BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ELK GROVE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016100772

DECISION

Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings, State of California, on October 12, 2016, naming Elk Grove Unified School District. On November 7, 2016, OAH ordered the due process hearing bifurcated to first determine whether Elk Grove was obligated to provide special education and related services to Student during the 2016-2017 school year, as set forth in the July 5, 2016 Decision in *Elk Grove Unified School District v. Parent on behalf of Student* (OAH no. 2016020899).

Administrative Law Judge Marian H. Tully heard the first portion of the bifurcated hearing in Sacramento, California, on November 22, 2016.

Attorney Nicole Hodge Amey represented Student. A paralegal from Ms. Amey's office participated in the hearing and testified at the hearing.[1] The paralegal's assistant also attended the hearing. Parent and Student did not attend the hearing.

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[1] The paralegal testified that he is Student's brother and Parent's son. The paralegal's family relationship to Parent and Student is confidential personally identifiable information. Personally identifiable information includes the name of family

Attorney Lauri Arrow smith represented Elk Grove. Elk Grove Program Specialist Pat Spears Lee attended the hearing.

The evidentiary portion on the bifurcated issue concluded on November 22, 2016. The parties' request for a continuance until December 9, 2016, to file written briefs was granted. The parties timely filed their briefs on December 9, 2016, and the bifurcated issue was submitted for decision.

PROCEDURAL HISTORY

There is a long history between these parties concerning the need to assess Student following his enrollment in Elk Grove in September 2014.[2] The litigation began when Student filed a due process complaint in October 2014, (OAH no. 2014100698). One of the remedies requested in Student's complaint was funding for assessments. Elk Grove filed a due process complaint in January 2015, (OAH no. 2015010203), stating that it needed to assess Student in order to offer Student a free appropriate public education and seeking an order permitting assessment without parental consent. Both matters were resolved by a settlement agreement in March 2015. The March 2015 settlement agreement resolved Student's October 2014 complaint and Elk Grove's January 2015

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members or other information that would make it possible to identify the child with reasonable certainty. (Ed. Code, § 56515 subd. (b).) Accordingly, while the paralegal's name is on the record, his name is not used in this Decision to protect personally identifiable information about Student.

[2] Official notice is taken of the complaints and orders issued in OAH case numbers 2014100698, 2015010203, 2015080481, 2015090077, and 2016020899 pursuant to Government Code section 11515.

complaint, by allowing Elk Grove to assess Student and agreeing to Student's placement during the pendency of the assessment process.

DISTRICT'S AUGUST 2015 DUE PROCESS COMPLAINT

Elk Grove filed a due process complaint with OAH on August 12, 2015, (OAH no. 2015080481). Elk Grove claimed that Parent failed to cooperate to complete assessments in accordance with the March 2015 settlement agreement. Elk Grove sought an order requiring Parent to cooperate to complete the assessments. On Parent's motion, OAH dismissed Elk Grove's complaint on September 11, 2015 because OAH did not have jurisdiction over claims based upon breach of the settlement agreement.

STUDENT'S AUGUST 2015 DUE PROCESS COMPLAINT

Parent filed a due process complaint with OAH on August 24, 2015, (OAH no. 2015090077). Parent's claims stemmed from an alleged breach of the March 2015 settlement agreement. On Elk Grove's motion, OAH dismissed Student's complaint on October 8, 2015, because OAH did not have jurisdiction to hear matters based upon breach of the settlement agreement.

DISTRICT'S FEBRUARY 2016 DUE PROCESS COMPLAINT

Elk Grove filed a due process complaint with OAH on February 19, 2016, (OAH no. 2016020899). Elk Grove alleged Parent failed to sign and return an assessment plan provided to Parent in January 2016. The January 2016 assessment plan was outside the March 2015 settlement agreement. Elk Grove alleged that it was unable to comply with the Individuals with Disabilities Education Act to make an offer of a FAPE without an assessment of Student. *Elk Grove Unified School District v. Parent on behalf of Student* was heard on June 7, 2016, before ALJ Charles Marson. Elk Gove prevailed at the

hearing. According to the Decision assessments were necessary before Elk Grove could make an offer of placement and related services for Student and Elk Grove was entitled to proceed with the assessments contained in Elk Grove's January 2016 assessment plan without parental consent. The July 3, 2016 Decision ordered Parent to present Student for assessment and to timely complete and return documents (July 2016 Order).

If Student did not comply with the July 2016 Order, Elk Grove was not obligated to provide special education and related services to Student, or otherwise to accord Student the rights of a special education Student, until such time as Parent complied with the Order.

STUDENT'S CURRENT DUE PROCESS COMPLAINT

Student's due process complaint in this case alleged a number of issues for each of the 2014-2015, 2015-2016 and 2016-2017 school years. On November 9, 2016, Elk Grove filed a motion to dismiss Student's claims.

On November 17, 2016, OAH granted District's motion to dismiss Student's claims as to the 2014-2015 and 2015-2016 school years finding that Student's claims for those school years hinged upon a finding that Elk Grove breached the March 2015 settlement agreement and, once again, OAH did not have jurisdiction over claims for breach of a settlement agreement. (*Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Student's claims for the 2016 - 2017 school year concerned whether Elk Grove denied Student a FAPE by failing to: have an individualized education program in place at the beginning of the school year; provide Student a clear written offer of FAPE; properly assess Student; offer appropriate goals; and offer Student an IEP to meet Student's needs. On November 17, 2016, OAH denied Elk Grove's motion to dismiss claims for the 2016-2017 school year pending a determination as to whether Elk Grove

was obligated to provide special education and related services to Student for the 2016-2017 school year in accord with the July 2016 Order.

OAH bifurcated the due process hearing on Student's claims for the 2016-2017 school year to first determine whether Parent complied with the July 3, 2016 Order. If Parent failed to comply with the July 2016 Order, thus preventing completion of the assessments, Elk Grove would not be obligated to provide special education or related services to Student and Student's case would be dismissed. If, at the conclusion of the bifurcated issue, the ALJ determined that Elk Grove was obligated to provide special education and related services for the 2016-2017 school year, the due process hearing would proceed on the remaining issues.

ISSUE

Was Elk Grove obligated to provide special education and related services to Student for the 2016-2017 school year?

SUMMARY OF DECISION

Resolution of the issue in the bifurcated portion of this matter depends upon whether Parent complied with the July 2016 Order. Parent did not present Student for assessment and did not return required documents as required by the July 2016 Order. Therefore, Student did not meet his burden to prove Elk Grove was obligated to provide special education and related services to Student for the 2016-2017 school year.

FACTUAL FINDINGS

1. Student is a six-year-old boy. He lived with Parent within Elk Grove's geographical boundaries at all relevant times. Student was eligible for special education and related services in the category of other health impairment.

2. In March 2015, Elk Grove began to assess Student and scheduled IEP team meetings in May 2015, as agreed in a March 2015 settlement agreement. Parent withdrew Student from public school in Elk Grove on May 7, 2015. The assessments were not completed. In January 2016, Elk Grove gave Student an assessment plan. The January 2016 assessment plan was not part of the settlement agreement. The January 2016 assessment plan for which Elk Grove received the July 2016 order, allowed Elk Grove to proceed without parental consent. Parent and Ms. Amey's paralegal received a copy of the July 2016 Decision and Order.

3. On July 28, 2016, Elk Grove Program Specialist Pat Spears Lee wrote to Parent and to Ms. Amey's paralegal pursuant to the July 2016 Order. Ms. Lee informed them that the assessments would be conducted by the school psychologist, speech/language pathologist, occupational therapist, behaviorist, and special education teacher. Proposed dates for these assessments were September 6-9 and September 10-16, 2016. Ms. Lee included a Release of Information Form that required Parent's signature to permit Elk Grove to observe Student and discuss his current school setting, current performance and the observations of the staff working with Student in his private placement. Ms. Lee invited Parent to call her directly to respond to the letter and included her telephone number. Ms. Lee sent the letter by certified mail and received Parent's signed receipt dated August 8, 2016. Parent did not respond to the letter nor return the form.

4. Ms. Lee wrote to Parent again on August 15, 2016. The letter was sent as a follow-up to her July 28, 2016, letter. She reminded Parent of Elk Grove's right to assess Student according to the July 2016 Order. She asked if Parent had questions or conflicts with the date and time frame she had proposed on July 28, 2016. She informed Parent the assessments could be conducted at Butler Elementary, an Elk Grove school, or at Student's current school site on September 6-9 and September 10-16, 2016. She asked

Parent to sign and return the Release of Information Form sent on July 28, 2016. Ms. Lee invited Parent to call her if Parent had questions she would like to discuss and gave Parent her telephone number. Parent did not respond to the letter nor return the form.

5. Ms. Lee wrote to Parent again on August 29, 2016. The letter was intended as a follow-up to the letters sent on July 28 and August 15, 2016. She proposed to assess Student on September 6-9 and September 12-16, 2016, between 8:30 a.m. and 1 p.m. She inquired whether Parent had questions or conflicts with the dates or time frame that were proposed. She offered to have the assessments conducted at either Butler Elementary or at his current school site. She enclosed a Release of Information Form that would permit Elk Grove to discuss Student's progress with his current teacher. The letter was sent by certified mail to Parent's address. Elk Grove received a receipt signed by Ms. Amey's paralegal dated August 30, 2016. Neither Parent nor Ms. Amey's paralegal responded to the letter and Parent did not return the form.

6. Ms. Lee wrote to Parent for the fourth time on September 12, 2016. The letter was intended as a follow-up to the letters sent on July 28, August 15, and August 29, 2016. Ms. Lee included another copy of the Release of Information Form. Ms. Lee informed Parent that she wanted to find out if Parent had questions or conflicts with the date and time frame that was proposed. Ms. Lee again offered to assess Student at Butler Elementary or at his current school site on September 12 -16, 2016, between 8:30 a.m. and 1 p.m. Ms. Lee sent the letter by certified mail and received Parent's signed receipt dated September 13, 2016. Parent did not respond to the letter nor return the form.

7. Parent did not reasonably cooperate with Elk Grove in presenting Student for assessment. Parent did not present, or offer to present, Student for assessment at any time.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[3]

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)[4] et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme

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[3] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

[4] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.

(20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 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].) Student had the burden of proof in this case.

FINALITY OF OAH SPECIAL EDUCATION DUE PROCESS DECISION

5. Student contends ALJ Marson's Decision is wrong. Student argues the July 2016 Order included illegal assessments because Student is an African American child and IQ testing is prohibited by *Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963 (*Larry P.*). Student also contends that Elk Grove did not comply with the July 2016 Order because Elk Grove did not inform Parent of a specific date, time and location to present Student for assessment.

Legal Authority

6. A decision issued by OAH is a final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) OAH orders may be enforced in a court of competent jurisdiction, or through a compliance complaint to the California Department of Education. (*Id.*; see, Cal. Code Regs., tit. 5, § 4650, subd. (a)(7)(B).) The parties have the right to appeal the decision to a state court of competent jurisdiction within 90 days of receipt of the decision, or may bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).) Unless a court of competent jurisdiction orders otherwise, an OAH decision remains in full force and effect, and is legally binding upon the parties. (Ed. Code § 56505, subd. (h), (k).)

Analysis and Conclusion

7. The Decision in OAH case number 2016020899, including the July 2016 Order, was immediately binding on the parties unless a court of competent jurisdiction ordered otherwise. The validity of the assessment plan was decided in that case. Student's brief states the matter has been appealed. Whether the assessment plan at issue in that case included assessments contrary to the decision in *Larry P.* and whether *Larry P.* would apply in that case is not before the ALJ in this matter. OAH does not have a procedure to collaterally attack an Order contained in a binding Decision.

8. The evidence established that Elk Grove complied with the July 2016 Order. Ms. Lee, sent multiple letters to Parent and offered dates, times and locations for assessments. Ms. Lee invited Parent to call her if Parent had questions. She twice sent a Release of Information Form to Parent so that Elk Grove could contact Student's current placement. Parent did not respond to Elk Grove's letters nor comply with any part of the July 2016 Order. There was no evidence that the reason the assessments were not completed was anything other than Parent's failure to comply with the July 2016 Order. Accordingly, Student failed to demonstrate that, at the time Student filed his complaint up through the date of the hearing, Elk Grove was obligated to provide special education and related services to Student for the 2016-2017 school year. Therefore, Student's claims for the 2016-2017 school year, through the date of the hearing are dismissed because Parent did not comply with the July 2016 Order.

REMAINDER OF THE 2016-2017 SCHOOL YEAR-RIPENESS

9. Student filed his complaint at the beginning of the 2016-2017 school year, 30 days after Elk Grove's fourth letter to Parent. As to the 2016-2017 school year, the complaint alleges claims concerning assessments which had not yet occurred, an IEP

that Elk Grove had no obligation to offer, and a program that Elk Grove was not obligated to provide.

Legal Authority

10. There is no right to file for a special education due process hearing absent an existing dispute between the parties. A claim is not ripe for resolution "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (*Scott v. Pasadena Unified School Dist.* (9th Cir. 2002) 306 F.3d 646, 662 [citations omitted].) The basic rationale of the ripeness doctrine is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148 [87 S.Ct. 1507].)

Analysis and Conclusion

11. Here, the July 2016 Order was issued on July 5, 2016. The Order required Elk Grove to notify Parent in writing within 20 days, informing Parent of the Decision and dates, times and places for assessment. Elk Grove complied with the July 2016 Order, sending letters on July 18, 2016, August 15, 2016, August 29, 2016, and September 12, 2016. Each letter included the required information.

12. There was no timeline within which Parent was to comply. According to the July 2016 Order "Elk Grove will not be obligated to provide special education and related services to Student, or otherwise to accord Student the rights of a special education student, until such time as Parent complies with this Order." If, or when, Parent complies with the July 2016 Order, assessments must be completed and the IEP team must meet to review the assessments and develop an IEP. Thus, Student's claims for the 2016-2017 school year rest upon a contingent future event that might not occur

at all. Student's claims for the 2016-2017 school year are not ripe for resolution and are therefore dismissed.

ORDER

1. Student's complaint is dismissed.
2. All dates are vacated.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section, the following finding is made: District prevailed on the sole issue presented.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: December 22, 2016

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings