

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:  PARENT ON BEHALF OF STUDENT,  v.  REDONDO BEACH UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2010090344
REDONDO BEACH UNIFIED SCHOOL DISTRICT,  v.  PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2010070140  ORDERS RE: Prehearing conference Motion to consolidate Motion to Continue Motion to Dismiss Motion for Sanctions Motion to Strike

On September 13, 2010, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Eileen M. Cohn, Office of Administrative Hearings, Special Education Division (OAH) in Case No. 20100070140 (District's case). Nancy Finch-Heurman, Attorney at Law, appeared on behalf of Redondo Beach Unified School District (District). Tania Whiteleather, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

The ALJ considered the written briefs of the parties and heard oral argument on several motions.

1. Student's Motion to Consolidate District's Case with Case No. 2010090344 (Student's case) and Student's request for a continuance of both matters.

District's case was filed on July 1, 2010, and OAH issued a scheduling order on July 6, 2010. On July 12, 2010, the parties executed a stipulation and requested that OAH continue the prehearing conference to September 13, 2010, and the due process hearing to September 21 through September 24, 2010.

Student's case was filed on September 8, 2010. Student also moved to consolidate Student's case with District's case. On September 10, 2010, Parents waived the resolution session. The OAH issued a scheduling order on September 13, 2010 setting mediation for October 19, 2010, the PHC for October 27, 2010, and the due process hearing for November 2, 2010. On September 13, 2010, District notified OAH that Parents waived the resolution session and that District waived mediation. On September 13, 2010, District also opposed Student's Motion to Consolidate. Based upon District's notification, OAH issued a second scheduling order in Student's case setting the PHC for September 29, 2010, and the due process hearing for October 5, 2010.

For the reasons discussed below, the motion to consolidate is granted, and Student's continuance is granted for good cause.

### APPLICABLE LAW

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

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).) The procedural safeguards of the IDEA provide that under certain conditions, a pupil is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1)(2006); Ed. Code § 5329, subd. (b).) If the school district believes its evaluation was appropriate and it does not wish to pay for an IEE, it must request a due process hearing and prove that the evaluation was appropriate. (34 C.F.R. § 300.502(b)(2)(2006).)

### ANALYSIS

Here, the first issue in District's case and the first issue in Student's case involve a common question of law or fact, specifically related to the appropriateness of the District's OT assessment. Issue one of District's case is responsive to Parents' request for an IEE at

public expense. At the PHC, the parties stipulated that Parents' request for an IEE was limited to occupational therapy (OT). As dictated by statute, District was either required to fund the IEE in OT or file for due process and prove that its OT assessment was appropriate. Instead of funding the IEE, District timely filed for due process. If District prevails on Issue one, it will not have to fund an independent OT assessment; if it does not prevail, it will have to fund an independent OT assessment.

Issue one of Student's case is identical to District's case. Student alleges that District's assessment of OT was inappropriate. Student also claimed that the AT assessment was inappropriate, but at the PHC Student withdrew this claim and it is deemed withdrawn and stricken from Student's case. In Student's case she also requested the same remedies she would be afforded if it is determined that District failed to meet its burden of proof in Issue one of District's case. Accordingly, by filing its own case Student elected to prove by a preponderance of the evidence that District's assessment was inappropriate.

In addition to Issue one, Student's case includes Issue two where she alleges that District's failure to fully and properly assess her denied her access to education and benefits enjoyed by her non-disabled peers in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and the American with Disabilities Act (ADA). Issue two of Student's case is addressed more fully in the discussion of District's Motion to Strike.

District opposed Student's motion to consolidate and a continuance of District's case on the ground that it was a disingenuous eleventh hour attempt to delay the hearing and a final determination of District's case. In addition to Issue one District's case includes Issue two where it seeks a determination that its IEP offer for ESY 2010 and the 2010-2011 school year was an offer of FAPE in the least restrictive environment.

District's case was scheduled to proceed eight days after the PHC, on September 21 through September 24, 2010. Student's counsel represented that she was just notified that she was required to appear in federal district court on another matter on September 21, 2010. The ALJ informed her that the hearing would not proceed that day to accommodate her schedule. The ALJ also informed the parties that the hearing would be dark on Friday, September 24, 2010, due to the state government furlough mandate. Accordingly, of the four days originally scheduled, the matter would proceed only on September 22 and September 23, 2010.

During the PHC, Student's counsel maintained that she could not competently represent Student's interest if the hearing proceeded on September 22 and September 23. Student's counsel represented that Parents just retained an expert occupational therapist to conduct an IEE. She represented that Parents could not afford to retain an expert until recently and that the expert would not be able to assess Student until on or about October 4, 2010. She represented that she filed Student's case as soon as Parents retained the OT assessor. She further represented that the OT expert would need about two weeks from that time to complete a written assessment report. The relevance of the expert assessment to Issue one of both cases was discussed as Issue one only required an analysis of the

appropriateness of District's assessment, and did not address the appropriateness of an independent assessment or require a completed assessment. The parties also discussed proceeding with District's Issue two on September 22 and September 23, and continuing the matter to complete Issue one after counsel had an opportunity to consult with the OT expert. Student's counsel insisted that she required input from the OT expert to conduct cross-examination of District's witnesses on Issue two which concerned the appropriateness of District's IEP offer. She maintained that she would not cross-examine District's witnesses at all if she were not provided with time needed to consult with the OT expert. When offered the opportunity to recall District witnesses at continued dates, she still maintained that she would not be able to represent her client or participate in the proceeding should it proceed on September 22 and September 23. Although Student's counsel conceded that the OT expert was not qualified to challenge other assessments and services that formed the basis of District's offer, she insisted that, as a pupil with autism, Student's unique OT needs were critical to properly analyze District's IEP offer, and that input from Student's OT expert was required for her to competently represent Student.

Student did not file a motion to continue District's case due to the late retention of the OT expert, or otherwise notify District or OAH prior to the PHC of the need to continue District's case for good cause on the ground that Parents could not fund a needed expert. Instead, counsel stated that she filed Student's case with a request for consolidation. Counsel assumed that the 45 day time period of Student's case would provide the necessary time to complete her OT expert consultation. Parents however waived the resolution session and District waived mediation collapsing the 45 day timeline. At the PHC, Student's counsel represented that she required a continuance of District's case and Student's case to accommodate the OT expert. District objected to the continuance, but cooperated in identifying available dates.

Good cause exists to consolidate both actions given that Issue one of both cases is identical. Consolidation will further the interests of judicial economy because the witnesses and evidence are similar or the same in both cases.

Based solely on the representation of Student's counsel that Parents could not afford to retain an expert until on or about the date that Student's case was filed, and the anticipated, and relatively short, period of time required for the OT to review District's OT assessment, and provide consultation to Student's counsel, good cause exists to continue both District and Student's cases. All scheduled dates in both cases are vacated and the consolidated matter continued to a PHC on October 18, 2010 at 1:30 p.m. and hearing on October 25, 26, 27, and 28, and November 1, 2, 3, and 4, 2010.

Based upon the representations of Student's counsel, good cause does not exist for any further continuances beyond the continued dates based upon the availability of the OT expert or completion of the OT report. First, Student was on notice when District refused to grant her request for an IEE and filed for due process that the appropriateness of District's assessment would be determined at the hearing. Student's counsel stipulated to the continuance of the hearing to September 21 through 24, 2010. Second, Student's claim that

District's OT assessment was inappropriate does not require the completion of an independent OT assessment. Relevant expert testimony or cross-examination will be directed at the appropriateness of District's assessment, not Student's IEE. Similarly, Student's defense against District's claim that its IEP offer constituted a FAPE, does not depend on the completion of an independent assessment. Third, the 45 day timeline for decisions applies equally to District and Student-filed cases. Both Districts and students are entitled to a timely determination of issues.

2. Student's Motion to Dismiss District's Case and District's Motion for Sanctions.

On September 8, 2010, Student moved to dismiss District's case on the ground that District requested a determination that all its assessments were appropriate, even though Student only requested an IEE in OT and AT. At the PHC, Student's counsel stipulated that Student was only requesting an IEE in OT, and that Student had withdrawn requests made for IEEs in neuropsychology, AT and "inclusion." Student alleged that District's attempt to seek a determination that all its assessments were appropriate amounted to an unauthorized request for declaratory relief. (Cal. Code. Regs. Tit 5, § 3089.)

District opposed Student's motion on the ground that it was not seeking declaratory relief, and that the appropriateness of District's assessments was also relevant to Issue two of District's case which addressed whether District offered a FAPE for ESY 2010 and the 2010-2011 school year. District further requested sanctions against Student for filing a meritless claim that has no basis in fact or law. District claims that Student filed a Motion to Dismiss as a frivolous tactic on the eve of trial to delay the proceedings.

#### APPLICABLE LAW

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has 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 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].) The procedural safeguards of the IDEA provide that under certain conditions, a pupil is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1)(2006); Ed. Code § 5329, subd. (b).) If the school district believes its evaluation was appropriate and it does not wish to pay for an IEE, it must request a due

process hearing and prove that the evaluation was appropriate. (34 C.F.R. § 300.502(b)(2)(2006).)

## ANALYSIS

In Issue one of District's case, District seeks a determination that it conducted a "full and robust assessment of Student in all areas of suspected disability beginning in March 2010." Based upon the District's pleadings, Issue one was filed in response to Parents' request for an IEE. Student wrongly interprets the IDEA as barring District requests for declaratory relief. However, District may not request declaratory relief without a case or controversy. Pursuant to the operative statute, in the event that District does not want to pay for an IEE, District may only request a due process hearing to prove that the evaluation in issue was appropriate. In sum, District may not file a due process hearing to determine the appropriateness of all its assessments in the absence of a case or controversy regarding its assessments. Accordingly, based upon the stipulation of counsel at the PHC that Student's IEE request is limited to OT, District may only seek a determination in Issue one that its OT assessment was appropriate. For this reason, District's Issue one is limited to OT and its request for a determination of the appropriateness of all its assessments as part of its compliance with the IEE procedures is stricken from District's case. Student's request to dismiss the entire issue is denied.

Student moved to dismiss District's complete complaint and failed to acknowledge that District's case also included a second issue. District contends that the appropriateness of all its assessments is relevant to the determination in Issue two of whether its IEP offer for ESY 2010 and the 2010-2011 constituted a FAPE. District maintains that its most recent assessments of Student formed one of the bases for the IEP team's offer of services and placement. At the pleading stage, it is not possible to determine whether findings as to the appropriateness of District's assessments in all areas will be required to decide Issue two. To the extent that the assessments were discussed and considered in making the IEP offer, their appropriateness is relevant. At the hearing the ALJ may request an offer of proof. For these reasons, Student's Motion to Dismiss District's case in its entirety is denied.

District's motion for sanctions is denied. Although Student requested that District's case be dismissed in its entirety, and not partially stricken, Student's claim had merit and was not frivolous.

### 3. District's Motion to Strike Student's Complaint.

On September 10, 2010, District moved to strike Issue two of Student's complaint. Student did not file an opposition to District's motion to strike.

## 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.) OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 or the ADA.

## ANALYSIS

In Issue two, Student alleges that District’s failure to appropriately assess Student in the area of OT denied her access to education and benefits enjoyed by her non-disabled peers, all in violation of Section 504 and the ADA. OAH does not have jurisdiction to hear claims that do not arise under the IDEA. District’s motion to strike Student’s Issue two is granted.

## ORDER

1. Student’s Motion to Consolidate is granted. Student’s Case shall be designated as the primary case under OAH Case Number 2010090344 and the 45-day timeline for issuance of the decision in the consolidated cases shall be based on the date of the filing of the complaint in Student’s case, OAH Case Number 2010090344.
2. All dates previously set in District’s Case, OAH Case Number 2010070140, (secondary case) are vacated and continued for good cause.
3. All dates previously set in Student’s case, OAH Case Number 20100090344, are vacated and continued for good cause.
4. The Prehearing Conference in the consolidated cases shall be held on October 18, 2010 at 10:00 a.m. and the Due Process Hearing in the consolidated cases shall be held on October 25, 26, 27, 28, and November 1, 2, 3, 4 The first day of hearing will start at 10:00 a.m.
5. The failure of the OT assessor to complete a written OT assessment report, counsel’s need for more time to review the assessor’s findings, or the OT assessor’s limited availability, shall not constitute good cause for any further continuance of this matter.

6. District's Issue one and Student's complaint is limited to OT, and any references to assessments other than OT are stricken from District's Issue one and Student's complaint.
7. Student's Motion to Dismiss is denied.
8. District's Motion to Strike Issue two of Student's case is granted and Student's claim based upon 504 and the ADA is dismissed.
9. District's Motion for Sanctions is denied.

**IT IS SO ORDERED.**

Dated: September 15, 2010

/s/

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EILEEN M. COHN  
Administrative Law Judge  
Office of Administrative Hearings