

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015050827

ORDER DENYING MOTION TO
DISMISS WITHOUT PREJUDICE

BACKGROUND INFORMATION

On May 7, 2015, Student filed a Request for Due Process Hearing (complaint), naming Riverside Unified School District. Student's complaint alleges that Riverside Unified denied him a free appropriate public education by: 1) Failing to assess Student and find him eligible for special education instruction and services under the category of specific learning disability between May 7, 2013, and March 4, 2015; 2) Failing to timely hold an individualized education plan team meeting following his parent's consent to assess Student on December 19, 2014; and, 3) Failing to retain Student in fifth grade for the 2015-2016 school year.

On August 10, 2015, Riverside Unified filed a motion to dismiss Issue Three of Student's complaint. Riverside Unified contends that the Office of Administrative Hearings does not have jurisdiction under federal or state special education law to hear matters concerning the retention or promotion of its students.

Student filed an opposition to Riverside Unified's motion on August 10, 2015.

DISCUSSION AND LEGAL ANALYSIS

Riverside Unified first found Student eligible for special education and related services on March 4, 2015, under the category of specific learning disability. Riverside Unified convened an additional individualized education program team meeting on April 14, 2015. At that time, Student's parent requested that Riverside Unified retain Student in fifth grade to improve Student's confidence and improve his reading ability. According to Riverside Unified's motion to dismiss, Student's IEP team discussed his progress to date at the meeting, as well as the supports and services Riverside Unified was providing to Student. The district members of Student's IEP team reached a consensus that there was no reason to

retain Student. Student's parent was not in agreement with that decision, and filed the instant due process complaint.

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

Riverside Unified contends that decisions regarding the retention and promotion of students are entirely within the province of each school district according to whatever standards the district has established, and that a retention or promotion decision is not synonymous with placement decisions under the Individuals with Disabilities Education Act. Riverside Unified cites to *Letter to Anonymous* (OSEP 2000) 35 IDELR 35 in support of its position.

However, *Letter to Anonymous* does not state that IEP teams do not have the authority to make retention or promotion decisions. To the contrary, *Letter to Anonymous* states “. . . the IDEA does not prevent a State or local educational agency from assigning [retention or promotion] decision making responsibility to the IEP team.” *Letter to Anonymous* continues by stating that, while retention or promotion issues that are separate from IEP placement decisions should not be the basis for a due process proceeding, “. . .there may be FAPE issues that have a direct impact upon retention and promotion decisions, and these issues can be the basis for a hearing request.” *Letter to Anonymous* then recognizes that a remedial order in a due process hearing could conceivably encompass reconsideration of a decision on retention.

In the instant case, there is no evidence concerning what Student's IEP team considered when the district team members denied Parent's request for retention. There is no evidence that the team informed Parent that retention was not an IEP team issue. The only facts presented by either side are that Parent requested retention and Student's IEP team denied the request. Even if either party had presented declarations as to what occurred at the IEP team meeting at issue, this would have created a factual dispute, turning Riverside Unified's motion to dismiss into a motion for summary judgment. Although OAH will grant motions to dismiss allegations that are facially outside its jurisdiction, such as civil rights

claims, special education law in California does not provide for a summary judgment procedure.

Given the above authority, it is possible that the retention issue presented by Student may relate to the provision to him of a free appropriate public education. (See, e.g. *Student v. Montecito Union Elementary School District* (2011) Cal.Offc.Admin.Hrgs. 2010110031, at pp. 18-20.) Therefore, Riverside Unified's motion to dismiss is denied without prejudice. Riverside Unified may raise the issue of retention as an affirmative defense at hearing.

ORDER

Riverside Unified's motion to dismiss is denied without prejudice.

DATE: August 17, 2015

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings