

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LINCOLN UNIFIED SCHOOL DISTRICT  
AND SAN JOAQUIN COUNTY BOARD  
OF EDUCATION..

OAH CASE NO. 2013090535

TENTATIVE ORDER DISMISSING  
SECOND AMENDED COMPLAINT  
WITH PREJUDICE

TENTATIVE RULING SUBJECT TO  
ORAL ARGUMENT

Student, acting through his Father, filed a second amended complaint in this matter on January 9, 2014, against the Lincoln Unified School District (District) and the San Joaquin County Board of Education (County). On January 13, 2014, District filed a motion to dismiss the second amended complaint. Student did not file a responsive pleading.

On January 21, 2014, Student filed a motion for leave to present oral argument on the motion and an accompanying Notice of Insufficiency. District did not file a responsive pleading.

APPLICABLE LAW

The Office of Administrative Hearings (OAH) will grant motions to dismiss allegations that are facially outside of OAH jurisdiction, such as civil rights claims, claims under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), or claims that on the face of the complaint are barred by the statute of limitations.

*Statute of Limitations*

The statute of limitations for special education due process claims in California requires that the party initiating a request for due process hearing must file it within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (1); see also 20 U.S.C. § 1415(f)(3)(C).) This rule does not apply if the parent was prevented from requesting a due process hearing: 1) because of specific misrepresentations by the local education agency that it had solved the problem forming the basis for the request, or 2) because the local education agency withheld information from the parent that was required to be provided. (Ed. Code, § 56505, subd. (1)(1),(2); 20 U.S.C. § 1415(f)(3)(D).)

### *OAH's Jurisdiction*

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to “ensure that all children with disabilities have available to them a free appropriate public education” (FAPE), 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.)

In disciplinary cases resulting in expulsion, OAH’s principal role is to ensure that a school district’s manifestation determination was correct; that is, that a special education student’s violation of a code of student conduct was not a manifestation of his disability. (See 20 U.S.C. § 1415(k)(1)(E), (k)(3)(A).) If it was not such a manifestation, the IDEA permits a school district to impose discipline to the same extent it would concerning a student who was not disabled. (20 U.S.C. § 1415(k)(1)(C).)

### *Jurisdiction over Expulsion Proceedings*

Education Code section 48918 provides a remedy for a student to challenge his expulsion for violating a code of student conduct. It establishes the right to a hearing before the school’s governing board at which the student is afforded a variety of procedural rights including notice of the charges against him; the right to counsel; the right to subpoena, present and confront witnesses; the right to present evidence, and the right to obtain a decision within 10 school days.

If the governing board upholds the order of expulsion, the expulsion order remains in effect until a date set by the board which cannot be later than the last day of the semester following the semester in which the expulsion occurred, when the pupil shall be reviewed for readmission to school. (Ed. Code, § 48916, subd.(a).) In anticipation of that readmission process, the board must adopt, among other things, a plan of rehabilitation with which the student must comply to gain readmission. (*Id.*, subds.(b), (c).)

An expelled student who disagrees with the order of the governing board may appeal its decision to the county board of education, which has the power to uphold, overturn or modify the order of the governing board in accordance with various procedures and standards set forth in the Education Code. (Ed. Code, §§ 48919-48923.) The Education Code then provides that “[t]he decision of the county board of education shall be final and binding upon the pupil and upon the governing board of the school district” and that “[t]he order shall become final when rendered.” (Ed. Code, § 48924.)

The expulsion decisions of the governing board and the county board of education are not subject to review by OAH. OAH’s jurisdictional grant must be read in harmony with the

statutes authorizing the governing board and the county board of education to make those decisions. (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 746; *Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 523-524; *People v. Kennedy* (2001) 91 Cal.App.4th 288, 297.) It is apparent that the Legislature, in providing a two-level administrative procedure for a student to appeal an expulsion and then providing that the decision at the second level is “final and binding on the pupil” (Ed. Code, § 48924), did not intend that the pupil could then institute an administrative appeal with OAH concerning the actions of the governing board and the county board of education.

## DISCUSSION

District argues that Student’s second amended complaint should be dismissed with prejudice, and without leave to amend, because it simply repleads allegations in Student’s earlier complaints in this matter; because all the relief it seeks relates to events that are either beyond the applicable statute of limitations, or outside of the jurisdiction of OAH, or both; and that it is manifestly filed to harass and punish District for perceived wrongs it did Student. Evaluation of these arguments requires a review of the factual background and procedural history of this matter.

### *Factual Background*

From the pleadings it appears that Student is over the age of 18, and first became eligible to receive special education and related services in April 2010 under the category of specific learning disability (SLD) due to a mild reading disorder attributable to a deficit in phonemic awareness.<sup>1</sup> He attended District’s Lincoln High School during the school year 2010-2011. On May 23, 2011, he was suspended as a result of a disciplinary incident in the school’s library. At a manifestation determination meeting, District concluded that Student’s conduct was not a manifestation of his disability, and he was later expelled.

Student appealed his expulsion to District’s governing board, which upheld the expulsion, and among other things set forth a rehabilitation plan with which Student had to comply before he could be readmitted to a District school.

Student then filed a request for due process with OAH, claiming that District had erred in determining that his conduct was not a manifestation of his disability. (*Student v. Lincoln Unified School Dist.*, OAH Case No. 2011090998.) A decision adverse to Student was filed on November 30, 2011, in which ALJ Gary Geren found that District was correct in ruling that Student’s conduct in the disciplinary incident was not a manifestation of his disability, and that Student’s conduct did not result from a failure to implement his individualized education program.

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<sup>1</sup> Student has been represented by Father throughout this matter pursuant to an assignment of his educational rights.

On December 14, 2011, Student appealed to the governing board for reenrollment at Lincoln High School, but was denied reenrollment due to his failure to comply with his rehabilitation plan.

### *Original Complaint in This Matter*

Student filed his complaint in this matter on September 16, 2013, naming District and County. On September 18, 2013, District filed a Notice of Insufficiency of the complaint (NOI)(20 U.S.C. § 1415(c)(2)(A).)

On September 20, 2013, in an Order Determining Sufficiency of Due Process Complaint, Administrative Law Judge (ALJ) Adeniyi Ayoade held the complaint insufficient in its entirety. ALJ Ayoade described the complaint as follows:

Student's complaint is presented in an array of documents, including: 1) the Office of Administrative Hearing (OAH)'s Mediation and Due Process Hearing Request Form (OAH Form 64), which included seven alleged issues; 2) seven pages of allegations (dated August 8, 2011) listing seven additional alleged issues; and 3) additional four pages of documents presenting 20 alleged issues earlier presented in OAH Case Number 2011090998. [Footnote omitted.] Further, Student submitted with his complaint: a) a 21 page "amended & supplemented closing brief" that was earlier submitted by Student in OAH Case Number 2011090998; b) some documents relating to a US District Court case; and c) a declaration by Dr. Closson [Student's then-advocate] dated December 31, 2012 regarding the US District Court case. In all, the documents submitted by Student presented a total of 34 alleged issues, and all taken together present a very confusing picture.

ALJ Ayoade ruled that the first 13 issues presented by Student's original complaint were unclear, confusing, and insufficiently pled, and gave him 14 days to amend his complaint as to those issues. He dismissed 20 other issues with prejudice because they restated verbatim the grievances that had already been heard and resolved in OAH Case No. 2011090998.

In his Order, ALJ Ayoade noted that pursuant to Education Code section 56505, subdivision (e)(6), a parent who is not represented by an attorney may request that OAH provide a mediator to assist the parent in identifying the issues and proposed resolutions that must be included in a complaint, and suggested that if Parent desired the assistance of a mediator, he should contact OAH immediately in writing. Parent did not do so.

### *First Amended Complaint*

Student's first amended complaint was due on October 4, 2013, but was filed four days after that date. (OAH subsequently denied a motion to dismiss on that ground, holding that District was not, at the time, unduly prejudiced by the delay.) The amended complaint

named only District, but also mentioned County in its caption. County moved to be dismissed as a party on the ground that it was not properly named and that no adequate charging allegations were made against it. Student did not oppose the motion. On October 30, 2013, OAH dismissed County as a party.

The first amended complaint was, in form, almost identical to the original complaint; it consisted of allegations on part of OAH's hearing request form 64 and many pages of attached documents, with handwritten annotations. District filed another NOI concerning the first amended complaint, which was decided on October 18, 2013, by ALJ Marian Tully in another Order Determining Sufficiency of Due Process Complaint. In her Order, ALJ Tully described the first amended complaint as follows:

Student's amended complaint is comprised of 36 pages including 1) OAH's Mediation and Due Process Hearing Request Form (OAH Form 64), 2) eight pages of correspondence, 3) all 21 pages of an Amended and Supplemental Closing Brief in OAH Case number 2011090998, and 4) two pages with "Proposed Resolutions of Problems." Student's allegations of issues, identified as the "nature of the problem" are set out in subparts in the first six pages. The remaining 30 pages indicate "Facts" by numbers 1 through 45 which purport to set forth the dates, events and people involved, along with when, where, and how the problems occurred.

From this mass of documents ALJ Tully was able to piece together three contentions that Student had sufficiently pled, which she described as follows:

1. Whether Student was denied a free appropriate public education for the 2011-2012 school year because he was denied a placement and services based on a disciplinary rehabilitation plan that was developed without consideration of Student's unique needs, a report from Student's IEP team, parental input, and Student's status as qualifying for mental health services under chapter 26.5 [of the Government Code]. . . ;
2. Whether Student was denied a free appropriate public education for the 2011-2012 school year because there was no offer of placement and services, including mental health services under chapter 26.5 . . . ;
3. Whether Student was denied a free appropriate public education for the 2011-2012 school year because the school board, in conducting its expulsion review did not:
  - A. follow board policies . . . ;
  - B. consider that there were requests for assessment pending . . . ;  
[and]
  - C. grant Father's request for a continuance of the expulsion hearing

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Judge Tully ruled that if Student wished to allege any issues other than those identified in her Order, he must either seek permission from OAH to amend the complaint, or file a separate due process hearing request. She emphasized that she ruled only that Student had pled the three above issues with adequate clarity, and specifically deferred ruling on arguments concerning the statute of limitations and OAH's jurisdiction to a later ruling on a motion to dismiss.

District moved to dismiss the first amended complaint on October 28, 2013. Student did not file a response. On November 1, 2013, ALJ Adrienne Krikorian granted District's motion in part, ruling that two of the three issues identified by ALJ Tully in her October 18, 2013 Order (Issues No. 1 and 3, above) were beyond the 2-year statute of limitations and not within OAH's jurisdiction.<sup>2</sup> She ordered that Student could proceed to hearing on the first amended complaint only on the following issue: "whether, from September 16, 2011 through the end of the 2012 regular school year, District had a duty to provide a FAPE while Student was expelled, and whether District did not meet that duty." ALJ Krikorian further ordered that the hearing on that issue "shall not include anything related to the school board's actions regarding Student's expulsion, or the rehabilitation plan arising from the expulsion, as both issues are barred by the statute of limitations and additionally are outside of OAH jurisdiction."

Notwithstanding that ruling, Student on November 20, 2013, filed a prehearing conference statement setting forth 28 issues for hearing. 27 of those issues repled matters arising in the spring of 2011 relating to the manifestation determination, all of which were beyond the applicable statute of limitations, most of which had been resolved after hearing in OAH Case No. 2011090998, and most of which had been previously ruled beyond the statute of limitations in this matter. The remaining issue attacked the decisions of County concerning the expulsion, although that issue had previously been held beyond OAH's jurisdiction.

At a prehearing conference on December 2, 2013, Student moved for leave to amend his complaint. Notwithstanding a substantial showing by District that it would be prejudiced by any further delay, having prepared for the upcoming hearing and readied its witnesses, the undersigned ALJ granted Student's request and allowed him until the close of business on December 17, 2013, to amend his complaint. However, because the dispute had been pending between the parties since 2011, because it had been the subject of previous litigation between the parties, and because District had shown significant prejudice from a further delay, the ALJ granted leave to amend "on the condition that failure to file a second amended complaint within the time allotted will result in dismissal of the pending amended complaint with prejudice." The Order once again offered Student the assistance of a mediator in redrafting his complaint.

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<sup>2</sup> This matter was originally filed on September 16, 2013. The statute of limitations therefore bars any claims arising before September 16, 2011.

On December 16, 2013, Student requested additional time to amend his complaint and requested the assistance of a mediator in redrafting it. Over District's objection, on December 18, 2013, OAH granted Student's request and extended Student's time for filing the second amended complaint to the close of business on January 8, 2014, but reminded him that if the second amended complaint was not timely filed, "the amended complaint now pending shall be dismissed with prejudice, in accord with the December 3, 2013 Order after PHC." Subsequently, Student received the assistance of an OAH mediator in redrafting his complaint.

### *The Second Amended Complaint*

Student failed to file a timely second amended complaint on January 8, 2014. After business hours on that day, Student sent to OAH by facsimile a second amended complaint naming both District and County. By OAH regulation, since the document arrived after business hours, it was deemed to have been filed on January 9, 2014, the next business day. (Cal. Code Regs., tit. 1, § 1006, subd. (h).) The second amended complaint was therefore untimely filed.

The second amended complaint was also defective in form. Although Student used part of OAH's Form 64, his filing omits the Statement of Service on that form, and there is no indication in the second amended complaint that either District or County had been served with it. Since District filed responsive motions it appears that District was in fact served, but there is no indication County was ever served.<sup>3</sup>

Student's second amended complaint is presented in the same fashion as its predecessors: entries on a truncated OAH Form 64 together with numerous appended documents annotated in handwriting. Student's charging allegations begin on page 3 of his complaint, which is a reproduction of a page from his original complaint, the allegations of which had already been held insufficiently pled. The first of the two allegations on page 3 addresses matters occurring in spring 2011, which have been previously held outside of the statute of limitations. The second relates to the rehabilitation plan that was imposed by the governing board as a condition of Student's readmission to a District school, and has previously been held outside OAH's jurisdiction.

Page 4 of the second amended complaint is a reproduction of a page from Student's first amended complaint; it sets forth allegations previously ruled beyond OAH's jurisdiction that relate to the rehabilitation plan or previously ruled beyond the statute of limitations. The initials "SJCOE" have been added to these allegations.

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<sup>3</sup> Neither the original complaint nor the first amended complaint was served on County.

Pages 5, 6, and 7 of the second amended complaint consist of correspondence relating to events in spring and summer 2011, which have previously been held beyond the statute of limitations, with occasional notations that criticize the governing board's rehabilitation plan.

Pages 8 through 12 of the second amended complaint, which also appeared in the first amended complaint, consist of a claim for medical and general monetary damages directed to District's Superintendent and relating to the same matters in the spring and summer of 2011 that have previously been ruled beyond the statute of limitations. The only mention of a claim within the statute of limitations is dated October 25, 2011, and is a criticism of the fairness of OAH's hearing in Case No. 20110909981.

Page 13 of the second amended complaint repeats allegations concerning the rehabilitation plan that have previously been held beyond OAH's jurisdiction. Pages 14 through 34 of the second amended complaint reproduce the same memorandum that was appended to the original complaint: a closing brief by Student's then-advocate Dr. Robert Clossen filed in fall 2011 in OAH Case No. 2011090998, pertaining solely to the issues that were resolved in that case.

Pages 35 and 36 of the second amended complaint make additional allegations concerning events of spring and summer 2011 that have been previously held beyond the statute of limitations. The document then ends with two pages of requested resolutions and the unexplained reproduction of a page from OAH's ruling on October 13, 2013.

Notably, the second amended complaint does not plead the single issue identified as properly pled in OAH's Order of November 1, 2013, in that language. It pleads instead that Student was denied a FAPE by District in the school year 2011-2012 "due to a rehabilitation program that [the Governing Board] ordered . . ." It also pleads that "on or about January 21, 2012, student was denied placement and IEP program due to a rehabilitation plan that was wrong for this student."

These allegations establish, on the face of the second amended complaint, that Student's only real grievance within the statute of limitations is with the rehabilitation plan imposed upon him by the Governing Board, a matter beyond OAH's jurisdiction.

It is apparent from the contents of the second amended complaint that Student has simply replead issues previously pled in the original and first amended complaints and previously held beyond the statute of limitations, outside of OAH's jurisdiction, or both. Several allegations have also been held too vague and general to give adequate notice of Student's claims, and are replead in the same language. This constitutes an abuse of Student's right to amend.

Student's second amended complaint must be dismissed because it was untimely filed and was defective in form, as it lacked proof of service. But most importantly, it must be dismissed because it is now clear that Student is unable to plead any issue that is both within the statute of limitations and within OAH's jurisdiction.

It is equally apparent that no purpose is served by allowing Student to amend his complaint again, as he will continue to replead those issues previously rejected by OAH rulings in this matter and will continue to exhaust the resources of the District in responding to allegations already litigated in this matter. Accordingly, Student's second amended complaint is dismissed without leave to amend. Student's remedies, if any, now lie in a court of competent jurisdiction.

*Tentative Nature of Ruling*

Student's motion, filed January 1, 2014, to allow Father to present oral argument on this motion and the accompanying Notice of Insufficiency is granted only to the extent that oral argument will be permitted on this motion to dismiss and on the notice of insufficiency. Oral argument will be heard by telephone on Monday, February 3, at 1:00 p.m. Each side is allocated 15 minutes for argument.

ORDER

1. Tentatively, District's motion to dismiss the second amended complaint with prejudice will be granted.
2. Tentatively, this matter will be dismissed with prejudice.
3. Student's motion to argue orally is granted to the extent that it affects this motion to dismiss and the accompanying NOI. Oral argument will be heard by telephone on Monday, February 3, at 1:00 p.m. Each side is allotted 15 minutes for argument.

Dated: January 27, 2014

/s/

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CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings