

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

CORONADO UNIFIED SCHOOL DISTRICT,

vs.

PARENT on behalf of STUDENT,

OAH CASE NO. 2009100351

PARENT on behalf of STUDENT,

vs.

CORONADO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009101505

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS

On September 21, 2009, attorney Robin J. Champlin, on behalf of the Coronado Unified School District (District), filed a Request for Due Process Hearing (District's complaint) against Student. This matter was designated as Office of Administrative Hearings (OAH) Case No. 2009100351.

On October 23, 2009, Parents, on behalf of Student, filed a Request for Due Process Hearing (Student's complaint) against the District. This matter was designated as OAH Case No. 2009101505. On November 10, 2009, District filed a Notice of Insufficiency (NOI) concurrently with its motion to dismiss. On November 16, 2009, OAH issued a Determination of Insufficiency wherein it granted the NOI in part. OAH has not received a response from Student.

APPLICABLE LAW

Parents have 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 free appropriate public education (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].) OAH has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act (IDEA). (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [hereafter *Wyner*].)

This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement. (*Id.* at p. 1030.) In *Wyner*, during the course of a due process hearing, the parties reached a settlement agreement in which the district agreed to provide certain services. The hearing officer ordered the parties to abide by the terms of the agreement. Two years later, the student initiated another due process hearing, and raised, among other things, six issues as to the school district's alleged failure to comply with the earlier settlement agreement. The California Special Education Hearing Office (SEHO), OAH's predecessor in hearing IDEA due process cases, found that the issues pertaining to compliance with the earlier order were beyond its jurisdiction. This ruling was upheld on appeal. The *Wyner* court held that "the proper avenue to enforce SEHO orders" was the California Department of Education's compliance complaint procedure (Cal. Code Regs., tit. 5, § 4600, et. seq.), and that "a subsequent due process hearing was not available to address . . . alleged noncompliance with the settlement agreement and SEHO order in a prior due process hearing." (*Wyner, supra*, 223 F.3d at p. 1030.)

More recently, in *Pedraza v. Alameda Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS 26541 (D. Cal. 2007), the United States District Court for the Northern District of California held that OAH has jurisdiction to adjudicate claims alleging denial of a FAPE as a result of a violation of a mediated settlement agreement. However, a "mere breach" of the mediated settlement agreement should be addressed by the California Department of Education's compliance complaint procedure.

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

Prior to October 9, 2006, the statute of limitations for due process complaints in California was generally three years prior to the date of filing the request for due process. The statute of limitations in California was amended, effective October 9, 2006, and is now two years, consistent with federal law. (Ed. Code, § 56505, subd. (1); see also 20 U.S.C. § 1415(f)(3)(C).) However, Title 20 United States Code section 1415(f)(3)(D) and Education

Code section 56505, subdivision (1), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent.

DISCUSSION

District moves to dismiss the following issues in Student's complaint.

Issue No. 1

District asserts this issue should be dismissed for multiple reasons. First, with respect to the allegations of a denial of FAPE based upon the March 16, 2007 IEP, District asserts these allegations should be dismissed on the grounds that the claim is barred by the statute of limitations, and were released as of the date of the fully executed November 10, 2008 settlement agreement. District attached a copy of the settlement agreement to its motion. However, these claims within Issue No. 1 were held to be insufficiently pled pursuant to the November 16, 2009 NOI order; therefore, District's motion to dismiss is denied as moot.

Second, District asserts that claims based upon a failure to implement the November 10, 2008 settlement agreement, within Issue No. 1, should be dismissed on the grounds that OAH lacks jurisdiction over the enforcement of settlement agreements. Student's claim with respect to the November 10, 2008 settlement agreement asserts the District failed to provide FAPE when it:

1. Failed to implement the accommodations and recommendations from Dr. Cureton's report;
2. Failed to identify a mutually acceptable case manager;
3. Failed to provide for the speech needs of Student;
4. Failed to assess in all areas of suspected disability;
5. Failed to provide four hours a week of in home tutoring and educational therapy.

Under the settlement agreement, item numbers one and two above were part of Student's prospective placement moving forward from November 10, 2008. While OAH lacks jurisdiction over the enforcement of settlement agreements, OAH does have jurisdiction to determine if Student has been denied a FAPE based upon prospective placement and services originating from a settlement agreement. Therefore, District's motion to dismiss related to item numbers one and two is denied.

With respect to item numbers three and four above, Student raised those claims specifically in Issue No. 9. The November 16, 2009 NOI order found those claims to be insufficiently pled. Therefore, with respect to items three and four above, District's motion to dismiss is denied as moot.

Finally, with respect to item number five above, failure to provide four hours per week of home tutoring and educational therapy, the settlement agreement sets out this term as compensatory education. The parties did not intend for this service to be part of Student's prospective placement designed to confer a FAPE. Therefore, Student's allegation of a failure to provide compensatory education is a claim for breach of the settlement agreement, and is outside the jurisdiction of OAH. As to item five above, District's motion to dismiss is granted.

Issue No. 3

District asserts that portions of Issue No. 3 that raise claims under the March 16, 2007 IEP should be dismissed because they are barred by the statute of limitations, and were released as of the date of the fully executed November 10, 2008 settlement agreement. With respect to the March 16, 2007 IEP Student alleges that the District failed to have required individuals present, provide progress reports, develop appropriate and measurable goals, develop a transition plan, provide an assessment plan, and conduct a triennial assessment.

These allegations raise a denial of FAPE due to procedural violations occurring prior to November 10, 2008. Under the settlement agreement, Student waived all claims prior to the date of the settlement agreement. Therefore, District's motion to dismiss Issue No. 3 is granted.

Issue No. 6

Student alleges that her parents have been denied the right to meaningfully participate in the development of her program, and in advocating on her behalf, because District failed to provide records pursuant to requests made on June 5, 2008, and July 13, 2009. With respect to claims based on the June 5, 2008 records request, District asserts that Issue No. 6 should be dismissed because the settlement agreement of November 10, 2008, released all claims prior to the date of the executed settlement agreement. District is correct. Under the settlement agreement, Student released all claims prior to November 10, 2008. Therefore, with respect to claims based on the June 5, 2008 records request, within Issue No. 6, District's motion to dismiss is granted. Claims based upon the July 13, 2009 request for records are not dismissed.

Issue No. 8

Student asserts that District denied her a FAPE when it failed to comply with the corrective actions ordered by the California Department of Education, in a compliance complaint finding of June 18, 2009. District asserts that OAH lacks jurisdiction over this claim. OAH's jurisdiction is limited, and it does not have jurisdiction over issues of compliance with decisions or orders. Therefore, District's motion to dismiss Issue No. 8 is granted.

Issue No. 9

District moves to dismiss only the part of Issue No. 9 that alleges a denial of FAPE due to a failure to provide speech services since June 2008. This has been addressed by the NOI order dated November 16, 2009; therefore, District's motion to dismiss this sub-issue is denied as moot.

ORDER

1. District's motion to dismiss parts of Issue No. 1 is granted in part and denied in part. To clarify, District's motion to dismiss FAPE claims based on a failure to implement the March 16, 2007 IEP is denied; claims based on a failure to implement Dr. Cureton's recommendations and accommodations is denied; failure to identify a case manager is denied; failure to provide for speech needs is denied; failure to assess all areas of suspected disability is denied; and, failure to provide four hours per week of tutoring is granted.
2. District's motion to dismiss Issue No. 3, with respect to claims based upon the March 16, 2007 IEP, is granted.
3. District's motion to dismiss Issue No. 6, with respect to claims based on the June 5, 2008 records request, is granted.
4. District's motion to dismiss Issue No. 8 is granted.
5. District's motion to dismiss parts of Issue No. 9 is denied.

Dated: November 18, 2009

/s/
BOB VARMA
Administrative Law Judge
Office of Administrative Hearings