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 ON DISTRICT'S MOTION TO DISMISS VACATING DATES FOR FAILURE TO PARTICIPATE IN RESOLUTION SESSION AND RESETTING ALL TIMELINES

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.

On April 22, 2012, the undersigned administrative law judge ordered further briefing from the parties on three questions raised by District's motion: (1) with specific reference to the Probate Code, what was the scope of the power of attorney executed by Student with regard to special education matters, and whether there were any limitations on Ms. Whiteleather's power to act on Student's behalf in this due process proceeding, (2) whether an assignment of educational rights require the District and 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, and (3) why adult Student, who seeks placement and services within the boundaries of the District, was unable to attend a statutorily mandated meeting with District representatives to discuss the facts that form the basis of her complaint?

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 purpose of a resolution meeting is to discuss the due process complaint, and the facts that form the basis for the complaint, so that the school district has an opportunity to resolve the dispute. (34 C.F.R. § 300.510(a)(2).) 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).)

Many sections of the federal regulations implementing the IDEA and California special education law, distinguish between the party and their counsel. 34 Code of Federal Regulations part 300.512(a)(1) (2012) provides that "[a]ny party to a [due process] hearing…has the right to. . . [b]e accompanied and advised by counsel...." Education Code section 56502, subd. (c)(1), provides that the "party, or the attorney representing the party" may initiate a due process hearing by filing a written request. Education Code, section 56505, subd. (e)(1) gives parties to due process the right "to be accompanied and advised by counsel...." Education Code section 56505(e)(6) states that a "parent who is not represented by an attorney" is entitled to mediator to assistance in identifying issues and proposed resolutions. The federal regulations regarding resolution meetings expressly recognize that an attorney for the parent is not the same person as the parent, requiring that an LEA convene a meeting "with the parent," but not include an attorney for the LEA "unless the parent is accompanied by an attorney." (34 C.F.R. § 300.510(a)(ii).)

For both the IDEA and California special education law, the term "parent" expressly includes biological and adoptive parents, guardians, court appointed surrogates and persons acting as parents or holders of educational rights by court decree or order. (34 C.F.R. § 300.30; Ed. Code, § 56028). These definitions of "parent" do not include, nor even reference, attorneys representing adult, non-conserved students, appearing at resolution sessions in place of their clients.

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 attorneys be similarly barred.

In its further briefing, District additionally argues that Student submitted a durable power of attorney authorizing counsel to act on her behalf after the statutory time period in which to hold a resolution session had passed, and that the durable power of attorney is

legally insufficient for failure to comply with Probate Code sections 4124 and 4404, requiring inclusion of language that the power of attorney is not affected by the subsequent incapacity of the principal, which language is missing from Student's document. District argues that allowing an attorney to attend the resolution meeting as the parent, rather than accompanying the parent, would lead to the absurdity of disallowing the LEA from having its own counsel present, as it may only be represented by counsel if the parent is "accompanied by an attorney."

Student opposes District's motion. 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 her 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.

In further briefing, Student contends that Student has a state right to designate an attorney to attend the resolution session on her behalf because such a right has not been preempted by federal law, that is, that Congress has not expressly stated an intent to have parents attend resolution meetings in person. She contends that California is a sovereign state, in which an individual may designate another to act in his or her stead with respect to "all lawful subjects and purposes." (Prob. Code § 4123(a).) Student cites a number of OAH decisions in which attorneys in fact have represented Students. In response to the questions posed by the prior order, Student responds that the power of attorney is unlimited in allowing counsel to appear and act for Student in this due process proceeding, and therefore Student has no obligation to appear at the resolution session herself. A sworn declaration by Student adds that she is anxious and does not want to appear at the resolution session, and has no means of transportation.

Each word in a statute is given its usual and ordinary meaning to ascertain and effectuate the Legislature's intent. (See *Da Fonte v. UpRight, Inc.* (1992) 2 Cal.4th 593, 601.) Both the IDEA's implementing regulations and California law expressly define a "parent" who may act on behalf of a child for special education purposes, and those definitions do not include attorneys representing the child except by "judicial decree or order" transferring the right to make educational decisions. (34 C.F.R. § 300.30(b)(2) (2006); Ed. Code, § 56028, subd. (b)(2).) Student's durable power of attorney, legally sufficient or not, falls far short of a judicial decree or order transferring her educational rights. Therefore Student has failed to submit evidence that any person, including her counsel, is authorized to act as a "parent" on her behalf at the resolution meeting that is a statutorily mandated prerequisite to maintenance of this due process proceeding.

Contrary to Student's assertion, Congress has clearly stated an intention to have parents (the meaning of which includes adult, non-conserved students), themselves attend resolution meetings. 34 Code of Federal Regulations part 300.510(a) (Section 300.510) expressly states that the resolution meeting must be between the LEA and the parent, and the

attending parent may be "accompanied by an attorney." Had Congress intended that the resolution session be between the LEA and the attorney representing the parent, it could have worded Section 300.510 differently. Instead, Congress differentiated between the parents and their counsel within Section 300.510 and mandated that the parent participate in the meeting. The authors of the federal regulations also clearly responded to comments to Section 300.510 that there was no authority under the IDEA to allow even a court-appointed advocate to attend the resolution meeting "in place of a parent" except for limited exceptions not relevant here. (71 Fed. Reg. 46,701 (Aug. 14, 2006).)

Lastly, a reading of Section 300.510 to permit counsel to attend the resolution meeting as the "parent" would lead to absurd results. Section 300.510 states that the resolution meeting "[m]ay not include an attorney of the LEA unless the parent is accompanied by an attorney." If a party's attorney were permitted to attend the resolution meeting as the "parent," rather than accompanying the parent, LEAs would be placed in the untenable position of being barred from having counsel to advise their own representatives at the meetings. Such an unbalanced interpretation of the resolution process, the purpose of which is to informally discuss the facts that form the basis for the due process complaint so that the school district has an opportunity to resolve the dispute, could not have been intended.

Student, as the adult holder of her own educational rights, must attend a resolution meeting with District if she wishes to proceed in this due process matter. Student cannot circumvent the procedural requirement of participation in a resolution meeting by designating her attorney to appear in her stead. Accordingly, District is correct that this matter should not proceed to hearing until such time as Student herself has participated in a resolution session.

However, as there was a good faith dispute between the parties regarding whether counsel could attend the resolution meeting without her client, rather than dismiss the matter, all timelines will be reset as of the date of this order in order to afford Student an opportunity to participate in the mandatory resolutions session. If, after 30 days, Student still has not participated, District may renew its motion to dismiss the matter.

ORDER

1. All currently scheduled dates are vacated. The timelines for hearing established pursuant to Title 20 United States Code section 1415(f)(1)(B) shall recommence and all applicable timelines shall be reset as of the date of this Order. OAH will issue a scheduling order with the new dates.

2. Student shall participate in a resolutions session within 15 days of the date of this order.

3. If a resolution session with Student in attendance is not completed within 15 days of the date of this Order, District may re-file its motion to dismiss for failure to participate in a resolution session.

Dated: May 06, 2013

/s/
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings