

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

VICTOR ELEMENTARY SCHOOL
DISTRICT.

OAH Case No. 2016041163

ORDER (1) DENYING MOTIONS TO
DISMISS AND (2) UNEXPEDITING
DUE PROCESS HEARING

On April 26, 2016, Student filed a due process hearing request (complaint) with the Office of Administrative Hearings naming Victor Elementary School District. The complaint alleged that District denied Student a free appropriate public education by failure to provide appropriate special education and related services, and sought as remedies assessments, services and compensatory education. In its background facts, the complaint alleged that District was aware that Student had unaddressed behavioral needs because District had suspended Student multiple times and sent him home for inappropriate behavior, and had decided at a manifestation determination review meeting that Student's conduct had been a manifestation of his disability.

On April 28, 2016, OAH issued a scheduling order setting dual hearing dates, with an expedited hearing scheduled for expedited issues.

On April 29, 2016, Student filed a motion for clarification, stating that he was not appealing a manifestation determination or a disciplinary change of placement. On May 9, 2016, OAH issued an order treating the motion as one to unexpedite, which was denied because Student had not clearly stated that any issues raised under 20 United States Code section 1415(k), which mandates an expedited hearing on disciplinary changes of placement, were withdrawn. The order was served on May 13, 2016.

On May 12, 2016, District filed a motion to dismiss expedited issues on the ground that the allegations in Student's complaint were inaccurate.

On May 16, 2016, the administrative law judge conducting the prehearing conference ordered that the parties file prehearing written briefs on the expedited relief sought.

On May 17, 2016, District filed a motion to dismiss for the parties' failure to participate in a resolution meeting within seven days of District's receipt of the complaint. On May 20, 2016, Student filed an opposition.

On May 24, 2016, the parties appeared on the date scheduled for the expedited hearing, and as ordered at the PHC, the parties filed prehearing written briefs on the expedited relief sought. The undersigned ALJ read and considered the record, the motions and the prehearing briefs, and heard the argument of the parties on pending motions. As set forth below, District's motions were denied and the hearing was unexpedited.

Motion to Dismiss Expedited Issues

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction, for example, civil rights claims, special education law does not provide for a summary judgment procedure. Here, District's motion was not limited to matters that were facially outside of OAH jurisdiction, but instead seeks a ruling on the merits and based upon a declaration filed in support of the motion. Accordingly, the motion to dismiss expedited issues was denied.

Motion to Dismiss

A local educational agency is required to convene a meeting with the parents and the relevant members of the individualized education program team within 15 days of receiving notice of the Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I); 34 C.F.R. § 300.510(a)(1) (2006).¹) The resolution session need not be held if it is waived by both parties in writing or the parties agree to use mediation. (34 C.F.R. § 300.510(a)(3).) If the parents do not participate in the resolution session, and it has not been otherwise waived by the parties, a due process hearing shall not take place until a resolution session is held. (34 C.F.R. § 300.510(b)(3).) If the local education agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the agency may, at the conclusion of the 30-day period, request that a hearing officer dismiss the complaint. (34 C.F.R. §300.510(b)(4).)

As to expedited due process hearings, unless the parents and the local educational agency agree in writing to waive the resolution meeting, the resolution meeting must occur within seven days of receipt of the due process complaint. (34 C.F.R. §300.532(c)(3)(i).) The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the due process complaint. (34 C.F.R. § 300.52(c)(3)(ii).) The U.S. Department of Education, in its comments to the regulations implementing the 2006 amendments to the IDEA, stated that dismissal of an expedited claim for failure to participate in a resolution meeting is available for expedited hearings, despite the lack of an express reference to dismissal in the expedited regulations:

Section 300.532(c)(3)(i) clearly states that the resolution meeting must occur within seven days of a public agency's receiving notice of the parent's due process complaint. It is not expected that parties will necessarily reach

¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

agreement during the resolution meeting; the parties often need time to consider the resolution options offered at the meeting. The intent of § 300.532(c)(3)(ii) is to allow parties sufficient time to consider the resolution options discussed in the resolution meeting. However, if the parties do not reach agreement within 15 days of receipt of the parent's due process complaint, the expedited hearing may proceed and all the applicable timelines for an expedited due process hearing under paragraph (c) commence. Lack of parent participation in the resolution meeting would be addressed the same way it is in a regular due process hearing under § 300.510(b), except that the timeframes will differ.

(71 Fed.Reg. 46725 (Aug. 14, 2006).)

District's motion contends that the parties failed to participate in a resolution meeting within seven days of District's receipt of the complaint. Here, however, the evidence established that this was not because District was "unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented," as the law would require in order to dismiss the complaint on these grounds. Here, both parties attempted in good faith to schedule a resolution meeting under the short timeframes allowed. In fact, the parties admitted on the record that a resolution meeting did take place on May 19, 2016, prior to the scheduled expedited due process hearing. Parent did not refuse to participate in a timely resolution meeting, a resolution meeting took place less than 30 days after the complaint was received by District and prior to the scheduled expedited proceeding, and as set forth below, Student's matter was unexpedited. Accordingly, District's motion to dismiss was denied.

Hearing Unexpedited

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or with a manifestation determination made by the district, may appeal the decision by requesting a hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) A due process hearing on the appeal of a disciplinary change of placement or manifestation determination must be scheduled on an expedited basis, to be heard within 20 school days of the date the complaint is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2) .) An expedited due process hearing on an appeal of a disciplinary change of placement or manifestation determination is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*) In sum, a matter can only be unexpedited or continued if no appeal of the decision is sought, or if the student withdraws the issues in the complaint that triggered the expedited hearing.

A disciplinary change of placement occurs if a child is subjected to a series of removals for violations of a student code of conduct that constitute a pattern because (i) the series of removals total more than 10 school days in a school year, (ii) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of

removals, and taking into consideration (iii) such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. (34 C.F.R. § 300.536(a)(2).)

Here, OAH scheduled an expedited hearing in an abundance of caution, based upon Student's allegations of multiple suspensions and a series of removals that constituted a pattern and cumulatively resulted in removal from the classroom for a period in excess of ten days. It was unclear from the pleading if Student was seeking to appeal a decision regarding a disciplinary change of placement. This question remained unclear, and the parties were ordered at the PHC to file briefs prior to the scheduled expedited hearing.

Based upon the prehearing written briefs on the expedited relief sought, the representation of Student's counsel on the record at the May 24, 2016 hearing that Student was not seeking an appeal of a disciplinary change of placement or manifestation determination and that no expedited relief was sought in this matter, and for the reasons stated in this order and on the record, this matter was ordered unexpedited prior to any witnesses being called. The order unexpediting this proceeding does not in any way limit Student's opportunity to reference, and seek to admit, evidence of or related to Student's suspensions, removals from the classroom, or alleged deficiencies in the manifestation determination review meeting for purposes of establishing a denial of FAPE and seeking compensatory and equitable relief based on those actions and events.

All non-expedited dates currently scheduled in this matter are confirmed.

IT IS SO ORDERED.

DATE: May 26, 2016

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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings