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

In the Matter of: STUDENT, Petitioner, vs. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N 2005070660

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on August 24, 2005. Petitioner was represented by Joel S. Aaronson, Attorney at Law. Respondent was represented by Dean T. Adams, Attorney at Law. Petitioner's father and Susie Glickman, Special Education Specialist of the Los Angeles Unified School District, were also present during the hearing.

Petitioner presented documentary evidence (Exhs. P1 - P14) and the testimony of petitioner's father. Respondent presented documentary evidence (Exhs. R1 – R8) and the testimony of petitioner's mother. The Administrative Law Judge on his own motion hereby marks the Psychoeducational Report dated March 28, 2005, as respondent's Exhibit R9 and hereby admits the aforementioned exhibits of both parties into evidence. Neither party voiced any objection to the opposing party's exhibits during the hearing.

At the conclusion of the hearing, the record was held open for the parties to file written briefs. On August 30, 2005, respondent filed a letter with an attached letter by petitioner's mother addressed to the school district; said letter was marked as respondent's Exhibit R10. On September 9, 2005, petitioner filed his Post Hearing Brief, which was marked as Exhibit P15, and respondent filed a Closing Brief, which was marked as Exhibit R11.

On September 13, 2005, respondent filed a Motion to Strike Portions of Post Hearing Brief for Petitioner which was marked as Exhibit R12 . On the same date, petitioner filed a letter which was marked as Exhibit P16.

Oral and documentary evidence having been received and the record closed, the Administrative Law Judge submits this matter for decision on September 13, 2005, and finds as follows:

ISSUE

The issue presented for decision is whether the school district was required to obtain the consent of both parents to conduct a special educational assessment where the parents shared equally in educational decisions under their marital settlement agreement and court order.

FACTUAL FINDINGS

1. Petitioner Student (also student) is a six-year old child who has been attending Canyon Charter School of the respondent Los Angeles Unified School District (school district) since January 2005. Petitioner lives with his ten-year old brother, who attends private school, and his parents. The parents are divorced and have joint legal and physical custody of their two children pursuant to a marital settlement agreement.

2. Three years ago, in February 2002, petitioner's parents dissolved their marriage pursuant to a Marital Settlement Agreement and a Judgment of Dissolution entered in the Superior Court of California, County of Los Angeles, in Case No. BD-334-543. Under the

terms of the Marital Settlement Agreement dated January 8, 2002, the parents settled all rights and obligations between them, including the support and custody of their two children. The Marital Settlement Agreement and Judgment provided, in pertinent part:

"Subject to . . . mutual agreement of the parties, or order of Court, if they cannot agree, [former husband/father] and [former wife/mother] ...shall share equally in all major decisions concerning the children's health, welfare, and education, including without limitation, schooling, medical care, and the like."

In the event that a dispute arises under the Marital Settlement Agreement and Judgment, either parent can enforce any term of the agreement by first making a written demand requesting the relief desired and then filing a motion for relief with an agreed-upon family law commissioner or the Family Law Court.

3. (A) Earlier this year, in or about January 2005, petitioner was expelled from a private school. Thereupon, his parents mutually agreed to enroll him at Canyon Charter School (school). On February 23, 2005, school officials, including the principal and petitioner's kindergarten teacher, convened a meeting with the parents to discuss their child's adjustment or behavioral issues and referral for assessment.

(B) On February 23, 2005, school officials proposed that petitioner undergo an assessment for special education eligibility and services. Petitioner's father strongly objected to the proposed assessment and advised school officials that he did not consent to any special education assessment of his son. The father further informed school officials that, under their divorce decree and marital settlement agreement, not only the consent of his former spouse but also his consent were required in any major decisions concerning their son's education and schooling. Petitioner's mother, however, agreed with the school's recommendation that the student receive a special education assessment.

(C) On February 23, 2005, notwithstanding the objections of the father and her former husband, petitioner's mother consented to the district's referral for assessment and signed the Request for Special Education Assessment form. Two days later, on February 25, 2003, the school district presented a special education assessment plan and petitioner's

mother consented to the plan. Petitioner's father did not sign or consent to either the request for assessment or the assessment plan.

4. Subsequently, on four occasions in February and March 2005, the school psychologist from Canyon Charter School conducted an initial assessment and psychoeducational evaluation of petitioner. On March 28, 2005, the school psychologist prepared and issued a Psychoeducational Report (Exh. 10).

5. On March 21, 2005, the family law attorney for petitioner's father advised the school district by letter that the parents' Marital Settlement Agreement and Judgment required the consent of both the father and the mother in all major decisions concerning their child's education. Said counsel averred that this court judgment or order required the school district to obtain the consent of both parents to conduct testing for an Individualized Education Plan (IEP). Because the father did not give his consent, counsel demanded that the school district cease and desist from testing the child. The school district received this letter.

6. (A) On April 4 and April 11, 2005, school and school district personnel convened IEP meetings and developed and prepared an IEP report and addendum. Petitioner's mother attended the IEP meetings and agreed with the IEP. Pursuant to the IEP, the school district provided and petitioner received special education services, including a one-on-one classroom aide, during the last two months of the school year.

(B) Petitioner's father was present for the initial IEP meeting on April 4, 2005; he observed but did not participate in the meeting. He refused to sign the attendance sheet. The father stated that he did not give his consent to the assessment and objected to the convening of the IEP meeting.

7. On April 26, 2005, petitioner's father submitted a letter to the principal of Canyon Charter School that he did not consent to the special education assessment. He requested that the principal comply with the judgment or order from his divorce case, expunge all records related to the assessment, and provide an independent evaluation of his son. The father further stated that he did not agree with the programs recommended

for his son under the IEP and requested a due process hearing. He indicated that he would permit an aide to assist his son on a temporary basis until the conclusion of due process proceedings.

8. (A) On July 1, 2005, petitioner's father filed a compliance complaint with the California Department of Education, Special Education Division, Quality Assurance Unit, under Education Code section 5600.2 and pursuant to the school district's publication, "A Parent's Guide to Special Education Services (Including Procedural Rights and Safeguards)." Petitioner's father complained that he had requested a due process hearing and the district had failed to implement a due process hearing in accordance with state and federal laws. The compliance complaint was directed to and/or received by the Office of Administrative Hearings, Special Education Hearing Office, in Sacramento (OAH).

(B) On August 2, 2005, OAH treated the father's complaint as a request for a due process hearing and set the matter for a hearing. On August 16, 2005, respondent school district filed a motion to dismiss, contending that the complaint or petition filed by the father was vague and did not identify any issues or offer any proposed resolution. In the alternative, the school district argued that the hearing should be continued and petitioner directed to set forth an issue statement. On August 16, petitioner filed an opposition to the motion. On August 17, 2005, OAH denied the motions of respondent school district on the grounds that the school district had failed to timely challenge the sufficiency of the due process complaint under the provisions of United States Code, title 20, section 1415, subdivision (c)(2)(A).

9. On August 21, 2005, the Administrative Law Judge convened a telephonic prehearing conference with the parties to clarify the issues for the upcoming due process hearing. Petitioner's father and his counsel, school district counsel, and petitioner's mother participated in the conference. Based on the discussion during the conference, and with agreement of the parties, the Administrative Law Judge ruled that the sole issue in this matter was whether the consent of both parents was required for the school district to perform the assessment for purposes of developing an IEP.

10. (A) As shown by the evidence in this matter, petitioner's father aspires that his son, who is bright and intelligent, attend a highly-regarded private school. He has continued to make application to private school for him. His older son attends private school. On the other hand, the student's mother believes that private school is not appropriate for petitioner at this time. She believes that her son has issues that interfere with his ability to learn and behave in the classroom and she wants her son to receive services to cope with those issues.

(B) Toward the end of last school year, petitioner showed improvement at school. The father attributes his son's improvement to the fact that the student spent more time with him rather than to the assistance that the student received from the full-time aide at school.

11. On August 29, 2005, both petitioner's father and mother attended a hearing before the Family Law Court of the Los Angeles County Superior Court. Following the hearing, the mother wrote a letter to the school stating, "I have been ordered by the Judge in our case to inform you that the I.E.P. must be terminated as of November 1st, 2005, unless otherwise directed by the court or [by] written agreement by both [parents]."

* * * * * *

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist to sustain petitioner's due process petition in that it was established by the preponderance of the evidence and applicable law that the school district did not have proper written parental consent to conduct the assessment of the student or child in this matter, based on Findings 1 – 10 above.

2. Discussion--The Individuals with Disabilities Education Act (IDEA) confers rights and procedural safeguards upon handicapped students and their parents. (20 U.S.C.A. §1401 et seq.) Any state qualifying for federal funds available under the IDEA must adopt

policies and regulations that assure school districts will provide a free appropriate public education and related services to students with educational disabilities. (20 U.S.C.A. §1401 et seq.) The IDEA emphasizes participation by parents in developing and assessing the effectiveness of the child's education program. (34 C.F.R. 300.345.) Under federal and state law, parents are guaranteed minimum procedural safeguards such as access to school records, notice of proposed changes in a child's educational placement, and the right to file complaints related to the placement or provision of a free appropriate education. (See Ed. Code §§56500 et seq.)

Before a school district can assess a child and place the child in a special education program, the IDEA provides that a school district must obtain the written consent of a parent. (20 U.S.C. §1414(a).) California law likewise states that an assessment may not be conducted unless the consent of the parent or guardian is obtained prior to the assessment (Ed. Code §56321). The parent's consent for assessment must be in writing (Ed. Code §56043, subd. (d)(1)) unless the school district prevails in a due process hearing or has taken reasonable measures to obtain consent and the parent has failed to respond (Ed. Code §56506, subd. (e)). A school district shall also obtain written parental consent before placing a pupil in a special education program (Ed. Code §56506, subd. (f)) and 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 (Ed. Code §56321, subd. (d)).

Moreover, under the new IDEA, where the parent of a child does not consent to an initial evaluation, a school district or educational agency may pursue the initial evaluation of a student by utilizing itself the due process complaint procedures except to the extent inconsistent with state law relating to parental consent. (20 U.S.C. §1414(A)(1)(D)(ii)(I).) If, after the initial evaluation, the parent then refuses to consent to services, the school district shall not provide special education and related services to the child and the school district shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with special education and related services. (20 U.S.C. §1414(A)(1)(D)(ii)(II-III).)

A parent is a natural parent, any person having legal custody of a child, or any person who is legally responsible for the child's welfare. (20 U.S.C. §§1401–1402.) Under the California Education Code, a parent includes a person having legal custody of a child, a person acting in the place of a parent including a grandparent or stepparent with whom the child lives, and a foster parent if the natural parents' authority to make educational decisions on the child's behalf has been specifically limited by court order. (Ed. Code §56028, subd. (a).)

While the IDEA grants rights to parents, and the regulatory definition of parent includes all biological parents and impliedly a divorced parent, nothing in the IDEA overrides the states' allocation of authority as part of a custody determination. (*Navin v. Park Ridge School District* (7th Cir. 2001) 270 F.3d 1147.) Under California law, joint legal custody means that both parents share the right and the responsibility to make decisions regarding the health, education, and welfare of a child. (Fam. Code §3003.)

In the present matter, the parents have joint legal and physical custody of the student which means that under state law both parents *share* in the right and responsibility to make decisions regarding the student's education. The Marital Settlement Agreement and Judgment further adds that the parents must share *equally* in all major educational or schooling decisions. If they cannot mutually agree, either parent can enforce their marital agreement and seek relief by filing a motion in the Superior Court.

Here, the student's father has strongly objected to the assessment of his son by the school district for special education services from the outset. He made his position known to the school district by voicing his objections at the school meeting on February 23, 2005; by refusing to sign the consent to assessment; by having his family law attorney send a letter and a portion of the marital agreement and court order to the school district on March 21, 2005; and by refusing to sign the attendance sheet at the IEP meeting on April 4, 2005, and mailing a follow-up letter to the school principal. At all times relevant herein, and prior to the assessment, the school district has known that the father did not consent to the assessment of the student and did not obtain or receive his written consent for any

assessment. The father specifically advised the school district that, under his marital agreement and court judgment, his consent was needed for any major educational decision. Shortly thereafter, and prior to issuance of the assessment report, the school district received documentation from the father's family law counsel of the marital agreement and court judgment. Nevertheless, the school district proceeded with the assessment, IEP meeting, and provision of services with only the written consent of the student's mother.

Based on California family law and the Marital Settlement Agreement and Judgment of the parents, the written consent of both mother and father of the student was required before the school district could assess the student for special education services. In the absence of the written consent of both parents and regardless of the merits of the parents' beliefs or reasons for or against any assessment for special education services, the school district cannot be found to have obtained lawful written consent for the assessment. Therefore, the assessment must be deemed void or invalid and must be expunged from the student's record.

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Wherefore, the Administrative Law Judge makes the following Order:

ORDER

The due process petition of the student Student is hereby sustained. Petitioner shall be considered the prevailing party in this matter. The Los Angeles Unified School District shall forthwith expunge the assessment from the student's school records.

Dated: 10/11/05

Vincent Nafarrete

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision and both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.