

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
DALLAS INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

**ORDER GRANTING RESPONDENT’S MOTION TO DISMISS**

Petitioner, \*\*\* (“Student”), by next friend, \*\*\* (“Parent”), filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaint was received by the Texas Education Agency July 26, 2021 and assigned to this hearing officer. The Respondent in the complaint is Dallas Independent School District, (“District”).

On August 6, 2021, District moved to dismiss the instant action arguing that it was filed outside the statute of limitations. Petitioner opposed Respondent’s motion to dismiss, and argued that an exception to the Texas one-year statute of limitations applied. On November 3, 2021, the parties convened for a virtual evidentiary hearing on the limitations issue.

Jonathan Winocour, attorney, represented Petitioner, Student by next friend, \*\*\* (“Parent”). Parent was present throughout the due process hearing. Dianna Bowen and Taylor Montgomery, attorneys, represented Respondent, Dallas Independent School District (“District”). \*\*\*, Principal of \*\*\*, was present as party representative for Respondent.

**Findings of Fact**

Based on the parties’ documentary evidence and testimony of witnesses before this hearing officer, below are the findings of fact in the limitations issue. Citations to Petitioner’s Exhibits and Respondent’s Exhibits are designated with a notation of “P,” or “R,” respectively, followed by exhibit and page numbers as appropriate. Citations to the transcript are designated with a notation of “T” followed by the page numbers. Unless otherwise stated, all dates included in the Findings of Fact occurred in the 2019 calendar year.

1. Student enrolled in District April 12, 2019 and attended \*\*\* (“\*\*\*\*”). Parent received Notice of Procedural Safeguards May 17. Parent signed Receipt for Explanation of Procedural Safeguards (“Procedural Safeguards”), Receipt of Procedural Safeguards and Rights Consent for Full and

Individual Evaluation, and gave written consent for a full and individual evaluation the same date.  
R-4, 5, 6, 7

2. Student, whose disabilities are intellectual disability and speech impairment, received all services in a special education setting called the \*\*\* (“\*\*\*\*”) classroom. R-9, pgs. 11-14
3. In May, Parent expressed safety concerns for Student regarding Student sensory input deprivation, including a need for a safety plan, high supervision, installation of video and audio equipment for Student’s classroom, and lack of certified teacher. Parent wanted 1:1 adult supervision to ensure Student’s safety. R-30, pgs. 3-4
4. Parent requested an Admission, Review and Dismissal (“ARD”) committee that met August \*\*\*. Deliberations indicate that Parent requested 1:1 supervision, and the committee was working toward that end, along with developing classroom self help goals to assist Student to refrain from \*\*\*. Parent agreed with the ARD committee decisions. R-8, 9, 10; T-pgs. 111-112
5. Parent emailed Student’s teacher September \*\*\* and expressed concern that Student came home \*\*\*. R-15, pg. 2
6. On Saturday, September \*\*\*, Parent found \*\*\*. On January \*\*\*, she notified District of the discovery and that she had called Texas Department of Family and Protective Services, (commonly referred to as CPS). Parent said she believed that Student \*\*\*. Parent asked to view the videos of Student’s classroom for the days of September \*\*\*, and requested the next steps that she should follow. R-16
7. The Principal emailed a link that contained a Request Form for Parent to complete and explained the video scheduling process. Parent completed the Request Form, returned it to the Principal who forwarded it to the appropriate department. R-16, 17, 18
8. On the Request Form, Parent’s reason for the request to view videos was, “[Student] \*\*\*.” The Request Form indicated that upon receipt of the form, appropriate staff would begin viewing the footage recorded on the dates describe in the form. R-18
9. Parent retained attorney, Jason Amon. On September \*\*\*, the attorney notified District of the belief that District was negligent when Student \*\*\*. He indicated that Student would be kept at home until a resolution could be reached. R-13, 14
10. On September \*\*\*, the Acting Deputy General Counsel for District explained the ARD process to Mr. Amon, particularly that Parent could request a 1:1 aide for Student at the upcoming ARD Committee meeting. She explained that under the IDEA, the ARD Committee is required to make all decisions regarding a child’s educational program, including related services. R-22

11. On September \*\*\*, District sent Parent a copy of the Notice of Procedural Safeguards and a draft of the upcoming ARD Committee meeting. R-21
12. The Notice of Procedural Safeguards addressed the one-year timeline in which a parent must request a due process hearing, and the applicable exceptions to that timeline. It also specifically stated that before a parent sues the school in court about matters relating to the identification, evaluation or educational placement of his/her child, or the provision of FAPE to the child, the parent must request a due process hearing. It informed the reader that failure to participate in a due process hearing could result in a dismissal of claims filed in a court. R-21, pgs. 17-18
13. The ARD Committee met September \*\*\*. Parent attended the meeting. The Committee conducted a Review of Existing Evaluation Data (“REED”) and requested a series of formal evaluations of Student. Parent requested a 58PH (assignment of 1:1 aide). Among other items, the Committee discussed safety concerns. The teacher/paraprofessional was to closely monitor Student to ensure that Student did not \*\*\*. The Committee delineated the steps to take in the event that Student began showing \*\*\*. The Committee discussed Student’s instructional services and adopted new goals and objectives. Based on her attorney’s advice, Parent did not sign the ARD document. A meeting to obtain Parent consent for evaluations and to finalize the ARD meeting was scheduled for September \*\*\*. On the morning of September \*\*\*, Parent emailed that she needed to reschedule the meeting. R-21, 23
14. On September \*\*\*, Parent contacted District’s Parent Intake Center and indicated she did not want her child in the \*\*\* classroom. She indicated she had retained an attorney due to the September \*\*\* incident. Parent reported that Student was \*\*\*. R-26
15. A CPS special investigator contacted the Principal and requested classroom video footage for September \*\*\*. The Principal sent the Request Form for CPS to complete. She also indicated that she had viewed the videos requested by Parent (the morning of September \*\*\*), and stated that she saw no evidence of an incident. R-27
16. On September \*\*\*, the Principal emailed Parent that she had reviewed the video from the morning of September \*\*\* and “did not see any footage of [Student] \*\*\*.” She also told Parent that she could submit another request form if she wanted to make another viewing request. R-28
17. Also on September \*\*\*, the Principal emailed the CPS investigator and included the complaint Parent made to the Special Education Department Intake Center, and reported that a District staff member was told by Student’s father that he did not believe that Student \*\*\*. Further, the Principal told the CPS investigator that she had told Parent that she “saw no evidence that [Student] \*\*\*.” R-29, 32

18. Student \*\*\*. R-35
19. On September \*\*\*, the Acting Deputy General Counsel explained to Mr. Amon that if the parties participated in a successful mediation, “the ARD Committee will still need to convene to adopt the agreed issues. There is simply no other way around it. Even a Hearing Officer’s ruling from a due process hearing, requires the ruling be adopted by the ARD Committee.” R-34
20. On September \*\*\*, Mr. Amon informed the Acting Deputy General Counsel of Student’s \*\*\*. He further explained the family’s belief that \*\*\* while at school. R-35
21. Four days later, Parent’s new attorney, Christina Davis, gave written notice of Student’s claims against District for the September \*\*\* incident, along with reviewing \*\*\* incident during the summer program. R-36
22. Student did not return to school after September \*\*\*. Parent withdrew Student from District October \*\*\* and enrolled Student in a different school district October \*\*\*. During the 2019/2020 school year, Student attended \*\*\* \*\*\* days. R-12, 37, 38; T-pg. 107
23. On October \*\*\*, the CPS investigator told Parent of what she viewed on the video and that she would be validating the two District staff for neglectful supervision. P-A, pg. TxDFPS 034 (or 21 of 26).
24. On October \*\*\*, by letter to Parent’s attorney, the Acting Deputy General Counsel reviewed District’s and its professional employees’ statutory immunity. She specifically told the attorney that in accordance with the IDEA, the attorney was required to exhaust administrative remedies before pursuing any other cause of action against the school district. R-40
25. By October \*\*\*, Parent had received the CPS investigator’s Notice of Finding of CPS Investigation (“Notice”). Parent sent a copy of the Notice to District’s Supervisor of Specialized Programs. CPS made findings of “Reason to Believe” that two District employees were neglectful in their supervision of Student. R-41; T-pgs. 290-291
26. On October \*\*\*, the Principal informed Parent that redacted video for two cameras from the morning of September \*\*\* was ready for her to view. By January \*\*\*, 2020, all redacted videos from September \*\*\* were available for viewing and the Principal contacted Parent with this information. R-42, 43-pg. 6
27. Petitioner filed the request for due process hearing and complaint July 26, 2021. See TEA Notice of Filing of Request for a Special Education Due Process Hearing

### **Burden of Proof**

In this case, Respondent filed a motion to dismiss the complaint for reasons that the issue pled falls outside the one-year statute of limitations. Having raised the affirmative defense of the statute of

limitations, District bears the burden to present sufficient facts of the accrual date. *Matter of Hinsley v. Boudloche*, 201 F.3d 638, 645 (5th Cir. 2000). If the District meets its initial burden, the burden of proof then shifts to the Petitioner to prove by a preponderance of the evidence one of the enumerated exceptions to the one-year statute of limitations. *G.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581 (E.D. Tex. 2013).

The running of limitations begins at the time a litigant is entitled to seek a remedy, and contemplates the exercise of reasonable diligence on the part of the litigant to discover the facts giving rise to the claim. *See, e.g., Trinity River Authority v. URS Consultants*, 889 S.W. 2d 259 (Tex. 1994).

### **Statute of Limitations**

#### **Date Petitioner Knew or Should Have Known**

The applicable federal law provides the following with regard to the statute of limitations: “A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.” 20 U.S.C. §1415(f)(3)(C).

Under 19 Texas Administrative Code § 89.1151(c), “[a] parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request.”

In a due process hearing request under the IDEA, there are two explicit exceptions to the timeline for making the request. The timeline does not apply to a parent if the parent was prevented from requesting a due process hearing due to specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint, or the local education agency’s withholding of information from the parent that was required under this part to be provided to the parent. 20 U.S.C. §1415(f)(D).

Petitioner filed the request for due process hearing and complaint with the Texas Education Agency July 26, 2021. Petitioner alleged that District failed to provide adequate supervision to Student and allowed Student to \*\*\*; thus, denied Petitioner a free appropriate public education (“FAPE”).

On September \*\*\*, 2019, Parent emailed the Principal that she had \*\*\*, and had called CPS. She further stated that she had reason to believe that Student \*\*\*.

The basis of the complaint in the instant action is Petitioner’s allegation that District failed to properly monitor Student and keep Student from \*\*\*. It is clear that on September \*\*\*, when Parent found the \*\*\*, she suspected that District had failed to properly monitor Student. Parent did not return Student to school from that point forward. Two days later, Petitioner’s attorney notified District of

Parent's belief that District was negligent. On September \*\*\*, Student \*\*\*. One week later, Petitioner's attorney informed District of the family's belief that the \*\*\*. If Parent did not know about the alleged action on September \*\*\*, she knew or should have known about the alleged action that served as the basis for her complaint on the day of \*\*\*. Thus, Petitioner had one year from September \*\*\*, 2019 to file the complaint unless Parent was prevented from requesting a due process hearing due to one of the specific exceptions allowed in the IDEA.

Respondent met its initial burden of proof. Petitioner's filing of the instant action in July 2021 falls outside the one-year limitations rule.

### **Exception to the One-Year Statute of Limitations**

The burden of proof now shifts to the Petitioner to prove by a preponderance of the evidence one of the two enumerated exceptions to the one-year statute of limitations. The one-year limitation timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent. 34 C. F. R. §300.511(f). Petitioner argued the misrepresentation exception only.

If Parent was *prevented* from filing a due process complaint due to a *specific* misrepresentation by District that it had *resolved the problem forming the basis of the complaint*, the limitation period does not apply. *C. H. v. Northwest Indep. Sch. Dist.*, 815 F. Supp. 2d 977, 984-85 (E.D. Tex. 2011). The problem forming the basis of this complaint was the lack of classroom supervision of Student that resulted in Student's \*\*\*.

Petitioner contends that the record was not available until February 2021, the month that she was in possession of evidence sufficient to support her filing a due process hearing request. Further, Petitioner argues that she could not be certain that the events recorded on the video had in fact happened. However, in September 2019 \*\*\*, and Petitioner's attorney notified District of the family's belief that District was negligent. In October 2019, Petitioner had a copy of the CPS Notice that validated neglectful supervision by District staff. By January 2020, the videos were available for Petitioner's viewing, but she failed to do so. A complaining party only needs to know or have reason to know of the *facts* that would support a claim, rather than realizing a legal cause of action exists. *Student v. Floresville ISD*, Docket No. 166-SE-1020 (TEA 2020). Petitioner knew of the *facts* that would support her claim well before February 2021 and within the one-year limitation timeline.

Petitioner specifically alleged that the Principal misrepresented what was on the video of the morning of September \*\*\*, 2019. After viewing the video, the Principal notified Parent that she saw no

footage of Student \*\*\*, specifically stating that she observed from \*\*\*. Petitioner argued that the statement misrepresented what was on the video and thus, prevented Parent from filing the instant action. Even if Parent was prevented from filing the due process hearing request following the Principal's impression from the video footage, she learned from the CPS investigator of the finding of negligent supervision in October. Further, Parent had the opportunity to view all of the footage in early January 2020, failed to do so, and did not file the instant action until July 2021.

Petitioner's argument loses sight of the IDEA's misrepresentation exception language in its entirety. A specific misrepresentation alone is insufficient. Petitioner also must show that the specific misrepresentation was *that District had resolved the problem forming the basis of the complaint*. While it may have been in disagreement with the CPS investigator's Notice, the Principal's report of what she viewed on the video did not indicate that the problem of lack of supervision of Student in the classroom had been resolved.

Petitioner complained that the District misrepresented that it was implementing an appropriate IEP for Student to prevent Student from \*\*\*. Parent argued that despite her concerns, Student's safety needs were not noted appropriately in the ARD documents and safety precautions were not being implemented with Student.

If a party proves that a school district failed to implement an IEP, there is a violation of FAPE. However, the allegation alone cannot be the basis for a misrepresentation exception to the statute of limitations rule. Action that constitutes the basis for an IDEA claim itself, absent more, does not satisfy the exception to the statute of limitations rule. *D. K. v. Abington School Dist.*, 696 F.3d 233 (2012). In a Texas due process hearing case, the hearing officer found that lack of competence in provision of services, documentation and communication by the school district was negligence but not specific misrepresentation for purpose of invoking exception to statute of limitations rule. *G.G. v. El Paso Ind. Sch. Dist.*, Dkt. No. 010-SE-0906 (SEA Tex. 2006). In order to prevail, Petitioner needed to show that Respondent intentionally misled her or knowingly deceived her regarding Student's progress. *D. K.*, 696 F. 3d at 246. Petitioner failed to do so.

Petitioner generally complained about lies, misrepresentations, or omissions of truth by Respondent. Parent testified that a letter from the Acting Deputy General Counsel to Petitioner's attorney, Mr. Amon, was among such misrepresentations that prevented her from filing the instant action. The letter explained to the attorney that mediation agreements or hearing officer decisions needed to be adopted by the ARD Committee. While Petitioner may have misunderstood the letter, she failed to present evidence to support her allegation that it was a specific misrepresentation; further, she failed to show that the letter prevented her from filing her due process hearing and complaint. Rather, Parent

testified that the accumulation of misrepresentations, lies, or omissions caused her to believe that pursuing a due process hearing would be futile.

Shortly after Parent discovered \*\*\*, she retained legal representation. She promptly contacted CPS of her discovery, and an investigation began. The CPS investigator provided Parent a copy of its Notice of Findings on October \*\*\*, 2019. The Notice validated neglectful supervision by Student's teachers. District provided Parent copies of Procedural Safeguards in May and September 2019. District's Assistant General Counsel informed Petitioner's second attorney of the IDEA requirement to exhaust administrative remedies in October 2019. The videos of Student's classroom on September \*\*\* were available to Parent by January 2020. However, Parent waited until July 2021 to file the due process hearing and complaint.

Petitioner failed to carry the burden of proof that Parent was prevented from filing the instant action within the limitations period due to a specific misrepresentation by Respondent that it had resolved the problem forming the basis of the complaint.

#### **Conclusions of Law**

1. Respondent carried its burden of proof that Petitioner's claim accrued September \*\*\*, 2019 when Petitioner knew or should have known about the alleged action forming the basis of the due process hearing request. 19 Tex. Admin. Code § 89.1151(c); 34 C.F.R. § 300.511(e); 20 U.S.C. § 1415(f)(3)(C); *Matter of Hinsley v. Boudloche*, 201 F.3d 638, 645 (5th Cir. 2000).
2. Petitioner did not meet the burden of proving Petitioner was prevented from filing a due process hearing request in a timely manner due to specific misrepresentations by the District that it had resolved the problem forming the basis of the due process complaint. 19 Tex. Admin. Code § 89.1151(d)(1); 34 C.F.R. § 300.511(f)(1); 20 U.S.C. § 1415(f)(3)(D)(i); *G.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581 (E.D. Tex. 2013); *C. H. v. Northwest Indep. Sch. Dist.*, 815 F. Supp. 2d 977, 984-85 (E.D. Tex. 2011).
3. Petitioner had one year from September \*\*\*, 2019 to file the request for due process hearing and complaint. Petitioner failed to timely file the request for due process hearing and complaint. 20 U.S.C. §1415(f)(3)(C); 19 Tex. Admin. Code § 89.1151(c).

#### **Order**

Respondent's Motion to Dismiss is GRANTED. IT IS ORDERED that Petitioner's request for due process hearing and complaint in the instant action is DISMISSED WITH PREJUDICE as time-barred.



SIGNED on December 11, 2021.

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Brenda Rudd  
Special Education Hearing Officer  
For the State of Texas

Notice

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a-b).