

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. 2006030599

**ORDER DENYING MOTION TO
DISMISS OR CONSOLIDATE**

On March 16, 2006, petitioner Capistrano Unified School District (District), represented by Advocate G. R. Roice, filed a request for a due process hearing,¹ naming as respondent its student (Student). The request alleges that on February 10, 2006, the District completed a comprehensive assessment of Student to determine her eligibility for special education and, on March 1st, found her ineligible. It alleges that Student's parent disagreed with the assessment and requested that the District fund an independent educational evaluation (IEE). Instead of funding the IEE, the District seeks a determination here that its assessment was appropriate.

On March 28, 2006, Student moved to dismiss the District's request, or, in the alternative, to consolidate the matter with *Student v. Capistrano Unified School District*, No. N2005100440, a pending matter previously filed by Student against the District. Student argues that the District's request herein is deficient as a matter of law and omits highly relevant facts. In the alternative, she argues that judicial economy would be served by consolidation of the two matters because they have issues of law and fact in common.

On April 3, 2006, the District filed an opposition to Student's motion, and on April 5th, Student filed a reply.

¹ A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under section 1415(b)(7)(A) of title 20 of the United States Code.

APPLICABLE LAW

Independent educational evaluation

The Individuals with Disabilities Education Act (IDEA)(20 U.S.C. §§ 1400 et seq.) requires a participating state to provide to the parents of a child with a disability the right to obtain an independent educational evaluation (IEE) of the child. (20 U.S.C. § 1415(b)(1).)

A federal regulation promulgated under the IDEA grants to the parents the right to obtain an IEE at public expense if they disagree with the agency's evaluation. (34 C.F.R. § 300.502(b)(1).) The agency must pay for the IEE unless it initiates a due process hearing to show that its evaluation is appropriate. (*Id.*, § 300.502(b)(2)(i).)²

Section 56329, subdivision (b) of the California Education Code also grants to the parent of a child with a disability the right to obtain an IEE at public expense if the parent disagrees with the assessment of the public education agency. Subdivision (c) of that section then provides:

The public education agency may initiate a due process hearing ... to show that its assessment is appropriate. If the final decision ... is that the assessment is appropriate, the parent ... maintains the right for an independent educational assessment, but not at public expense.

Consolidation

No statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education due process proceedings. However, California statutes offer, by analogy, a standard appropriate to special education cases. Section 11507.3(a) of the Administrative Procedure Act (Gov. Code §§ 11370 et seq.) provides that an administrative law judge “may” order pending administrative proceedings consolidated if they involve “a common question of law or fact ...” Section 1048(a) of the California Code of Civil Procedure applies the same standard to the consolidation of civil cases.

The existence or nonexistence of a common question of law or fact has been recognized as the appropriate standard for deciding motions to consolidate in numerous decisions of the California Special Education Hearing Office (SEHO). (See, e.g., *Student v. Cypress Elementary School Dist.* (March 14, 2005) SEHO No. SN05-00175, 105 LRP 19424; *Student v. Encinitas Union School Dist.* (Oct. 7, 1999) SEHO No. SN99-0766, 31 IDELR 198); *Student v. San Ramon Valley Unified School Dist.* (June 24, 1999) SEHO No. SN99-0138, 31 IDELR 22).

² The agency may also avoid payment by showing at a due process hearing that the evaluation obtained by the parents did not meet agency criteria. (34 C.F.R. § 300.502(b)(2)(ii).) That is not an issue here.

DISCUSSION

The Motion to Dismiss

Student argues that the District's request is "deficient as a matter of law, and omits highly relevant facts." (Respondents: Motion to Dismiss or Joinder [sic], dated March 28, 2006, at p. 2.) Student does not explain why the request is deficient or address the express statutory and regulatory authority that allows the District to avoid paying for an IEE by filing a request such as this one and establishing that its assessment is appropriate. (Ed. Code § 56329(c); 34 C.F.R § 300.502(b)(2)(i).) Those provisions establish that this request is proper and cognizable as a matter of law.

Student sets forth at length factual claims that the District omits from its request. Most of the claims appear to relate to Student's action against the District, not this action. The remaining claims are not relevant to a motion to dismiss. A request for a due process hearing need only contain "a description of the nature of the problem of the child ... including facts relating to such problem ..." (20 U.S.C. § 1415(b)(7)(A)(ii)(III).) There is no requirement that it contain all the facts, or balanced facts, or any factual claims helpful to respondent. Those are matters for hearing.

The Motion to Consolidate

Student argues that this action and her action against the District have many questions of law and fact in common. Conflating "assessments" made and not made from September 2002 to the present, Student asserts that the District made many errors in conducting or not conducting those assessments; that those errors led to the District's refusal to find Student eligible for special education; and that those errors are at issue in both actions. (Respondents: Motion to Dismiss or Joinder [sic], *supra*, at pp. 2, 4-7; Respondents: Response to Brief in Opposition to Dismiss/Joinder [sic], dated April 5, 2006, at pp. 2-4.)

But the District's request does not involve a series of assessments of Student, or any failure to assess Student. It involves only the single assessment the District completed on February 10, 2006. (Request, p. 1.)³ The District alleges only that "its assessment of February 10, 2006 is comprehensive and accurately reflected the student's needs." (*Ibid.*) The only relief the District seeks is to "establish the appropriateness of its assessment." (*Ibid.*)

Student asserts that the actions "involve identical factual issues and overlapping legal issues" (Respondents: Response to Brief in Opposition to Dismiss/Joinder [sic], at p. 2). However, Student does not identify any legal issue the cases have in common except that they both concern assessments. A general legal standard is not the same as a specific legal

³ The District's request is in the form of a letter to March 16, 2006, from the District to the Office of Administrative Hearings.

issue. The only legal issue pertinent to this request is whether the assessment of February 10, 2006, was appropriate.

Student does not identify any witness' testimony, document, or other evidence that would be admissible in both cases, or any economy that consolidation might achieve. The only factual issues relevant to this request concern the assessment of February 10, 2006. Student's request in her action against the District was filed on October 14, 2005, and amended on October 24, 2005. Of necessity it involves events that occurred before the latter date.

Thus the two matters appear to have no issue of law or fact in common. If they do, the moving party has failed to discharge her burden of identifying them.

ORDER

1. The motion to dismiss is denied.

2. The motion to consolidate this matter with *Student v. Capistrano Unified School District*, No. N2005100440, is denied.

IT IS SO ORDERED THIS DAY: _____, 2006.

CHARLES MARSON
Administrative Law Judge
Special Education Division
Office of Administrative Hearings