

UNITED STATES DISTRICT COURT  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

K.D., by his guardian ad litem, J.B.,

Plaintiff,

No. C 07-00920 MHP

v.

OAKLEY UNION ELEMENTARY SCHOOL  
DISTRICT, et al.,

Defendants.

**MEMORANDUM & ORDER**  
**Re: Plaintiff’s Motion for a Preliminary  
Injunction and Defendants’ Motion to  
Strike**

On February 24, 2007 plaintiff K.D., through his guardian ad litem J.B., brought this action against the Oakley Union Elementary School District (“OUESD” or “District”), the Board of Trustees of the OUESD (the “Board”) and related officials (collectively “defendants”) asserting violations of the Americans with Disabilities Act (“ADA”), the Rehabilitation Act (“RA”), the Individuals with Disabilities Education Act (“IDEA”) and certain California statutes. Now before the court is plaintiff’s motion for a preliminary injunction and defendants’ motion to strike. Having considered the parties’ arguments fully and for the reasons stated below, the court enters the following memorandum and order.

**BACKGROUND**

I. **Factual Background**

Plaintiff K.D. is a fourteen year old boy with normal intellectual ability who has attention deficit hyperactivity disorder, learning disabilities, executive control deficits, and social skills and reasoning deficits. Currently, K.D.’s writing abilities are at the 3rd grade level and his mathematical abilities are at the 5th grade level.

1 K.D. transferred into the OUESD on March 30, 2006 into the 7th grade. The individual  
2 education plan (“IEP”) in place when K.D. transferred did not call for transportation services.  
3 Loughrey Dec., Exh. T2. Upon transferring, K.D. was placed in an “Interim Special Ed  
4 Administrative Placement” based upon an IEP dated the same day, which did not provide for  
5 transportation services. Hussey Dec., Exh. A; see also Loughrey Dec., Exh. T1. Soon after K.D.  
6 began attending the Delta Vista school, he brought a knife to school and was suspended. Hussey  
7 Dec., Exh. D.<sup>1</sup> In a subsequent interview with the OUESD psychologist, K.D. admitted that he had  
8 brought the knife to school and had pointed it at another student. Id., Exh. E.<sup>2</sup> A manifestation  
9 determination meeting was then held to consider whether the conduct subject to discipline  
10 was related to K.D.’s disability or a result of the OUESD’s failure to implement the operative IEP.  
11 At this meeting, the OUESD determined that K.D.’s behavior was neither. Id., Exh. F;<sup>3</sup> see also id.,  
12 Exh. E. Concurrently, the OUESD: 1) developed an updated IEP that provided for five hours a week  
13 of in-home tutoring for K.D. until June 6, 2006, id., Exh. G; and 2) informed K.D. of his scheduled  
14 expulsion hearing, id., Exh. H. Subsequently, the Board voted to expel K.D. for the remainder of the  
15 seventh grade and the following two trimesters. Id., Exh. I.

16 On May 4, 2006, the day after the expulsion decision, the principal of Delta Vista School  
17 informed J.B. that K.D. was eligible to attend the county school at OUESD expense. J.B. Reply  
18 Dec., ¶ 13. No transportation services to the county school were offered. Id. Two weeks later, on  
19 or around May 16, 2006, the OUESD sent a referral form to the county school. Hussey Dec., Exh. J.  
20 J.B. met with the county school staff that same day. J.B. Reply Dec., ¶ 17. A month later, K.D.  
21 filed, then withdrew, a due process complaint with the Office of Administrative Hearings (“OAH”)  
22 related to the manifestation hearing and expulsion. Id.; see also Hussey Dec., Exh. L. K.D. then  
23 failed to return to the county school on July 31, 2006 to continue the placement process. Hussey  
24 Dec., Exh. K.

25 On August 14, 2006, J.B. wrote to the OUESD requesting an independent educational  
26 evaluation (“IEE”) for K.D. that included social/emotional, academic achievement, and intellectual  
27 development components. J.B. Reply Dec., Exh. C. In a separate letter written the same day, J.B.  
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1 also requested an evaluation that included occupational therapy and assistive technology  
2 components. Hussey Dec., Exh. M. Two weeks later, the District denied J.B.'s request for an IEE  
3 claiming the same was not warranted since a comprehensive educational evaluation of K.D. had yet  
4 to be conducted. Id., Exh. N. Concurrently, the District agreed to perform a comprehensive  
5 education evaluation with respect to all the requested areas and attached a consent form with its  
6 correspondence. Id. J.B. did not respond. By this time, however, K.D. had already been assessed  
7 by Dr. Grandison, a private doctor, who found K.D. had new ailments previously undiagnosed. See  
8 generally Grandison Dec. In fact, Dr. Grandison's assessment began August 9, 2006—before the  
9 IEE request to the OUESD was made. Id., Exh. A.

10 On September 19, 2006 the District reiterated their offer to evaluate K.D. and inquired about  
11 his enrollment status, stating that he may be considered truant if he was not receiving an appropriate  
12 education. Hussey Dec., Exh. O. A few days later, J.B. filed for a due process hearing with the  
13 OAH to challenge K.D.'s expulsion. Def.'s Request for Judicial Notice, Exh. A.<sup>4</sup> After completion  
14 of the OAH proceedings, the District again offered to assess K.D. while concurrently inquiring about  
15 his enrollment status, reminding J.B. of the county school as an option and warning her that K.D.  
16 could be considered truant if he was not enrolled in school. Hussey Dec., Exh. P; see also J.B.  
17 Reply Dec., Exh. D. J.B. then withdrew her request for the IEE and other assessments, Hussey Dec.,  
18 Exh. Q, and expressed confusion regarding the District's letters because J.B. had accepted the  
19 District's offer of placement at the Marchus school, J.B. Reply Dec., Exh. E. The District  
20 responded, explaining that the Marchus placement was part of a confidential settlement offer, which  
21 was mooted by the OAH proceedings in the interim. Id., Exh. F. J.B. then wrote to the District  
22 stating the county school placement was inappropriate and vouched for the adequacy of the five hour  
23 per week education program she was providing K.D. Id., Exh. G.

24 On February 2, 2007 the District wrote J.B. asking her to request readmission in writing  
25 since K.D.'s expulsion was scheduled to end on February 23, 2007. Hussey Dec., Exh. S; see also  
26 J.B. Reply Dec., Exh. H. The letter stated that readmission procedures required K.D. to submit his  
27 academic regimen while he was expelled and to aver that he does not continue to pose a threat to  
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1 campus safety. Hussey Dec., Exh. S; see also J.B. Reply Dec., Exh. H.

2 On February 14, 2007, this action was filed. Subsequently, J.B.'s attorney requested a  
3 meeting with the District. Hussey Dec., Exh. T. The District responded, stating that K.D. was free  
4 to request readmission and that due to the passage of time, the District would have to conduct a  
5 comprehensive evaluation of K.D. before readmission. Id., Exh. U. The same day, J.B. refused to  
6 agree to the requested assessments. Id., Exh. V; see also Loughrey Dec., Exh. A1. This refusal  
7 occurred even though since 1997, K.D. has had an IEP made at least once a year and oftentimes  
8 multiple times a year. Hussey Dec., Exh. N. Subsequently, J.B.'s counsel wrote defendants stating  
9 that the District's "Readmission After Expulsion" policy did not require K.D. to submit his  
10 academic program while he was expelled, nor does the policy require K.D. to aver that he does not  
11 continue to pose a danger to campus safety. Loughrey Dec, Exh. C1; see also Benedetti Dec., Exh.  
12 B. Defendants responded stating that the academic information was necessary to determine where to  
13 place K.D. and that the averment was not required, but that the Board had the right to bar  
14 readmission if they found K.D. to be a continued threat. Loughrey Dec, Exh. D1.

15 On April 12, 2007 J.B. and counsel met with the District to discuss K.D.'s possible  
16 readmission into the District. At this meeting, the District represented that K.D. must be evaluated  
17 by the District regarding three readmission factors, whether: 1) K.D. and J.B. would conform to the  
18 District's conduct rules; 2) K.D. had completed the requirements of the District's rehabilitation plan;  
19 and 3) K.D. would pose a danger to himself or others if readmitted. Hussey Dec., Exh. X; see also  
20 Loughrey Dec., Exh's. F1, G1, I1. The second readmission factor was waived. K.D. requested  
21 readmission and submitted the necessary declarations. Hussey Dec., Exh. X; see also Loughrey  
22 Dec., Exh's. G1, I1. J.B. represented that during the expulsion, K.D. was: 1) tutored for two to three  
23 hours a week by a retired vice-principal; 2) tutored on a nightly basis by J.B.; 3) active in numerous  
24 church activities; and 4) tutored by the OUESD for five hours a week from May 2006 to June 2006.  
25 Hussey Dec., Exh. X; see also Loughrey Dec., Exh's. G1, I1. At the next Board meeting on May 2,  
26 2007, the Board voted to readmit K.D. Loughrey Dec., Exh. J1.

27 On May 11, 2007 the principal of Delta Vista Middle School informed J.B. that K.D. was to  
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1 attend Delta Vista, in the OUESD, for approximately four weeks and then transition to Freedom  
2 High School in the Liberty Union High School District (“LUHSD”). Loughrey Dec., Exh. K1. The  
3 same day, a 30-day temporary IEP was put in place and a new IEP meeting was to be scheduled  
4 within 30 days. Id. A few days later, K.D.’s special education case manager informed J.B. of the  
5 need to schedule a transition IEP for high school. Hussey Dec., Exh. Y; see also Loughrey Dec.,  
6 Exh. N1. Plaintiff then contended that an assessment was unnecessary and demanded an IEP  
7 meeting before K.D. returned to school. Loughrey Dec., Exh. M1. The IEP determination was  
8 scheduled for June 8, 2007, the day after classes ended at the OUESD.

9 On June 8, 2007, based in part on J.B.’s representations that K.D. was making adequate  
10 academic progress during his expulsion, Hussey Dec., ¶ 39,<sup>5</sup> and the school psychologist’s view that  
11 the presence of non-disabled students who are older than their peers can lead to detrimental effects,  
12 id., Exh. Z, the District recommended that K.D. be placed in the ninth grade. K.D. wished to be  
13 placed in eighth grade in a special day class at the OUESD. Id., Exh. Z. Defendants considered this  
14 placement inappropriate because students in that program were younger and had much more severe  
15 needs than K.D. Id. Furthermore, they considered it inappropriate to retain K.D. in the eighth grade  
16 without a comprehensive reassessment. Id. J.B. continued to refuse an assessment and demanded  
17 that defendants rely upon Dr. Grandison’s report, which, incidentally, did not require that K.D.  
18 remain in the eighth grade. Id. Defendants also allegedly threatened to bring truancy proceedings  
19 against K.D. for the 2006-07 school year if he insisted on an eighth grade placement. Loughrey  
20 Dec., Exh. P2. When discussion at the IEP meeting turned to K.D.’s placement in the ninth grade,  
21 J.B. and counsel left the meeting. Loughrey Dec., ¶ 18.

22 On July 18, 2007 defendants informed K.D. of a temporary placement from July 31, 2007 to  
23 October 15, 2007, during which time the District would reassess K.D. Hussey Dec., Exh. Z; see also  
24 Loughrey Dec., Exh. N1. This offer would place K.D. in the Odyssey program at Freedom High  
25 School, which provided for three hours of general education in a 24-student setting for incoming  
26 students at academic risk. After the morning program, K.D. would then be transported to Freedom  
27 High School for lunch and afternoon classes in physical education, an elective, tutorial support, and  
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1 English fundamentals. Hussey Dec., Exh. Z; see also Loughrey Dec., Exh. N1.

2 Between July and September 2007, the parties conducted unfruitful settlement negotiations  
3 before Magistrate Judge Spero.<sup>6</sup>

4 On October 1, 2007 plaintiff accused defendants of refusing to offer K.D. educational  
5 placement at any District school, at any nonpublic school or at home. Hussey Dec., Exh. AA; see  
6 also Loughrey Dec., Exh. R1. Ten days later, defendants responded, summarizing and renewing the  
7 Odyssey offer of June 8, 2007. Hussey Dec., Exh. BB; see also Loughrey Dec., Exh. S1; Benedetti  
8 Dec., Exh. D. A few days later, K.D. enrolled at Sand Paths Academy—a private school serving  
9 students from the sixth grade to the twelfth grade—and informed defendants that: 1) the June 8,  
10 2007 educational offer was inappropriate; 2) K.D. had enrolled at Sand Paths; and 3) K.D. intended  
11 to seek reimbursement for this education. Loughrey Dec., Exh. V1. Defendants responded, stating  
12 that they were not responsible for K.D.’s placement as he was no longer a student of the OUESD.  
13 Id., Exh. W2. Thereafter, the LUHSD wrote J.B. that placement in the Odyssey program was still  
14 available.

15 K.D. now seeks a preliminary injunction to have defendants pay for his eighth grade  
16 education at the Sand Paths Academy for the 2007-08 school year.

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18 II. Procedural Background

19 As stated above, on September 29, 2006 J.B. filed for a due process hearing with the OAH to  
20 challenge K.D.’s expulsion. Def.’s Request for Judicial Notice, Exh. A. The complaint set forth  
21 thirteen separate issues and the OAH bifurcated these issues into two hearing phases. Id., Exh. B.

22 The first phase dealt with two questions. First, whether the OUESD denied K.D. a free  
23 appropriate public education (“FAPE”) by failing to allow his mother and mental health  
24 professionals to provide relevant information during the manifestation determination meeting on  
25 April 21, 2006; and second, whether the OUESD denied K.D. a FAPE by pre-determining that the  
26 conduct for which he was disciplined was not a manifestation of his disability prior to the  
27 manifestation determination meeting on April 21, 2006. Id.

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1           The second phase was to deal with three questions, whether: 1) the OUESD denied K.D. a  
2 FAPE by failing to provide transportation services to his education program after he was expelled;  
3 2) the OUESD denied K.D. a FAPE by failing to provide an appropriate interim alternate  
4 educational setting from April through June 2006 and by failing to provide an appropriate placement  
5 for the 2005-06 school year; and 3) Oakley, Pittsburgh, and Mt. Diablo denied K.D. a FAPE by  
6 failing to assess him in all areas of suspected disability and by failing to identify and provide  
7 educational services related to his specific learning disability to address his deficits in written  
8 expression, executive control, social reasoning and social skills. Id.

9           Prior to the phase one hearing, the hearing officer dismissed four issues raised by K.D. for  
10 lack of jurisdiction based on a finding that those issues involved alleged violations of state law and  
11 thus touched solely upon issues outside the scope of the IDEA. The hearing officer also denied as  
12 untimely a request by K.D. to amend his due process complaint to assert that the IEP team's finding  
13 on both prongs of the manifestation determination was in error. Id.

14           The phase one issues were heard on November 1 and 2, 2006 and on November 16, 2006 the  
15 hearing officer issued a decision favorable to the OUESD. Id., Exh. D. In the interim, K.D.  
16 dismissed the phase two issues. Id., Exh. C.

17           The instant action was originally brought by J.B. as K.D.'s guardian ad litem. Pursuant to a  
18 case management conference held on June 4, 2007, a corrected amended complaint was filed three  
19 days late on June 18, 2007. This amended complaint added a new plaintiff, J.B., as the parent of a  
20 child with disabilities. On July 5, 2007, instead of filing an answer, defendants filed a motion to  
21 strike the amended pleadings in their entirety, or alternatively, to seek a more definite statement,  
22 dismiss claims and strike improper matter.

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24 LEGAL STANDARD

25           “A preliminary injunction is a provisional remedy, the purpose of which is to preserve status  
26 quo and to prevent irreparable loss of rights prior to final disposition of the litigation.” Napa Valley  
27 Publ’g Co. v. City of Calistoga, 225 F. Supp. 2d 1176, 1180 (N.D. Cal. 2002) (Chen, Mag. J.) (citing  
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1 Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984)). Thus, a  
2 plaintiff seeking preliminary injunctive relief must demonstrate either: “(1) a likelihood of success  
3 on the merits and the possibility of irreparable injury; or (2) that serious questions going to the  
4 merits [have been] raised and the balance of hardships tips sharply in [the plaintiff’s] favor.” Sw.  
5 Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per  
6 curiam) (citing Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir.  
7 2003)); see also Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999).  
8 The components of these two tests, together with the added consideration of the public interest,  
9 operate on a sliding scale or “continuum.” Sw. Voter, 344 F.3d at 918. Consequently, “the less  
10 certain the district court is of the likelihood of success on the merits, the more plaintiffs must  
11 convince the district court that the public interest and balance of hardships tip in their favor.” Id.;  
12 see also Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994) (en banc).

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14 DISCUSSION

15 I. IDEA

16 Congress enacted the IDEA “to assure that all children with disabilities have available to  
17 them . . . a free appropriate public education which emphasizes special education and related  
18 services designed to meet their unique needs . . . .” 20 U.S.C. § 1400(c). The education to which  
19 access is provided must be “reasonably calculated to enable the child to receive educational  
20 benefits.” Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley, 458  
21 U.S. 176, 207 (1982). To this end, IEPs are required for each disabled student. Id. § 1414(d); Cal.  
22 Educ. Code § 56344; see also Hacienda La Puente Unified Sch. Dist. v. Honig, 976 F.2d 487, 491  
23 (9th Cir. 1992).

24 In addition to its substantive requirements, the IDEA provides procedural safeguards. Some  
25 violations of these procedural safeguards may prevent a child from receiving a FAPE. Among the  
26 most important procedural safeguards are those that protect parents’ rights to be involved in the  
27 development of their child’s IEP. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir.  
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1 2001). In addition, parents have the right to “present complaints with respect to any matter relating  
2 to the identification, evaluation, or educational placement of the child, or the provision of [a FAPE]  
3 to such child.” 20 U.S.C. § 1415(b)(1)(E). After making such a complaint, parents are entitled to  
4 “an impartial due process hearing . . . conducted by the State educational agency or by the local  
5 educational agency or an intermediate educational unit, as determined by State law or by the State  
6 educational agency.” Id. § 1415(b)(2). The IDEA requires the child to remain in the interim  
7 alternate educational setting during the pendency of any appeal, or until the expiration of an  
8 expulsion, whichever occurs first. Id. § 1415(k)(4).

9 The IDEA provides that a party aggrieved by the findings and decision made in a state  
10 administrative due process hearing has the right to bring an original civil action in a state court of  
11 competent jurisdiction or in federal district court in order to secure review of the disputed findings  
12 and decision. See 20 U.S.C. § 1415(e)(2), (i)(2). The party challenging the decision bears the  
13 burden of persuasion on its claim. Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1399 (9th  
14 Cir. 1994). The statute provides “the court shall receive the records of the administrative  
15 proceedings; shall hear additional evidence at the request of a party; and basing its decision on the  
16 preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20  
17 U.S.C. § 1415(i)(2)(B).

18 Judicial review of state administrative proceedings under the IDEA is less deferential than  
19 the review of other agency actions. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir.  
20 1992). However, “[b]ecause Congress intended states to have the primary responsibility for  
21 formulating each individual child’s education, [courts] must defer to their ‘specialized knowledge  
22 and experience’ by giving ‘due weight’ to the decisions of the states’ administrative bodies.”  
23 Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 888 (9th Cir. 2001) (quoting  
24 in part Rowley, 458 U.S. at 206–08). This review requires the district court to carefully consider the  
25 administrative agency’s findings. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 758 (3rd Cir. 1995).  
26 “The amount of deference accorded the hearing officer’s findings increases where they are thorough  
27 and careful.” Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995). After  
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1 such consideration, “the court is free to accept or reject the findings in part or in whole.” Susan N.,  
2 70 F.3d at 758. When the court has before it all the evidence regarding the disputed issues, it may  
3 make a final judgment in what “is not a true summary judgment procedure [but] a bench trial based  
4 on a stipulated record.” Ojai, 4 F.3d at 1472.

5 “Equitable considerations are relevant in fashioning relief” under the IDEA. Sch. Comm. of  
6 Burlington v. Dep’t of Educ., 471 U.S. 359, 374 (1985). By nature, equitable relief is a fact-specific  
7 inquiry in which the Ninth Circuit had held that “the conduct of both parties must be reviewed to  
8 determine whether relief is appropriate.” Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31  
9 F.3d 1489, 1496 (9th Cir. 1994) (internal citations omitted).

10 In the Ninth Circuit, parents have an equitable right to reimbursement for the cost of  
11 compensatory education where a school district has failed to provide a FAPE. W.G. v. Bd. of  
12 Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992). However,  
13 procedural violations under the IDEA do not necessarily result in the denial of a FAPE unless the  
14 violation results in the loss of an educational opportunity or seriously infringes upon the parent’s  
15 opportunity to participate in the IEP process. Id. at 1484. And even if there is a denial of a FAPE,  
16 the remedy remains an equitable one. Id.

17 In 1997, Congress amended the IDEA to limit the circumstances in which parents who have  
18 unilaterally placed their child in a private school can seek reimbursement for that placement.  
19 Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 157 (1st Cir. 2004). As amended, the IDEA does not  
20 “require a local education agency to pay for the cost of education, including special education and  
21 related services, of a child with a disability at a private school or facility if that agency made a free  
22 appropriate public education available to the child and the parents elected to place the child in such  
23 private school or facility.” 20 U.S.C. § 1412(a)(1)(C)(i). To determine if K.D. is entitled to  
24 compensation, the court must address the availability of a FAPE to K.D.

25 Much of the above discussion and the relevant standard focuses on the court’s power to  
26 review the state educational agency’s decision. Here, the corrected first amended complaint  
27 demonstrates that only four decisions made by the OAH are on appeal. Specifically, whether the  
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1 hearing officer: 1) erroneously dismissed four state law issues due to a lack of jurisdiction;  
2 2) erroneously denied plaintiff’s request to amend; 3) made erroneous findings of fact and  
3 conclusions of law regarding the two specific issues related to K.D.’s manifestation determination;  
4 and 4) erroneously concluded that new issues raised during the hearing were untimely. These issues  
5 can easily be gleaned from the corrected first amended complaint and were succinctly stated in  
6 defendants’ motion to dismiss.<sup>7</sup> As such, defendants’ motion to dismiss based upon plaintiff’s  
7 failure to distinguish between IDEA and non-IDEA claims is denied.

8           None of the other IDEA issues in the case, including what plaintiff characterizes as K.D.’s  
9 back-door expulsion during the June 8, 2007 IEP meeting, have been decided by the OAH.  
10 Moreover, plaintiff has not demonstrated that the OAH process would be futile with respect to these  
11 claims. Plaintiff’s reliance on the outdated Cox v. Brown, 498 F. Supp. 823, 829 (D.D.C. 1980), is  
12 without avail because it is neither controlling nor does it bear any factual resemblance to the case at  
13 hand. In Cox, a school “appropriate to [the children’s] needs” was “allegedly unavailable in  
14 Department's dependent school system.” 498 F. Supp. at 824. The facts there were also far more  
15 egregious—defendants there had completely failed to perform annual assessments. Id. at 828. No  
16 such issues exist here. In fact, K.D. would like to be placed in the OUESD and J.B. has consistently  
17 thwarted the OUESD’s attempts to assess K.D. Consequently, other than the four issues specified  
18 above, this court lacks subject matter jurisdiction to review defendants’ actions in order to determine  
19 if an injunction should issue. 20 U.S.C. § 1415(f); Cal. Educ. Code § 56501(a). Thus, all IDEA  
20 claims that have not been vetted through the OAH process are dismissed.

21           Plaintiff argues that the OAH erroneously dismissed four state law issues due to a lack of  
22 jurisdiction. Without reaching the merits, this court holds that any error with respect to these issues  
23 does not warrant the relief sought by plaintiff. First, even if the court were to determine that the  
24 OAH incorrectly limited its own jurisdiction, the proper remedy would be to remand to the OAH to  
25 consider these issues. Second, the denial of these notices was substantially cured by the District’s  
26 subsequent actions, thereby precluding the possibility that the violation resulted in the loss of an  
27 educational opportunity for K.D. For instance, the District’s February 2, 2007 letter described what  
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1 K.D. and J.B. needed to do in order to seek re-enrollment in the District. Finally, the probability of  
2 being able to establish a causal connection between the denial of notices and harm justifying the  
3 desired remedy has not been demonstrated.

4 Furthermore, the OAH's denial of the request to amend and its failure to consider new issues  
5 during the hearing are both procedural issues which suffer from similar flaws as above. Neither the  
6 state law issues nor the procedural issues implicate the parents' right to be involved in the  
7 development of their child's IEP. Consequently, the proper remedy for those alleged procedural  
8 errors would be to provide the proper procedure, not tuition at Sand Paths Academy.

9 Finally, the substantive issues that were actually considered by the OAH were resolved in  
10 defendants' favor. Plaintiff merely states that the OAH decision was erroneous without any  
11 explanation or argument whatsoever. This does not address whether K.D. was denied a FAPE.  
12 Thus, giving that decision due deference, this court finds that plaintiff has demonstrated neither a  
13 clear nor reasonable probability of success.

14 In sum, plaintiff's motion for a preliminary injunction based upon the IDEA claims is denied.  
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16 II. Due Process claims

17 Education is a property right protected by the Due Process Clause of the Fourteenth  
18 Amendment. Gross v. Lopez, 419 U.S. 565, 574 (1975). Due process includes, at minimum, the  
19 right to be provided notice and an opportunity to be heard. Jones v. Flowers, 547 U.S. 220, 240–41  
20 (2006). Plaintiff contends he was not provided with four notices as required by California law.  
21 Specifically, he was not provided notices regarding: 1) a date for readmission review following  
22 expulsion, per California Education Code section 48916(a)<sup>8</sup>; 2) his alternative educational  
23 placement, to be provided during the expulsion period per California Education Code section  
24 48916(b); 3) a rehabilitation plan detailing the terms of readmittance into the District, per California  
25 Education Code section 48916(b); and 4) applicable admission process for readmission into the  
26 District following expulsion, per California Education Code section 48916(c).

27 As a baseline, the court notes that not every violation of a state procedural statute rises to the  
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1 level of a constitutional due process violation. Gonzales v. McEuen, 435 F. Supp. 460, 463 (C.D.  
2 Cal. 1977); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1970). It goes without saying that it would  
3 be neither sound law nor desirable policy to constitutionalize every school board regulation.  
4 Plaintiff does not demonstrate how a violation of these state statutes has deprived him of notice and  
5 an opportunity to be heard. Here, even if there was a failure to provide any of these notices, each  
6 failure was cured or waived during the expulsion period. Therefore, plaintiff's sought-after remedy,  
7 a preliminary injunction, is unavailable.

8 California Education Code section 48916(a) states, in pertinent part:

9 An expulsion order shall remain in effect until the governing board, in the manner  
10 prescribed in this article, orders the readmission of a pupil. . . . For a pupil who has  
11 been expelled pursuant to [how K.D. was expelled], the governing board shall set a  
12 date of one year from the date the expulsion occurred, when the pupil shall be  
13 reviewed for readmission to a school maintained by the district, except that the  
14 governing board may set an earlier date for readmission on a case-by-case basis.

15 The plain language of this statute does not require that plaintiff be notified of the date set by the  
16 governing board and therefore the court is unable to discern any statutory violations giving rise to a  
17 denial of due process. Nevertheless, plaintiff was notified on February 2, 2007 that his expulsion  
18 was scheduled to end on February 23, 2007. Even if a notification requirement is read into the  
19 above statute, the District's letter dated February 2, 2007, substantially meets the requirement above.  
20 Since the expulsion was scheduled to end, the Board would have to then review the applicant for  
21 readmission. Indeed, the February 2, 2007, letter was notifying plaintiff of the procedures necessary  
22 to initiate readmission. Finally, assuming arguendo that the above statute creates a federal right that  
23 was violated, none of plaintiff's arguments demonstrate how he was denied notice or an opportunity  
24 to be heard with respect to the review for readmission by the Board.

25 California Education Code section 48916(b) states:

26 The governing board shall recommend a plan of rehabilitation for the pupil at the  
27 time of the expulsion order, which may include, but not be limited to, periodic review  
28 as well as assessment at the time of review for readmission. The plan may also  
include recommendations for improved academic performance, tutoring, special  
education assessments, job training, counseling, employment, community service, or  
other rehabilitative programs.

There is no argument that K.D. was informed of the county school placement when the expulsion

1 period began. This county school placement itself could itself be considered a rudimentary  
2 rehabilitation plan where further details were to provided when K.D. enrolled at the county school.  
3 Indeed, the District has presented evidence that K.D. was scheduled to attend an intake meeting at  
4 the county school on July 31, 2006, but neglected to do so. Furthermore, the statute makes no  
5 guarantees regarding the level of detail that must be provided in the rehabilitation plan. The Board  
6 could have concluded that placement at the county school would be rehabilitative enough. Finally,  
7 assuming arguendo that the rehabilitation plan does create a federal right and the same was violated,  
8 no prejudice stems from this deprivation. Reading the above section in combination with section (c)  
9 below, the rehabilitation plan was meant, in part, to aid the District when it made readmission  
10 decisions. Since the District waived adherence to the rehabilitation plan as a requirement for  
11 readmission, no prejudice inured to K.D.

12 California Education Code section 48916(c) states:

13 The governing board of each school district shall adopt rules and regulations  
14 establishing a procedure for the filing and processing of requests for readmission and  
15 the process for the required review of all expelled pupils for readmission. Upon  
16 completion of the readmission process, the governing board shall readmit the pupil,  
17 unless the governing board makes a finding that the pupil has not met the conditions  
of the rehabilitation plan or continues to pose a danger to campus safety or to other  
pupils or employees of the school district. A description of the procedure shall be  
made available to the pupil and the pupil's parent or guardian at the time the  
expulsion order is entered.

18 There is no argument that the school neglected to provide K.D. with readmission procedures at the  
19 time of his expulsion. The District did, however, inform K.D. on February 2, 2007, of the  
20 procedures necessary to initiate readmission. Though this does not comport with the letter of the  
21 statute, which requires notification at the time the expulsion order is entered, the court is not able to  
22 discern any prejudice that K.D. has suffered as a result. The due process clause requires at  
23 minimum, notice and an opportunity to be heard. K.D. was given both, albeit he was given notice a  
24 few months late. This, however, did not impede upon his opportunity to be heard. This court does  
25 not consider a delayed notice, which led to no prejudicial effects and nevertheless allowed K.D. to  
26 be heard, to be a deprivation of due process of such magnitude that the District be required to pay  
27 for K.D.'s private placement.

28

1 In sum, plaintiff's motion for a preliminary injunction based upon alleged federal due  
2 process violations is denied. The deviations were minor ones that did not affect the fundamental  
3 fairness of any of the processes established by the regulations.

4  
5 III. Retaliation claims

6 Title II of the ADA, 42 U.S.C. § 12131, provides that: 1) people with disabilities shall not be  
7 excluded from participation in, nor be denied the benefits of an educational institution; and 2) a  
8 public entity may not provide a qualified person with a disability any aid, benefit or service that is  
9 inferior to that received by non-disabled persons. Similarly, Section 504 of the RA, 29 U.S.C. § 749  
10 et seq., and the regulations promulgated thereunder, provide that no otherwise qualified individual  
11 with a disability shall, solely by reason of his disability, be excluded from participation in, be denied  
12 the benefits of, or be subjected to discrimination under, any program or activity receiving federal  
13 financial assistance. It is illegal under the ADA and RA to coerce, intimidate, threaten, or interfere  
14 with any individual who exercises or helps another person to exercise, his or her rights provided  
15 under these disability civil rights statutes. See 42 U.S.C. § 12203(a), (b), (c); 34 C.F.R. § 104.61.

16 In order to establish a claim of retaliation under the ADA and the RA, a plaintiff must  
17 demonstrate by a preponderance of the evidence that: 1) he or she engaged in activity protected by  
18 the statute; 2) defendant engaged in conduct having an adverse impact on the plaintiff; and 3) the  
19 adverse action was causally related to the plaintiff's exercise of protected rights. If a prima facie  
20 case is made, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory  
21 reason for its adverse action. After the defendant has made this showing, the plaintiff must then  
22 demonstrate the reason is a pretext for retaliation or intimidation. Henry v. Guest Services, Inc., 902  
23 F. Supp. 245, 251 (D.D.C. 1995).

24 Assuming arguendo that K.D. has made a prima facie showing of discrimination, the District  
25 has provided a non-discriminatory rationale for its actions. During the expulsion, J.B. made  
26 representations that K.D. was being adequately tutored. As such, the District did not initiate truancy  
27 proceedings. Therefore, at the June 8, 2007 meeting, based in part on this representation, the  
28

1 District decided to place K.D. in the ninth grade. Plaintiff has not demonstrated that this reasoning  
2 is pretextual.

3 Plaintiff further argues the denial of transportation was retaliatory. He presents no evidence  
4 except his and J.B.'s self-serving testimony to this effect. No documentary evidence has been  
5 presented. In fact, plaintiff voluntarily dismissed this issue when it was on appeal at the OAH. This  
6 is not enough for a prima facie showing.

7 Thus, it is unlikely that plaintiff will prevail on his retaliation claim.

8  
9 IV. Irreparable harm

10 Plaintiff is correct that deprivation of educational services can constitute irreparable harm.  
11 See Van Scoy v. San Luis Coastal Unified Sch. Dist., 353 F. Supp. 2d 1083 (C.D. Cal. 2005).

12 However, this harm is not irreparable if self-inflicted. K.D. could currently be in school at the  
13 LUHSD. K.D. will be in remedial studies whether he is in the eighth grade or the ninth grade since  
14 his last known abilities were at the fifth grade level. The court, therefore, is unconvinced that K.D.  
15 must be enrolled in the eighth grade. In fact, K.D.'s placement at Sand Paths exposes him to  
16 students from the sixth grade to the twelfth grade, similar to placement at the LUHSD. In addition,  
17 there is no evidence that the LUHSD has refused to enroll K.D. or to conduct an assessment and  
18 provide a permanent IEP upon K.D.'s enrollment. Indeed, the interim placement calls for an  
19 assessment within a short period of K.D.'s enrollment—there is no evidence that the LUHSD's  
20 permanent IEP would not place K.D. on the “success track,” as recommended by Dr. Grandison.  
21 Thus, since the court is unconvinced that K.D.'s harm could not be avoided by enrolling at Freedom  
22 High School, K.D.'s harm is not irreparable. If K.D.'s permanent IEP at Freedom High School was  
23 deficient, then plaintiff's harm could have been irreparable. However, there is no evidence of this.

24 Plaintiff is also correct that a parent need not place a disabled child in an inappropriate  
25 educational program before enrolling the child in private school. See Bd. of Educ. of the City Sch.  
26 Dist. of the City of New York v. Tom F., 522 U.S. \_\_\_, 128 S. Ct. 1 (2007) (per curiam) (4-4  
27 decision) (affirming Bd. of Educ. of the City Sch. Dist. of the City of New York v. Tom F., 193 Fed.

1 Appx. 26 (2d Cir. 2006)); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006). Again, however,  
2 plaintiff needs to first show the proffered educational program was inappropriate. In both the cases  
3 cited above, an inappropriate permanent IEP was in place when the parents privately placed their  
4 child. As stated above, no showing has been made that K.D.'s permanent IEP would have been  
5 inappropriate.

6  
7 V. Public Interest

8 The public interest here includes both the integrity of the IDEA procedural safeguards as  
9 well as K.D.'s continued education. The IDEA safeguards require the district to create an IEP at  
10 least annually. 20 U.S.C. §§ 1401(8)(D), 1412(a)(1)(A), (a)(4), 1414(d); 34 C.F.R. § 300.346.  
11 Nevertheless, despite the District's numerous attempts, plaintiff has refused to allow the District to  
12 assess K.D. This is in spite of the fact that a new IEP had been put into place at least once a year  
13 since 1997. Furthermore, if the procedural safeguards were complied with, K.D.'s up-to-date IEP  
14 could also have been reviewed by an administrative law judge.

15 K.D.'s continuing academic progress substantially implicates the public interest. The  
16 maintenance of the procedural safeguards in place, however, serve all individuals affected by the  
17 IDEA. The cumulative impact of their integrity is therefore substantial. The court therefore finds  
18 that the interests do not substantially tip in either party's favor.

19  
20 VI. Motion to Strike

21 As discussed above, defendants motion to strike the pleadings as non-responsive to the court  
22 order is denied.<sup>9</sup> Furthermore, defendants' motion to strike extraneous facts and legal argument in  
23 the corrected first amended complaint is also denied.

24 Defendants' suggestion that K.D. could have attached a copy of the OAH decision instead of  
25 summarizing the events in pages 26–39 of the corrected first amended complaint is simply  
26 puzzling—the issue seems to be solely with the format of the complaint. This court is unwilling to  
27 subject plaintiff to this obligatory exercise in redundancy. Furthermore, defendants' concern  
28

1 regarding the inclusion of legal argument in the complaint is also unpersuasive. The arguments in  
2 the complaint only aid the defendants in anticipating counter-arguments when they move for  
3 summary judgment. Further, the court refuses to entertain argument over the minutiae of whether  
4 non-sequitur “sub-headings” ought to be stricken. Instead, this court urges defendants to  
5 concentrate on the merits of this litigation. The court hereby orders defendants to file an answer to  
6 the remaining IDEA issues raised in the corrected first amended complaint within twenty days of  
7 this order.

8 Plaintiff added J.B. as a named plaintiff in its amended complaint. J.B. has standing.  
9 Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2006 (2007) (“Parents enjoy rights under  
10 IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf.”).  
11 Defendants assert, however, that the statute of limitations with respect to J.B. has expired. Plaintiff  
12 claims Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), makes the rule retroactive. Harper  
13 does not help plaintiff since its retroactivity provision only applies to cases still open when a rule is  
14 decided by the Supreme Court. Id. at 97. J.B.’s case in her own capacity was not open when  
15 Winkelman was decided. Since no statute of limitations is present in the IDEA, the court must look  
16 to a parallel state law provision. Livingston Sch. Dist. Nos. 4 and 1 v. Keenan, 82 F.3d 912, 915  
17 (9th Cir. 1996). The relevant state law provision is the California Education Code section 56505.  
18 See Ostby v. Oxnard Union High, 209 F. Supp. 2d 1035 (C.D. Cal. 2002). This section provides for  
19 a ninety-day statute of limitations for an appeal of the OAH decision. Cal. Educ. Code § 56505; see  
20 also Def.’s Request for Judicial Notice, Exh. D. Since more than ninety days have elapsed since the  
21 OAH decision, J.B.’s claim against the defendants is time-barred.

22 Finally, plaintiff has made no claims against the hearing officer. Thus, any request to  
23 dismiss such a claim is simply a waste of the court’s time. If plaintiff wishes to make a claim  
24 against the hearing officer, he must do so in unequivocal terms.

25  
26 VII. Request for a Special Master

27 This court is adequately prepared to handle the factual complexity of the issues involved.  
28

1 The request for a special master is therefore denied.

2

3 CONCLUSION

4 For the foregoing reasons, defendants' motion to strike is DENIED and plaintiff's motion for  
5 a preliminary injunction is DENIED. Defendants are to file an answer to the remaining IDEA issues  
6 raised in plaintiff's first amended complaint within twenty days of this order.

7 IT IS SO ORDERED.

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9 Dated: February 8, 2008

  
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MARILYN HALL PATEL  
United States District Court Judge  
Northern District of California

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**ENDNOTES**

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2 1. Plaintiff's objections based upon a lack of foundation, hearsay and irrelevance are overruled.  
3 The court only considers the notice of suspension—admissible as a business record—since it has  
4 been properly authenticated by a declarant with personal knowledge. See Fed. R. Evid. 803(6).

5 2. Plaintiff's objections based upon a lack of authentication and hearsay are overruled. The  
6 court only considers K.D.'s admissions—which are not hearsay—during his interview with Scott  
7 Schwartz.

8 3. All of plaintiff's authentication and foundation objections with respect to documentary  
9 evidence submitted through Ms. Hussey's declaration are overruled since she claims personal  
10 knowledge and vouches for the documents' authenticity. Furthermore, objections based on  
11 relevance are overruled with respect to all evidence cited in this memorandum.

12 4. The court hereby takes judicial notice under Federal Rule of Evidence 201 of all four  
13 documents pertaining to the OAH's decision. See generally Def.'s Request for Judicial Notice.

14 5. A statement's purported falsity, when demonstrated through a competing declaration, is  
15 insufficient to sustain plaintiff's objection to the statement. Furthermore, statements made by a  
16 party to the action are admissions, not hearsay.

17 6. During these talks, the Liberty Union High School District ("LUHSD") allegedly demanded  
18 a hold harmless agreement as a precondition to attendance. Loughrey Dec., ¶ 22. Plaintiff claims  
19 this action, combined with defendants' earlier rejection of K.D. attending eighth grade within their  
20 District, left K.D. with no public schools willing to accept him. Id. These facts, however, are  
21 inadmissible as they may, at best, demonstrate the LUHSD's bias and prejudice but not the District's  
22 bias and prejudice. The court is seriously concerned about counsel's cavalier approach regarding  
23 confidential settlement discussions and strongly warns against repeating such behavior.

24 7. If plaintiff is appealing any other decision made by the OAH, it must state so clearly.  
25 Plaintiff's appeal is therefore currently limited to these four issues with respect to the OAH decision.

26 8. The court hereby takes judicial notice of sections related to the California Education Code as  
27 requested by plaintiff. See Fed. R. Evid. 201.

28 9. The court is very concerned about plaintiff's disregard for its order that the amended  
complaint be filed by Friday June 15, 2007. Though an amended complaint was filed on Saturday  
June 16, 2007, the operative corrected first amended complaint was not filed until Monday June 18,  
2007. Furthermore, plaintiff has not been abiding by the page limitations set forth by the rules.  
Further disregard of the court's orders or rules will be met with sanctions.