

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PANAMA-BUENA VISTA UNION  
SCHOOL DISTRICT and KERN COUNTY  
SUPERINTENDENT OF SCHOOLS.

OAH CASE NO. 2012060648

ORDER GRANTING IN PART AND  
DENYING IN PART DISTRICTS'  
MOTION TO LIMIT ISSUES

PROCEDURAL BACKGROUND

Student, through her parent, filed a request for due process (complaint) on June 18, 2012, naming the Panama-Buena Vista Union School District and the Kern County Superintendent of Schools (Districts). Student's complaint contains eight issues, alleging, in pertinent part, that Student was denied a free appropriate public education (FAPE) for various specified and unspecified school years. On June 21, 2012, the Districts filed a motion to dismiss issues arising prior to the two-year statute of limitations. The Office of Administrative Hearings (OAH) granted the Districts' motion on June 27, 2012.

On July 19, 2012, the Districts filed a motion to further limit Student's issues one, two, three, and six, and to dismiss Student's issue four. The Districts request dismissal of all allegations in Student's complaint that relate to Student's January 2010 individualized education program (IEP). The Districts contend that, since that IEP was developed and offered to Student outside of the applicable two year statute of limitations, which starts on June 19, 2010, two years prior to the following of Student's due process complaint, any issues arising from or related to the IEP are foreclosed. The Districts contend that only issues relating to Student's subsequent IEP, which is dated January 10, 2011, are cognizable within the statute of limitations. The Districts contend that the legal concept of a continuing violation does not apply to due process hearings. The Districts provide the declaration under penalty of perjury of Judith Noack, who was the Principal of the educational program Student attended, to support their contention that Student's mother was notified of her procedural rights at Student's January 2010 IEP, and that Student's mother subsequently agreed to the full implementation of that IEP.

As with the Districts' first motion to dismiss issues outside the statute of limitations, Student has not filed an opposition or otherwise replied to the Districts' motion.

## APPLICABLE LAW AND DISCUSSION

An IEP 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 Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*J.W. v. Fresno*)). Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.)

Both federal and state law contain a two year statute of limitations for special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2)(2006); Ed. Code, § 56505, subd. (1).) The state statute provides as follows: “A request for due process hearing arising under subdivision (a) of Section 56501 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 of the request. In accordance with Section 1415(f)(3)(D) of Title 20 of the United States Code, the time period specified in this subdivision does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following (1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; (2) The withholding of information by the local educational agency that was required under this part to be provided to the parent.” (Ed. Code, § 56505, subd. (1).)

The statute of limitations therefore operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno, supra*, 626 F.3d at pp. 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.)

Student has not alleged in her complaint that either of the two exceptions to the two year statute of limitations applies in this case, and has not filed an opposition to the Districts’ motion that would put the exceptions at issue. Therefore, as determined in OAH’s Order of June 27, 2012, Student’s issues are limited to those arising during the two-year statute of limitations. The questions now posed by the Districts is whether Student’s issues one, two, three, four, and six allege continuing violations and, if so, whether those portion of the issues stemming from Student’s January 2010 IEP are foreclosed in the instant due process proceeding.

Both federal statute and subsequent case law inform that continuing violations are not cognizable in due process proceedings. In its commentary on the 2006 version of the Code of Federal Regulations that were written in response to the reauthorized Individuals with Disabilities Education Act (IDEA), the United States Department of Education directly addressed the issue of continuing violations. A commenter to the proposed 2006 regulations suggested that the regulations should allow extensions of the statute of limitations when a violation is continuing. The United States Department of Education rejected the suggestion, stating “Section 615(f)(3)(D) of the Act [IDEA] provides explicit exceptions to the timeline

for requesting a due process hearing. Section 300.511(f) [of the then proposed regulations] incorporates these provisions. These exceptions do not include when a violation is continuing . . . . Therefore, we do not believe that the regulations should be changed.” (71 Fed.Reg. 46697 (Aug. 13, 2006).)

To the extent that a student alleges that a school district failed to implement the student’s IEP, courts have found that “an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the 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.) Student here has not, however, alleged that the Districts have failed to implement her IEP’s. For all other circumstances, the cases primarily hold that special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (See, e.g., *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269).

Student’s issue one alleges that the Districts denied Student a FAPE by failing in their child find obligation to her. This issue does not relate to Student’s January 2010 IEP. To the extent that Student contends that the Districts breached their child find obligation to Student based upon facts that arose during the applicable two-year statute of limitations, this issue is cognizable in the instant due process proceeding. The Districts’ motion to further limit Student’s issue one is therefore denied.

In issue two, Student alleges that the District failed to assess her in all areas of suspected disability. Again, this issue does not specifically relate to Student’s January 2010 IEP. The issue has already been limited to the two year period prior to the filing of Student’s complaint. The District’s motion to further limit issue two is denied.

Student’s issue three alleges that the Districts denied Student a FAPE from February 2010 through the present school year by failing to: a) offer a non-public school placement; b) identify all Student’s areas of needs; c) accurately measure Student’s present levels of performance; and d) identify all of Student’s unique needs. Issues three (a) and (d) are identical. All issues relate to actions that the Districts allegedly failed to do during the IEP process. Since Student’s January 2010 IEP was developed and offered outside of the two year statute of limitations, any allegations that the IEP did not offer Student a FAPE are foreclosed in this proceeding. The Districts’ motion to limit all allegations in Student’s issue three to Student’s January 10, 2011 IEP is therefore granted. All allegations in issue three relating to Student’s January 2010 IEP are dismissed.

In issue four, Student alleges that the Districts denied her a FAPE from February 2010 through February 2011 by failing to draft appropriate and measurable IEP goals and objectives. The Districts contend that all allegations in this issue are outside of the statute of limitations. The Districts are correct that allegations concerning the goals of Student’s January 2010 IEP are outside of the statute of limitations. The Districts’ motion to exclude

issues as to that IEP is granted. However, the Districts' motion to exclude issues relating to goals developed in Student's January 10, 2011 IEP is denied. The second IEP is well within the applicable two year statute of limitations.

Student's issue six alleges that the Districts violated Student's procedural rights and denied her a FAPE by their failure to provide prior written notice of their refusal to complete triennial assessments. This issue does not specifically stem from Student's January 2010 IEP. Issue six has already been limited to the two years prior to the filing of Student's complaint by OAH's June 27, 2012 Order. The Districts have not shown any justification to further limit this issue. Their motion as to issue six is therefore denied.

### ORDER

1. The Districts' motion to further limit Student's issues one, two and six is denied.
2. The Districts' motion to further limit Student's issue three to Student's January 10, 2011 is granted. Those portions of issue three relating to or stemming from Student's January 2010 IEP are dismissed.
3. The Districts' motion to further limit Student's issue four is granted as to any issues relating to or stemming from Student's January 2010 IEP. Those portions of issue four referencing Student's January 2010 IEP goals are dismissed. The Districts' motion to limit the allegations of issue four pertaining to Student's January 10, 2011 IEP are denied.

Dated: July 25, 2012

/s/  
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DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings