BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020020631

ORDER GRANTING IN PART AND DENYING IN PART FREMONT'S MOTION TO DISMISS

MAY 5, 2020

On February 18, 2020, Parent, as educational rights holder, filed on behalf of adult Student a due process hearing request with the Office of Administrative Hearings, called OAH, naming Fremont Unified School District.

On April 21, 2020, Fremont filed a motion to dismiss Student's due process hearing request, called a complaint, for Parent's failure to participate in a mandatory resolution session, and to dismiss various individual claims on other grounds. On May 1, 2020, Student filed an opposition.

RESOLUTION SESSION PARTICIPATION

A local educational agency is required to meet with the parents and Student's relevant individualized education program, or IEP, team members within 15 days of receiving Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I); 34 C.F.R. § 300.510(a)(1) (2006). The meeting called a resolution session, can be waived in writing by both parties or if they agree to use mediation. (34 C.F.R. § 300.510(a)(3).) If the parents do not attend the resolution session, and it was not waived, there is no due process hearing until the resolution session waived or held. (34 C.F.R. § 300.510(b)(3).) The respondent can request the case be dismissed after the 30-day period, if it documented reasonable efforts to hold the resolution session and the parents did not attend. (34 C.F.R. §300.510(b)(4).)

Procedures for documenting reasonable efforts include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. §§ 300.510(b)(4), 300.322(d).)

Fremont did not establish it made reasonable efforts to obtain parental participation. The motion is not supported by a sworn declaration to lay a foundation for documents purporting to demonstrate efforts to contact Parent. The unauthenticated mail correspondence attached to the motion does not include proof of receipt, and the email does not include verification of the email address. There is no evidence that Fremont made any attempt to call Parent, or to visit Parent at home or his place of employment.

In Student's opposition, Parent notes that Fremont sent him a letter that expressly stated that participation in a resolution session was voluntary. Had Parent been correctly informed that the resolution session was mandatory unless waived, he could have responded appropriately and either attended the resolution session or opted for mediation only.

Accordingly, the motion to dismiss Student's complaint for failure to participate in a resolution session is denied.

JURISDICTION AND SETTLEMENT AGREEMENTS

Initially, it is noted that Fremont characterizes Student's complaint as stating one set of issues 1 through 10, and another set of issues a through x, which Fremont contends are duplicative. In fact, Student provides a detailed history of alleged violations in Section III, Relevant Factual Background, and clearly delineates his claims, lettered a through x, in Section IV, Issues for Hearing. This order will not address arguments to dismiss factual allegations, arbitrarily identified as Issues 1 through 10 by Fremont.

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, called a FAPE, 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 School. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement. (*Wyner, supra,* 223 F. 3d at p. 1030.) However, in *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. March 27, 2007) 2007 WL 949603, the District Court held that a claim under the IDEA is stated where the school district's alleged conduct resulted in a denial of FAPE, as opposed to "merely a breach" of the settlement agreement. (*Id.,* at pp. *4-5.) OAH has jurisdiction over claims of violation of the IDEA.

Fremont contends that OAH lacks jurisdiction to hear Student's Issues f, g and h because they seek enforcement of a settlement agreement. Parent is an unrepresented litigant, and the issues as stated lack a certain precision. However, as more than 15 days have passed since Fremont received the complaint and Fremont did not file a notice of insufficiency with OAH, the complaint is deemed sufficient to give Fremont an awareness and understanding of the issues forming the basis of the complaint. (20 U.S.C. § 1415(c)(2)(C); Ed. Code, § 56502, subd. (d)(1).)

At Issue f, Student seeks a determination that OAH can revisit the prior due process case filed by Student and settled by an August 2, 2017 settlement agreement, to encompass Parent's attempts to discuss the violations through August 7, 2019. The factual background alleges that as a result of Fremont's conduct after the August 2, 2017 agreement, Student was denied a FAPE. (Complaint, 21:19-22:7). Issue g alleges that the triennial assessments completed by Fremont in October 2017 were barred by the settlement agreement and done without parental consent. Issue h alleges that Student was denied a FAPE because she was promoted from eighth grade to ninth grade despite failing her classes. OAH has jurisdiction to determine if Student has been denied a FAPE, or if Fremont significantly interfered with Parent's opportunity to

participate in the development of Student's IEP. Accordingly, the motion to dismiss for lack of jurisdiction is denied.

WAIVER OF CLAIMS

Fremont contends that Student's Issues j and q must be dismissed because they raise claims regarding the 2016-2017 school year, and Student waived all claims as to that school year in the August 2017 settlement agreement.

Although OAH will grant motions to dismiss claims that are facially outside of OAH jurisdiction, such as civil rights claims, special education law does not provide for a summary judgment procedure.

Fremont is arguing that an alleged waiver bars Student's claims with regard to the 2016-2017 school year. No sworn declaration was presented by Fremont to lay a foundation for, or to authenticate, an agreement attached to the motion as an exhibit. Therefore, the motion to dismiss Issues j and q as barred by a settlement agreement is denied.

STATUTE OF LIMITATIONS

The statute of limitations in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) However, 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 was required to be provided to the parent.

An individualized education program for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 439.)

While the adequacy of the IEP document is evaluated from the perspective of the IEP team at the time it was written, "the implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such." (*O'Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Incidents occurring within the statute of limitations for failure to implement an IEP as written, or of notice of the need to reassess or modify an IEP, will support a due process claim. However, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document is in effect within the statute of limitations, as special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. (See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *E.F. v. Newport Mesa Unified School Dist.* (C.D. Cal., June 23, 2015, No. SACV 14–00455–CJC(RNBx)) 2015 WL 3867982, *8, fn. 6).)

Fremont contends that Student's Issues b, c, d, and portions of Issues j and q, must be dismissed as beyond the statute of limitations, and because Student does not allege any exceptions to the statute.

Issues b, c, and d seek determinations that Student was entitled to a FAPE after IEP team meetings in September 8, 2017, October 27, 2017, and February 28, 2018, respectively. Issue j alleges that Student did not receive a FAPE for the 2016-2017,

2017-2018, 2018-2019, and 2019-2020 school years. Issue q alleges that Student did not receive appropriate instructional time for the 2016-2017, 2017-2018 and 2018-2019 school years. Student's complaint was filed on February 18, 2020, and contains no allegations that Parent was prevented from filing a request for due process due to specific misrepresentations by Fremont that it had resolved the problem forming the basis of the complaint, or that Fremont withheld information from Parent that was required to be given to Parent.

Student is statutorily entitled to a FAPE under the IDEA and California special education law, and therefore Issues b and c are not reasonably read as seeking only a determination that Student was entitled to a FAPE after the identified IEP team meetings. Rather, in conjunction with the factual allegations, these issues dispute the appropriateness of the offer of placement and services in the September 8, 2017 and October 27, 2017 IEPs. As those IEPs occurred more than two years prior to the filing of Student's complaint, any challenge to the appropriateness of the IEP offers is barred by the two-year statute of limitations. Accordingly, Issues b and c are barred by the statute of limitations and must be dismissed.

The February 28, 2018 IEP was created within two years of the filing of Student's complaint on February 18, 2020. Accordingly, the motion to dismiss Issue d as barred by the statute of limitations is denied.

Issues j and q are somewhat duplicative, in that Issue j alleges that Student did not receive a FAPE for the 2016-2017, 2017-2018, 2018-2019, and 2019-2020 school years, and Issue q alleges that Student did not receive appropriate instructional time during those same years. The events of the 2016-2017 school year are beyond the statute of limitations.

Student alleges that she was assessed in Fall 2017 without Parent's consent, that an IEP team meeting was held on October 27, 2017 without Parent present, and that the October 2017 IEP did not offer a FAPE. She also alleges that her IEP was not implemented correctly after February 2018, and in particular that she did not receive home instruction. The statute of limitations bars claims challenging the offer of FAPE made in October 2017, that is, prior to February 18, 2018. However, it but does not bar claims arising during the 2017-2018 after February 18, 2018, including that Fremont denied Student a FAPE by failing to implement Student's then-current IEP.

Accordingly, Fremont's motion to bar claims arising prior to February 18, 2018, including the 2016-2017 school year and part of the 2017-2018 school year, encompassed by Issues j and q, is granted.

NON-FAPE CLAIMS

Fremont contends that Issue i fails to allege a FAPE claim and is not within OAH jurisdiction. Student's Issue i seeks a determination of whether a grade of C, or 2.0, is truly a passing grade for any class subject. This is not a claim with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE, and so does not fall within OAH's jurisdiction. Therefore, Fremont's motion to dismiss Issue i is granted.

PARENT'S STANDING

Fremont contends that the complaint's allegations regarding adult Student's limited transfer of educational rights to Parent do not clearly establish that Parent has standing to file the complaint on Student's behalf. Fremont appears to concede that this is an evidentiary matter, and rather than seeking dismissal on these grounds, requests that Student be required to attend the prehearing conference and confirm that

she is in agreement with Parent's filing of the complaint. Student bears the burden of proof that Parent has standing to bring this complaint, and that determination will be made at hearing by the administrative law judge presiding in this matter.

ORDER

1. Fremont's motion to dismiss Student's complaint in its entirety for Parent's failure to participate in the resolution session is denied.
2. Fremont's motion to dismiss Student's Issues f, g, and h as seeking enforcement of a settlement agreement outside of OAH jurisdiction is denied.
3. Fremont's motion to dismiss Issue d as beyond the statute of limitations is denied.
4. Fremont's motion to dismiss Student's Issues b and c as barred by the statute of limitations, and claims in Issues j and q arising prior to February 18, 2018, is granted.
5. Fremont's motion to dismiss Issue i as outside of OAH jurisdiction is granted.
6. Fremont's request that Student be ordered to attend the prehearing conference in this matter to confirm Parent's authority to bring this action on Student's behalf is denied.

IT IS SO ORDERED

DocuSigned by:
Alexa Hohensee
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Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings