

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2017050096

CORRECTED DECISION ON BIFURCATION¹

Mother on behalf of Student filed a request for due process hearing with the Office of Administrative hearings on April 28, 2017, naming Los Alamitos Unified School District. On May 16, 2017, Father filed a Notice of Intent to Exercise Parental Rights regarding the complaint Mother filed on behalf of Student. On June 9, 2017, OAH determined no joinder was required for Father to participate as a party in this matter, as Father shared legal custody of Student, including educational rights, with Mother.

On August 8, 2017, during the telephonic prehearing conference, Administrative Law Judge Judith L. Pasewark bifurcated the matter to determine the issue of OAH jurisdiction over the remaining issues of Student's complaint. The parties stipulated to submit the issue of OAH jurisdiction on September 26, 2017, through written declarations and legal briefs only. The remaining issues of Student's complaint were

¹ This Corrected Decision fixes a formatting issue that was on page one.

continued for hearing on October 31, November 1, and 2, 2017.

On September 26, 2017, Tracy Peznick Johnson, Attorney for District, submitted a written brief and accompanying declarations and documents on behalf of District, and Father submitted a written declaration and documents. On September 26, 2017, Tania L. Whiteleather, Attorney for Mother on behalf of Student, requested a one day extension of time to file her brief and declarations in support of the complaint. Subsequent to this request, OAH did not receive any further documents or communications from Ms. Whiteleather or Mother.

On October 2, 2017, ALJ Judith L. Pasewark, closed the record and took the issue of OAH jurisdiction under submission.

ISSUE

The sole issue in the bifurcated matter is whether OAH has jurisdiction to determine whether Student was denied a free appropriate public education between May 2015, when Father withdrew Student from special education without the consent of Mother, and April 28, 2017.

SUMMARY OF DECISION

This decision holds that both Mother and Father held joint legal custody of Student pursuant to a 2009 determination of temporary child custody in their dissolution of marriage action, which has never been changed. As such, both parties held equal educational rights for Student. Once Father revoked consent for Student to receive special education and related services and withdrew her from special education in May 2015, the prospective protections of the IDEA ceased. OAH has no jurisdiction to reinstate or determine special education services where one of the joint holders of Student's educational rights objects.

FACTUAL FINDINGS

1. Student was 12 years old at the time of this Decision. She resided within the boundaries of District. In July 2009, Mother filed for dissolution of her marriage to Father. On November 12, 2009, the Los Angeles County Superior Court awarded Mother and Father joint legal custody of Student. There was no evidence that the custody order was ever changed after 2009.

2. At Mother's request in spring 2012, District assessed Student for eligibility for special education and related services. In June 2012, the individualized education program (IEP) team qualified Student for special education with primary eligibility under speech and language impairment and secondary eligibility of autistic-like behaviors. The IEP team developed an IEP for Student.

3. During the fall semester of 2014, Mother requested a social skills assessment and an educationally related mental health assessment. District complied, and held an addendum IEP team meeting on February 19, 2015, to review and discuss these assessments. The educationally related mental health assessment reported there were no social or emotional concerns impeding Student's success at school. The social skills assessment indicated Student's interactions with peers were appropriate. No changes were made in Student's IEP at that time.

4. In spring 2015, District conducted a multi-disciplinary triennial reassessment of Student. District held an IEP team meeting on May 20, 2015. Based upon the results of the triennial reassessments, District determined Student was no longer eligible for special education and related services. Father agreed with District's determination of ineligibility; Mother did not agree. As Parents disagreed about District's recommendation, District took no action to exit Student from special education, and Student briefly continued to receive special education and services under

stay put.²

5. On May 29, 2015, Father notified District in writing that he explicitly revoked consent for continuing provision of special education and related services to Student.

6. On June 2, 2015, District provided both Mother and Father prior written notice, which acknowledged that Father had withdrawn his consent to provision of special education and related services for Student, and stated District was therefore prohibited from providing Student with further special education services. As of June 2, 2015, Student returned to general education.

7. Almost two years later, on April 7, 2017, Mother notified District in writing of her requests to immediately reinstate Student's IEP and hold an IEP team meeting within the following 30 days.

8. On April 13, 2017, District provided Mother with prior written notice that District could not reinstate an IEP without the recommendation of the IEP team as well as the consent of both parents, as Father had expressly withdrawn consent to further provision of special education services to Student. Mother was unable to obtain Father's consent or provide District with proof of sole legal custody of Student or any other court order providing Mother with sole educational rights for Student.

9. On April 28, 2017, Mother filed this request for a due process hearing on behalf of Student. Mother raises two issues in her complaint; (1) "Whether District properly exited [Student] from special education in May 2015 when only one parent consented to that exit and the other rejected District's offer to terminate IEP services";

² Until due process procedures are complete a special education student is entitled to remain in his/her current educational placement unless the parties agree otherwise (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518 (a) (2006); Ed. Code § 56505, subd. (d).)

and (2) “Whether District had properly assessed [Student]’s unique educational needs in mental health and social/emotional, speech/language, and in occupational therapy.”

LEGAL CONCLUSIONS

1. The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to “ensure that all children with disabilities have available to them a free appropriate public education”, and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), & (C); see also Ed. Code, § 56000.)

2. A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

3. California’s definition of parent for special education purposes is largely analogous to the federal definition. California defines “parent” as a biological or adoptive parent; a foster parent if the authority of the biological or adoptive parents to make educational decisions on the child’s behalf specifically has been limited by court order; a guardian authorized to act as the child’s parent or to make educational decisions for the child, including a responsible adult appointed for the child in accordance with Welfare and Institutions Code section 361; an individual acting in the place of a biological or adoptive parent, including a grandparent, stepparent, or other

relative, with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed pursuant to Government Code section 7559.5. (Ed. Code, § 56028, subd. (a).)

4. When more than one party qualifies as a parent pursuant to these definitions, the biological parent is presumed to be the parent unless the biological parent does not have legal authority to make educational decisions for the child. (34 C.F.R. § 300.30 (b)(1) (2006);³ Ed. Code, § 56028, subd. (b)(1).) When a judicial decree or order identifies a specific person or persons as having authority to make educational decisions on behalf of a student, that person is determined to be the parent for purposes of the IDEA. (34 C.F.R. § 300.30(b)(2); Ed. Code, § 56028, subd. (b)(2).) When the parents of a student are divorced, the parental rights established by the IDEA apply to both parents, unless a court order or state law specifies otherwise. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46568 (August 14, 2006); see also *Letter to Biondi*, OSEP, October 7, 1997, *Letter to Best*, OSEP, January 8, 1998, and *Letter to Serwecki*, OSEP, February 28, 2005.)

5. Although the Ninth Circuit Court of Appeals has not expressly commented on the issue of which of two divorced parents has superior rights in a special education related matter under the IDEA, the Second and Seventh Circuits have addressed the question and determined that "the question of which divorced parent should be allowed to perform parental functions under the IDEA . . . is a matter for State or local divorce courts. Just as these courts deal with matters of custody, they can appropriately deal with matters related to the responsibility for making educational decisions on behalf of the child." (*Pam Taylor v. Vermont Department of Education et al.* (2nd Cir. 2002) 313

³ All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

F.3d 768, 780; see also *Navin v. Park Ridge School Dist.* (7th Cir. 2001) 270 F.3d 1147, 1149 [“a divorced parent retains statutory rights [and] nothing in the IDEA overrides states’ allocation of authority as part of a custody determination”]; see also *Newdow v. U.S. Congress* (9th Cir. 2002) 313 F.3d 500, 503-504.) Consistent with the above, the express language of a custody order has been used to determine which of two divorced parents has decision-making authority regarding education. (See *North Allegheny School District* (Penn. SEA 1997), 26 IDELR 774; *Upper Darby School District* (Penn. SEA 2002), 36 IDELR 285; *L.T. ex rel. C.T. v. Denville Township Board of Education* (N.J. Adm. 2004), 2004 WL 2623606.)

6. In California, joint legal custody means that both parents share the right and the responsibility to make decisions relating the health, education, and welfare of a child. (Fam. Code, § 3003.) When a family court makes an order of joint legal custody, the court must specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. If the court does not state that the consent of both parents is required on an issue, either parent acting alone may exercise legal control of the child. (Fam. Code, § 3083.)

7. If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency (i) may not continue to provide special education and related services to the child but must provide prior written notice in accordance with 34 Code of Federal Regulations part 300.503 before ceasing the provision of special education and related services; (ii) may not use the procedures in subpart E (including the mediation procedures under 34 Code of Federal Regulations part 300.506 or the due process procedures under 34 Code of Federal Regulations parts 300. 507 through 300.516)

in order to obtain agreement or a ruling that the services may be provided to the child; (iii) will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and (iv) is not required to convene an IEP team meeting or develop an IEP under 34 Code of Federal Regulations parts 300.320 and 300.324 for the child for the further provision of special education and related services. (34 C.F.R. § 300.300(b)(4).)

8. The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (f); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations does not apply to claims filed by a parent who was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentation by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) withholding of information by the local educational agency from the parent that was required to be provided to the parent. (Ed. Code, § 56505, subd. (f); 20 U.S.C. 1415 (f)(3)(D).)⁴

OAH JURISDICTION TO DETERMINE STUDENT'S ISSUES

9. As indicated in Legal Conclusion Two, a party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child or to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child." Despite Student's attempt to frame Issue One in the vocabulary of a denial of

⁴ Student has not alleged any exceptions to the two-year statute of limitations.

FAPE by District, in substance it asks OAH to determine whether one parent with joint educational rights may withdraw his/her child from special education and related services without the consent of the other joint custodial parent. The complaint does not present a claim under the IDEA. There is no special educational issue to be determined, no contention of denial of FAPE. Rather, Student's complaint asks for a determination of validity of a joint legal custody determination from the superior court. Father unilaterally exercised his educational rights and withdrew Student from special education in accordance with title 34 Code of Federal Regulations part 300.300(b)(4). OAH does not have jurisdiction to determine or override the jurisdiction of the Family Court or its orders.

10. Student's complaint also asks whether District properly assessed Student's unique educational needs. While Student's complaint fails to identify when District failed to properly assess Student, the applicable statute of limitations is from the date of Student's last IEP team meeting on May 20, 2015, to May 29, 2015, when Father revoked his consent to the provision of special education and related services. Student did not provide any declarations or supporting information to clearly establish a claim for, at best, this nine day period. Student's complaint references educational needs in mental health and social emotional areas. At Mother's request, District assessed Student in these areas and held an IEP team meeting to review the assessments on February 19, 2015, a date prior to the applicable statute of limitations. Student's references to speech and language and occupational therapy needs and assessments arose from an independent assessment obtained by Mother in December 2016, long after Father withdrew consent to special education and related services, and District therefore was not required to make a FAPE available to Student. (34 C.F.R. § 300.300(b)(4)(iii).) As such, OAH has no jurisdiction to adjudicate issues which are outside the applicable statute of limitations in this case. Therefore, Student's complaint, in its entirety, is dismissed for

lack of jurisdiction.

ORDER

Student's complaint is dismissed with prejudice.

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. In this matter, OAH has no jurisdiction to adjudicate the issues presented in Student's complaint.

RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATE: October 20, 2017

/s/

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings