

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MILPITAS UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014090329

AMENDED ORDER OF DISMISSAL<sup>1</sup>

On September 5, 2014, Parents, on behalf of Student, filed a request for a due process hearing (complaint), naming Milpitas Unified School District (Milpitas).<sup>2</sup>

A prehearing conference was held on February 2, 2015. Milpitas objected to Student's complaint, because it was filed after the expiration of the two-year statute of limitations for due process complaints. Milpitas was then ordered to file a brief concerning the statute of limitations for Student's complaint. Parents would be permitted to file a written response, and/or present oral argument and make an offer of proof in response at the beginning of the hearing.

Milpitas filed its brief concerning the statute of limitations on February 5, 2015, with supporting declarations and other documentation. When the due process hearing was convened on February 10, 2014, Parents responded to the Milpitas brief orally and made an offer of proof as to the evidence they would present as to why the statute of limitations should be tolled. After hearing argument and considering all filings and arguments in this matter, the undersigned Administrative Law Judge ruled that Student's claim would be dismissed because, based on the offer of proof, Parents could not present evidence that would support tolling of the statute of limitations. The ALJ informed the parties that she would be issuing this written order.

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<sup>1</sup> On February 24, 2015, the Office of Administrative Hearings inadvertently sent out an incorrect dismissal order, which did not contain the necessary facts or analysis. This Order supersedes the February 24, 2015 Order.

<sup>2</sup>This initial complaint was found to be insufficient and an amended complaint was subsequently filed on October 3, 2014.

## APPLICABLE LAW

The statute of limitations for the filing of a due process complaint pursuant to the Individuals with Disabilities Education Act is two years. (20 U.S.C. § 1415(f)(3)(C); Ed. Code, § 56505, subd. (l).) However, title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint or the local educational agency's withholding of information from the parent that was required to be provided to the parent.

## DISCUSSION

In her complaint Student claimed that Milpitas had denied her a free appropriate public education from the time she entered school in a special day class for deaf students operated by the Santa Clara County Office of Education (Santa Clara) as a Milpitas student in 2008, until she became a Student at the California School for the Deaf in Fremont, California (School for the Deaf) in June 2011. Student claimed that following Student's admission to the School for the Deaf, employees of Milpitas had promised to provide her with compensatory education. The reason this compensatory education was warranted, alleged Student, was because the educational program she had received from 2008 to the end of the 2010-2011 school year was not a FAPE because the Santa Clara classroom was not staffed by personnel proficient in American Sign Language.

Milpitas, in its February 5, 2015 brief concerning the statute of limitations noted that Student had filed a complaint with OAH in June 2008, claiming that Student was not receiving a FAPE in the Santa Clara program, and when that complaint was dismissed for insufficiency, Student had not filed an amended complaint. Further, at individualized education program team meetings from 2008 to 2013, Milpitas claimed that Student had not requested compensatory education, nor had any promises been made to Parents by Milpitas staff concerning compensatory education. Attached to its brief, Milpitas had supporting declarations from staff, as well as copies of all IEP's and correspondence from 2008 to June 2014.

The declarations and documentary evidence provided by Milpitas established that the only time compensatory education had been discussed with Parents was in August and September 2013. On August 26, 2014, Parents sent a letter to Milpitas asking for an IEP team meeting to discuss Student's admission into an afterschool program at the School for the Deaf, and to discuss "compensatory services for the 2013-2014 school year." The IEP team meeting was held on September 30, 2013. At that time it was agreed by Parents, School for the Deaf, and Milpitas, that Student would attend the afterschool program several afternoons each week. Parents would be reimbursed for transporting Student home since the program ended later than Milpitas could transport her. The reimbursement was referred to as "compensatory education." The IEP also stated that Matt Patterson, Director of Special

Services for Milpitas at that time, would determine if additional compensatory education was warranted. Following this IEP team meeting, Mr. Patterson determined that no further compensatory education was warranted, and also that Parents' request was based a claim barred by the statute of limitations.

In the complaint Student states that for each of the school years she attended the Santa Clara program Parents questioned the ASL abilities of the staff. Parents confirmed this on February 10, 2015, at the commencement of the hearing. For this reason, Student was denied a FAPE. On February 10, 2015, Parents argued that on several occasions various employees of Milpitas had offered compensatory education for this alleged denial of a FAPE. However, there was no evidence of this in the documents submitted by Milpitas, other than those discussed above. Parents had no other documents to establish this. Parents took the position that since Student had not received a FAPE when she attended the Santa Clara program, and promises had been made for compensatory education after that time, there was a "continuing violation" of the IDEA. However, a claim pursuant to IDEA accrues "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).) The concept of a continuing violation tolling the statute of limits was discarded by the court and discussed at length in *Miller v. San Mateo-Foster City Unified School District* (N.D. Cal. 2004), 318 F.Supp.2d 851, at pages 860-862.

Parents then argued that because Milpitas personnel had said Student would be provided with compensatory education several times between 2011-2013, these were the misrepresentations that tolled the statute of limitations. However, the facts forming the basis of Student's complaint were events between 2008 and 2011, and the statute of limitations began to run when each of these events occurred.<sup>3</sup> Accordingly, Student's complaint must be dismissed as her claims are outside the two-year statute of limitations.

#### ORDER

Student's complaint in this matter is dismissed.

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<sup>3</sup> There was no evidence or offer of proof made that Milpitas had withheld from Parents any information it was required to give them.

## RIGHT TO APPEAL

This Order of Dismissal is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Order to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: February 25, 2015

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REBECCA FREIE  
Administrative Law Judge  
Office of Administrative Hearings