

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ETIWANDA SCHOOL DISTRICT.

OAH CASE NO. 2013120121

ORDER GRANTING MOTION TO
DISMISS

On December 2, 2013, attorney Stephen Wyner filed a due process complaint (Complaint) on behalf of Student. On December 12, 2013, attorney Constance M. Taylor on behalf of Etiwanda School District (District) filed a Motion to Dismiss on the grounds Student's Complaint included matters beyond the jurisdiction of the Office of Administrative Hearings (OAH) and the action was barred by the statute of limitations. Student filed an opposition on December 22, 2013. District filed a reply to Student's opposition on December 22, 2013.

District contends: 1) OAH does not have jurisdiction over claims based upon section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the California Constitution or the United States Constitution; and 2) Claims relating to the 2007-08 and 2008-09 school years are barred by the statute of limitations.

Student does not oppose dismissal of claims based upon section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the California Constitution or the United States Constitution. According to Student's opposition to the motion to dismiss, Student alleged claims over which OAH admittedly lacks jurisdiction in order to exhaust administrative remedies. Student contends the claims over which OAH has jurisdiction are not barred by the statute of limitations because his Complaint was filed on November 29, 2013, which was within two years of November 29, 2011, the date Student allegedly learned of his claim. Alternatively, Student contends District misrepresented Student's legal rights to Parents in April 2008, and therefore his claims fall within an exception to the statute of limitations.

For the reasons set forth below, District's motion to dismiss is granted. OAH does not have jurisdiction over claims based upon section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the California Constitution or the United States Constitution. Student's complaint was not filed within two years of November 29, 2011, Student knew of the facts giving rise to his claim before November 29, 2011, and no statutory exception applies.

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) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) 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.) Accordingly, Student’s claims based upon section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the California Constitution or the United States Constitution are dismissed

Statute of Limitations

Student’s complaint alleges: District completed a psycho-educational evaluation, in April 2008, that addressed Student’s difficulties with attention, some characteristics of Asperger Spectrum Disorder and a number of behaviors that affected Student’s academics in the classroom. An individualized education program (IEP) team meeting was held on April 24, 2008. Student was found eligible for special education with a primary eligibility of specific learning disability and a secondary eligibility of speech and language impairment. At that time, District suggested to Parents that they “may want to rule out autism spectrum disorder and ADD” with Student’s physician at their own expense. Student alleges that this suggestion was an intentional misrepresentation of Parents’ rights and District’s obligations.

Student claims District denied Student a free appropriate public education (FAPE) during the 2007-08 school year by failing to assess Student in the area of autistic-like behaviors and convene an IEP team meeting. Student claims District further denied Student a FAPE during the 2007-08 and 2008-09 school years by failing to designate autistic-like behaviors as Student’s primary eligibility instead of specific learning disability and by failing to offer an IEP that was specifically designed for students with a primary eligibility of autism. Student also claims District denied Parents the right to participate in Student’s IEP’s during the 2007-08 and 2008-09 school years by, among other things, engaging in a practice or policy of not informing parents of children whose primary eligibility might have been autistic-like behaviors that District was obligated to assess these students to establish or rule out eligibility based upon autistic-like behaviors. .

Student alleges that he first learned of this misrepresentation, characterized as a “subterfuge,” on November 29, 2011, during a due process hearing in OAH Case No.

2011081122. In that case, Student claimed that District denied Student a FAPE by failing to identify Student's primary disability as autism for the 2009-10 and 2010-11 school years. Mr. Wyner represented Student and Ms. Taylor represented District at the hearing. The "subterfuge" alleged in Student's Complaint concerns testimony given in OAH Case No. 2011081122 on November 29, 2011. Student contends this testimony revealed a District practice or policy of recommending parents obtain assessments for autism spectrum disorder and attention deficit disorder at parents' expense, thus misrepresenting District's legal obligation to assess Student in all areas of suspected disability. The Decision following that hearing contains factual findings pertaining to Student's behaviors from November 2007, District assessments performed during 2008, and an independent educational evaluation performed by Dr. Mitchel D. Perlman on November 26, 2008.

Applicable Law

A request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, sub. (l).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) the withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.)

A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (*See El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

With the exception of dismissing allegations facially outside of OAH's jurisdiction, OAH does not generally dismiss claims that have otherwise been properly pleaded. OAH's determination of a request to waive the two-year statute of limitations usually involves a fact-specific inquiry; generally, the relevant facts are subject to dispute, and an evidentiary hearing is required so that the ALJ can make factual findings from contradictory evidence. (*See J.L. v. Ambridge Area Sch. Dist.* (W.D. Pa. 2008) 622 F.Supp. 2d 257, 266; *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46706 (2006).)

This well settled principle, however, does not apply to matters where the request for waiver relies upon a legal theory that, as a matter of law, does not qualify as an exception to the two year statute of limitations. Furthermore, deference to an evidentiary proceeding, does not apply where the pleadings provide factual admissions from which a determination can be made. It is well settled that under the doctrine of "conclusiveness of pleadings," a

pleader is bound by well pleaded material allegations or by failure to deny well pleaded material allegations. (4 Witkin, Cal Procedure (5th ed. 2008) Pleading, § 454, pp. 585,587, citing Code Civ. Proc., § 431.20 (failure to controvert material allegations) and *Brown v. Aguilar* (1927) 202 Cal. 143, 149 (“While a pleader is not bound by allegations of evidence or conclusions of law, he is concluded by material averments of his pleading, and may not, as a rule, prove facts contrary thereto”).)

Analysis

Student’s Complaint was not filed within two years of November 29, 2011. The date and time printed on Student’s Complaint shows that it was faxed from Mr. Wyner’s office on November 29, 2013, at 17:38, in other words at 5:38 p.m. November 28, 2013, and November 29, 2013, were state holidays. Therefore, Student’s complaint was not timely filed on November 29, 2013, because it was faxed after business hours and because it was faxed on a state holiday. On this basis alone, Student’s Complaint must be dismissed as untimely.

As discussed below, even if the Complaint had been timely, which would have required the Complaint to have been filed by 5:00 p.m. on November 27, 2013, the statute of limitations would bar the action and the Complaint does not allege facts that would support either statutory exception.

Parent learned during the 2007-08 and 2008-09 school years, certainly by April 2008, and no later than Mr. Wyner filed OAH Case No. 2011081122, that Student exhibited autistic-like behaviors and District did not assess Student for eligibility under that category. The statute began to run when Student knew or had reason to know District did not offer to assess for autism or ADD and found Student eligible under other categories, not when Student found a new legal theory upon which to base a claim. Whatever District’s motive might have been for recommending Parents obtain an assessment at their own expense, on the basis of the facts pled in the Complaint, Student knew of the problem long before November 29, 2011. Student is bound by his pleading.

Student argues, in the alternative, that an exception to the statute of limitations applies because District knowingly engaged in a practice intended to mislead or deceive Parents concerning District’s financial obligation to fund assessment children for autistic-like behaviors because District had a financial incentive to under-identify children with autistic-like behaviors as a primary eligibility because services for those children were more costly than services for children eligible under SLD. These facts, even if proven, do not constitute either a specific misrepresentation by District that it had solved the problem (i.e. assessing and identifying Student) or that District withheld information that was required to be provided to Parents under special education law. On the basis of the facts alleged, District did not misrepresent to Parents that it had solved the problem upon which Student’s claim was based. Student does not allege District withheld any particular information District was required to provide, and does not cite any legal authority for the proposition that special education law required District to disclose the alleged misrepresentation. Student’s broad

equitable argument that the failure to disclose District's legal obligation to assess was somehow a "subterfuge" intended to mislead these Parents and others does not bring the matter within the two specific statutory exceptions under special education law because equitable exceptions to the statute of limitations do not apply to special education cases. Therefore, no exception to the statute of limitations applies.

ORDER

1. District's Motion to Dismiss is granted.
2. All dates are vacated.

Dated: January 10, 2014

/s/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings