

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL  
DISTRICT & DESERT MOUNTAIN  
SELPA.

OAH CASE NO. 2010090872

ORDER CONSOLIDATING  
SEPTEMBER 21, 2010 AND  
SEPTEMBER 22, 2010 COMPLAINTS;  
ORDER ON SAN DIEGO UNIFIED  
SCHOOL DISTRICT'S MOTION TO  
DISMISS; ORDER ON MOTIONS TO  
ADD PARTY; & ORDER ON  
STUDENT'S MOTION TO AMEND

On September 21, 2010, Student filed a due process hearing request (complaint)<sup>1</sup> naming San Diego Unified School District (District) and Desert Mountain SELPA (SELPA) as respondents. The September 21, 2010 complaint listed "University High School" as Student's school of attendance and set forth allegations that District had failed to complete assessments or an IEP for Student. The educational history allegations referred to enrollment by lottery in "High Tech High" charter school at the beginning of the 2008-2009 school year. This complaint sought an "immediate" IEP for Student from District, in addition to reimbursements for various private placements and expenses in the past.

On September 22, 2010, Student filed a second request for a due process hearing (complaint) naming District and SELPA as respondents. The September 22, 2010 complaint for the first time identified High Tech High Media Arts (HTH) as Student's school of attendance and alleged that respondents, in particular, SELPA, denied Student a FAPE by not meeting his special education needs. As proposed resolutions, the September 22, 2010 complaint sought the same reimbursement as the September 21, 2010 complaint, but did not seek an immediate IEP.

On September 27, 2010, OAH issued a scheduling order under case number 2010090872. The scheduling order correctly reflected that the named respondents were District and SELPA, but failed to distinguish between the September 21, 2010 and September 22, 2010 complaints. At the time, OAH did not formally issue an order consolidating the two complaints.

Neither District nor SELPA timely filed a notice of insufficiency (NOI) to challenge the September 21, 2010 or September 22, 2010 complaints. The complaints are deemed to

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<sup>1</sup> A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

provide sufficient notice to respondents by operation of law. (See 20 U.S.C. § 1415(c)(2)(C) & Ed. Code, § 56502, subd. (d)(1).)

On October 21, 2010, SELPA filed a motion to be dismissed as a party on the ground that HTH, the local educational agency, had responsibility to provide special education to Student and that SELPA had no independent duty to do so. In SELPA's motion to be dismissed, it erroneously noted that HTH had been named as a party in the September 22, 2010 complaint. SELPA believed that OAH had, on its own motion, consolidated the September 21, 2010 and September 22, 2010 complaints. SELPA's motion to dismiss will be addressed by a separate order.

On October 25, 2010, Student filed a single page request with OAH, asking to add "High Tech High (LEA), High Tech High Media Arts" as a party. There is no indication that this request was served on District or SELPA.

On October 26, 2010, in response to SELPA's motion to be dismissed as a party, District filed its own motion to be dismissed as a party, opposition to SELPA's motion to dismiss, and a request to add HTH as a party. In support of its request to add HTH as a party and motion to dismiss, District provided convincing evidence that HTH had entered an interagency agreement with District that defined HTH's responsibility to provide special education services. Effective July 1, 2004, the interagency agreement provided that HTH was a "local educational agency" that was solely responsible for providing special education services to its students in conjunction with SELPA. District also believed that OAH had, on its own motion, consolidated the September 21, 2010 and September 22, 2010 complaints.

On October 29, 2010, HTH filed a non-opposition to being added as a party provided the matter was treated as a newly consolidated matter and all dates were reset. That same day, SELPA filed a non-opposition to District's motion to add HTH and an opposition to District's motion to be dismissed as a party.

Also on October 29, 2010, Student filed a combined opposition to District's motion to dismiss that also included a request that the complaint be amended to include facts alleged in the combined motion. The motion to amend was not accompanied by a draft amended complaint.

As discussed below, this Order will first clarify the status of the September 21, 2010 and September 22, 2010 complaints. The Order will then address District's motion to dismiss and Student's request to add HTH as a party and amend the complaint. First, the matters will be formally consolidated. As to District's motion to dismiss, it will be denied because it is premised on resolution of disputed facts, such that it cannot be granted at this time. Finally, Student's request to add HTH as a party will be granted, resetting all timelines. However, Student's request to amend the complaint to add facts alleged in the October 29, 2010 combined opposition and motion to amend will be denied without prejudice to Student refileing a motion to amend that includes a proposed amended complaint

that combines all issues and allegations from the September 21, 2010 and September 22, 2010 complaints, as well as any new allegations he wishes to make.

### *Consolidation*

As described above, Student filed two complaints, one on September 21, 2010 and one on September 22, 2010. It appears that OAH inadvertently issued a single scheduling order without formally issuing a consolidation order. Both SELPA and District have proceeded on the assumption that the two complaints had been consolidated.

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].)

Here, OAH did not formally issue an order consolidating the September 21, 2010 and September 22, 2010 complaints under the same case number. Instead, it appears a clerical error led to issuance of a single scheduling order. However, consolidation is appropriate under the circumstances, given the overlap of parties and issues, as well as parent's apparent unfamiliarity with how to file a due process hearing request. Because both SELPA and District have been proceeding on the assumption that the matters were consolidated under a single case number, they will not be prejudiced if the matters are consolidated by this order. Accordingly, the September 21, 2010 and September 22, 2010 complaints are ordered consolidated under the instant case number. The operative due process hearing request will consist of both pleadings.

### *District Motion to Dismiss*

District contends that it should be dismissed because the claims against it are barred by the two year statute of limitations and because Student's demand for a current IEP is not yet ripe. On October 27, 2010, Student filed a response alleging that he was not informed of the assessment timelines and IDEA procedural safeguards during the 2008 assessments conducted by District.

Special education law does not provide for a summary judgment procedure. Although OAH will dismiss claims prior to hearing that are clearly outside its jurisdiction, dismissal is not warranted when disputes of fact must be resolved to determine jurisdiction.

First, District's statute of limitations may be a defense at hearing, but is not a ground to grant a motion to dismiss at this time. Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the

problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent. Here, the complaints have been deemed sufficient and Student has argued facts implying that he may be able to prove an exception to the statute of limitations. Because there are disputed facts about whether an exception to the statute of limitations exists, District is not entitled to dismissal on this ground at this time.

District's contention that dismissal is warranted because Student's current demand for an IEP is not "ripe" also fails. The September 21, 2010 complaint has been deemed to provide sufficient notice because District did not file an NOI within the statutory time period. The complaint alleges that Student is currently a resident of District who attends a District school and is entitled to an IEP. Notably, District's motion to dismiss is not supported by any evidence conclusively establishing when Student actually re-enrolled in District. The sole enrollment history document offered by District is not authenticated, and there is no way to determine its accuracy or whether Student put the District on notice of reenrollment in some other way. District's motion is also supported by an exhibit proffered by SELPA regarding HTH, and other documents about HTH, none of which conclusively establishes that OAH lacks jurisdiction because the issue is not "ripe." In sum, District's contention that the issue is not "ripe" because the 60-day time period for it to complete assessments of Student has passed is an issue of fact that will not be decided on the basis of the complaint and District's motion. District's motion to dismiss is denied on both grounds.

#### *Adding HTH as a Party and Student's Motion to Amend*

Both Student and District request that HTH be added as a party. Because Student is requesting the addition, and Student has identified HTH as a local educational agency, Student's request will be treated as a motion to amend the complaint, which will be granted. Because Student's request to amend the complaint will be granted, District's motion to add HTH need not be addressed.

A public education agency involved in any decisions regarding a student may be a proper respondent in a due process hearing. (Ed. Code, § 56501, subd. (a).) A public education agency is defined as any public agency, including a charter school, responsible for providing special education or related services. (Ed. Code, §§ 56500, 56028.5.) Children with disabilities who attend public charter schools retain all rights under federal and State special education law. (34 C.F.R. § 300.209(a); Ed. Code, § 56145.)

A party may amend a complaint only if the hearing officer grants permission, or as otherwise specified.<sup>2</sup> (20 U.S.C. § 1415(c)(2)(E)(i).) The applicable timeline for a due process hearing shall recommence at the time a party files an amended complaint. (20 U.S.C. § 1415(c)(2)(E)(ii).)

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<sup>2</sup> The applicable timeline for a due process hearing shall recommence at the time a party files an amended Complaint. (20 U.S.C. § 1415(c)(2)(E)(ii).)

Here, Student seeks to add HTH as a respondent because it is a local educational agency. District's evidence corroborated Student's position and established that HTH was the LEA responsible for providing Student a FAPE while he was enrolled there. Accordingly, Student's request to amend the complaint to add HTH as a party should be granted.

However, Student's October 29, 2010 request to amend the combined complaints to allege new facts will be denied. At present there are two complaints on file, with allegations up to September 22, 2010. The two complaints on file overlap significantly, and it is already challenging to determine the exact legal issues for hearing. Student's request to piecemeal add facts from the October 29, 2010 opposition and motion to amend will only add to this confusion rather than bring clarity. The complaint has been deemed sufficient by failure of respondents to file an NOI. Accordingly, the October 29, 2010 motion to amend to add facts is denied without prejudice to Student renewing the motion to amend with a single, unified proposed amended complaint.

Because the motion to add a party (i.e. amend the complaint) is being granted, all hearing timelines will be reset as of the date of this order.

## ORDER

1. Student's September 21, 2010 and September 22, 2010 complaints are consolidated under OAH case number 2010090872 and together form the operative due process hearing request in this matter.
2. District's motion to be dismissed as a party is denied.
3. Student's motion to amend the complaints to add HTH is granted.
4. Student's motion to amend the complaints to add new facts as set forth in Student's October 29, 2010 combined opposition to District's motion to dismiss and motion to amend is denied. This denial is without prejudice to Student bringing a motion to amend that includes a single, unified, proposed amended complaint containing all facts and issues.
5. All previously scheduled hearing and mediation dates are vacated. Pursuant to Title 20 United States Code section 1415(c)(2)(E)(ii), the applicable timeline for this due process hearing, including the resolution session, recommences as of the date of this order. OAH will issue a new scheduling order.

Dated: November 1, 2010

/s/

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RICHARD T. BREEN  
Administrative Law Judge  
Office of Administrative Hearings