

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ROCKLIN UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014070464

ORDER DENYING MOTION TO  
WITHDRAW CASE

On July 8, 2014, the Rocklin Unified School District filed a request for due process hearing with the Office of Administrative Hearings naming Student. On July 25, 2014, the matter was continued at the request of the parties. This case concerns a single issue: Did Rocklin's May 2014 speech and language assessment of Student meet all legal requirements such that Student is not entitled to a speech and language independent education evaluation at Rocklin's expense?

On October 13, 2014, the hearing began. Opening statements were delivered and Rocklin called its first witness. Rocklin completed its direct examination of the witness and Student completed her cross examination of the witness before the hearing was recessed until October 15, 2014, the next scheduled hearing date.

On October 14, 2014, Rocklin filed a "Notice of Withdrawal of the Due Process Complaint with Prejudice." On the same date, Student filed a response titled "Request for Order Upon Dismissal" in which Student asked that Rocklin be ordered to fund the entire amount of Student's independent educational evaluation and that Student be determined to be prevailing party in the matter.

On October 14, 2014, OAH directed both parties to appear at hearing on October 15, 2014, and notified the parties that Rocklin's "notice" of withdrawal was being considered as a motion to withdraw the case. On October 15, 2014, the hearing reconvened and the parties were given time to argue their respective positions regarding the dismissal of this case with prejudice. After the parties arguments were completed, the parties were notified that a written order would follow.

APPLICABLE LAW AND DISCUSSION

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to withdraw a case after a hearing has started, OAH will generally allow

withdrawal by the party who filed the complaint. (See Code of Civ. Proc., § 581, subd, (e).) However, this case presents a unique procedural posture that makes unilateral withdrawal by Rocklin result in an impingement on Student's rights under the Individuals with Disabilities Education Act and the Education Code.

In this case, sometime prior to June 19, 2014, after Parent disagreed with Rocklin's speech and language assessment completed in May 2014, Parent requested that Rocklin fund an independent evaluation in the area of speech and language. Rocklin sent a notice to the Parent specifically noting its refusal to fund such an assessment and then filed for hearing, as Rocklin acknowledged in its opening statement, it was required to do. Rocklin provided no authority which allowed them to dismiss a case which they were statutorily required to bring.

Although counsel for both parties acknowledged that on October 14, 2014, Rocklin's counsel sent a brief email to Student's counsel agreeing to fund an independent evaluation in the area of speech and language. The email had no details, no specific terms and contemplated that the evaluation must be in conformance with the special education local plan area requirements, which were not attached. This email was not specific enough to constitute an actual offer to fund the independent evaluation, as all of the terms necessary for Student to accept the offer were not present in the communication. Therefore, as of today's date, Rocklin has not either funded or agreed to fund the independent evaluation and the parties remain in dispute.

Rocklin argues that it should be allowed to dismiss its case with prejudice. There are two compelling arguments which require that the case not be dismissed with prejudice. First, since Rocklin has refused to fund the independent evaluation, Student is entitled to timely determination of her entitlement to public funding of the evaluation. More importantly, should Student need to further litigate the independent evaluation, the dismissal with prejudice unfairly and incorrectly shifts the burden of proof from Rocklin to Student.

#### *Provision of the Independent Evaluation without Undue Delay*

The independent education evaluation is not just an additional tool for determining a student's needs; it is designed to give parents essential information to use in the IEP process. The IEP is the "modus operandi" of the IDEA; it is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*Burlington School Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].) Parental participation in the development of an IEP is therefore essential to the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994]. It is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

The Supreme Court has stressed the importance of the right to an independent evaluation in redressing the relative advantages a school district has in expertise and in its superior control of information about a student:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. . . . [Parents] have the right to an independent educational evaluation of the[ir] child . . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

(*Schaffer v. Weast* (2005) 546 U.S. 60-61 [126 S.Ct. 528, 163 L.Ed.2d 387 [citations and internal quotation marks omitted].) Recently the Eleventh Circuit, in rejecting an attack on the regulation allowing for an independent evaluation to be conducted at public expense, observed that “[t]he right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP.” (*Phillip C. v. Jefferson County Bd. of Educ.* (11th Cir. 2012) 701 F.3d 691, 698 [citation omitted].) Thus, the process for litigating a student’s right to an independent evaluation at public expense is essential to protect the student’s substantive rights under the IDEA.

The significance of a student’s right concerning an independent evaluation at public expenses is also illustrated by the school district’s obligation to either fund the evaluation or file a hearing request without unnecessary delay. Unlike other cases filed by a student or school district, where the party filing the complaint has discretion over whether to file the case, a school district is required to file a case promptly when it refuses to provide an independent evaluation at public expense. When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for a due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); (b)(2)(i), (ii); see Ed. Code, § 56329, subd. (c).)

A delay as short as three months has been found to be unnecessary. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3, for example, the court determined that the school district unnecessarily delayed filing its due process request because it waited almost three months to do so. (See also *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111 [four month delay unnecessary]; *Student v. Temecula Valley Unified School Dist.* (OAH, Jan. 14, 2013, No. 2012020458 [four- and-one-half month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, Dec. 14, 2012, No. 2012090139 [70 day delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, July 7, 2011, No. 2011020188) [90-day delay unnecessary]; *Lafayette School Dist. v. Student* (OAH, July 1, 2009, No. 2008120161) [74-day delay unnecessary]; *Fremont Unified School Dist. v. Student* (OAH, June 1, 2009, No. 2009040633) [four month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, June 20, 2007, No. 2006120420 [64-day delay unnecessary]; cf. *H.S. v. San Jose*

*Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12–06358 SI) 2013 WL 1891398, pp. 2-4 [seven month delay unnecessary].)

In this case, Rocklin has not funded the independent evaluation or even made an offer to fund the IEE which could be accepted by Student. Parent asked for the independent evaluation at least four months ago. Allowing Rocklin to abandon this litigation seriously impinges on Student's right to litigate her entitlement to an independent evaluation at public expense without undue delay. Once Student requested an independent evaluation at public expense, Rocklin had a choice: either fund it, or litigate it. Rocklin chose to litigate the issue. Allowing Rocklin to unilaterally withdraw its request for hearing forces Student to litigate the issue herself. This is neither contemplated by the statutory scheme, or consistent with the spirit of the IDEA.

*Shifting of the Burden of Proof from Rocklin to Parent*

The party filing a request for hearing has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) As a result, dismissing this case with prejudice may likely result in shifting the burden of proof. Rocklin has the burden in this current case. If its case is dismissed, Student would be required to file her own case in order to litigate Rocklin's refusal to fund an independent evaluation, and would have the burden of proof. In addition, dismissing the case results in further unnecessary delay in litigating Student's right to an independent evaluation at public expense. Dismissing this case would result in significant prejudice to Student and benefit to Rocklin.

*Dismissal Without Prejudice is Not Appropriate*

Although the parties did not argue for dismissal without prejudice, this would also not be appropriate. The case began and some witness testimony was heard. Dismissal without prejudice would allow a petitioner who did not feel that the case was going well, to dismiss the case and start over again on another day with another judge. (See Cal. Code Civ. Proc., § 581, subd. (e).)

*Student's Request for an Order Requiring Rocklin To Fund the Independent Educational Evaluation and Designation as Prevailing Party*

No statute or regulation allows OAH to render a summary judgment, a directed verdict or other order finding liability, with the exception of a final decision rendered after a due process hearing is completed. Therefore, Student's requests are denied.

ORDER

Rocklin's motion to withdraw the case without prejudice is denied. The hearing will move forward on October 15, 2014, at 9:00 a.m. as scheduled and continue, day to day, Monday through Thursday, at the discretion of the ALJ.

IT IS SO ORDERED.

DATE: October 15, 2014

/s/  
\_\_\_\_\_  
MARGARET BROUSSARD  
Administrative Law Judge  
Office of Administrative Hearings