

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009101232

ORDER ON DISTRICT'S MOTION TO  
DISMISS AND NOI

On October 19, 2009, Student filed a Due Process Hearing Request<sup>1</sup> (complaint) naming San Jose Unified School District (District) as the respondent. The complaint alleges that Student was diagnosed with an autism spectrum disorder in March of 2007 and that as of June 6, 2007 the District denied Student a free appropriate public education by failing to: 1) assess him in all areas of suspected disability; provide a behavior intervention plan; “address his failure to achieve his IEP goals and designing a program to meet his unique and individual needs;” and provide prior written notice regarding the failure to assess and denial of special education eligibility. The fifth issue in the complaint is not an issue at all, but a request for the remedy of compensatory education. The only factual allegation in the complaint that can be construed as relating to a time period beyond June of 2007 is a reference to a January 31, 2008 “504 Accommodation Plan” being inadequate to meet Student’s needs. The complaint does not allege that an exception to the two year statute of limitations applies.

District timely filed a Notice of Insufficiency (NOI) and Motion to Dismiss (Motion) on October 29, 2009. In the Motion, District contends that the complaint should be dismissed because it is facially outside of the statute of limitations and Section 504 issues are outside of OAH jurisdiction. As discussed below, the Motion has merit, such that the NOI need not be addressed.

OAH has granted 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, and statute of limitations. Under the IDEA, a complaint must be filed within two years of the date a party knew or had reason to know of the fact underlying the basis for the request. (Ed. Code, § 56505, subd. (1).) Section 504 claims are not addressed by special education due process hearings and are outside of OAH jurisdiction. (See Ed. Code, § 56501, subd. (a).)

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<sup>1</sup> A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

Here, to the extent the complaint alleges problems with Student's Section 504 plan, the allegations are outside of OAH jurisdiction. Student's fifth issue is not an issue at all, but a requested remedy. As to the remaining four issues, review of the complaint shows that the complaint can only be construed as facially alleging violations of IDEA that occurred outside of the two year statute of limitations in March and June of 2007. This is particularly true where the complaint on its face shows that parents were aware of the facts forming the basis for the complaint and there are no allegations that can be construed as alleging an exception to the statute of limitations. Under these facts, the complaint must be dismissed for lack of jurisdiction. Because the allegations of the complaint are facially outside of OAH jurisdiction, District's NOI need not be addressed.

#### ORDER

1. The Motion to Dismiss is granted with leave to amend.
2. All dates in this matter are vacated.
3. Student has fourteen days from the date of this order to file an amended complaint. If Student files an amended complaint, District may file any appropriate motion such as an NOI.
4. If Student does not file an amended complaint within 14 days of the date of this Order, the matter will be dismissed.
5. District's NOI is moot in light of the above.

Dated: November 03, 2009

/s/  
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RICHARD T. BREEN  
Administrative Law Judge  
Office of Administrative Hearings