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

IN THE MATTER OF:THE EDUCATION OF	)	**RULING ON DISTRICT'S MOTION FOR SUMMARY DETERMINATION AND FINAL ORDER**
	)	
STUDENT v. PORTLAND SCHOOL DISTRICT	)	OAH Case No. 2017-ABC-00259
	)	Agency Case No. DP 17-101

HISTORY OF THE CASE

On January 13, 2017, Parent of Student filed a Request for Due Process Hearing with the Oregon Department of Education (ODE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC §§ 1400 *et seq*. In the complaint, Parent alleged procedural and substantive violations of the IDEA, regarding the evaluation, educational placement, and the provision of a free appropriate education to their child. The parties agreed in writing to waive the resolution meeting.

On January 17, 2017, the Oregon Department of Education (ODE) referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to conduct the due process hearing and issue a Final Order in this case. ALJ Webster presided over a telephone prehearing conference on February 16, 2017. Attorney Elizabeth Polay represented Parent. Attorney Taylor Richman represented the Portland Public School District (District). Parent participated in the conference, as did Mr. Baker and Mr. Cartwell from the District. During the prehearing conference, the parties agreed the 45 day hearing timeline was not feasible. The parties jointly requested waiver of the deadline. Finding good cause to do so, the ALJ extended the time limits for issuance of the final order to a date certain, August 21, 2017 pursuant to ORS 343.167(5). Based on the District's stated intention to file a motion for summary determination, a briefing schedule for the District's motion was established, as was the deadline for issuing a ruling on the District's motion. In addition, dates for the hearing were set, June 5 through 9, 2017, if the District's motion was not determinative of all issues.

On March 17, 2017, in accordance with the established schedule, the District filed its Motion for Summary Determination with supporting documentation. On March 31, 2017, Parent filed her Response to District's Motion for Summary Determination and, on April 7, 2017, the District filed its Reply in Support of its Motion for Summary Determination. Thereafter, the ALJ took the Motion under consideration.

///

ISSUES

1. Whether there are genuine issues of material fact in dispute and, if not, whether the District is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether Parent's claim for denial of FAPE based on the alleged failure to provide an appropriate district representative at Student's IEP meetings during the 2014-2015 academic year should be dismissed as untimely and/or harmless error.

3. Whether Parent's claim based on the alleged failure to properly evaluate Student during the 2014-2015 academic year should be dismissed as untimely or failure to state a claim.

4. Whether Parent's claim based on the alleged failure to provide Student a FAPE during the 2014-2015 academic year should be dismissed as untimely or failure to state a claim.

5. Whether Parent's claim based on the alleged failure to provide Student with appropriate placement during the 2014-2015 academic year should be dismissed as untimely.

6. Whether Parent's claims alleging a failure to evaluate Student, provide FAPE, and/or provide an educational placement during the 2015-2016 and 2016-2017 academic years (after Parents withdrew Student from the District to attend Park Academy in Lake Oswego) should be dismissed for failure to state an actionable claim.

7. Whether Parent's claim for reimbursement for unilateral placement of Student at the Park Academy should be dismissed for failure to state an actionable claim and/or failure to give notice as required by the IDEA.

EVIDENTIARY RULINGS

In connection with the Motion, the District submitted the following: The Affidavit of Rachel Lent; Affidavit of Robert Cantwell; Affidavit of Melanie Van Witzenburg; Affidavit of Ivonne Dibblee; and Exhibits 1 through 5.[1] Parents submitted Exhibits P1 through P4 and the Affidavit of Deanne Gomez. These documents were made a part of the record and considered in ruling on the Motion.

FINDINGS OF FACT

1. Parents filed their due process complaint against the Portland Public School District on January 13, 2017, just shy of two years from the date Student withdrew from the District to attend the Park Academy, a private school in Lake Oswego. (Complaint at 28, 34.)

2. At the beginning of the 2010-2011 academic year, Student, born in the fall of 2004, began attending kindergarten at Atkinson Elementary School, a public elementary school in the District. (Ex. DM3 at 1.)

[1] For ease of reference herein, the District's exhibits are cited using the prefix DM (*e.g.* Ex. DM1).

3. Student was initially determined eligible for special education services in the category of Communication Disorder. During Student's first grade year, Student was deemed eligible under the category of Specific Learning Disability (SLD). (Ex. DM3 at 1, 7.)

4. On June 6, 2013,[2] one week before the end of Student's second grade year, Student's mother emailed the elementary school's then-Principal, Debbie Armendariz, "to request a formal occupational therapy evaluation" on Student. Mother noted that "recent developmental vision testing done on [Student] suggests that [s/he] has serious developmental issues that are significantly impacting [his/her] academic performance. I feel strongly that [Student] would benefit from OT support at school." (Ex. DM1.)

5. During Student's third grade year, the District convened Student's annual IEP meeting in November 2013. The following month, the District convened another meeting to review the IEP. Among other things, Student's December 2013 IEP provided for specially designed instruction in the areas of reading (130 minutes per week) and math (90 minutes per week). (Complaint, ¶¶ 148, 163, 168, 172 at 17-19.)

6. On July 1, 2014, Ivonne Dibblee became the Principal of Atkinson Elementary School. (Dibblee Aff.)

7. On October 22, 2014, during Student's fourth grade year, Parent emailed Ms. Dibblee regarding Student's upcoming annual IEP meeting. Parent wrote, in pertinent part, as follows:

> There is an IEP meeting scheduled for November 5 and I would really like you to be there. I believe this is [Student's] three year re-evaluation meeting. [Student] has been struggling in school since kindergarten and I am very concerned about [his/her] lack of academic progress. It even seems like [s/he] has regressed in some areas such as math. Ms. [Nelson] works hard with [him/her] and each year [his/her] teacher puts a lot of effort towards helping [him/her] progress. Although[s/he] makes small gains here and there, it doesn't feel like enough and I know it's starting to affect [his/her] self-confidence and motivation. I have been looking into alternative schools because I am to a point where it seems that [Student's] challenges are too great for Atkinson's resources. Obviously, I would like [him/her] to succeed at Atkinson but it just may not be the best fit to meet

---

[2] Parents alleged in their complaint that this email was sent in October 2014, and argue the June 3, 2013 is a disputed fact. But, in responding to the Motion, Parents presented no evidence contravening the District's evidence (Ex. DM1, a photocopy of the email, from Mother, to Ms. Armendariz, "Sent: Thursday, June 06, 2013, 10:10 AM.") Parents do not challenge the authenticity of Ex. DM1 and do not dispute that Ms. Armendariz was the Principal of Atkinson during the 2012-2013 school year, but *not* the school's Principal in October 2014. Parents do not dispute that Ivonne Dibblee took over the position in July 2014. (Dibblee Aff.) Thus, despite Parents' contention, the date of this email is not a material fact in dispute. Moreover, that the District did not produce this document in response to Parents' request for production of "Student's educational records" does not create a disputed issue of fact regarding the timing of this email, nor does it impact the exhibit's admissibility into the record. *See* OAR 137-003-0580(8) (each party has the burden of producing evidence on any issue relevant to the motion as that party would have at the hearing).

> [his/her] needs. I really would like to come away from this IEP meeting being clear about whether Atkinson can meet [Student's] needs. I want to say again that my feelings in no way reflect the effort given by [his/her] teachers. I know that Ms. [Nelson] has been doing everything she can to help [Student] and I know that each year, [his/her] teacher works very hard to help [Student] progress. I appreciate any support and hope you will be able to attend the meeting.

(Ex. DM2.)

8. On November 12, 2014, the District, through School Psychologist for the District Melanie van Witzenburg, issued a Prior Notice about Evaluation/Consent for Evaluation to Parent, proposing to reevaluate Student to determine Student's continued eligibility for special education services, as required by federal mandate.[3] The District proposed classroom observation of Student and review of Student's file, including review of Student Progress Monitoring data, and review and assessment of Student's scores on various tests, including the Behavior Rating Inventory of Executive Function (BRIEF), Wide Range Assessment of Memory and Learning 2 (WRAML-2), Wechsler Individual Achievement Test (WIAT), and Wechsler Intelligence Scale for Children IV (WISC IV). Parent received the Prior Notice/Consent for Evaluation form, and on November 19, 2014, signed the form consenting to the proposed evaluation procedures and evaluation. (Ex. DM3 at 22-24 to District's Motion.)

9. The BRIEF, WRAML-2, WIAT-III and WISC IV tests referenced in the Prior Notice/Consent for Evaluation form were administered to Student in the late fall of 2014 by Erika Doty, Psy.D., of Pediatric Psychology PC as part of a comprehensive psychological evaluation of Student. Dr. Doty saw Student between October 30, 2014 and December 1, 2014 "on referral from Park Academy in Lake Oswego, Oregon, for comprehensive psychological testing to help provide diagnostic clarification." (Ex. DM3 at 6.)

10. On November 20, 2014, the District convened an IEP meeting for Student's annual IEP review. The following individuals participated in the meeting: Janette Nelson, Student's special education teacher/provider; Amy Nunn, Student's regular education teacher; Ivonne Dibblee, Atkinson Elementary Principal; Melanie van Witzenburg, School Psychologist; and Parents. (Ex. DM4 at 1; Witzenburg Aff.) During the meeting, Ms. Nelson reviewed Student's history of referrals and special education services. Parents shared Student's vision therapy treatment and progress. Ms. Nunn summarized Student's reading and writing progress. Parents raised concerns about Student's academic process and noted that Student had a private evaluation in process. Parents agreed to share the evaluation results with the District. Parents mentioned during the meeting that they were "considering changing schools" for Student, and would "be making a decision in the Spring." (Ex. DM4 at 3, 15-16.)

11. As part of developing the November 20, 2014 IEP, the team determined that Student needed assistive technology devices or services. (Ex. DM4 at 2.) The team set goals and agreed to Student's special education services. (*Id.* at 6-10.) The services included

---

[3] Pursuant to 34 CFR §300.303(b)(2) and OAR 581-015-2105(4)(b)(B), a public education agency is required to reevaluate each child with a disability at least once every three years, unless the parent and agency agree that reevaluation is unnecessary.

removing Student from the regular classroom for 300 minutes per week for specially designed instruction in reading (150 minutes per week) and math (150 minutes per week), with certain modifications and accommodations on a daily basis, including preferential seating, a partner to work with, a computer writing program, and access to manipulatives in math. The team selected Student's placement during this meeting as well: general education with learning center support. (*Id.* at 10-11.)

12. On January 6, 2015, the District issued a Notice of Team Meeting, advising Parents of a scheduled meeting for January 14, 2015, for the federally mandated three-year eligibility review. The Notice indicated the meeting was to decide whether Student "continues to be eligible for special education" and to review Student's IEP and placement. (Ex. DM3 at 45.)

13. On January 9, 2015, Parent provided the District with a copy of Dr. Doty's Psychology Evaluation Report on Student. (Exs. DM3 at 6-20; DM5.)

14. On January 14, 2015, the District convened the three-year eligibility reevaluation and IEP review meeting. The following individuals participated in this meeting: Ms. Nelson; Ms. Nunn; Ms. van Witzenburg; and Parents. (Ex. DM3 at 32.) The team reviewed available data including Dr. Doty's Evaluation Report and the test results described therein, and agreed that Student continued to qualify for special education services in the area of Specific Learning Disability. (*Id.* at 26-27, 49; Ex. P3.) The team also reviewed Student's November 20, 2014 IEP and made few changes (adding 90 minutes per week of specially designed instruction in the area of writing and access to a student dictionary as a supplemental aid). (Ex. DM3 at 42; Ex. P4 at 23.) During this meeting, Parents advised that Student would be leaving Atkinson and begin attending the Park Academy in Lake Oswego beginning January 20, 2015. (*Id.* at 35, 49.)

15. At no time did Parents provide the District with written notice that they were rejecting the placement proposed in Student's November 20, 2014 IEP. (Cantwell Aff.)

16. On January 20, 2015, Student began attending Park Academy, a private school located within the boundaries of the Lake Oswego School District. (Complaint at 28.) Prior to removing Student from Atkinson (on January 16, 2015), Parents did not inform the District that they intended to enroll Student in private school at public expense. (Cantwell Aff.)

17. Student attended Park Academy during the 2015-2016 academic year at Parents' expense. (Complaint at 29-30.)

18. Student continues to attend Park Academy in the 2016-2017 academic year at Parent's expense. On November 1, 2016, a school psychologist in the Lake Oswego School District (LOSD) completed a Psychoeducational Report of Student to be used by the LOSD to determine what, if any, services Student would receive under an individualized service plan (ISP) as a student attending private school within the LOSD boundaries. Thereafter, the LOSD convened an eligibility meeting to determine Student's eligibility for an ISP. The LOSD found Student eligible under the category of Specific Learning Disability. (Complaint at 30-31.)

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact in dispute. The District is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Parent's claim for denial of FAPE based on the alleged failure to provide an appropriate district representative at Student's November 20, 2014 IEP meeting should be dismissed as untimely pursuant to OAR 581-015-2345(3). Parent's claim for denial of FAPE based on the alleged failure to provide an appropriate district representative at the January 14, 2015 meeting should be dismissed for failure to state a claim and/or as harmless error.

3. Parent's claim based on the alleged failure to properly evaluate Student during the 2014-2015 academic year should be dismissed as untimely pursuant to OAR 581-015-2345(3).

4. Parent's claim based on the alleged failure to provide Student a FAPE during the 2014-2015 academic year should be dismissed for failure to state an actionable claim.

5. Parent's claim based on the alleged failure to provide Student with appropriate placement during the 2014-2015 academic year should be dismissed as untimely.

6. Parent's claims alleging a failure to evaluate Student, provide FAPE, and/or provide an educational placement during the 2015-2016 and 2016-2017 academic years (after Parents withdrew Student from the District to attend the Park Academy in Lake Oswego) should be dismissed as a matter of law pursuant to OAR 581-015-2085.

7. Parent's claim for reimbursement for unilateral placement of Student at Park Academy should be dismissed for failure to state an actionable violation of the IDEA.

OPINION

1. *Summary Determination Standard*

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

As noted above, summary determination in the District's favor is appropriate if the record, viewed in a light most favorable to the non-moving party, shows there is no genuine issue of material fact relevant to the resolution of the determinative legal issue. For the reasons discussed below, I find there are no material facts in dispute relevant to resolution of the determinative legal issues. The District is entitled to a favorable ruling as a matter of law on the dismissal of all claims in the due process complaint.

2. *Alleged failure to provide an appropriate district representative at Student's IEP meetings during the 2014-2015 academic year.*

a. <u>November 20, 2014 IEP meeting</u>

In the complaint, Parent alleges as a procedural violation, that "no appropriate district representative with the requisite knowledge of district resources and programs attended the November 20, 2014 IEP meeting or the January 14, 2015 review meeting" (Complaint at 20), and assert that this violation denied Student educational opportunity. In the Motion, the District argued that, as to the November 20, 2014 meeting, Parent's claim is barred by IDEA's two year limitations period and OAR 581-015-2345(3)(a).

The IDEA's two year statute of limitations is codified in two different provisions, 20 USC §1415(b)(6)(b) and 20 USC §1415(f)(3)(C). Section 1415(f)(3)(C) requires the parent or agency to request a due process hearing within two years "of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." Just recently, in *Avila v. Spokane School Dist. 81,* __ F3d __, 117 LRP 11515 (9th Cir. 2017), the court held that Congress did not intend the IDEA's statute of limitations to be governed by a strict occurrence rule, but rather by the discovery rule, *i.e.,* the date the parent or agency discovers the alleged misconduct forms the basis of the complaint.

In Oregon, OAR 581-015-2345(3) sets out the time limitation for due process complaints as follows:[4]

---

[4] 34 CFR § 300.507(a)(2) similarly provides:

(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.

Here, Parent does not allege she was prevented from requesting the hearing due to any misrepresentation from the District or due to the District's withholding of information. Therefore, the two year timeline set out in subparagraph (3)(a) is applicable.[5] Parent filed the Complaint herein on January 13, 2017, more than two years after the November 20, 2014 IEP meeting. Under the plain language of OAR 581-015-2345(3)(a) (even read in light of the Ninth Circuit's recent determination in *Avila*), Parent's procedural claim as to this particular meeting is time-barred, as Parent attended the meeting, and therefore discovered the alleged act or omission (the failure to have an appropriate district representative attend) on November 20, 2014, more than two years prior to January 13, 2017.

b. <u>January 14, 2015 reevaluation and IEP meeting</u>

As noted above, Parent also alleges that that the District failed to have an appropriate district representative attend the January 14, 2015 review meeting, the date of which falls within the two year limitations period.

In the Motion, the District argues it is undisputed that Ms. van Witzenburg, District Psychologist, attended the January 14, 2015 IEP meeting, and that she satisfied the District's obligation to have a district representative present. The District further argues that, even if Parent established a procedural violation with regard to the composition of the IEP team at the January 14, 2015 meeting, it was harmless error because the team's composition that day did not

---

The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section.

The exceptions in 34 CFR § 300.511(f) are the same as stated in OAR 581-015-2345(3)(b).

[5] Parents apparently acknowledge as much. In the Complaint at ¶ 175, Parents allege as follows: "This Due Process Complaint makes claims for the period after January 13, 2015, which is within the two-year statute of limitations period. Any references to occurrences before January 13, 2015, are for historical and background information only." (Complaint at 19.)

result in any loss of educational opportunity to Student, because Student withdrew from the District just two days later to attend the Park Academy.

In responding to the Motion, Parent does not dispute that Ms. van Witzenburg attended the meeting. Rather, Parent argues that it remains question of material fact whether Ms. van Witzenburg was qualified to serve as the district representative at the meeting. Parent further asserts that the absence of a qualified district representative at the meeting denied Student an educational opportunity and Parent the opportunity to meaningfully participate in Student's education. Parent argues that "alternative options outside of Atkinson Elementary were beyond the knowledge and ability of those in attendance at the IEP meetings to discuss or to commit resources." (Response at 16.)

Pursuant to OAR 581-015-2210, a District must ensure that an IEP team includes certain participants, including:

> A representative of the school district, who may also be another member of the team, who is:
>
> (A) Qualified to provide, or supervise the provision of, specially designed instruction;
> (B) Knowledgeable about the general education curriculum;
> (C) Knowledgeable about district resources; and
> (D) Authorized to commit district resources and ensure that services set out in the IEP will be provided.

OAR 581-015-2201(1)(e); *see also* 34 CFR § 300.321(a)(4).

First, in the Complaint, Parent did not allege that Ms. van Witzenburg, a District Psychologist and IEP team member who issued the District's November 2014 Consent for Evaluation, lacked the qualifications to serve as the District representative at the January 14, 2015 meeting. Second, the District is entitled to a favorable ruling on this claim as a matter of law because Parent has alleged no facts to support a finding that Student suffered any loss of educational opportunity as a result of any act or omission of the District at the January 14, 2015 meeting. As both parties note in their briefs, harmless procedural errors do not constitute a denial of FAPE. Only those procedural inadequacies that result in "the loss of educational opportunity * * *, or seriously infringe the parents' opportunity to participate in the IEP formulation process" result in a denial of FAPE. *W.G. v. Board of Trustees of Target Range School Dist.*, 960 F2d 1479 (9th Cir. 1992); *see also Amanda J v. Clark County Sch. Dist.,*267 F3d 877. 891-92 (9th Cir. 2001); *R.B. v. Napa Valley Unified Sch. Dist.,* 496 F3d 932, 938 (9th Cir. 2007 (holding a district's procedural violation in the composition of student's IEP team to be a harmless error).

As set out in the findings above, by late October 2014, Parent was considering alternative schools for Student. It is undisputed that, at the January 14, 2015 meeting, Parent notified the other IEP team members that Student would be leaving the District for Park Academy the

following week.[6] Student then withdrew from Atkinson two days later, on January 16, 2015, and began attending Park Academy on January 20, 2015.[7] Furthermore, in the Complaint, Parent did not allege any way in which the composition of Student's IEP team at the January 14, 2015 meeting adversely affected Parent's participation in the IEP formulation process or Student's education in general in the two days that followed the meeting.

Because the Complaint contains no allegations in this regard, it is undisputed that at the time of the January 14, 2015 meeting Parent had already decided to change Student's school, and Student in fact left the District just two days later, Parent's procedural violation claim fails as a matter of law. In other words, even assuming the District failed to have an appropriate District representative at this meeting, the violation was harmless in light of the circumstances.

3. *Alleged failure to properly evaluate Student during the 2014-2015 academic year.*

In the Complaint, as Substantive Violation 1,[8] Parent alleges that the District failed to evaluate Student in all areas of suspected disability during the 2014-2015 academic year. Specifically, Parent alleges the District failed to conduct an occupational therapy evaluation or an executive functioning evaluation as part of Student's January 2015 reevaluation. (Complaint at 21-23.)

a. Occupational therapy evaluation

In the Motion, the District argues that this claim is time-barred as Parent last requested an occupational therapy (OT) evaluation for Student on June 2013, one and a half years before the start of the two year limitation period (January 13, 2015 to January 13, 2017). The District further argues that the November 12, 2014 Consent for Evaluation form did not request Parent consent for an OT evaluation, which consent the District would have been required to conduct the evaluation. The District therefore contends that at least by November 2014 Parent knew or should have known that the District was not going to conduct an OT evaluation, and she discovered the alleged omission giving rise to the claim (*i.e.,* the failure to conduct an OT evaluation) more than two years before the date she filed the due process complaint.

Parent, in response, contends that the claim is not barred by the two-year limitations period because the District was on notice of Parent's request for an OT evaluation during the statutory period yet still failed to evaluate Student during that period despite the request and the District's knowledge of Student's suspected disability.

---

[6] In the Complaint, at page 28, Parents allege "pp. On January 14, 2015, Student was accepted to Park Academy. * * * ww. On January 20, 2015, Student began attending Park Academy." (Complaint at 28.)

[7] Monday, January 19, 2015 was a holiday, Martin Luther King Day.

[8] Although Parents characterize this as a substantive violation, case law indicates that the failure to evaluate a child for all areas of suspected disability is a procedural violation of the IDEA. *See, e.g., Timothy O. v. Paso Robles School Dist.,* 822 F3d 1105 (9th Cir. 2016); *N.B. and C.B. v. Hellgate Elementary School District,* 541 F3d 1202 (9th Cir. 2008) (holding that a district's failure to meet its obligation to evaluate a student in all areas of suspected disability was a procedural error that denied the student a FAPE).

As noted above, OAR 581-0156-2345(3) sets a two year limitation period based on the date of the act or omission that gives rise to the claim. Yet, just recently, in *Avila v. Spokane School Dist.,* the Ninth Circuit held that Congress did not intend the IDEA's statute of limitations to be governed by a strict occurrence rule, but rather by the discovery rule. Therefore, construing OAR 581-0156-2345(3) in light of *Avila*, Parent's failure to evaluate claim is barred if filed more than two years from the date Parent knew or should have known of the District's failure to conduct an OT evaluation on Student.

Parent requested an OT evaluation for Student in June 2013, but no evaluation was conducted. Thus, since that time (a year and a half before the start of the two year limitations period) Parent knew or should have known of the District's failure to act. To the extent Parent contends that the District had an obligation to conduct an OT evaluation of Student as part of Student's three-year reevaluation independent of Parent's June 2013 request,[9] Parent still knew as of mid-November 2014 that the District did not intend to conduct such an evaluation in connection with Student's January 2015 eligibility evaluation and IEP review. Parent therefore discovered the District's omission well before the start of the two year limitation period. Consequently, as a matter of law, this claim is untimely.

Moreover, even if this claim was timely, as a procedural violation, Parent would have to show that Student suffered a loss of educational opportunity as a result of the District's failure to conduct an OT evaluation. Considering the timing, *i.e.,* the fact that Student left the District only two days later, such a showing is not possible.

b. <u>Executive functioning evaluation</u>

The District argues that the claim is also untimely with regard to the executive functioning evaluation and, alternatively, that it assessed Student's executive function as part of the January 2015 reevaluation. On the latter point, the District asserts that the IEP team reviewed Dr. Doty's evaluation results and Student's scores on the BRIEF and WRAML-2 tests, which are designed to evaluate executive function. Additionally, the District contends that any alleged deficiency in Student's reevaluation could not have resulted in a loss of educational opportunity—a showing necessary to establish a denial of FAPE—because Parent unilaterally placed Student in private school just days after the January 2015 reevaluation and IEP review

---

[9] As noted previously, pursuant to OAR 137-003-0580(8), each party has the burden of producing evidence on any issue relevant to the motion as that party would have at the hearing. In responding to the Motion, Parent argues that it is the school district, and not the parent, who has the training and educational sophistication to know when and/or how to evaluate a child for special education and related services. But Parent did not allege or present evidence to support the contention that the District had reason to believe it necessary to conduct an OT evaluation of Student as part of Student's three-year reevaluation independent from Parent's request. Parent further argues the fact that she consented to the evaluations proposed by the District did not mean she waived her right to challenge the District's failure to evaluate Student in other areas of suspected disability. Parent did not waive her right to challenge the District's alleged failure evaluate in all areas of disability to by consenting to certain evaluations. Rather, she waived her right to challenge the District's alleged omission by not filing her claim within two years of the date she knew or should have known of the omission.

meeting.

For the reasons discussed above, Parent's claim that the District failed to conduct an executive function evaluation of Student is also time-barred. As of mid-November 2014, upon receipt of the Consent for Evaluation, Parent knew the evaluation procedures, assessments and tests to be used for Student's January 2015 reevaluation. Parent did not file the Complaint until January 13, 2017, more than two years later.

Furthermore, as explained below, even if this claim was timely, the District would still be entitled to a favorable ruling as a matter of law due to the failure to plead facts to support a finding of loss of educational opportunity and/or harmless error. Parent does not dispute that Dr. Doty evaluated Student's executive functioning skills as part of her comprehensive psychological evaluation of Student, that Parent shared the evaluation results with the District, and that the IEP team reviewed the results at the January 14, 2015 meeting. (Response at 23.) Parent nevertheless contends that Dr. Doty's evaluation did not relieve the District of its own obligation to evaluate Student's executive functioning skills, especially in light of the fact the IEP team did not incorporate any of Dr. Doty's recommendations into Student's IEP at the January 15, 2015 meeting. (*Id.* at 23-24.)

The District responds to this latter argument by noting that, under *Timothy O. v. Paso Robles Unified School Dist.,* 822 F3d 1105, 1122-26 (9th Cir. 2016), a District may rely on an outside evaluation as long as certain criteria are met.[10] The District argues that Parent signed the Consent for Evaluation form, she was aware of and consented to the District relying on Dr. Doty's evaluation, the evaluation results were actually considered by the IEP team and Dr. Doty's evaluation was conducted for the particular purpose of assessing Student's individual educational needs. Therefore, the District reasons, all of the *Timothy O.* criteria were satisfied in this case.

Even assuming Parent is correct and the District improperly relied on Dr. Doty's evaluation and assessment at the January 14, 2015 meeting, the District's error was harmless because Parent has not pleaded any facts to support her claim that the District's alleged failure to evaluate Student's executive function resulted in a loss of educational opportunity. As discussed above, Parent withdrew Student from the District just two days after the January 14, 2015 meeting and unilaterally placed Student at the Park Academy the following week. In the absence of any allegations as to the loss of educational opportunity over those two days, the District is entitled to a ruling in its favor.

4. *Alleged failure to provide Student a FAPE during the 2014-2015 academic year.*

In the Complaint, Parent alleges as Substantive Violation 2 that the District failed to meet

[10] The outside evaluation must be conducted and considered in a manner that complies with the IDEA, with the following procedural safeguards: (1) the school district inform the parents of its intention to rely on the outside evaluation; (2) the IEP team actually consider the outside evaluation in developing the IEP; and (3) the evaluation be conducted explicitly for the purpose of determining the student's individual educational needs or whether the student qualifies for special education under the IDEA. 822 F3d at 1122-26.

Student's educational needs during the 2014-2015 academic year, which denied Student a FAPE. (Complaint at 29.) Parent also notes, and confirms in her Response, that the Complaint only makes claims "for the period after January 13, 2015, which is within the two-year statute of limitations period." (*Id.* at 19; Response at 25.)

As the District notes in the Motion, the IEP team reviewed Student's IEP on January 14, 2015 and Parent removed Student from the District on January 16, 2015. In light of these events, Parent's denial of FAPE claim is limited in time to a two day period (January 15 and 16, 2015). Yet, as noted above, Parent has not alleged any facts to support a finding that the District denied Student a FAPE during those two days.

It is undisputed that at the January 14, 2015 meeting the IEP team reviewed Student's IEP and made revisions (including adding 90 minutes per week of specially designed instruction in writing). It is undisputed that Parent announced during the meeting Student would be leaving the District and starting at the Park Academy the following week. On this record, Parent has not stated an actionable claim for a denial of FAPE for the 2014-2015 school year, and the District is entitled to a favorable ruling on this issue as a matter of law.

5. *Alleged failure to provide Student with appropriate placement during the 2014-2015 academic year.*

Parent also alleges, as Substantive Violation 3, that the District failed to provide an appropriate placement for Student during the 2014-2015 academic year. (Complaint at 29.)

In the Motion, the District argues that this claim is time-barred because the IEP team did not make a placement decision within the two-year limitations period. The District notes that Student's placement was determined at the November 20, 2014 IEP meeting, which falls outside the two year period, and that Parent did not object to the placement decision or seek reconsideration of the determination during the January 14, 2015 meeting. The District also argues, as above, that because Parent unilaterally enrolled Student in private school just days after the January 14, 2015 meeting, any decision made at the January 14, 2015 meeting could not have resulted in a denial of FAPE and is therefore not actionable.

In response, Parent asserts that the claim is timely because Student's placement did not change at the January 2015 meeting and was therefore "still inappropriate during the statutory period." (Response at 28.) Parent further contends that she rejected this placement by way of removing Student from the District and placing Student at a private school only a few days later.

As noted above, under OAR 581-0156-2345(3) construed in light of *Avila*, claims are time-barred unless filed within two years of the date the parent discovered or should have known of the act or omission giving rise to the request for hearing. Thus, despite Parent's argument, it is immaterial that the placement did not change at the January 2015 meeting and was "still inappropriate" during the statutory period.[11] What is important, under *Avila*, is the discovery

[11] There is no evidence that Parent requested the IEP team reconsider the placement determination at the January 14, 2015 meeting, or that the District was obligated to reconsider Student's placement in the

date. And in this case, there is no dispute that Parent attended the November 20, 2014 IEP meeting, and was therefore aware of Student's placement determination for the 2014-2015 academic year more than two years before she filed the Complaint. As a matter of law this claim is untimely.

6. *Alleged ongoing denial of FAPE after Parents withdrew Student from the District in January 2015 to attend the Park Academy in Lake Oswego.*

In the Complaint, as Substantive Violations 4 through 9, Parent alleges that the District failed to evaluate Student in all areas of suspected disability during the 2015-2016 and 2016-2017 school years, failed to provide Student a FAPE during the 2015-2016 and 2016-2017 school years, and failed to provide Student with an appropriate placement during the 2015-2016 and 2016-2017 school years. (Complaint at 29-32.)

In the Motion, the District contends that these claims fail as a matter of law because once Parent unilaterally enrolled Student in a private school outside of the District's service boundaries on January 20, 2015, the District had no obligation to evaluate Student, provide FAPE, make a placement determination or provide an appropriate placement for Student.

In responding to the Motion, Parent does not dispute that Student enrolled in a private school outside of the District's service boundaries (within the boundaries of the Lake Oswego School District), and that the Lake Oswego School District then began providing Student's special education services. Rather, Parent argues that the claims for the 2015-2016 and 2016-2017 years are "continuing violation claims" based on the District's alleged failure to meet Student's needs in January 2015. (Response at 29-30.)

Parent's response does not raise any disputed issue of material fact. Consequently, the District is entitled to a favorable ruling as a matter of law on Parent's claims arising out of the 2015-2016 and 2016-2017 academic years. The District was not legally obligated to provide special education services to Student after January 16, 2015. Once Student left the District and became a parentally-placed private school child with a disability pursuant to 34 CFR §300.130, responsibility for Student's special education shifted to the Lake Oswego School District pursuant to OAR 581-015-2085.[12]

///

---

context of the reevaluation meeting. Without any obligation to reconsider placement at the January 14, 2015 meeting, no new act or omission occurred to give rise to a claim.

[12] As pertinent here, OAR 581-015-2085(1) provides:

> Each school district must locate, identify and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary and secondary schools located within the boundaries of the school district.

7. *Parent's claim for reimbursement for unilateral placement of Student at Park Academy.*

In the Complaint, Parent seeks as a remedy, among other things, reimbursement for tuition and fees paid to Park Academy for Student's enrollment and attendance. (Complaint at 33.) In the Motion, the District contends that, as a matter of law, Parent is precluded from receiving tuition reimbursement for the unilateral placement of Student in private school because (in addition to failing to state a claim for denial of FAPE) Parent failed to comply with the IDEA's notice provisions before removing Student from the District.

Parent asserts that it is a disputed question of fact whether she gave proper notice, and that even if she did not do so, the failure to give notice as required does not necessarily preclude reimbursement as a remedy because the statute is permissive, and the ALJ has discretion to grant relief as appropriate. (Response at 33.)

As a general rule, if a district fails to provide a FAPE to a child with a disability and the parents enroll the child in a private school without the consent of or referral by the district, the district may be required to reimburse the parents for the cost of that private school enrollment. 20 U.S.C. §1412(a)(10)(C)(ii) and OAR 581-015-2515(3). Pursuant to 20 U.S.C. §1412(a)(10)(C)(iii)[13] and OAR 581-015-2515(4),[14] a school district's liability for cost of

---

[13] 20 U.S.C. §1412(a)(10)(C)(iii) states:

> (iii) Limitation on reimbursement The cost of reimbursement described in clause (ii) may be reduced or denied—
> (I) if—
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

[14] OAR 581-015-2515(4) similarly states as follows:

> (4) The cost of reimbursement described in paragraph (3) of this section may be reduced or denied if:
>
> (a) At the most recent IEP or IFSP meeting that the parents attended before removal of the child from the public school or ECSE program, the parents did not inform the IEP or IFSP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (b) At least ten business days (including any holidays that occur on a business day) before the removal of the child from the public school or ECSE program, the parents did

reimbursement for a private school placement may be reduced or denied if: (a) at the most recent IEP meeting, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (b) the parents fail to give the district at least 10 days written notice before removing the child from public school of their intent to enroll the child in private school at public expense. Pursuant to 20 U.S.C. §1412(a)(10)(c)(iii)(III) and OAR 581-015-2515(5)(b), the cost of reimbursement may also be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents."

Here, based on the determinations set out above, Parent has failed to state an actionable claim under the IDEA for the days Student remained enrolled in the District (January 13 -16, 2015) during the two-year limitations period. Because the District is entitled to a favorable ruling dismissing Parent's claims alleging a denial of FAPE, it need not be decided whether, as a matter of law, Parent's failure to comply with the IDEA's 10 day notice requirement precludes an award of tuition reimbursement.[15] In the absence of a viable and timely claim against the District, Parent is not entitled to tuition reimbursement for the unilateral placement of Student at Park Academy.

RULING AND ORDER

The District's Motion for Summary Determination is GRANTED.

Parent's Request for Due Process Hearing filed January 13, 2017 (DP-17-101) is DISMISSED.

Alison Greene Webster
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. §

---

not give written notice to the public agency of the information described in paragraph (4)(a) of this rule.

[15] In *West-Linn Wilsonville School Dist. v. Student,* 63 IDELR 251 (D Or 2014), the court, noting that "constructive notice is simply not sufficient," denied reimbursement when the parents failed to comply with the 10 day notice requirement. In this case, there is no dispute that Parents failed to strictly comply with the IDEA's requirement. While the timing and form of Parent's notice of intent to enroll Student in private school may be in question (*i.e.*, whether it was on January 14, 2015 or earlier and whether this notice was written or verbal), it is undisputed that Parent failed to timely notify the District of the intention to enroll Student in private school *at public expense*.

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 3rd day of May, 2017, with copies mailed to:

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

CERTIFICATE OF MAILING

On May 3, 2017 I mailed the foregoing **RULING ON DISTRICT'S MOTION FOR SUMMARY DETERMINATION AND FINAL ORDER** in OAH Case No. 2017-ABC-00259 to the following parties**.**

By: First Class Mail

Parent(s) of Student
6208 SE Stephens St.
Portland OR 97215

Elizabeth Polay, Attorney at Law
Wiscarson Law PC
3330 NW Yeon Ave Ste 240
Portland OR 97210

Diane Wiscarson, Attorney at Law
Wiscarson Law PC
3330 NW Yeon Ave, Ste 240
Portland OR 97210

Bob McKean, Superintendent
Portland School District 1J
PO Box 3107
Portland OR 97208

Taylor Richman, Attorney at Law
3400 US Bancorp Tower
111 SW Fifth Ave
Portland OR 97204

Mike Porter, Attorney at Law
3400 Us Bancorp Tower
111 SW Fifth Ave.
Portland OR 97204

BY ELECTRONIC MAIL:

Mike Franklin, Legal Specialist
Department of Education
255 Capitol Street NE
Salem, OR 97310-0203

Alesia K Vella
Hearing Coordinator
Office of Administrative Hearings