

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION**

IN THE MATTER OF:THE EDUCATION OF STUDENT AND EUGENE SCHOOL DISTRICT 4J) RULING ON EUGENE SCHOOL DISTRICT 4J'S MOTION TO DISMISS AND FINAL ORDER)) OAH Case No. 2018-ABC-01842) Agency Case No. DP 18-122
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HISTORY OF THE CASE

On July 12, 2018, Student filed a Request for a Due Process Hearing (due process complaint) with the Oregon Department of Education (ODE or the Department) on his/her own behalf alleging the Eugene 4J School District (the District) violated federal and state statutes, regulations, and administrative rules during the period from September 1, 2015 through June 30, 2017 (the period in issue).

On July 17, 2018, the ODE referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to conduct the due process hearing and issue a Final Order in this case.

On August 13, 2018, Senior ALJ Allen presided over a telephonic prehearing conference. Kimberly H. Sherman, attorney at law, appeared on behalf of Student. Kelly D. Noor, attorney at law, appeared and represented the District. The parties agreed to the issue statements for hearing. Also, during the conference, Student requested and the District agreed to extend the final order due date to August 26, 2019 pursuant to ORS 343.167(5). The parties also agreed to an in-person hearing on May 13 through 24, 2019 in Eugene, Oregon.

On August 13, 2018, the District filed a Motion to Dismiss (the motion). On August 31, 2018, Student filed a response to the motion. On September 13, 2018, the OAH issued a Notice of Oral Argument setting telephonic argument on the motion for September 21, 2018. On September 17, 2018, the District filed a reply to Student's responsive brief. On September 21, 2018, the OAH rescheduled oral argument in this matter due to unavailability of the ALJ. Senior ALJ Allen heard oral argument on the motion on September 26, 2018. Ms. Noor appeared on behalf of the District. Ms. Sherman appeared on behalf of Student. At the conclusion of oral argument on that date, Senior ALJ Allen took the matter under advisement.

ISSUE

Whether the District's Motion to Dismiss the due process complaint should be granted.

CONCLUSION OF LAW

The District's motion should be granted.

OPINION¹

In due process proceedings alleging violations of the IDEA, 20 U.S.C § 1400 *et seq.*, the party seeking relief has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, Student filed a due process complaint alleging procedural and substantive violations of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (§504) resulting in a denial of a free appropriate public education (FAPE) during the period in issue.

The District filed the motion arguing certain portions of Student's due process complaint should be dismissed because the alleged events occurred more than two years prior to the filing of the complaint. For the reasons stated herein, I agree with the District and further find that the remaining portions of the due process complaint were not properly filed and therefore must be dismissed.

According to the due process complaint, Student graduated from South Eugene High School (SEHS) in June 2017 and turned 18 on August 22, 2017. During his/her time at SEHS, Student was eligible for special education services under the categories of specific learning disability (SLD) and, as of February 2017, other health impairment (OHI) based on a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). *See* Due Process Complaint at 2 and 5. The due process complaint alleges Student suffered mental and emotional harm as a result of events occurring during the 2015-2016 and 2016-2017 school years. *See* Due Process Complaint at 17. Student seeks the following remedies identified in the due process complaint:

A. REIMBURSEMENT

1. Reimbursable Educational Expenses. [Student] requests that provide reimbursement to Parents for educational expenses incurred on behalf of Student between September, 2015 and the effective date of this June 30, 2017 [due process complaint]. The phrase "Educational Expenses" shall include, but not be limited to, the following: assessments and evaluations; assistive technology; academic instruction and/or remediation, including tuition and/or tutoring; behavioral interventions and services; social and emotional skills development; and/or "related services," within the meaning of 20 U.S.C. § 1401(26), including, but not limited to transportation costs, to be calculated at the rate of 54.5 cents per mile. Total amounts to be proven at trial.

¹ The ALJ in this matter engages in no findings of fact as none would be appropriate on the briefs. Rather, the ALJ accepts the relevant factual allegations in the due process complaint as true in order to determine whether, in a light most favorable to Student, those allegations may survive the present motion. Accepting those facts identified in the Opinion as true and accurate, Student's due process complaint must be dismissed for the reasons stated herein.

B. COMPENSATION FOR MENTAL AND EMOTIONAL HARM

2. Compensation for mental and emotional harm to be paid by the District. [Student] requests District pay Student \$125,000 as compensation for the mental and emotional harm suffered by [Student] for the denial of reasonable accommodations, discrimination, and bullying by certain SEHS staff and students during Student's years at SEHS.

C. ADDITIONAL REMEDIES SOUGHT

Plaintiff requests the hearing officer order the District to provide the following additional remedies:

3. By the conclusion of the 2018-2019 school year, Superintendent to provide proof to [Student] that Mr. Stasack's violations have been reported to the TSPC related to the events involving [Student] and any other similar events with other students known to the District related to Mr. Stasack's ongoing refusals to implement [§] 504 and IDEA accommodations.

4. By the conclusion of the 2018-2019 school year, District to implement "Plan of Assistance for Improvement" to Mr. Stasack regarding § 504 and special education responsibilities of teacher. The plan of assistance for improvement must include accountability measures, including student and parent surveys related to appropriate delivery of accommodations and classroom climate for students with [§] 504 plans or Individualized Education Programs.

5. By the conclusion of the 2018-2019 school year, District to implement "Plan of Assistance for Improvement" with any administrator currently within the District who had supervisory or evaluation responsibility for Mr. Stasack, to include training regarding § 504 and special education plan implementation responsibilities of teachers and administrator responsibility toward ensuring that staff adhere to the requirements of §504 and the IDEA. The plan of assistance for improvement must include accountability measures, determinations of whether the administrator appropriately documented staff violations of teaching standards, including written reports, reprimands, and notices filed in staff personnel files and with the TSPC.

6. By the conclusion of the 2018-2019 school year, implement mandated training of all teachers and administrators in the District regarding their obligations toward children with special education or 504 accommodations in regular and special education classes, including supervisory and disciplinary actions for failure to implement accommodations for a student with disabilities.

7. By the conclusion of the 2018-2019 school year, through an outside agency, such as Disability Rights Oregon or similar agency approved by [Student],

District to provide training for students in District's various immersion programs and International High School programs on understanding disabilities and the rights of individual students to accommodations in those programs.

8. By the conclusion of the 2018-2019 school year, through an outside agency such as Disability Rights Oregon or similar agency approved by [Student], District to provide training to students in language immersion programs and International High School programs in compassion and civility and ways to empower students to reduce the number and intensity of hurtful events.

Due Process Complaint at 17 and 18.

Under contract with the ODE, the OAH conducts due process hearings regarding, *inter alia*, allegations that a school district has failed to provide FAPE under both the IDEA and §504.

IDEA statute of limitations.

ORS 343.165 identifies circumstances requiring a due process hearing and establishes the time limit for requesting such hearings and provides, in part:

(1) A hearing shall be conducted pursuant to rules of the State Board of Education if:

(a) The parent requests a hearing to contest the determination of the school district concerning the identification, evaluation, individualized education program, educational placement or the provision of a free appropriate public education to the child; or

(b) The school district requests a hearing to obtain a decision regarding whether its identification, evaluation, individualized education program or educational placement of the child is appropriate or whether the district's proposed action is necessary to provide the child with a free appropriate public education.

* * * * *

(3)(a) Except as provided in paragraph (b) of this subsection, *a hearing described in subsection (1) of this section must be requested within two years after the date of the act or omission that gives rise to the right to request a hearing under subsection (1) of this section.*

(b) The timeline described in paragraph (a) of this subsection does not apply to a parent if the parent was prevented from requesting the hearing due to:

(A) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint; or

(B) The school district withholding from the parent information that the district was required to provide under this chapter.

(Emphasis added.)

Pursuant to the authority granted in ORS Chapter 343, the Department promulgated OAR 581-015-2345 which further clarifies a party's responsibilities in filing a hearing request and response with regard to alleged violations of the IDEA. OAR 581-015-2345 reads, in relevant part:

(1) Request for Hearing:

(a) Parent Requests for a Due Process Hearing:

(A) A parent may request a due process hearing in accordance with subsection(3) if the parent does not agree with the identification, evaluation, educational placement of a child, or the provision of a free appropriate education to a child who may be disabled.

* * * * *

(3) Time limitation and exception:

(a) A special education due process hearing must be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.

(b) This timeline does not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint, or the school district's withholding of information from the parent that the district was required to provide under Chapter 343.

(Emphasis added.) Pursuant to OAR 581-015-2325(1), parental rights applicable to proceedings under the IDEA transfer to a student who is either emancipated or has reached the age of majority under ORS 109.510 or 109.520. Nonetheless, nothing in the applicable statutory or regulatory schemes tolls the statute of limitations during a student's minority.

Student raises several allegations that he/she acknowledges in the due process complaint fall outside the statute of limitations applicable to due process hearings before the OAH. According to the due process complaint, Student and his/her parents were aware of the alleged violations and raised numerous complaints with the District, TSPC, and the Department. *See*, Due Process Complaint at 19 and 20. Each complaint was brought to the attention of one or more of these agencies in close temporal proximity to its occurrence. Nothing in the due process complaint indicates that parents were unaware of their right to request a hearing for the alleged violations. To the contrary, the due process complaint indicates parents were well aware of

procedures and remedies available under the IDEA and availed themselves of the applicable procedural safeguards on more than one occasion. *See* Due Process Complaint at 2 through 13. Student argues, in response to the District’s motion, that the applicable statute of limitations should be tolled under ORS 12.160.² I am not persuaded by Student’s arguments in this matter. The statutory and regulatory schemes identified above, which mirror their federal counterparts, clearly establish a statute of limitations which supersedes the tolling provision identified in ORS 12.160. Student’s arguments appear to disregard the provisions of ORS 12.010, which provides, “[a]ctions shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, *except where a different limitation is prescribed by statute.*” As identified herein, ORS 343.165 and the implementing rule found at OAR 581-015-2345 clearly establish a statute of limitations for due process hearings different than actions subject to ORS Chapter 12.

Based on the statute of limitations applicable to due process hearings under the IDEA and §504, Student’s due process complaint must be limited to allegations arising no more than two years before the filing date, to wit June 12, 2016. Further, according to the due process complaint, Student graduated in June 2017. Moreover, the complaint raises no allegations related to extended school year services that would extend the applicable period beyond the end of the traditional school years. Accordingly, the relevant period for consideration in this proceeding is September 2, 2016 through June 2017. Student’s due process complaint raises no

² ORS 12.160 provides for suspension of certain specified statutes of limitation for minors and persons who have disabling mental condition and provides:

- (1) Subject to subsection (2) of this section, if a person is entitled to bring an action mentioned in ORS 12.010 to 12.050, 12.070 to 12.250 or 12.276, and at the time the cause of action accrues the person is a child who is younger than 18 years of age, the statute of limitation for commencing the action is tolled for so long as the person is younger than 18 years of age.
- (2) The time for commencing an action may not be extended under subsection (1) of this section for more than five years, or for more than one year after the person attains 18 years of age, whichever occurs first.
- (3) Subject to subsection (4) of this section, if a person is entitled to bring an action mentioned in ORS 12.010 to 12.050, 12.070 to 12.250 or 12.276, and at the time the cause of action accrues the person has a disabling mental condition that bars the person from comprehending rights that the person is otherwise bound to know, the statute of limitation for commencing the action is tolled for so long as the person has a disabling mental condition that bars the person from comprehending rights that the person is otherwise bound to know.
- (4) The time for commencing an action may not be extended under subsection (3) of this section for more than five years, or for more than one year after the person no longer has a disabling mental condition that bars the person from comprehending rights that the person is otherwise bound to know, whichever occurs first.
- (5) If a child’s cause of action is tolled under subsection (1) of this section, a cause of action for recovery of damages for medical expenses incurred by a parent, guardian or conservator of the child is tolled for the same period of time as the child’s cause of action if the medical expenses resulted from the same wrongful conduct that is the basis of the child’s cause of action.

allegations of procedural or substantive violations of the IDEA during that period. *See* Due Process Complaint at 13 through 15. Rather, Student’s complaint attempts to apply the minority tolling provisions found in ORS 12.160 to bootstrap discrimination, retaliation, and hostile environment claims, seeking punitive damages otherwise unavailable in administrative proceedings before this tribunal, to untimely IDEA claims. Nonetheless, Oregon courts have held that where a statute prescribes its own statute of limitation, any statute of limitation which may also be applicable, such as ORS 12.110, does not apply because pursuant to ORS 12.010, that cause of action is completely removed from ORS Chapter 12. *See Wimber v. Timpe*, 109 Or App 139, 144 (1991); *Giulietti v. Oncology Assoc. of Or., P.C.*, 178 Or App 260, 266 (2001); and *Eldridge v. Eastmoreland General Hosp.*, 307 Or 500, 503 (1989).

Because the due process complaint fails to raise any claims, under the IDEA or its state counterparts, redressable before this tribunal, the alleged violations of the IDEA must be dismissed as untimely because each occurred prior to July 2, 2016.

§504 claims raised in the due process complaint.

In the due process complaint, Student also raises a number of allegations asserting the District failed to provide FAPE as required by §504. OAR 581-015-2395 provides procedures for administrative hearings before the OAH under §504 and reads:

(1) *The parent³ or guardian of a qualified student with a disability under section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent will conduct a hearing.*

(2) *The school district involved in the hearing is responsible for the costs of the hearing.*

(3) *The prehearing and hearing procedures in OAR 581-015-2340 through 581-015-2383 apply to hearings conducted under Section 504 of the Rehabilitation Act.*

(4) *The parties are entitled to the procedural rights under OAR 581-015-2360 with the exceptions of the stay-put provision and the right to obtain at no cost a written or electronic verbatim record of the hearing, both of which do not apply to a hearing under this rule.*

³ ORS 343.035(13) defines “Parent” as, “the parent, person acting as a parent or a legal guardian, other than a state agency, of the child or the surrogate parent. “Parent” may be further defined by rules adopted by the State Board of Education.”

(5) Nothing in this rule is meant to prevent the parties from also seeking due process remedies under the Individuals with Disabilities Education Act as set forth in OAR 581-015-2340 through 581-015-2385.⁴

(Emphasis added.)

Unlike the administrative rules applicable to due process hearings under the IDEA, Oregon administrative rules governing due process hearings alleging a denial of FAPE under §504 do not provide for a transfer of the procedural rights, applicable to parents, to a student who has reached the age of majority or has been emancipated. Pursuant to OAR 581-015-2395(1), the right to request a hearing under §504 of the Rehabilitation Act lies solely with a student's parent or guardian.⁵

⁴ OAR 581-015-2390 provides definitions applicable to hearings under §504 and reads:

The following definitions apply to OAR 581-015-2395:

(1) "Student with a disability under Section 504" means any student who has a physical or mental impairment that substantially limits one or more major life activities.

(2) As used in section (1) of this rule:

(a) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; endocrine; any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(b) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(3) "Qualified student with a disability under Section 504" means a student with a disability under Section 504 who is:

(a) Of an age during which persons without a disability are provided educational services;

(b) Of any age during which it is mandatory under state law to provide such services to students with disabilities; or

(c) To whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act.

(4) "School District" means a school district as defined in ORS 343.153.

⁵ Similarly, the corresponding federal regulation appearing at 34 CFR §104.36 identifies procedural safeguards applicable to actions under §504 and provides:

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

In this case, Student graduated from the District in June 2017 and celebrated his/her 18th birthday on August 22, 2017, approximately 2 months after graduation. All claims raised in the due process complaint related to alleged violations of the District's obligation to provide FAPE under §504 occurred while Student was still a minor and attending high school within the District. Under the applicable rules, Student's parents were entitled to work with the District to resolve the perceived issues and, if unable to do so, request a hearing on Student's behalf to seek any available remedies. According to the due process complaint, Student's parents engaged with the District on multiple occasions to remedy issues related to Student's special education needs. *See* Due Process Complaint at 9 and 10, 12 through 15, 18, and 21 through 28. While arguably parents of Student might still be able to request a due process hearing for a denial of FAPE under 504, those rights did not transfer to Student upon reaching the age of majority. As such, the due process complaint fails to comply with OAR 581-015-2395(1) and is hereby dismissed.⁶

RULING AND ORDER

The District's Motion to Dismiss is GRANTED.

Student's due process complaint filed July 12, 2018 is DISMISSED with prejudice. Because this ruling and order disposes of all claims raised in Student's due process complaint, the hearing currently set for May 13 through 24, 2019 is CANCELED.

Joe L. Allen

Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 17th day of October, 2018, with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.

⁶ While the due process complaint also asserts the claims contained therein are brought under the Americans with Disabilities Act (ADA) and the ADA Amendments Act (ADAAA), 42 U.S.C. § 12101 *et seq.* (2008), this tribunal has no independent authority to address such claims.

CERTIFICATE OF MAILING

On October 17, 2018 I mailed the foregoing RULING ON EUGENE SCHOOL DISTRICT 4J'S MOTION TO DISMISS AND FINAL ORDER in OAH Case No. 2018-ABC-01842 to the following parties.

By: First Class Mail

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