

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. 2014040776

ORDER GRANTING MOTION TO
DISMISS ISSUES OUTSIDE STATUTE
OF LIMITATIONS

On June 6, 2014, Student filed an amended request for a special education due process hearing (amended complaint) with the Office of Administrative Hearings naming the Elk Grove Unified School District. On June 23, 2014, District filed a motion to dismiss issues in the amended complaint that are outside the statute of limitations, or in the alternative, a motion that the amended complaint be deemed insufficient.¹

APPLICABLE LAW

The statute of limitations for special education due process complaints in California was amended, effective October 9, 2006, and is now two-years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) A request for a due process hearing "shall 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." (Ed. Code, § 56505, subd. (l); see, *Miller, etc. v. San Mateo-Foster City Unified Sch. Dist.* (N.D.Cal. 2004) 318 F.Supp.2d 851, 860-61.)

Both 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 specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that

¹ On June 25, 2014, OAH issued a separate order finding that District's notice of insufficiency was untimely and holding that Student's amended complaint was legally sufficient.

was required to be provided to the parent. Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, section 504 claims, enforcement of settlement agreements, incorrect parties, etc.....), special education law does not provide for a summary judgment procedure.

DISCUSSION

Student filed his original complaint with OAH on April 15, 2014. Under the applicable two-year statute of limitations, his earliest problem is an issue arising on or after April 15, 2012. However, that complaint began with the 2008 – 2009 school year. On May 30, 2014, the undersigned ALJ conditionally granted District's motion to dismiss all issues in Student's complaint that were outside of the applicable two-year statute of limitations because his complaint did not set forth sufficient facts to support any exceptions. The complaint did not set forth sufficient factual allegations in support of a waiver of the two-year statute of limitations due to either specific misrepresentations by District that it had solved the problem forming the basis of a due process hearing request, or District's withholding of information that was required to be provided to Parents. Nor did the complaint aver that Parents were thereby prevented from requesting a due process hearing at any time prior to April 2012. Student's motion to amend his complaint was granted, rendering the dismissal of issues moot. The ALJ ordered Student to file a cover letter with his amended complaint to provide notice to District and OAH of the nature of his amendments. Except for notice of new issues for the 2014-2015 school year, Student did not comply with the order to identify the nature of the amendments in his ten-page pleading. The ALJ has compared the original and amended complaints, with reference to the statute of limitations.

Misrepresenting Provision of Compensatory Education

The first issue in Student's amended complaint claims that from May 1, 2009, through the 2013-2014 school year, including extended school years, District denied him a free appropriate public education (FAPE) in fifteen separate ways, including, in Issue 1(a), failing to implement his individualized education program (IEP). Issue 1(j) claims District misrepresented to Parents that it would provide compensatory education, but does not say when that occurred.

Beginning in May 2009, Student has been eligible for special education services under the categories of other health impairment and visual impairment, and placed by his IEP's on home hospital instruction with various services. Student claims District failed to implement his IEP services beginning in May 2009. The facts in support of his misrepresentation claim show that, at an IEP team meeting on October 14, 2011, District offered to provide Student compensatory education for missed services in the 2008-2009, 2009-2010, and 2010-2011 school years. Although a specific offer was made for 15 hours of occupational therapy and 47 sessions of speech and language therapy, no specific amount of compensatory home hospital instruction was offered at that IEP team meeting. In fact,

Student's new paragraph nine states that District intended to reconvene a meeting to discuss the number of hours. Student's paragraph 13 (formerly paragraph 11) continues to aver that *Mother did not agree with the amount of compensatory education* at the October 2011 team meeting. Absent any agreement, there was therefore no agreement upon which Parents could rely to conclude that District had solved their problem and which misled them to not file a request for a due process hearing.

In new paragraphs 14 through 18, Student states that following the IEP team meeting, District declined to convene another IEP team meeting because it preferred to handle the issue of compensatory education outside of the IEP process. On November 1, 2011, a program specialist misrepresented to Mother that the specialist had recalculated the number of home hospital hours to be 6.25 hours (instead of 70 hours mentioned during the IEP team meeting). Student claims that "as a result of this misrepresentation," Parents did not seek due process. However, Student does not claim Parents relied on the specialist's statements. Rather, they disagreed. Based upon these facts, Parents knew by November 1, 2011, that they had a significant dispute with District regarding their claim for compensatory education, and that no agreement regarding the total amount of any such compensatory education had been agreed upon. Thus, District did not lead Student and Parents to believe it had solved the problem when it was clearly not solved and the issue remained in dispute.

These facts also do not explain Parents' failure to seek due process at any time prior to October 2011. For example, if District failed to implement Student's May 2009 IEP in June 2009, Student had until June 2011 in which to seek legal redress. The amended complaint is devoid of any facts claiming Parents were unaware that District had failed to implement services or made misrepresentations that it had provided all services or had otherwise solved the problem. Since the services were (or were not) provided in Student's home, Parents' knowledge whether services were provided may be implied. Thus, by October 2011, some of Student's earlier claims had already been lost, absent facts supporting a waiver or exemption from the statute of limitations.

Student claims in new paragraph 10 that, at the October 2011 IEP team meeting, District promised some of the compensatory education services "would be made up during the regular school year." That claim fails to qualify for an exemption to the statute of limitations as found above: absent a binding agreement on the compensatory education package, when the services would have been provided was a moot point.

In addition, the facts do not explain why Parents waited until April 2014, following the impasse in the fall of 2011, to seek legal relief. For example, assuming District denied Student a FAPE in connection with the October 2011 IEP team meeting in any or all of the other ways listed, Student had until October 2013 within which to request due process. His amended complaint is devoid of any claim that District misrepresented, at or following that meeting, the appropriateness of Student's goals, instruction, or related services, which led Parents to believe District had solved those problems unrelated to compensatory education. Since Student's pleading seeks to go back to May 2009 on all aspects of his first two issues, his narrow focus on the compensatory education issue misses the point as to the other issues.

In paragraphs 19 through 24 (formerly paragraphs 12 through 17), Student itemizes that in November 2011, District stopped providing physical therapy services; in May 2012, District stopped providing home hospital instruction, and in June 2012, District stopped providing vision impairment services. Student's brief in opposition to the motion to dismiss argues that "at that point," Parents discovered for the first time that District had no intention of providing the compensatory education promised in October 2011. First, as found above, Parents knew in November 2011 they had a dispute and not an agreement about compensatory education. Second, Student's claim that District again failed to implement his IEP by stopping physical therapy services in November 2011 was subject to a statute of limitations that ran in November 2013. No facts are averred about misrepresentation in that regard. The claims pertaining to denial of services in May and June 2012 are within the statute of limitations since Student filed his complaint in April 2014, but no basis is shown based on misrepresentation to relate those new violations back in time.

Withholding Required Information

California law requires school districts to inform a parent of state and federal procedural safeguards at each IEP team meeting. (Ed. Code, § 56500.1, subd. (b).) In addition, districts must provide written notice of the procedural safeguards at other designated times, including on initiating an assessment. (34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) Student's Issue 2(a) in his amended complaint claims that District committed a procedural violation by misrepresenting to Parents that it would provide compensatory education. Issue 2 does not list any legal issue that District withheld procedural safeguard information required by law. However, in new factual paragraph 14 of the amended complaint, Student claims that District withheld procedural safeguards. In view of liberal pleading standards, Student's complaint is read to include a claim of withholding notice of procedural safeguards as an issue even though it was not set forth as such.

The amended complaint does not say when this claim began. The first sentence in paragraph 14 says that *since the October 2011 IEP meeting*, District failed to hold an IEP team meeting. The second sentence is the claim: "[u]ntil April 2, 2014, the District failed to provide the family with procedural safeguards." Thus, Student's amended complaint does not expressly claim District failed to provide Parents with notice of their procedural safeguards *at* the October 2011 IEP team meeting, and suggests that the violation occurred "*since*," or after the meeting. However, Student's opposition brief claims that District failed to provide Parents with written notice of their procedural safeguards *at, or after* the October 2011 IEP team meeting. The claim as to failure to provide safeguards notice *at* the meeting is not supported by the express allegations in the amended complaint, or any declaration under penalty of perjury from Parents or other documentation.

Uncontroverted evidence and argument establish that Mother attended IEP team meetings in April 2009, April 2010, and October 2011. There is no claim in the amended complaint that District failed to provide written notice of procedural rights at the 2009 and 2010 IEP team meetings. District has submitted uncontroverted declarations under penalty of perjury from District program specialists Jennifer Lipsky and Brooke Warren that, in

connection with both IEP team meetings on April 20, 2009, and April 13, 2010, Student's mother was provided copies of his procedural safeguards. The attached IEP documents for each meeting corroborate their statements. In connection with the October 2011 IEP team meeting, Ms. Warren attested in her declaration that Parent was provided a copy of the procedural safeguards notice, and Exhibit D to District's motion corroborates that statement on the notes page of the IEP. This evidence is also uncontroverted. Thus, Student's ambiguous claim is refuted by District's sworn declarations and IEP documentation. Student had the opportunity to submit rebuttal evidence but did not do so.²

Conclusion

Based on the foregoing, there is no need to have an evidentiary hearing regarding the statute of limitations, or permit Student's claims regarding exceptions to the statute of limitations to go forward to hearing. Student's amended complaint, on its face, shows that Parents knew they had a disputed claim with District regarding compensatory education by November 2011, and that District's mere offers to resolve that claim were rejected by Parents. Therefore, District did not mislead them or prevent them from filing a request for due process. In addition, Student's claim, if any, that District withheld notice of procedural rights in connection with the October 2011 IEP team meeting was refuted by District's uncontroverted evidence submitted with its motion to dismiss. Moreover, Student has not presented any facts to support a claim that Parents needed to be served with another copy of their procedural rights after October 2011. Even if District was again required to provide notice of safeguards prior to April 2014, Student's amended complaint does not claim or provide any facts showing that failure to do so prevented Parents from seeking legal relief.

ORDER

District's motion to dismiss all issues in Student's amended complaint that are outside of the applicable two-year statute of limitations is granted.

DATE: July 2, 2014

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

² District's initial motion to dismiss issues, filed on May 27, 2014, also included the above-described declarations and documents showing timely delivery of notice of procedural safeguards at the IEP team meetings. Hence, Student has had ample opportunity to rebut that evidence by adding specific allegations in his amended complaint, and/or submitting rebuttal evidence in his reply to District's renewed June 23, 2014 motion, and did not do so.

