

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

In the Matter of:

STUDENT,

Petitioner,

v.

HAYWARD UNIFIED SCHOOL DISTRICT
and ALAMEDA COUNTY BEHAVIORAL
HEALTH CARE SERVICES,

Respondents.

OAH CASE NO. N 2007080062

HAYWARD UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH Case No. N2007010545

**ORDER DENYING MOTION TO
DISMISS ISSUES, DENYING
MOTION TO ADD PARTY, AND
GRANTING MOTION TO AMEND
COMPLAINT**

On January 18, 2007, the Office of Administrative Hearings (OAH) received from attorney Jennifer R. Rowe, on behalf of Hayward Unified School District (Hayward), a Request for Due Process Hearing (complaint) naming Student as the respondent. That matter is identified as OAH Case No. N2007010545.

On August 2, 2007, OAH received from attorneys Mandy G. Leigh and Sarah J. Fairchild, on behalf of Student, a complaint naming Hayward and Alameda County

Behavioral Health Services as the respondents.¹ That matter is identified as OAH Case No. N2007080062. In August 2007, OAH granted a motion to consolidate the two cases. Following OAH's Determination of Sufficiency of Request for Due Process Hearing in OAH Case No. N2007080062, Student filed an amended complaint on September 4, 2007.

On November 14, 2007, Hayward filed a motion to dismiss Issue 2, subsections (6) and (9) from Student's amended complaint. On November 19, 2007, OAH received Student's opposition to that motion. Attached to Student's opposition was an Order Granting The Hayward Unified School District's And The Children's Health Council's Motions To Dismiss from the Honorable Judge Jeffrey S. White of the United States District Court, Northern District of California, in the matter entitled *R.K., by and through his parents, T.K. and C.K. v. Hayward Unified School District, et al.*, Docket No. C 06-07836 JSW. Judge White's order, dated September 21, 2007, granted motions by Hayward and CHC to dismiss most of Student's claims against those parties in a federal court case Student filed on December 21, 2006.

On November 15, 2007, OAH received from Student a motion requesting leave to amend his amended complaint to add additional claims, and also requesting to add Children's Health Council (CHC) as a party. The proof of service indicates service on attorneys for both respondents, and also on an attorney who appears to be representing CHC. OAH did not receive any opposition to Student's motions.

APPLICABLE LAW

California Education Code section 56501, subdivision (a), provides that a parent or public education agency may request a due process hearing when there is a proposal or a refusal to initiate or change the identification, assessment, educational placement or the provision of a free appropriate public education (FAPE) to their child, or when there is a disagreement regarding the availability of a program available for the child, including the question of financial responsibility, as specified in subsection (b) of Section 300.403 of Title 34 of the Code of Federal Regulations. (See also 20 U.S.C. § 1415(b)(6).)

One key component of whether a public education agency has provided a FAPE is whether the agency has complied with the procedural requirements of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) However, a procedural violation may constitute a denial of FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see also Ed. Code, § 56505, subd. (j); *Park v. Anaheim Union High Sch.*

¹ This is Student's second due process request against these respondents in recent months. Student filed his first due process request in March 2006, and OAH identified that matter as OAH Case No. N2006080526. Student withdrew that matter in December 2006.

Dist. (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

In *Wyner v Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026, 1029, the Ninth Circuit Court of Appeals held that OAH's predecessor, the Special Education Hearing Office (SEHO) did not have jurisdiction to enforce its orders. (See *Porter v. Manhattan Beach Unified School District* (9th Cir. 2002) 307 F.3d 1064, 1070-1071.) The *Wyner* case remains applicable to OAH.

Special education due process procedures extend to the parent, under some circumstances to the student, and to the public education agencies involved in decisions regarding the student. (Ed. Code, § 56501, subd. (a); 20 U.S.C. § 1415(a).) A "public education agency" is defined as "a district, special education local plan area, or county office, ...or any other public agency providing special education or related services." (Ed. Code, § 56500.) Similarly, federal law defines public agencies that are subject to the procedures of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) as all political subdivisions of the State that are involved in the education of children with disabilities, including the State education agency, local education agencies, and other State agencies and schools, and State and local juvenile and adult correctional facilities. (34 C.F.R. § 300.2.)

Pursuant to the IDEA, specifically, section 1415(b) and (c) of Title 20 of the United States Code, an amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the request occurs more than 5 days prior to the due process hearing. (20 U.S.C. §1415(c)(2)(E).) In either case, the filing of an amended complaint restarts the applicable timelines for due process hearing pursuant to section 1415(f)(1)(B).

DISCUSSION

Hayward's Motion To Dismiss Issues

Hayward moves to dismiss Issue 2, subsections (6) and (9) from Student's amended complaint, filed on September 4, 2007. Issue 2(6) alleges that Hayward denied Student a FAPE for the 2006-2007 school year by failing to provide educational programming and services to Student, in violation of Hayward's obligation to maintain Student in his current educational placement pursuant to the stay put provisions of section 1415(j) of Title 20 of the United States Code, section 300.518 of Title 34 of the Code of Federal Regulations, and California Education Code section 56505, subdivision (d). Issue 2(9) alleges that Hayward denied Student a FAPE for that school year by failing to provide Student's parents with information about available alternative programs, contrary to statutory requirements.

Citing *Wyner, supra*, 223 F.3d at 1030, Hayward argues that these issues should be dismissed because OAH does not have jurisdiction to enforce its own orders, specifically the Order Granting Motion For Stay Put issued on September 6, 2006, in OAH Case No. N2006080526, and the Order Granting Motion For Stay Put issued in the present matter on March 8, 2007.² However, Student's September 2007 amended complaint does not cite either of these orders when raising Issues 2(6) or 2(9). Rather, a plain reading of the amended complaint indicates that Issue 2(6) alleges the failure to maintain Student in his current educational placement as a procedural violation which caused a denial of FAPE. Issue 2(9) similarly alleges that a procedural violation caused a denial of FAPE. The allegations of procedural denial of FAPE in these two issues raise claims within OAH's jurisdiction pursuant to California Education Code section 56501, subdivision (a).

The present order considers Hayward's motion to dismiss only as it applies to Issues 2(6) and 2(9) in the September 2007 amended complaint. However, it is indicative that Student's November 2007 second amended complaint argues that, contrary to Hayward's motion to dismiss, the issues alleging stay put violations are "not an enforcement request," but rather constitute "a request for determination that the failure to abide by stay put denied petitioner a FAPE."

Moreover, Hayward's reliance on the stay put order in *Student v. Bassett Unified School District*, OAH Case No. N2006080963, is misplaced. In that matter, the Administrative Law Judge (ALJ) denied a school district's prehearing motion to compel a student to comply with a stay put order previously issued by OAH. The question addressed in that order is different from the present matter, wherein Student raises a hearing issue alleging failure to maintain him in his current educational placement as a procedural violation that caused a denial of FAPE.

Hayward also contends that these issues should be dismissed on the grounds of collateral estoppel and res judicata, because the U.S. District Court and the Ninth Circuit Court of Appeals denied Student's request to enforce OAH's September 6, 2006 stay put order. However, those court rulings did not address the present claims that the failure to maintain stay put constituted a procedural violation which denied Student a FAPE. As a result, these issues are not precluded by the doctrines of collateral estoppel or res judicata.

For the above reasons, Hayward's motion to dismiss Issues 2(6) and 2(9) of Student's September 2007 amended complaint are denied. Given this outcome, this order need not reach the question of how to apply Judge White's September 21, 2007 ruling regarding OAH's application of *Wyner, supra*.

While Hayward's motion to dismiss is denied, the motion raised a colorable issue and was not "frivolous." (Code Civ. Proc., § 128.5.) Therefore, Student's request that the motion be deemed frivolous is denied.

² Given Hayward's reliance on *Wyner*, it is curious that Hayward did not address or acknowledge Judge White's September 21, 2007 ruling regarding how the holdings of that case apply to OAH.

Student's Motion To Add CHC As A Party

In his September 21, 2007 Order, Judge White dismissed Student's claims against CHC on the grounds that Student failed to administratively exhaust those claims against CHC in a special education due process matter. Specifically, Judge White held that:

To the extent CHC is subject to the IDEA, Plaintiff must first administratively exhaust his claims against CHC. To the extent CHC is not subject to the IDEA, the Plaintiff's claims fail against CHC for failure to state a claim. Regardless, the Court finds it is appropriate to have the OAH make this determination in the first place. [Footnote omitted.]

As noted above in the Applicable Law section, special education due process procedures apply to the public education agencies involved in decisions regarding the student. (Ed. Code, § 56501, subd. (a); 20 U.S.C. § 1415(a).) CHC is not a public education agency. There is no authority extending due process procedures to non-public agencies (NPAs) such as CHC.

Student's citation to an OAH order adding a charter school as a party to a due process hearing is entirely misplaced. Unlike NPAs, charter schools are public schools which may be subject to due process procedures, depending upon whether the charter school is a local educational agency (LEA) or part of an LEA that receives funding pursuant to specific provisions of the IDEA. (34 C.F.R. §§ 300.28, 300.209; see Ed. Code, §§ 56145, 56146.)

Hence, because NPAs are not public education agencies subject to due process procedures, Student may not add CHC as a party.

Student's Motion To Amend His Complaint

The unopposed motion to amend contends that, in light of Judge White's September 21, 2007 Order Granting The Hayward Unified School District's And The Children's Health Council's Motions To Dismiss, Student seeks to add claims against CHC and claims relating to an August 2005 settlement agreement between Student and Hayward. Student submitted a copy of the Second Amended Complaint he seeks to file; that document also included a new claim for the present school year. Student's motion established that he is not seeking amendment for an improper purpose such as delaying the hearing.³

³ The grant of permission to file the second amended complaint automatically vacates the current hearing dates. However, given that the hearing is not scheduled to begin until January 22, 2008, every attempt will be made to reschedule the hearing for the same or similar dates.

Pursuant to 20 U.S.C. section 1415(c)(2)(E), OAH received Student's request more than five days prior to the due process hearing, and the respondents filed no objection to the request to amend. In light of the above ruling, Student cannot amend to add claims concerning CHC, because CHC is not a proper party to this due process proceeding. However, in light of Judge White's ruling, Student should be permitted to amend to add the claims concerning the August 2005 settlement agreement.⁴ Student should also be permitted to amend to add his claims concerning the present school year. Therefore, Student's motion to amend is granted, except that claims against CHC must be stricken because CHC is not a party.

ORDER

1. Hayward's motion to dismiss issues is denied.
2. Student's motion to add CHC as a party is denied.
3. Student's motion to amend his complaint is granted, except that the claims against CHC are dismissed.
4. The second amended complaint restarts the applicable timelines for due process hearing. (20 U.S.C. § 1415(f)(1)(B).) All hearing dates are vacated and an amended notice of due process hearing will be issued. However, since mediation is voluntary, the parties remain free to proceed to mediation currently scheduled for November 29, 2007, and OAH will make a mediator available in case all parties agree to participate in that mediation.
5. All applicable timelines shall recommence beginning the date of this order.

Dated: November 28, 2007

SUZANNE B. BROWN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

⁴ This permission to amend does not necessarily establish that these issues are sufficient and/or within OAH's jurisdiction. Respondents retain the right to file a Notice of Insufficiency or other motions concerning the second amended complaint.