

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

DUBLIN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012010475

ORDER GRANTING DISTRICT'S
MOTION TO LIMIT ISSUES

On January 18, 2012, Parent on behalf of Student (Parent) filed a Request for Due Process Hearing (complaint) against Dublin Unified School District (District). Student's amended complaint was deemed filed on May 11, 2012.

On June 22, 2012, District filed a motion to limit the issues in the amended complaint based on OAH's lack of jurisdiction over breach of settlement agreement claims and over disputes regarding individual service plans of parentally-placed children with disabilities in private schools.

Student did not file a timely opposition. During the prehearing conference on August 13, 2012, Student orally argued that case law prohibited prospective waivers of federal rights, but could not provide citations. Student was given until 5:00 PM to provide citations to the cases relied on, and District was given until noon on August 14, 2012 to respond. Student timely provided the citations, and District timely filed its response.

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).) 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, inter alia, 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.* (D. Cal. 2007) 2007 U.S. Dist. LEXIS 26541, the United States District Court for the Northern District of California held that OAH has jurisdiction to adjudicate claims alleging denial of a free appropriate public education as a result of a violation of a mediated settlement agreement, as opposed to "merely a breach" of the mediated settlement agreement that should be addressed by the California Department of Education's compliance complaint procedure.

"No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." (34 C.F.R. § 300.137(a)(2006); see also 20 U.S.C. § 1412(a)(10)(A); Ed. Code, §§ 56170, 56174.5, subd. (b).)

Instead, under the Individuals with Disability Education Act, local educational agencies (LEA) "only have an obligation to provide parentally-placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B funds that the LEA has determined, after consultation, to make available to its population of parentally-placed private school children with disabilities." (71 Fed.Reg. 46595 (Aug. 14, 2006); see also 20 U.S.C. § 1412(a)(10)(A)(i)(I); 34 C.F.R. §§ 300.132(a), 300.137(b)(2006); Ed. Code, § 56173.) The school district, or LEA, where the private school is located has the responsibility for providing the parentally-placed private school child with such equitable services. (34 C.F.R. § 300.133 (2006); Ed. Code, § 56172, subd. (a).) The responsible school district must provide equitable services to a parentally-placed private school child through a service plan. (34 C.F.R. § 300.138(b) (2006); Ed. Code, § 56174.5, subd. (b).)

A dispute regarding a service plan that provides equitable services to a parentally-placed private school child is properly the subject of state complaint procedures. (34 C.F.R. § 300.140(c)(2006).) Such a dispute is not governed by the due process provisions that apply with regard to disagreements regarding the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child. (34 C.F.R. § 300.140(a)(2006).) Accordingly, OAH does not have the authority to hear and decide cases in which a parent raises a dispute regarding the equitable services set forth in a service plan for a parentally-placed private school child. (Ed. Code, § 56501, subd. (a); *Wyner, supra* 223 F.3d at pp. 1028-1029.)

DISCUSSION

Student alleges four claims against District in his amended complaint, as follows:

1. District denied Student a free and appropriate public education (FAPE) by failing to properly provide comprehensive assessments in all areas of suspected disability from at least October 10, 2010, to the present.

2. District denied Student a FAPE by failing to tailor an appropriate educational program to meet his individual and unique needs.

3. Parents are entitled to reimbursement for their unilateral placement of Student in a private school, St. Raymond Catholic School, located in Dublin, California.

4. District denied Student a FAPE by failing to include Parents in the decision-making process regarding FAPE [by predetermining Student's placement and services], and by failing to provide prior written notice: (1) detailing why it failed to conduct an assessment of Student in all areas of suspected disability, or (2) why it failed to provide appropriate educational placement of Student, thus violating Student's procedural rights.

District's motion requests that Student's claims in the amended complaint be limited to a timeframe from October 10, 2010, to September 21, 2012, including Student's issues that arise from Student's individualized education program (IEP) team's alleged failure to consider Sarah Spencer's February 10, 2010 private speech and language assessment. District contends that parties entered into a fully executed settlement agreement on April 19, 2010, that "resolves all claims and issues up to and including October 9, 2010." District further contends that Parents forfeited Student's special education rights by unilaterally placing him in a private school. Copies of the settlement agreement and Student's ISP are attached to District's motion to limit issues.

Student acknowledges that the parties entered a final settlement agreement on April 19, 2010, and that Parents signed Student's ISP on September 21, 2011. However, Student contends prospective waivers of federal rights are invalid for public policy reasons, relying on *Pacificare Health Systems, Inc. v. Book* (2003) 538 U.S. 401; *Alexander v. Gardner-Denver Co.* (1974) 415 U.S.36, 51-52; *Adams v. Phillip Morris, Inc.* (6th Cir. 1995) 67 F. 3d 580, 584; *Urerek v. Houston Light and Power Co.* (S.D. Tex. 1998) 997 F. Supp. 789, 792; and *Cange v. Stotler & Co.* (7th Cir. 1987) 827 F.2d 581, 894, fn.11.

Student's first cited case deals with the enforceability of compulsory arbitration clauses. The other cases deal with protections of Title Seven of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) that cannot be waived prospectively because that would violate public policy by granting the employer a license to discriminate illegally for the duration of the prospective waiver. None of these cases deals with prospective waiver of rights guaranteed by the Individuals with Disabilities Education Act (IDEA) at issue here. As

District points out in its response, “By its very nature, special education involves agreements about the future.” (*Vacaville Unified School District* (SEHO 2003) SN03-01423, fn. 2, 103 LRP 53543 (*rev’d on other grounds in C.T. ex rel. D.T. v. Vacaville Unified School Dist.* (E.D. Cal., 2006, Civ. S-06-197) 2006 WL 2092613)). The April 2010 settlement agreement in this case included the goals, placement, and services that District was to provide to Student until his next annual IEP team meeting in October 2010. The prospective waiver did not preclude Student from forcing the District to comply with the terms of the settlement agreement by filing a compliance complaint with the Department of Education or by filing a due process complaint with OAH alleging that non-implementation of the settlement terms resulted in a denial of FAPE. The prospective waiver here did not provide District with a license to violate Student’s IDEA rights, because the agreement bound the District to conform to an IEP that Parents agreed provided Student a FAPE, and so does not violate public policy. Thus, prospective waiver in the parties’ settlement agreement was valid.

In his amended complaint, Student does not allege that District’s denial of FAPE resulted from the non-implementation of any term of the settlement agreement. Pursuant to the authority set forth above, OAH does not have jurisdiction to entertain Student’s claims arising before October 10, 2010. Because the plain language of the settlement agreement resolves any and all claims prior to October 10, 2010, OAH is without jurisdiction to entertain claims within that timeframe. Accordingly, District’s request to limit Student’s claims from October 10, 2010 onward is granted. However, although Student is precluded from asserting a claim arising directly from Susan Spencer’s February 10, 2010 speech and language assessment report, District may still be deemed to have the knowledge about Student provided by this report.

As to District’s request to limit Student’s claims arising after September 21, 2011, Parents forfeited Student’s right to special education except for equitable services by unilaterally placing him in a private school. The amended complaint alleges that Parents notified District of their private placement of Student, but does not allege that they sought to place him privately at public expense. (See 34 C.F.R. § 300.148(d)(1)(i), (ii).) To the contrary, in signing Student’s individual service plan (ISP) on September 21, 2011, Parents agreed as follows:

The Parents, on behalf of themselves and [Student], hereby waive their right to request District funding or reimbursement for any other services related to [Student’s] educational program or placement, including without limitation, any and all after school services, speech language services, instructional or tutoring services, evaluation and consultation services, not provided for in the IEP or the MOU, through the date of the next Annual Review IEP (10/9/10).

Pursuant to the authority set forth above, OAH does not have jurisdiction to entertain Student’s claims in his amended complaint arising after September 21, 2012. Accordingly, District’s request to limit Student’s claims in the amended complaint to a timeframe ending on September 21, 2012, is granted. However, although Student is precluded from asserting a claim arising after September 21, 2011.

ORDER

District's motion to limit issues in the amended complaint is granted. Student is limited to claims that arose during the period from October 10, 2010 and September 21, 2011.

IT IS SO ORDERED.

Dated: August 14, 2012

/s/

JOAN HERRINGTON
Administrative Law Judge
Office of Administrative Hearings