BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. DAVIS JOINT UNIFIED SCHOOL DISTRICT AND WINTERS JOINT UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015080259 ORDER (1) GRANTING REQUEST FOR RECONSIDERATION AND (2) GRANTING IN PART AND DISMISSING IN PART DAVIS' MOTION TO DISMISS PORTIONS OF STUDENT'S FIRST AMENDED COMPLAINT

On October 5, 2015, the undersigned administrative law judge issued an order denying in part and granting in part the motion to dismiss portions of Student's first amended due process request (first amended complaint) of Davis Joint Unified School District. On October 9, 2015, Student filed a response to the order that will be treated as a motion for reconsideration.

APPLICABLE LAW

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction. However, special education law does not provide for a summary judgment procedure upon consideration of evidence.

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a

complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Student is presently in a category of pupils known as "private school children with disabilities" which refers to children with disabilities enrolled by parents in private schools or facilities. (Ed. Code, § 56170.) The basic rule for such pupils is that they may have a different amount of services than pupils in public schools receive (Ed. Code, § 56174.5, subd. (a)), and "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." (34 C.F.R. § 300.137(a)(2006); see also 20 U.S.C. § 1412(a)(10)(A); Ed. Code, § 56174.5, subd. (a).)

Instead, local educational agencies "only have an obligation to provide parentally-placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B funds that the LEA has determined, after consultation, to make available to its population of parentally-placed private school children with disabilities." (71 Fed.Reg. 46595 (Aug. 14, 2006); see also 20 U.S.C. § 1412(a)(10)(A)(i)(I); 34 C.F.R. §§ 300.132(a), 300.137(b)(2006); Ed. Code, § 56173.) The school district, or local educational agency, where the private school is located has the responsibility for providing the parentally-placed private school child with such equitable services. (34 C.F.R. § 300.133 (2006); Ed. Code, § 56172, subd. (a).) The responsible school district must provide equitable services to a parentally-placed private school child through a service plan. (34 C.F.R. § 300.138(b) (2006); Ed. Code, § 56174.5, subd. (b).)

A dispute regarding a service plan that provides equitable services to a parentally-placed private school child is properly the subject of State complaint procedures. (34 C.F.R. § 300.140(c)(2006).) Such a dispute is not governed by the due process provisions that apply with regard to disagreements regarding the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child. (34 C.F.R. § 300.140(a)(2006).) Accordingly, OAH does not have the authority to hear and decide cases in which a parent raises a dispute regarding the equitable services set forth in a service plan for a parentally-placed private school child. (Ed. Code, § 56501, subd. (a); *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

The district in which the private school is located is charged with assessing the child and holding an IEP team meeting to consider the assessment and to determine whether the child is eligible for special education. (Analysis of Comments and Changes to 2006 IDEA part B Regulations, 71 Fed.Reg. 46591, 46593 (Aug. 14, 2006) (*Comments to Regulations*).) If the IEP team determines that the child is eligible for special education, then the school district where the child resides must convene an IEP team meeting to offer a FAPE to the child. (34 C.F.R. § 300.201; *Comments to regulations*, *supra*, at 46593.)

If the parent of a parentally-placed child disagrees with an evaluation by the local educational agency in which the private school is located, the parent may request an independent educational evaluation at public expense from that agency. (Comments to Federal Regulations, 71 Fed. Reg. at 46597 (Aug. 14, 2006).) Such an evaluation is part of the "child find" obligation that public agencies owe to all children with disabilities, and independent of the obligation to provide a disabled student with a FAPE. Parents of a parentally-placed private school student with a disability may file a due process complaint against the local educational agency in which the private school is located regarding that agency's failure to meet the consent and evaluation requirements of the IDEA at title 34 Code of Federal Regulations sections 300.151 through 300.153. (*Id*.)

The statute of limitations for special education due process claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 444-445 (*J.W. v. Fresno*); *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.) Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or (ii) by the local educational agency's withholding of information that was required to be provided to the parent.

DISCUSSION

Student appears to contend that Davis was a party to additional claims in the first amended complaint not addressed in the order dated October 5, 2015. For purposes of clarity, the motion for reconsideration is granted, and all claims in Student's first amended complaint will be addressed to determine if Davis is a proper party to, or should be dismiss from, each individual claim.

This order holds that OAH lacks jurisdiction to hear all but one of the claims (Issue 11) alleged against Davis. As explained below, all issues other than Issue 11 will be dismissed as to Davis, and Student's amended complaint will proceed against Davis as to Issue 11 only.

Student's first amended complaint contains an introductory paragraph that clarifies the substance of his claims against Winters Joint Unified School District and Davis. As to Winters, Student's school of residence, Student claims that the individualized education program documents of February 15, 2013, and February 14, 2014, were procedurally defective, and that the special education and related services offered in those IEP's did not

constitute a free appropriate public education. As to Davis, the district in which Student was privately placed, Student claims that Davis: (1) "promulgated" the defective and insufficient Winters IEP's with Winters "in attendance," (2) failed to properly assess Student or make appropriate recommendations, and (3) failed to offer a FAPE in the services plans consented to by Parent. Student claims that both districts failed to offer Student a prospective FAPE.

Student alleges that he resides within Winters' boundaries, but was parentally placed in a private school within the boundaries of Davis. Parent requested, and Davis conducted, assessments of Student in February 2013 and February 2014, and offered and provided service plans consented to by Parent in February 2013, February 2014, and April 2015. Winters offered Student individualized education programs dated February 15, 2013, February 14, 2014, and February 13, 2015, to which Parent did not consent. Parent subsequently requested independent educational evaluations from Davis, which Davis funded, and filed a complaint with the California Department of Education against Davis for failing to implement its April 2015 service plan.

Issue 1 of Student's first amended complaint alleges that the February 15, 2013 offer of FAPE was procedurally defective and substantively insufficient. The IEP team meeting took place at a Davis school, was conducted by Davis, and attended by Winters. Student was parentally placed in a private school within the boundaries of Davis, and Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Student's allegations that Davis "promulgated" or authored an IEP offer of FAPE as a result of hosting the IEP team meeting at one of its schools has no support in the IDEA, which limits Davis' obligation to holding the IEP team meeting to determine Student's eligibility, and places the obligation to determine Student's educational needs and make an offer of FAPE on Winters, Student's school of residence. Thus, Issue 1 challenging the procedural and substantive adequacy of the FAPE offer in the February 15, 2013 IEP does not state a claim against Davis, and this claim is dismissed as to Davis.

Issue 2 alleges that the February 14, 2013 IEP failed to document Student's present levels of performance and was not reasonably calculated to provide Student with educational benefit, and that the IEP was promulgated and conducted by Davis with Winters in attendance. Davis' obligation to Student, as a parentally placed private school student, was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Thus, Issue 2 challenging the procedural and substantive adequacy of the FAPE offer in the February 15, 2013 IEP does not state a claim against Davis, and this claim is dismissed as to Davis.

Issue 3 alleges that the February 21, 2013 services plan offered by Davis lacked necessary specificity and did not offer Student a FAPE. Winters was Student's district of residence, and the only school district responsible for offering Student a FAPE. OAH does

not have jurisdiction to address the adequacy of a service plan in a due process proceeding, as challenges to a service plan are properly the subject of State complaint procedures. Therefore, Student's allegations of a denial of FAPE do not state a claim against Davis, and Student's claims of the insufficiency of the service plan are outside of OAH jurisdiction. Accordingly, Issue 3 is dismissed as to Davis.

Issue 4 alleges further document inadequacies and a failure of Davis to offer a FAPE in the service plan of February 21, 2013. For the same reasons discussed at Issue 3, the allegation that Davis failed to offer a FAPE to Student fails to state a claim against Davis, and the claims of defects in the service plan are outside of OAH jurisdiction. Accordingly, Issue 4 is dismissed as to Davis.

Issue 5 alleges that Davis failed to properly assess Student in February 2013, and failed to make appropriate recommendations regarding Student's program at the IEP team meetings in February 2013. Student's claims as to the sufficiency of assessments conducted by Davis in February 2013 or to the recommendations based on those assessments arose more than two years prior to the filing of his complaint on July 31, 2013, and so are beyond the statute of limitations. Student alleges no facts that would establish an exception to the statute of limitations, and Issue 5 is dismissed as to Davis.

Issue 6 alleges that the February 14, 2014 IEP offer of FAPE by Winters did not include placement in the least restrictive environment, and that Davis conducted the IEP team meeting at a Davis school site. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Thus, Issue 6 challenging whether Winters' offer of FAPE included appropriate placement does not state a claim against Davis, and this claim is dismissed as to Davis.

Issue 7 alleges that the February 14, 2014 IEP document is defective for failing to explain why Student was not offered placement in the least restrictive environment, and that Davis conducted the IEP team meeting that promulgated the IEP. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Thus, Issue 7 challenging whether Winters' offer of FAPE included appropriate placement does not state a claim against Davis, and this claim is dismissed as to Davis.

Issue 8 alleges that the February 14, 2014 IEP document failed to include necessary information, particularly concerning goals and how progress would be measured, and did not offer a FAPE. The IEP team meeting was conducted by Davis. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Thus, Issue 8 challenging the procedural and substantive sufficiency of Winters' offer of FAPE does not state a claim against Davis, and this claim is dismissed as to Davis.

Issue 9 alleges that Davis' February 14, 2014 service plan failed to include necessary written information and failed to offer Student a FAPE. Challenges to the sufficiency of a service plan are properly the subject of State complaint procedures, and outside the jurisdiction of OAH. Accordingly, Issue 9 challenging the February 2014 service plan is dismissed as to Davis.

Issue 10 alleges that Davis' February 14, 2014 service plan did not offer Student a FAPE, and lacked requisite detail. Davis, as the district in which Student was parentally placed in a private school, was not obligated to offer Student a FAPE. Further, challenges to the sufficiency of a service plan are outside the jurisdiction of OAH. Accordingly, Issue 10 challenging the procedural and substantive adequacy of the February 2014 service plan is dismissed as to Davis.

Issue 11 alleges that Davis failed to properly assess Student in February 2014. Davis had an obligation to assess Student as the district in which Student's private school was located, and this claim is timely made. Davis' arguments that Student means other than what he says in the complaint at Issue 11, and that Student has already received several of the remedies that would be awarded if Student were to prevail on this claim, are matters for determination by the finder of fact at hearing. Davis' motion to dismiss Issue 11 is denied.

Student's Issue 12 alleges that Davis failed to report to the February 14, 2014 IEP team about Student's progress in speech services received under the February 2013 service plan. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Any procedural errors in the conduct of the IEP team meeting in February 2014 to prepare an offer of FAPE, or the contents of the February 2014 IEP, were the responsibility of Winters as the school district of residence, not Davis. Davis' motion to dismiss Issue 12 is granted as to Davis.

Issue 13 alleges that Davis failed to provide the services called for in Student's service plans from August 2014, and was found out of compliance as a result of a California compliance complaint. Challenges to implementation of a service plan are outside the jurisdiction of OAH. Accordingly, Issue 13 is dismissed as to Davis.

Issue 14 realleges the facts in Issue 13, that is, that Davis failed to implement the speech services called for in post-August 2014 service plans. Challenges to implementation of a service plan are outside the jurisdiction of OAH, and Issue 14 is dismissed as to Davis.

Issue 15 alleges that the members of the February 13, 2015 IEP team meeting failed to give due consideration to independent educational evaluations and other reports provided by Parent. Davis conducted the IEP team meeting at a Davis school site. Student was parentally placed in a private school within the boundaries of Davis, and Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a

meeting to determine if Student was eligible for special education services, and offering Student a services plan. Any procedural errors in the conduct of the IEP team meeting in February 2015 to offer Student a FAPE were the responsibility of Winters as the school district of residence, not Davis. Davis' motion to dismiss Issue 15 is granted as to Davis.

Issue 16 alleges that the recommendations by various assessors and reporters were not adopted by Winters in its IEP offer of April 14, 2015, and that IEP did not constitute a FAPE. The offer was promulgated by the IEP team at a Davis school site. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Issue 16 challenging the procedural and substantive sufficiency of Winters' offer of FAPE does not allege facts stating a claim against Davis, and this claim is dismissed as to Davis.

Issue 17 alleges that Parent first discovered at the April 14, 2015 IEP team meeting that Davis should have, but did not, include annual goals in its service plans and did not offer Student a FAPE. Challenges to the procedural completeness or substantive adequacy of a service plan are outside the jurisdiction of OAH. Accordingly, Issue 17 challenging the procedural and substantive adequacy of Davis' February 2013 and February 2014 service plans is dismissed as to Davis.

Issue 18 alleges that the April 14, 2014 IEP offer by Winters failed to contain a statement of special education and related services or supplementary aides and services to be provided to Student. Davis' obligation to Student was limited to performing an evaluation of student as part of child find, holding a meeting to determine if Student was eligible for special education services, and offering Student a services plan. Issue 18 challenging the procedural and substantive sufficiency of Winters' April 2015 offer of FAPE does not allege facts stating a claim against Davis, and this claim is dismissed as to Davis.

Issue 19 alleges that Davis representatives at the April 14, 2015 IEP team meeting told her that they did not include goals in service plans, and as a result, Student had been without goals in his service plans for two years. Challenges to the substance of a service plan are outside the jurisdiction of OAH, and Issue 19 is dismissed as to Davis.

Issue 20 alleges that Winters sent her a letter stating that Student would not have goals in future service plans. Student contends that this letter documents a prospective denial of FAPE by Davis and Winters. Challenges to the procedural completeness or substantive adequacy of a service plan are outside the jurisdiction of OAH. Accordingly, Issue 20 is dismissed as to Davis.

ORDER

1. Student's motion for reconsideration is granted.

2. The motion to dismiss of Davis Joint Unified School District is granted as to all issues, excepting only Issue 11.

3. The motion to dismiss Issue 11 as to Davis Joint Unified School District is denied.

4. The complaint shall proceed against Davis Joint Unified School District as to Issue 11 only.

IT IS SO ORDERED.

DATE: October 15, 2015

/S/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings