

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2009110730

PLEASANTON UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010060635

ORDER DENYING MOTIONS TO
COMPEL COMPLETION OF
ASSESSMENTS, COMPEL
OBSERVATIONS, REQUEST FOR
INDEPENDENT EDUCATIONAL
EVALUATION AND MOTION TO
CONTINUE DUE PROCESS HEARING

On June 19, 2010, Parent, on behalf of Student, filed a motion to compel completion of assessments, compel observations of Student’s proposed placement, request for an independent educational evaluation (IEE) of Student and a motion to continue the due process hearing. On June 28, 2010, Elizabeth A. Estes, attorney for District, filed a response, opposing in part, Student’s motions.

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 [FAPE] to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The Office of Administrative Hearings (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.

With respect to observations of school placements, a student has the right to have his or her expert observe a school district's proposed placement prior to testifying in a due process hearing. (Ed. Code, § 56329, subd. (b) and (c); *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875; *L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2008) 538 F.3d 1261.) Further, a student's observation right is not conditioned on reciprocity.

Education Code section 56329, subdivisions (b) and (c), are essentially identical in their relevant parts and provide as to assessments at public or private expense that, "if [the public education agency's] assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

The court in *Benjamin G.* examined the legislative history of Education Code section 56329, subdivision (b) and held that the statute mandated an opportunity for student's hired expert to observe the school district's proposed placement prior to testifying at a due process hearing and regardless of whether the observation is technically a part of an independent educational evaluation. (*Benjamin G. v. Special Education Hearing Office, supra*, 131 Cal.App.4th at pp. 883-884.) Education Code, section 56329, subdivision (c) was drafted in accord with subdivision (b), so whether the observation is approached as one related to public funding or private funding, the outcome is the same.

A parent has the right to obtain an IEE at public expense when the parent disagrees with an assessment conducted by a school district. (Ed. Code, § 56329, subd. (b).) A public education agency may initiate a due process hearing to show that its assessment was appropriate. (Ed. Code § 56329, subd. (c).) If the assessment is determined to have been appropriate, parent maintains the right to an IEE, however, it will not be at public expense.

Pursuant to Education Code section 56505.1, subdivision (e), the Administrative Law Judge (ALJ) has the authority to order an impartial assessment of a student, including an IEE, during a due process hearing. The ALJ may continue the hearing until the completion of the assessment.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, 3.1332 .) Generally, continuances of matters are disfavored. (Cal. Rules of Court, 3.1332(c).)

DISCUSSION

Completion of Assessments

Student contends that pursuant to a February 16, 2010 interim agreement between the parties, District was required to contract with Dr. Cynthia Patterson to conduct a neuropsychological assessment of Student. He contends that Dr. Patterson did not observe the Parents' proposed school placement for Student, consult with or observe Student in his home program and to the extent the assessor observed Student in the school setting, the observation was insufficient. It is unclear if Student is requesting that District be ordered to have Dr. Patterson complete the steps that he asserts were deficient in the assessment process.

Student also contends that pursuant to the interim agreement, District contracted with a nonpublic agency, Speech Pathology Group (Speech Pathology), to conduct a speech and language assessment of Student. He asserts that Speech Pathology failed to observe the proposed placement at Vintage Hills, which renders the assessment incomplete. Student requests that Speech Pathology be ordered to observe the placement at Vintage Hills.

District did not respond to the contentions regarding Dr. Patterson. District asserts that OAH lacks jurisdiction to order a nonpublic agency such as Speech Pathology to conduct an assessment.

OAH's jurisdiction is limited to claims relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child. OAH does not have jurisdiction to order compliance with a settlement agreement. While the document in question here is an interim agreement, the same principles of jurisdiction apply. Accordingly, OAH does not have jurisdiction to order assessments pursuant to an interim agreement. Student's request to order District to have Dr. Patterson and Speech Pathology complete assessments is denied.

Student has provided no authority for OAH to directly order Speech Pathology to conduct an observation. Accordingly, the request to directly order Speech Pathology to conduct an observation of the proposed placement at Vintage Hills is denied. Student is free to argue at due process hearing if the alleged deficiencies in each assessment impact the appropriateness of the assessment.

Observation of Placement by Student's Expert

Student contends that he has retained an expert, Dr. Carina Grandison, to complete an IEE. As part of the IEE, Student requests that Dr. Grandison be allowed to observe District's proposed placement at Vintage Hill.

District asserts that it does not object to Dr. Grandison's observation. It provides the contact information and guidelines for Parent to set up Dr. Grandison's observation at Vintage Hill. Because District has not denied Student the right to have his expert observe the placement, an order is not required. Student's request for an order to compel observation is denied as not being ripe for resolution.

Independent Educational Evaluation

Student contends that Quality Behavior Outcomes (QBO) has provided him services for three years, but cannot explain his deteriorating behaviors. QBO has recently completed an assessment of Student pursuant to the interim agreement. Student disagrees with the assessment and therefore, requests an IEE for a functional behavior assessment (FBA) by a nonpublic agency, Stepping Stones. District contends that OAH lacks jurisdiction to order an IEE without a due process hearing.

A student may be entitled to an IEE at public expense, if the parents disagree with an assessment and the school district agrees to their request for an IEE. An ALJ may order an IEE as a remedy, upon hearing evidence in a due process hearing and determining that the school district failed to conduct an appropriate assessment. Additionally, during a due process hearing, an ALJ may order an impartial assessment or IEE at public expense. None of these situations is applicable to this case.

Here, Student disagrees with the assessment by QBO and District disagrees with Student's request for an IEE. A due process hearing has not been held to determine if the QBO assessment was conducted appropriately. OAH does not have jurisdiction to order an

IEE without a due process hearing and there are no grounds to order an IEE under the ALJ's due process hearing powers. Accordingly, Student's request for an IEE by Stepping Stones is denied.

Motion to Continue

Finally, Student asserts that the completion of the assessments may impact his ability to participate in the due process hearing in this matter. Student requests the matter be continued until after the completion of the assessments. The hearing in this matter is currently set for August 3, 4 and 5, 2010. As discussed above, Student's requests pertaining to the completion of assessments or an IEE are denied. Accordingly, the only assessment currently in progress is that of Dr. Grandison. Student has failed to provide any evidence to support a finding that the assessment by Dr. Grandison may not be completed prior to the hearing dates in this matter. Accordingly, good cause does not exist for a continuance at this time.

ORDER

1. Student's request to complete assessments by Dr. Patterson and Speech Pathology is denied.
2. Student's request to compel District to allow observation of Vintage Hills by Dr. Grandison is denied.
3. Student's request for an IEE by Stepping Stones is denied.
4. Student's request for a continuance is denied.

Dated: July 08, 2010

/s/

BOB VARMA
Administrative Law Judge
Office of Administrative Hearings