

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

In the Matter of:

ANAHEIM UNION HIGH SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE No. N 2007040708

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter in Anaheim, California, on October 25, 2007.

Jeffrey J. Riel, Esq., represented Anaheim Union High School District (District). Barbara Moore-Brown, Director of Special Youth Services, attended the hearing on behalf of the District.

Student's mother (Mother) initially failed to appear for the hearing. After determination that the OAH provided Mother with notice of the hearing as required by law, the hearing commenced at 10:00 a.m. At approximately 10:45 a.m., Mother appeared at the hearing, but stated that neither would she take part in the hearing, nor be sworn to testify or speak on the record. Further, Mother indicated that Student is enrolled in a private school, and she does not consent to the District's further assessment of Student. Lastly, Mother stated she provided a FAX to OAH requesting that the matter be dismissed. Mother, however, refused to provide the ALJ or counsel with a copy of the FAX for the record. Mother left the hearing at approximately 10:50 a.m.

The District, filed this request for due process hearing on April 20, 2007. OAH granted an initial continuance of this matter on May 4, 2007. After several further continuances, OAH set this matter for due process hearing on October 25, 2007. OAH

provided notice to each party as required by law. The hearing commenced on October 25, 2007, and the record closed that same day.

ISSUE

Is the District is entitled to reassess Student in accordance with the assessment plan dated February 9, 2007, as amended on March 14, 2007, over the objection of Mother?

CONTENTIONS

The District contends that it has an obligation under the IDEA to offer Student a free appropriate public education (FAPE), and in order to meet this obligation, the District must reassess Student in order for the Individual Educational Plan (IEP) team to appropriately develop Student's IEP. Mother has stated that Student has been privately placed in a non-public school. Mother has not indicated any intention of returning Student to public school or seeking services from the District. Mother has not consented to a psychoeducational assessment of Student since initially enrolling Student in the District. The District is requesting an order permitting its proposed reassessment of Student without parental consent.

FACTUAL FINDINGS

Background Information

1. Student is 13 years old, and eligible for special education under the classification of autistic-like behavior. Student attended Brookhurst Junior High School (Brookhurst), which is within the boundaries of the District, from the fall of 2006 until February 13, 2007. At that time, Mother unilaterally removed Student from Brookhurst, and has not returned him to any District facility, nor has she sought any services from the District. On May 2, 2007, the District received a request for Student's school records from Anaheim Discovery Christian School.

Request for Reassessments

2. Once a child is eligible for special education services, a district must reassess the student at least once every three years, or sooner if conditions warrant, unless the parents and district agree that the reassessment is not necessary. In order for a district to make an offer of FAPE, it must determine a child's present levels of performance. Normally, when a parent refuses to consent to an assessment, a district may utilize the consent override provisions contained in the IDEA and in the California Education Code. The override provisions, however, exclude a student who is placed in private school by a parent at his/her own expense.

3. The Magnolia School District administered Student's most recent psychoeducational assessment in February 2005.¹ On May 24, 2006, the District held a transitional IEP meeting for Student as he was completing the 6th grade, and transitioning to junior high school within the District for the 2006-2007 school year. Mother did not consent to the IEP, however, she enrolled Student at Brookhurst for the 2006-2007 school year. On December 1, 2006, the District held another IEP meeting to discuss Student's low academics, behavioral needs and a behavioral support plan (BSP). Mother did not consent to the IEP or BSP.

4. On January 9, 2007, the District provided Mother with a reassessment plan. Daniela Olauson,² a school psychologist for the District, prepared the reassessment plan and explained the need for the assessment. The District delineated the areas of proposed assessment as well as the proposed methods of testing. The District proposed to reassess Student's educational achievement by administering the Woodcock-Johnson III (WJ-III), provide a Functional Analysis Assessment (FAA), administer the Clinical Evaluation of Language Fundamental-4 (CELF-4) for pragmatic speech and language skills, administer the Gilliam Autism Rating Scale, 2nd ed., Behavior Assessment System for Children II (BASC-II), Connors Rating Scale, and Asperger Syndrome Diagnostic Scale for social/emotional issues, provide a health assessment, as well as conduct interviews and observations to correlate with the various assessments. The plan was comprehensively crafted to determine Student's present levels of performance and unique needs in all areas of his suspected disabilities. The District selected qualified staff to administer the assessments. The District also provided Mother with a Notice of Procedural Safeguards as required by state and federal law. Determination of Student's present levels of performance is essential to an offer of FAPE, therefore the District needed to reassess Student.

5. On February 9, 2007, Mother consented only to the FAA and WJ-III. On February 13, 2007, Mother removed Student from Brookhurst. On March 14, 2007, the District sent Mother an amended reassessment plan which added additional areas of testing as requested by the IEP team. Mother did not respond to this reassessment plan. On May 2, 2007, the District received a request for Student's school records from a private Christian school. Student has not returned to the District. Further, although not sworn to testify at the hearing, Mother stated that she enrolled Student a private school and did not want Student assessed.

6. While the IDEA provides that a district may seek to conduct an assessment over the objections of a parent, the Act specifically recognizes that a parent is free to refuse special education services offered by the district. Further, a federal regulation provides that if a parent of a child who is placed in a private school at the parent's expense, fails to provide

¹ It is noted that Mother has not provided her consent to an IEP since March 19, 2003.

² Ms. Olauson has been employed by the District for three years. She holds a M.A. in Educational Psychology and received her School Psychologist Credential in 2005. She is a trained Behavioral Intervention Case Manager, and has experience assessing students, attending IEPs, and conducting FAAs.

consent to an assessment or reassessment, the district may not use the override procedure of filing for a due process hearing in order to compel an assessment.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

2. Districts must reassess special education students at least once every three years or sooner if conditions warrant, unless the parent and district agree that the reassessment is not necessary. (20 U.S.C. § 1414 (a)(2); Ed. Code, § 56381, subd. (a)(2).) A school district may reassess a student if the district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment. (Ed. Code, § 56381, subd. (a)(1).)

3. Parental consent for an assessment is generally required before a district can assess the student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).)

4. In order to assess or reassess a student, a district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); Ed Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).)

5. A district can override a lack of parental consent if the district prevails at a due process hearing relating to the district's need to conduct a reassessment. (20 U.S.C. §1414(a)(1)(B)(ii); Ed. Code, §§ 56321, subd. (c), 56506, subd. (e).)

6. The consent override procedure is not without limitation. Title 34 of the Code of Federal Regulations, section 300.300, subd. (d)(4)(i), which went into effect on October 13, 2006, specifically provides that 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 an initial assessment or reassessment, or the parent fails to respond to a request to provide consent, a district may not use the consent override procedures which allow for the filing of a due process complaint in order to compel an assessment.

7. Petitioner has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed. 387].)

Determination of Issue

The District has established that conditions warrant a reassessment of Student. The complete reassessment is essential in order to offer a FAPE. The District took reasonable measures to obtain consent from Mother. Mother, however, has the right to refuse further assessment of Student when she declines the special education services offered by the District, and unilaterally places Student in a private school at her own expense. Mother's refusal to allow reassessment of Student relieves the District from its obligation to provide Student a FAPE. Student will not be considered eligible for special education services within the District until Mother requests special education services from the District and Student is made available for reassessment.

ORDER

1. The District is not entitled to conduct a reassessment of Student in accordance with its February 9, 2007 reassessment plan as amended March 14, 2007.
2. Until such time as Parents request the provision of special education services from the District, the District is relieved of any obligation to assess or provide FAPE to Student.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The Student has prevailed on the single issue presented in this case.

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: November 13, 2007


JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings