

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PARADISE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010100642

ORDER PARTIALLY GRANTING
AND PARTIALLY DENYING
MOTION TO DISMISS

On October 8, 2010, Student filed a Request for Due Process Hearing (complaint), naming the Paradise Unified School District (District). The District filed a motion to dismiss Student's complaint on November 8, 2010. Student filed an opposition to the District's motion on November 10, 2010.

FACTUAL BACKGROUND

The following facts are based upon Student's complaint and his opposition to the District's motion to dismiss.

Student is presently 11 years old and in the fifth grade. He was found eligible for special education and related services by the District under the eligibility classification of other health impaired due to medical issues when he was three years old. The District provided Student services under an individualized education program (IEP) until he was five years old. Student's last IEP is dated December 16, 2004. It was proposed by the District in the middle of Student's Kindergarten year. Student's mother did not agree with this proposed IEP. Although she did not believe that the proposed IEP offered Student a free appropriate public education (FAPE), Mother did not choose to pursue any remedies through the due process procedures. Rather, she withdrew Student from the District and placed him in a private school.

Student and Mother continued to reside within the geographical boundaries of the District but there was no contact between them and the District until the 2010-2011 school year when Mother enrolled Student in the Children's Community Charter School (CCC), which is operated by the District. At the time she enrolled Student at CCC Mother informed the District that Student has special needs and had previously had an IEP. She requested that the District convene an IEP team meeting for Student. Instead, the District told Mother to request that a student study team meeting be convened. The District has not provided Student with any special education or related services since he enrolled at CCC.

In its motion to dismiss, the District contends that Student was a parentally placed private school pupil from mid-2004 until the 2010-2011 school year and that it therefore had no obligation to provide Student with an IEP once his Mother voluntarily removed Student from a District school. With regard to the 2010-2011 school year, the District asserts that the issues are not ripe for adjudication because Student is not presently eligible for special education and the District needs to assess him to determine his eligibility.

Student responds that the District had a child find obligation during the time he was enrolled in private school and that it failed in its obligation to find him. He contends that the District was obligated to provide him with an IEP, including full related services, and to assess him, during at least the two-year period prior to his filing the instant complaint. Student also contends in his opposition to the District's motion, as an alternative argument, that the District should have offered him an individualized service plan while he was enrolled at the private school. Finally, Student contends that the District was obligated to offer him an IEP as soon as he enrolled at CCC for the 2010-2011 school year, since he never lost his eligibility for special education.

APPLICABLE LAW AND DISCUSSION

While Student attended his private school he was 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 "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);¹ see also 20 U.S.C. § 1412(a)(10)(A); Ed. Code, 56174.5, subd. (b).)

Instead, under the Individuals with Disability Education Act, local educational agencies (LEA) "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); Ed. Code, § 56173.) The school district, or LEA, 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; 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); 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.

¹ All references to the Code of Federal Regulations are to the 2006 edition.

§ 300.140(c).) 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).) Accordingly, the Office of Administrative Hearings (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.) Therefore, the allegations made by Student for the first time in his opposition to the District's motion to dismiss that the District failed to provide him with an individualized services plan are not properly before OAH and are hereby dismissed.

However, the core of Student's complaint with regard to all school years prior to the 2010-2011 school year is that the District failed its child find obligations by failing to offer him an IEP and related services during the years he was enrolled in the private school. Student appears to contend that the District should have contacted Mother each year, held an IEP meeting for Student, and offered him an educational placement and related services even though he never re-enrolled in a District school, never indicated that he wished to return to the District, and never requested that it assess him during the years he attended private school. As support for his argument, Student cites to the District's obligation to "actively and systematically seek out all individuals with exceptional needs. . . . including children not enrolled in public school programs, who reside in a school district or are under the jurisdiction of a special education local plan area or a county office of education." (Ed. Code, § 56300.)

Student's argument, however, is unpersuasive, because Student had been found eligible for special education prior to the time Mother withdrew him from the District and placed him in a private school. The District therefore could not have failed in its child find obligations to him. While Student asserts that Mother removed him from the District during the 2004-2005 school year because it failed to provide him with a FAPE, those allegations were waived when Mother failed to file a request for due process during the applicable statute of limitations. Instead, she chose to retain Student in the private school placement. As a parentally placed private school student, Student did not have the right to a FAPE or to avail himself of due process procedures. (20 U.S.C. § 1412(a)(10)(A); 34. C.F.R. §§ 300.137 through 300.140.)

Student has not provided any authority for the proposition that the District was required to offer him an IEP and assessments while he remained a parentally placed private school student. Therefore, the District's motion to dismiss Student's allegations with regard to school years 2008-2009 and 2009-2010 is granted.

Conversely, the District's motion to dismiss Student's allegations with regard to school year 2010-2011, after Student enrolled at CCC, is not supported by any persuasive authority. The District contends that the issues are unripe for adjudication because Student has not yet been found eligible for special education. That is not a correct statement. As the District acknowledges in its motion, Student originally qualified for special education in

April 2002. The District appears to argue that Student somehow lost his eligibility once Mother withdrew him from public school and placed him in a private school. The District offers no authority for this contention. Additionally, the argument contradicts the fact that a school district is statutorily obligated to provide an individualized services plan to special education students who are privately placed, a duty that stems from those students' eligibility for services. This supports the contention that private school students *do not* lose their special education eligibility but rather only lose their entitlement to the full panoply of services and due process protections to which public school students are entitled. Student's issues with regard to the 2010-2011 school year are therefore ripe for adjudication. The District's motion to dismiss Student's claims with regard to the 2010-2011 school year is therefore denied.

ORDER

1. The District's Motion to Dismiss as to Student's claims during the time he continued to be a parentally placed private school student is granted.
2. The District's Motion to Dismiss Student's claims as to any time after Student enrolled at the Children's Community Charter School is denied.
3. This matter shall proceed to hearing on issues one and two of Student's complaint solely as the issues relate to the 2010-2011 school year.

Dated: November 23, 2010

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings