

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2013030710

ORDER FOR FURTHER BRIEFING ON
DISTRICT'S MOTION TO DISMISS

On March 15, 2013, attorney Tania L. Whiteleather filed with the Office of Administrative Hearings (OAH) a due process hearing request (complaint) on behalf of Student naming the San Diego Unified School District (District) as the respondent.

On April 15, 2013, attorney Amy J. Bozone filed on behalf of District a motion to dismiss due to the non-participation of Student's parent (Parent) in a mandatory resolution session. On April 17, 2013, Student filed opposition to District's motion.

APPLICABLE LAW

A local educational agency (LEA) is required to convene a meeting with the parents and the relevant members of the Individualized Education Program (IEP) 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).) 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 LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the LEA 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).)

DISCUSSION

District's motion, supported by the sworn declaration of District's resource teacher, indicates that in a telephone conversation on March 21, 2013, by voicemail message on March 25, 2013, and by letter dated March 26, 2013, Student's counsel agreed to participate in a resolution session on March 29, 2013 by telephone, but stated that her client would not

attend. The declaration is supported by documents establishing District's reasonable efforts to secure the participation of Student, who is an adult, in a resolution session. District argues that Student's counsel is not a "parent" within the definition of 34 Code of Federal regulations part 300.30, and so cannot attend a resolution session on Student's behalf. In support, District cites to 2006 comments to the federal implementing those regulations stating that a parent may not send a court-appointed advocate to attend a resolution session on behalf of a parent, and urges that a non-appointed attorney be similarly barred.

Student disagrees. Her opposition is supported by the declaration of Student's counsel, who explains that a "Durable Power of Attorney for Educational Decisions" from Student expressly authorizes counsel to appear on Student's behalf "at any meetings pursuant to the IDEA held by [District]." A copy of the signed and witnessed durable power of attorney, dated March 25, 2013, is attached to the declaration. Student's counsel stresses that she is willing to attend, and attempted to attend on March 29, 2013, a resolution session with District.

An adult student who holds her own educational rights is required to participate in a resolution session before a due process hearing may be commenced, and OAH has discretion to dismiss the matter 30 days after the date of filing if that student refuses to participate in a resolution session and the district provides appropriate documentation supporting its motion to dismiss.

Here, Student argues that by virtue of a signed power of attorney, she has the right to have her counsel recognized as the "parent" or adult student at the resolution meeting, rather than having counsel accompany Student as provided at 34 C.F.R. part 300.510(a)(1)(ii). Although Student makes broad references in the Probate Code in her opposition, she does not explain the legal basis for her argument. Therefore, Student is ordered to further brief this issue, and to specifically address the following questions:

(1) With specific reference to the Probate Code, what is the scope of the power of attorney executed by Student with regard to special education matters, and are there any limitations on Ms. Whiteleather's power to act on Student's behalf in this due process proceeding?

(2) Does an assignment of educational rights require the District and Office of Administrative Hearings (OAH) to treat Ms. Whiteleather as the adult Student for all purposes under the due process provisions of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq. (IDEA)) and related California law? In other words, is an assignment of educational rights alone sufficient to place Ms. Whiteleather in the position of "parent" as defined under the IDEA and California special education law?

(3) Why is adult Student, who seeks placement and services within the boundaries of the District, unable to attend a statutorily mandated meeting with District representatives to discuss the facts that form the basis of her complaint?

Student's brief shall be supported by specific reference to, and discussion of, the Probate Code and Education Code sections that she contends authorize counsel to stand in her stead at the resolution meeting, or throughout the due process proceeding. Student's explanation of her inability to attend a resolution meeting shall be accompanied by a sworn statement under penalty of perjury by Student, and documentary evidence if any, regarding the factors that prevent her attendance at such a meeting, and any and all alternative arrangements that would enable her to attend.

Student shall file and serve on District her supplemental brief no later than 5:00 p.m. on April 26, 2013. District shall have file and serve on Student any response to Student's supplemental brief no later than 5:00 p.m. on May 2, 2013.

IT IS SO ORDERED.

Dated: April 22, 2013

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings