

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 GRANTING IN PART AND
DENYING IN PART DAVIS JOINT
UNIFIED SCHOOL DISTRICT'S
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 22, 2015, Davis filed a motion to be dismissed as a party, which will be treated as a motion to dismiss the issues alleged against it. On September 28, 2015, Student filed an opposition. On September 29, 2015, Davis filed a reply.

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

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).) 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 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 Parents 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.

Student alleges, as to Davis, that Davis failed to: include sufficient goals in the February 2013 service plan (Issue 3), offer services reasonably calculated to provide Student with educational benefit in the February 2013 service plan (Issue 4), properly assess Student in February 2013 (Issue 5); include sufficient goals and present levels of performance in the February 2014 service plan (Issue 9); offer services reasonably calculated to provide educational benefit in the February 2014 service plan (Issue 10); properly assess in February 2014 (Issue 11); provide present levels of performance to the February 2014 IEP team (Issue 12); implement the February 2014 service plan (Issues 13 and 14); consider Student’s privately obtained assessment at the February 2015 IEP team meeting (Issue 15); or include goals in the April 2015 service plan (Issues 17, 19 and 20) and 19).

Davis moves to dismiss Issues 3, 4, 9 and 10, which challenge the sufficiency of the February 2013 and February 2014 service plans, as outside of OAH jurisdiction. Davis similarly moves to dismiss Issues 12, 13, 14, 15, 16, 17, 19 and 20 which challenge Davis' failures to implement the service plans, to take sufficient information into account in drafting the service plans and in failing to offer a FAPE in the service plans, as outside of OAH jurisdiction,. Davis moves to dismiss Issue 5, which challenges the February 2013 assessments, as outside the statute of limitations. Davis moves to dismiss Issue 11, which challenges the February 2014 assessment, arguing that it actually alleges a failure to offer a FAPE rather than a failure to properly assess.

In his opposition, Student argues that Parent was directed to file a due process complaint with OAH, and that Parent was never informed of the intricacies of special education law until recently, entitling Student to a tolling of the statute of limitations. In its reply, Davis contends that Student's reply confirms that Student is challenging the service plans, and that Student must bring his complaints regarding the service plans before the California Department of Education, warranting dismissal of Davis as a party to this due process proceeding.

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. Therefore, Student's challenges to the sufficiency of Davis' service plans at Issues 3, 4, 9 and 10 are properly the subject of State complaint procedures and outside of OAH jurisdiction, and these issues will be dismissed.

Similarly, whether Davis correctly offered or implemented the service plans is properly the subject of a State complaint and outside of OAH jurisdiction. Accordingly, Student's Issues 12, 13, 14, 15, 16, 17, 19 and 20 challenging Davis' failure to implement the service plans, to take sufficient information into account in drafting the service plans and in failing to offer a FAPE in the service plans will be dismissed.

Issue 5 of Student's complaint, filed on July 31, 2015, challenges the sufficiency of assessments conducted by Davis in February 2013, beyond the statute of limitations. Student alleges no facts that would establish an exception to the statute of limitations, and Issue 5 will be dismissed.

Student's 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 will be denied.

ORDER

1. The motion to dismiss of Davis Joint Unified School District is granted as to Issues 3, 4, 8, 10, 12, 13, 14, 15, 16, 17, 19 and 20.
2. The motion to dismiss Issue 11 as to Davis Joint Unified School District is denied.
3. The complaint shall proceed against Davis Joint Unified School District as to Issue 11 only.

DATE: October 5, 2015

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings