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 DENYING RESPONDENT WINTERS' MOTION TO DISMISS

On July 31, 2015, Parent on behalf of Student filed with the Office of Administrative Hearings a due process hearing request (complaint) naming Davis Joint Unified School District and Winters Joint Unified School District.

On September 1, 2015, Student filed an amended complaint.

On September 24, 2015, Winters filed a motion to dismiss Issues 1, 2, 5, 6, 7 and 8 of Student's amended complaint against Winters as precluded by Parent's execution of an individual service plan for services from Davis. On September 30, 2015, Student filed an opposition.

APPLICABLE LAW

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).)

Generally, the district in which a Student resides has the obligation to assess Student and make an offer of a free appropriate public education in an individualized education program. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, §§ 56300, 56321, 56344, subd. (c), 48200 and 56028.)

Here, however, 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 the school district, or local educational agency, where the private school is located, rather than the district of residence, has the responsibility for providing the parentally-placed private school child with 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).)

DISCUSSION

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 in February 2013, February 2014 and April 2015. Parent consented to the service plans offered by Davis.

Winters also offered Student individualized education programs dated February 15, 2013, February 14, 2014 and February 13, 2015, to which Parents did not consent.

Student alleges, as to the claims in dispute in this motion, that Winters denied Student a free appropriate public education in its offers in its individualized education programs by failing to: include measurable goals and measures of progress in the IEP dated February 15, 2013(Issue 1), include present levels of performance or services reasonably calculated to provide Student with educational benefit in the February 2103 IEP (Issue 2), offer a FAPE in the February 2013 IEP (Issue 5); offer Student a FAPE in the least restrictive environment in the IEP dated February 14, 2014 (Issue 6), explain its rationale for offering a restricted environment in the February 2014 IEP (Issue 7), and create a complete IEP document in February 2014 (Issue 8).

Winters moves to dismiss Issues 1, 2, 5, 6, 7, and 8 as precluded by Parent's consent to the service plans offered by Davis.

The consented to service plans included the following language:

> By signing this document, the parent/guardian(s) have indicated to the District of residence that they have chosen to unilaterally enroll or continue to enroll the student in a private school without the consent of, referral by, or at the expense of the District. It is further acknowledged that the DOR has offered to develop an IEP when the student's parent/guardian(s) express an interest in enrolling the student in public school.

Winters contends that Parent forfeited Student's right to a FAPE from Winters by entering into service plans with Davis due to the express language included in those plans.[1]

Whether or not Parent had expressed an interest to Winters to enroll Student in public school is an issue of fact to be determined at hearing. Whether or not the terms of service plans entered into between Parent and Davis are effective between Student and Winters are issues of fact and law. Winters' motion is in the nature of a summary judgment, and due process proceedings before OAH do not include prehearing summary judgment.

Therefore, Winter Joint Unified School District's motion to dismiss Issues 1, 2, 5, 6, 7, and 8 is denied.

IT IS SO ORDERED.

DATE: October 6, 2015

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

[1] Winters cites to an OAH decision that found, after a full evidentiary due process hearing, that the parents of a disabled child were precluded from asserting a FAPE claim because they had not intended to enroll their child in public school and had consented to a service plan.