

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

vs.

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

OAH CASE NO. 2009060940

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

vs.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009071109

ORDER GRANTING IN PART AND
DENYING IN PART THE DISTRICT'S
MOTION TO DISMISS

On August 13, 2009, attorney Marcella L. Gutierrez, on behalf of the Dry Creek Joint Elementary School District (District), filed with the Office of Administrative Hearings (OAH) a motion to dismiss Student's complaint in OAH Case No. 2009060940. On August 31, 2009, Student filed an opposition to the District's motion.

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.*, 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 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.

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.)

There is no right to file for a special education due process hearing absent an existing dispute between the parties. A claim is not ripe for resolution if "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (*Scott v. Pasadena Unified School Dist.* (9th Cir. 2002) 306 F.3d 646, 662 [citations omitted].) The basic rationale of the ripeness doctrine is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148 [87 S.Ct. 1507].)

DISCUSSION

Student's complaint raised four issues for hearing against the District. Student alleges that the District did not hold a timely individualized educational program (IEP) meeting in April 2009, and that the District failed to make an offer of goals, services and placement at the May 28, 2009 IEP meeting that provided Student with a free appropriate education

(FAPE) for the 2009-2010 school year (SY). Additionally, Student alleges that the District failed to provide him with an appropriate math intervention program for SY 2008-2009, and frustrated implementation of Student's educational program..

The District, in its Motion to Dismiss, asserts that the parties' October 21, 2008 Settlement Agreement moved Student's annual IEP to May 2009. Additionally, the District asserts that Student's claims regarding the appropriateness of the District's IEP are not ripe because the District is not required to have an IEP for Student until the first day of school, and that the District made a timely offer in August 2009. The District also alleges that Student's claims regarding the implementation of Student's IEP for SY 2008-2009 are barred by the terms of Settlement Agreement. Student asserts that his claims are not barred by the terms of the Settlement Agreement, that OAH has jurisdiction to hear his claims, and that the claims regarding the May 28, 2009 IEP are ripe for adjudication.

Regarding Student's claim in Issue One that the District needed to convene his annual IEP meeting in April 2009, this claim is barred by the provision of the Settlement Agreement. The Settlement Agreement explicitly stated in Paragraph 1(E) that the District had until May 2009 to convene Student's IEP meeting. According to the complaint, the District complied with the terms of the Settlement Agreement by convening the annual IEP meeting on May 28, 2009.

The remainder of Issue One and Issue Two allege that the District committed numerous procedural and substantive violations that prevented it from making an IEP offer of services and placement for SY 2009-2010. The purported violations in the complaint are ripe for adjudication because the procedural violations may have denied Parent's right to meaningfully participate in Student's educational decision making. Additionally, a triable issue for hearing exists as to whether the District made a timely offer of a FAPE to Student for SY 2009-2010.

Student alleges in Issue Three that the District denied him a FAPE during SY 2008-2009 by failing to develop an appropriate math intervention program to meet his needs. Pursuant to the Settlement Agreement, the District modified the August 21, 2008 IEP and Parents provided consent to the IEP on October 28, 2008. This IEP did not contain any math intervention services. The only specific academic educational service required by the Settlement Agreement was the 15 hours a week of one-to-one reading intervention services by a private Educational Therapist. The only District service provided pursuant to the Settlement Agreement was a physical education class. Additionally, Student waived his right to challenge the adequacy of the IEP developed pursuant to the provisions of the Settlement Agreement. Student waived any right to challenge whether the District needed to provide him with a math intervention program during SY 2008-2009 because the District's only obligation was to contract for a reading intervention program. Therefore, Issue Three is barred by the terms of the parties' Settlement Agreement.

Student asserts in Issue Four that the District falsified his test scores to indicate that he made adequate educational progress before implementation of the reading intervention

services provided in the Settlement Agreement. These claims are barred by the Settlement Agreement, in which Student waived all claims through October 21, 2008. Further, any claims that the District failed to timely pay the Educational Therapist are barred because those claims involve whether the District implemented the terms of the Settlement Agreement and Student does not allege that he did not receive the 15 hours a week of reading intervention services due to the District's purported failure to timely pay the Educational Therapist.

ORDER

1. Regarding Issue One, the District's motion to dismiss Student's claim that the District needed to convene an IEP meeting by April 2009 is granted.

2. Regarding Issues One and Two, the District's motion to dismiss Student's claim that the District committed procedural and substantive violations at the May 28, 2009 IEP meeting is denied.

3. The District's motion to dismiss Issues Three and Four in Student's complaint is granted.

Dated: September 17, 2009

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings