areas of health and development, including vision and hearing (to be performed by a nurse or physician), overall ability, language function, motor abilities, and social-emotional status (all of which were to be performed by a psychologist), and academic performance (to be performed by a special education teacher and others). The plan specifically noted that the assessments would be conducted by qualified assessors in Student's primary language, or using an interpreter. Mother did not respond. On February 14, 2006, Mother went to Ms. Kendrick's office. They discussed the District's assessment plan, and Mother took a copy of the plan home with her. On April 5, 2006, District again sent its comprehensive assessment plan to Mother, with a Korean translation of the letter and plan. Mother never responded.

9. At the due process hearing, Mother and Father did not contest the notice, appropriateness, or adequacy of the District's reassessment plan. Nor did they contest the standardized tests the District indicated would be used.

LEGAL CONCLUSIONS

1. A child with a disability has the right to a free appropriate public education (FAPE). (20 U.S.C. §1412(a)((1)(A));⁵ Cal. Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.)

2. Based on Factual Findings 1 through 4, the Student remains eligible for special education and related services based on his SLD.

3. Among the amendments to the IDEA, effective July 1, 2005, were provisions requiring parental consent for the provision of special education and related services. (§ 1414(a)(1)(D); see also 34 C.F.R. § 300.505(a)(1).) California law has similar provisions. (See, e.g., Educ. Code §§ 56321, subd. (d) [consent for initial assessment or evaluation may not be construed as consent for the initial placement or initial provision of special education and related services]; 56506, subd. (f) [school district shall obtain written parental consent before placing a pupil in a special education program].) But these statutes all involve the initial provision of special education and related services to an eligible child.

⁵ All statutory references are to the IDEA, Title 20 of the United State Code, unless specifically noted otherwise.

4. The law is quite different regarding the effect of a parent's refusal of consent after special education and related services have been provided to a child who remains eligible. The issues resolved in *Student v. Glendale Unified Sch. Dist.* (2004) Special Education Hearing Office (SEHO) case number SN04-744, 104 LRP 31710, 41 IDELR 284, are almost identical to this matter. (See Cal. Code Regs., tit. 5, § 3085 [“[O]rders and decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority by parties and hearing officers in subsequent proceedings.”].) Specifically, the mother of a child with a specific learning disability (and a speech and language disorder) asserted that the child was not eligible for special education and related services, refused to consent to the most recent IEP, and asked the school district to exit the child. The school district responded by asserting both that the child remained eligible, and that it had a legal obligation to provide to the child a FAPE, which included special education and related services, regardless of the mother's refusal to consent. The hearing officer ruled in favor of the school district, ordering the parent to make the child available for reassessment.

5. Section 300.505(d), Title 34 of the Code of Federal Regulations, allows states to adopt additional parental consent requirements. California did so, requiring school districts to obtain written parental consent for all or part of an IEP before a child is “required to participate in all or part of any special education program.” (Educ. Code § 56346, subd. (b).) Therefore, if a California parent consents to only part of a special education placement, the school district is permitted to implement only the parts of the placement to which the parent has consented. (*Ibid.*; see *Glendale, supra*, 104 LRP at p. 31710, 41 IDELR at p. 284.)

6. But Section 300.505(d), Title 34 of the Code of Federal Regulations, also requires states to adopt and implement procedures to “ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.” Hence, pursuant to federal law, states must balance a parent's right to consent to services for his or her child with the duty of school districts to provide a FAPE. In situations like this matter, where Mother has refused consent to the District's IEP offer, California law requires the District to take affirmative steps to ensure that Student receives a FAPE. (Educ. Code § 56346, subd. (c).) In such a situation, if a school district determines that the program (to which the parent has refused consent) is necessary to provide the child with a FAPE, the school district “shall” initiate due process hearing procedures to override the parent's refusal of consent. (*Ibid.*) While the school district's due process hearing request is pending, the school district may convene a parent conference, or participate in mediation, to try to informally resolve the disagreement. But if the matter goes to hearing, the parties are bound by the decision resulting from the case. (*Ibid.*; see *Glendale, supra*, 104 LRP at p. 31710, 41 IDELR at p. 284; see also *Student v. Pleasant Valley Sch. Dist.* (2001) SEHO case number SN01-1148, 101 LRP 1354, 35 IDELR 244.) Similar decisions have been reached in other states. (See, e.g., *In re: Student With A Disability* (2004) 104 LRP 31641, 41 IDELR 197 [Kansas]; *Galveston Indep. Sch. Dist. v. Student* (2002) 102 LRP 10162, 36 IDELR 281 [Texas]; see also *Letter to Manasevit* (2003) 104 LRP 16162, 41 IDELR 36; *Letter to Yudien* (2003) 103 LRP 11622, 38 IDELR 267; *Letter to Bowen* (2001) 101 LRP 449, 35 IDELR 129.)

7. Based on Factual Findings 5 and 6, and Legal Conclusions 1 through 6, Mother and Father cannot unilaterally exit Student from special education and related services.

8. Under special education law, a reassessment of a student with a disability must be undertaken by the district “at least once every three years or more frequently, if conditions warrant” (§ 1414(a)(2); Educ. Code § 56381, subd. (a).) Parental consent is required before a district can conduct a reassessment. (§ 1414 (c)(3); see also Educ. Code §§ 56321; 56381, subd. (f); 56506, subd. (e).) To obtain consent, a school district must develop and propose to the parents a reassessment plan. (§ 1414(b)(1); Educ. Code § 56321, subd. (a).) The reassessment plan must: (1) be in language easily understood by the general public; (2) be provided in the primary language of the parent or other mode of communication used by the parent, unless to do so is clearly not feasible; (3) explain the types of assessments to be conducted; and (4) state that no IEP will result from the assessment without the consent of the parent. (Educ. Code § 56321, subd. (b).)

9. A parent has 15 days to decide whether to provide their written consent to the proposed assessment plan. (Educ. Code § 56321, subd. (c).) A school district may proceed with a reassessment without parental consent if it “can demonstrate that it had taken reasonable measures to obtain such consent and the child’s parent has failed to respond.” (§ 1414 (c)(3); see also Educ. Code §§ 56321; 56381, subd. (f); 56506, subd. (e).) If a parent refuses consent to an assessment plan, the District may request a special education due process hearing to determine whether it may proceed with the assessment without the consent of the parent. (Educ. Code §§ 56346, subd. (b); 56501, subd. (a)(3).) The district must show that it needs to reassess the student and is lawfully entitled to do so. (§ 1415(b)(6)(A); 34 C.F.R. § 300.505(b); Educ. Code §§ 56321, subd. (c), 56501, subd. (a)(3), 56506, subd. (e).) Accordingly, to proceed with a reassessment over a parent’s objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student’s triennial reassessment is due, that conditions warrant reassessment, or that the student’s parent or teacher has requested reassessment. (Educ. Code §§ 56321; 56381.)

10. Based on Factual Findings 8 and 9, on January 20, 2006, the District provided a comprehensive assessment plan to Mother that met the requirements of Education Code section 56321. Specifically, the District’s plan was in language easily understood by the general public, was provided in Korean (the Mother’s primary language), and noted the types of standardized tests that the District proposed to use.⁶ Mother never responded.

⁶ In the letter and assessment plan, the District did not state that no IEP would result from the assessment without the consent of the parent. Rather, the District pointed out that, if the Mother refused consent, it may request a due process hearing to seek an order requiring the reassessment without Mother’s consent.

11. Furthermore, based on Factual Findings 1 through 8, conditions now warrant reassessment of Student by the District. First, the District is required to reassess Student before the District can determine whether he no longer qualifies for special education and related services. (§ 1414(c)(5)(A); Educ. Code § 56381, subd. (h).) Second, it has been over 18 months since Student was last assessed. The District reasonably suspects that Student has as-yet undiagnosed areas of disability. In spite of the Mother's refusal of consent, the District has an ongoing legal obligation to offer Student a FAPE, including an appropriate placement. The District cannot design, offer, and implement an appropriate placement for Student without a reassessment in all areas of suspected disability.

ORDER

1. The Student's request to exit special education is DENIED.
2. The District's request for an order to reassess the Student, pursuant to the reassessment plan dated January 20, 2006, is GRANTED.
3. The Student's parents shall make him reasonably available for the reassessment.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues in this matter.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: 5/12/2006

JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings