

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2013060358

ORDER GRANTING MOTION TO
DISMISS, IN PART

On June 10, 2013, Parents on behalf of Student (Student) filed a Due Process Hearing Request¹ (complaint) naming the Torrance Unified School District (District). The complaint contains 17 problems. On July 2, 2013, District filed a motion to dismiss Problems One through Problem Four, in their entirety, and to dismiss Problem Five as it pertains to the period of time prior to June 10, 2011, on the ground that the claims are barred by the applicable two-year statute of limitations.

On July 3, 2013, Student filed an opposition, asserting that Problems One through Five set forth that the District was not providing a free appropriate public education (FAPE) before two years prior to the due process filing. However, Student further claims that District continued to fail to provide a FAPE into the two-year limitation and, thus, is entitled to seek review of the IEP which predates the statute of limitation.

APPLICABLE LAW

A request for 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, subd. (1).) This 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).)

¹ A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

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.)

Common law or equitable exceptions to the statute of limitation do not apply to IDEA cases. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 248. (*Abington.*) In particular, the common law exception to the statute of limitations that applies when a violation is continuing is not applicable in IDEA cases. (*J.L. v. Ambridge Area School Dist.* (W.D. PA 2008) 622 F. Supp. 2d 257, 268-269 (*Ambridge*); accord, *Moyer ex rel. Moyer v. Long Beach Unified School Dist.* (C.D.Cal. Jan 24, 2013) 2013 WL 271686 (NO. CV 09-04430 MMM AJWX) (*Moyer*).) In finding the continuing violation doctrine to be inapplicable in an IDEA due process, the court stated in *Patrick B. ex rel. Keshia B. v. Paradise Protectory and Agr. School, Inc.* (M.D.Pa. Aug 06, 2012) 2012 WL 3233036 (NO. 1:11-CV-00927) at page 20:

“The same reasoning applies to Plaintiff’s argument that dismissal of any claim is inappropriate because the complaint alleges a continuing course of conduct. Here again, courts have found that claims premised upon the IDEA are ‘not subject to the continuing violation or equitable tolling doctrines, but instead can be extended only for one of the enumerated statutory exceptions.’
[Citations.]”

DISCUSSION

Student alleges he was denied a FAPE because, at the individualized education program (IEP) meeting of February 8, 2011: Student was not offered appropriate behavior support, including a full-time aide (Problem One); the District failed to develop proper goals (Problem Two); the offered educational program was not scientifically based upon peer reviewed research (Problem Three); and the behavior support plan (BSP) was not appropriate, for various reasons, including the failure to conduct a functional behavior assessment (FBA) (Problem Four).

The February 8, 2011 IEP took place 28 months before the filing of the complaint herein on June 10, 2013. Thus, the IEP predates the commencement of the running of the two-year statute of limitations. Student’s opposition asserts the IEP’s failure to provide a FAPE continued into the two-year statutory period and, thus, Student is entitled to seek due process review of the February 2011 IEP.

Student refers to a 2008 OAH decision in support of the assertion that the two-year statute of limitations does not bar his claims upon the February 2011 IEP.² Student cites no

² Prior administrative decisions have persuasive value in later cases and are not binding precedent. (Cal. Code Regs., tit. 5, § 3085.)

other authority. However, recent case law states that the only exceptions to the two-year limitation are those set forth in the IDEA statutes. Student has not alleged any facts in support of either of the two exceptions and, further, does not assert the exceptions in opposition to the motion to dismiss.

Student states that he is entitled to seek due process because District failed to provide a FAPE at the February 2011 IEP and because such FAPE failure continued into the two years before the complaint's filing. Federal courts have found that none of the common law exceptions to a statute of limitations applies to IDEA due process limitations. As noted by the *Ambridge* court, which was approvingly cited by the Central District of California in January 2013 (*Moyer*), the common law exception to the statute of limitations that applies when a violation is continuing is not applicable in IDEA cases.

Therefore, Student is not entitled to seek due process review of the creation or content of an IEP which occurred prior to the commencement of the two-year limitation period. Problems One, Two and Three seek such review and are therefore dismissed.

Problem Four also seeks review of the February 2011 IEP's BSP. However, Problem Four also states that the BSP was amended by an October 2011 IEP, which also proved inadequate. The October 2011 IEP is within two years of the complaint's filing. Therefore, the portion of Problem Four related to the February 2011 IEP is dismissed, while the motion to dismiss the assertions regarding the October 2011 IEP is denied.

In Problem Five, Student asserts that District denied him a FAPE because District failed to implement the behavior services and BSP which were in place as a result of the February 8, 2011 IEP. Student is not asserting a continuing violation by the IEP's failure to provide FAPE but, instead, is claiming that the IEP was not implemented, including during the limitations period. Student is entitled to seek due process review of a District's alleged failure to implement an IEP during the two-year limitation period, even though the IEP predates the two-year statute. District's motion to dismiss Problem Five is denied.

ORDER

1. District's Motion to Dismiss the complaint's Problem One, Problem Two, and Problem Three is granted.

2. District's Motion to Dismiss Problem Four is granted only as to that portion thereof related to the February 2011 IEP. The motion to dismiss the remaining portion of Problem Four, based upon the October 2011 IEP, is denied.

3. District's Motion to Dismiss Problem Five is denied because Student may seek due process review of his assertion that District failed to implement the February 2011 IEP after June 10, 2011, and was thus denied a FAPE.

IT IS SO ORDERED.

Dated: July 08, 2013

/s/

CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings