

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

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007040069

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter in Poway, California, on May 30, 2007.

Justin Shinnefield, Esq., represented Petitioner, Poway Unified School District (District). Emily Shieh, Assistant Director, Special Education Department, attended the hearing on behalf of the District.

Neither Student (Student) nor her parents (Parents) attended the hearing. Parents submitted written declarations and evidence which were admitted into evidence as Student's exhibits 1 through 8.

Petitioner, District, filed this request for due process hearing on April 2, 2007. On April 6, Petitioner requested that the initial due process hearing date of May 2, 2007, be continued to May 30 and 31, 2007. Notice was given to each party as required by law. On May 25, 2007, Parents filed a motion to dismiss the complaint, which was denied. The hearing commenced on May 30, 2007, and the record closed that same day.

ISSUE

Is the District is entitled to reassess Student for her triennial assessment in accordance with the assessment plan dated November 18, 2006, over the objection of Student's parents?

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 at least once every three years. Parents contend that Student has been privately placed in a non-public school located outside of the District. They have no intention of returning Student to public school or seeking services from the District. Therefore, Parents contend that the District has no obligation to perform any further assessments of Student. Parents have indicated they will consent to no further assessments of Student. The District is requesting an order permitting its proposed reassessment of Student without parental consent.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student is 19 years old, and eligible for special education under the classification of mental retardation. In November 2005, the Superior Court declared Student legally incompetent and appointed Parents as her legal conservators. Based upon the conservatorship, Parents retain educational rights for Student. Parents continue to reside within the District.
2. Student last attended school in the District in July 2006. As of August 2006, Parents privately placed Student in the Institute for Effective Education in San Diego, California. No applications have been made to return Student to a District school, nor

have Parents requested any assistance or services from the District.

REQUEST FOR REASSESSMENTS

3. Once a child is eligible for special education services, a district must reassess the student at least once every three years (triennial assessment), 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.

4. The District last assessed Student in 2003, and had not worked with her since August 2006, when Parents privately placed Student. Determination of Student's present levels of performance is essential to an offer of FAPE, therefore the District needed to reassess Student.

5. The District sent a letter to Parents on November 17, 2006, which explained the need for the assessment. The District enclosed the triennial assessment plan, which delineated the areas of proposed assessment as well as the proposed methods of testing. The District requested to reassess Student in the areas of academic achievement, processing and motor developments, language/speech communication development, intellectual development, social/emotional development, adaptive behavioral development, prevocational/vocational testing and health. The plan was comprehensively crafted to determine Student's present levels in performance and unique needs in all areas of her suspected disabilities. The District selected qualified staff to administer the assessments. The District also enclosed a copy of *Notice of Procedural Safeguards* and *Notice of Proposed Action* with the letter. The District sent follow up letters to Parents,

certified mail, on December 8, 2006, and January 23, 2007. Each letter contained an explanation of the request to assess, the triennial assessment plan, and the Notices.

6. The District mailed its final letter requesting the reassessment to Parents on February 12, 2007. The District took reasonable measures to obtain consent from Parents.

7. Parents responded by letter on February 17, 2007, indicating their reluctance to consent, and they ultimately refused to sign the assessment plan. Parents clearly indicated they would not consent to the assessment plan or cooperate with any further special education requests for assessments. Additionally, Parents clearly indicated they have no intention of reenrolling Student in public school or seeking any services from the District.

8. 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 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)(l); Ed. Code, § 56321, subd. (a).)

5. In certain instances, 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, part 300.300, subdivision (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.2d 387].)

DETERMINATION OF ISSUE

The District has established that conditions warrant a reassessment of Student. The proposed triennial assessment is essential in order to offer a FAPE to Student. The District took reasonable measures to obtain consent from Parents. Parents, however, have the right to decline special education services offered by the District. Parents' refusal of these services 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 Parents request 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 November 18, 2006 assessment plan.
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.

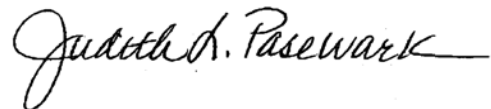
PREVAILING PARTY

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 ninety (90) days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 19, 2007

A handwritten signature in black ink, reading "Judith L. Pasewark". The signature is fluid and cursive, with a long horizontal stroke at the end. It is positioned above a solid horizontal line.

JUDITH L. PASEWARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings