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**
STUDENT AND GREATER ALBANY PUBLIC SCHOOL DISTRICT 8J	)	**FINAL ORDER**
	)	OAH Case No. 2020-ABC-03785
	)	Agency Case No. DP-108

HISTORY OF THE CASE

On May 26, 2020, Parent, on behalf of Student, filed a Request for Due Process Hearing (Original Complaint) 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, and violations of Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). The parties participated in a resolution session and did not participate in mediation.

On May 27, 2020, ODE referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Jessica E. Toth to conduct the due process hearing and issue a Final Order in this case. ALJ Toth presided over a telephone prehearing conference on June 30, 2020. Attorney Kimberly Sherman represented Parent and Student. Attorney Rich Cohn-Lee represented Greater Albany Public School District 8J (District). Parent participated in the conference. During the prehearing conference, the parties agreed the 45 day hearing timeline was not feasible. The ALJ granted Parent's request to waive the 45 day hearing timeline and to file an amended due process complaint. Ultimately, Parent filed both a First and Second Amended Complaint, with permission of the ALJ.

In a prehearing conference held on September 17, 2020, the District stated its intention to file prehearing motion(s). The ALJ established a prehearing motion timeline and identified March 19, 2021 as the date certain for issuance of a final order. With permission of the ALJ, Parent filed a Corrected Second Amended Complaint (Complaint) on September 21, 2020, which serves as the basis for the District's Motion for Summary Determination.

On November 16, 2020, in accordance with the established schedule, the District filed its Motion for Summary Determination with supporting documentation. On November 30, 2020, Parent filed a Response to District's Motion for Summary Determination and, on December 7, 2020, the District filed its Reply in Support of its Motion for Summary Determination.

Thereafter, the ALJ took the District's 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 that the District committed procedural violations of the Individuals with Disabilities Education Act (IDEA) by denying Parent participation (Claim A) must be dismissed as untimely under 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

3. Whether Parent's claim that the District failed to offer Student a free appropriate public education (FAPE) in violation of the IDEA when it failed to implement Student's IEP regarding behavior support plan and adult accommodations (Claim B.1) must be dismissed as untimely under 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

4. Whether Parent's claim that the District failed to offer Student a FAPE in violation of the IDEA when it failed to implement Student's IEP in accordance with a modified diploma plan (Claim B.2) must be dismissed as untimely under 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

5. Whether Parent's claim that the District discriminated against Student on the basis of disability in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) in terms of Retaliation: False Statements (Claim C.1) must be dismissed for failure to state a claim actionable under OAR 581-015-2395[1].

6. Whether Parent's claim that the District discriminated against Student on the basis of disability in violation of the ADA and Section 504 in terms of Retaliation: Grades (Claim C.2) must be dismissed for failure to state a claim actionable under OAR 581-015-2395.

7. Whether Parent's claim that the District discriminated against Student on the basis of disability in violation of the ADA and Section 504 in terms of Intentional Interference with Student's Civil Rights (Claim C.3) must be dismissed for failure to state a claim actionable under OAR 581-015-2395.

[1] OAR 581-015-2395 states, in pertinent part:

> The parent or guardian of a qualified student with a disability under Section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent will conduct a hearing.

UNDISPUTED FACTS[2]

1. Parents filed a due process complaint against the District on May 26, 2020, alleging violations of the IDEA, Section 504, and the ADA. (Original Complaint at 43.)

2. Student received special education and related services through an Individualized Education Program (IEP) as a public school student, including the time period during which Student was enrolled within the District. (Complaint at 3.)

3. Parent and Student moved within the jurisdictional boundaries of the District in the summer of 2015. (Complaint at 5.)

4. Student enrolled in the District as a 9th grade student on September 9, 2015. (Complaint at 1.)

5. On June 8, 2015, the District held an IEP meeting to review and revise Student's IEP upon transfer from another school district into the District. Parents participated in the June 8, 2015 IEP meeting. (Complaint at 6.)

6. During the June 8, 2015 IEP meeting, the District refused to adopt Student's prior IEP service of a one-to-one aide. (Complaint at 6.)

7. On September 22, 2015, the District held another IEP meeting. Parent also participated in the September 22, 2015 IEP meeting. (Complaint at 7.)

8. During the September 22, 2015 IEP meeting, the District again did not offer one-to-one aide service. (Complaint at 7.)

9. On October 18, 2015, Parent emailed the District with concerns about the accommodations and assistance being provided to Student. (Complaint at 34.)

10. On January 25, 2016, the District held an IEP meeting. Parent participated in the January 25, 2016 IEP meeting. (Supporting Exhibit 4.) The January 25, 2016 IEP did not include a Behavior Support Plan (BSP). The IEP reflected a change in Student's graduation plan to Modified Diploma track. (Complaint at 8.)

11. During the January 25, 2016 IEP meeting, Parent expressed concerns that the District did not offer adult one-to-one assistance and was not implementing Student's accommodations and supports. (Supporting Exhibits 4, 6).

12. On April 21, 2016, Student called Parent from school, very distressed about how a teacher had responded when Student accidentally spilled coffee. (Complaint at 8, 9.) On that

[2] The ALJ relied on the facts as alleged by Parent in the Complaint and, where noted, the exhibits offered by the District in support of its Motion. Parent did not object to the District's exhibits or dispute the District's recitation of facts in the Motion. *See* Parent's Response at 5.

same date, Parent emailed the District to express her frustration that Student's BSP was not being followed, that staff appeared to lack adequate training in working with students with autism, and that staff and students were bullying Student. (Complaint at 9; Supporting Exhibit 4.)

13. On multiple occasions, Parent asked for an explanation to Student's grades and academic progress, making these requests "at IEP team meetings (January 25, 2016) and via emails to Mr. Horn (October 18, 2015) and Mr. Davisson (April 21, 2016), among other communications." (Complaint at 34; *see also* Supporting Exhibit 4.)

14. On April 22, 2016, Parent notified the District that Student would not return to the District because Parent had "serious concerns." (Complaint at 9; *see also* Supporting Exhibit 4.)

15. On May 3, 2016, Parent notified the District that she hired an attorney to address concerns, including alleged failures regarding the contents and implementation of Student's IEP. (Complaint at 9; Supporting Exhibit 4.)

16. On May 16, 2016, Parent filed a tort claim letter against the District alleging that the District failed to provide adequate educational support to Student and failed to implement Student's IEP. (Complaint at 11.)

17. On May 27, 2016, Parent sent to the District the remainder of Student's completed homework. (Complaint at 12; Supporting Exhibit 4.)

18. On May 31, 2016, Parent's attorney emailed the District and alleged that the District had failed to implement Student's IEP accommodations. (Complaint at 12; Supporting Exhibit 4.)

19. On June 1, 2016, Student disenrolled from the District. (Complaint at 12; Supporting Exhibit 4.)

20. District staff made entries to Student's electronic transcript until June 15, 2016. (Complaint at 27.) In October 2019, Parent discovered these entries pursuant to a public records request. (Complaint at 18.)

21. On October 8, 2016, Parent filed an Office of Civil Rights (OCR) complaint against the District, alleging that the District discriminated against Student by failing to implement the BSP, improperly modifying the BSP, improperly interacting with Student, and improperly computing Student's grades for the second semester of the 2015-2016 school year. (Complaint at 14.) In a decision issued January 27, 2020, OCR found insufficient evidence to support a conclusion that the District discriminated against Student in the manner alleged. (Supporting Exhibit 3.)

22. On June 6, 2020, Student graduated from high school. (Complaint at 1.)

23. Student's grade point average (GPA) at the time of graduation was insufficient to enable Student to qualify for an Oregon Promise Grant, a college tuition scholarship, which

required a minimum GPA of 2.5, and also made Student ineligible for admission to the local university nearest Student's home. (Complaint at 17, 32.)

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 that the District violated the IDEA by infringing on Parent's right to participate in development of Student's educational program (Claim A) must be dismissed as untimely pursuant to 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

3. Parent's claim that the District denied Student a FAPE based on the alleged failure to implement the BSP and adult support accommodation (Claim B.1) must be dismissed as untimely pursuant to 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

4. Parent's claim that the District denied Student a FAPE based on the alleged failure to implement Student's IEP in accordance with the modified diploma plan (Claim B.2) must be dismissed as untimely pursuant to 20 USC §1415(f)(3)(C) and OAR 581-015-2345(3).

5. Parent's claim of discrimination in violation of the ADA and Section 504 in the form of Retaliation: False Statements (Claim C.1) must be dismissed for failure to state a claim actionable under OAR 581-015-2395.

6. Parent's claim of discrimination in violation of the ADA and Section 504 in the form of Retaliation: Grades (Claim C.2) must be dismissed for failure to state a claim actionable under OAR 581-015-2395.

7. Parent's claim of discrimination in violation of the ADA and Section 504 in the form of Intentional Interference with Student's Civil Rights (Claim C.3) must be dismissed for failure to state a claim actionable under OAR 581-015-2395.

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.

Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal. *King v. Department of Public Safety Standards and Training*, 289 Or. App. 314, 321 (2017), *citing Hamlin v. PERB*, 273 Or App 796, 798 (2015). An ALJ may not grant a motion for summary determination simply because the weight of the evidence favors one party over the other. *Id*. at 322, *citing Watts v. Board of Nursing*, 282 Or App 705, 714 (2016) ("If there is evidence creating a relevant fact issue, then no matter how 'overwhelming' the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing."); *see also Staten v. Steel*, 222 Or App 17, 31, (2008), *rev den*, 345 Or 618 (2009) (stating that a court does not weigh the evidence on a motion for summary judgment.)

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, 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. Claims A, B.1 and B.2 are dismissed as untimely under OAR 581-015-2345(3) and Claims C.1, C.2, and C.3 are dismissed for failing to state a claim within the scope of OAR 581-015-2395(1).

2. *Claim A: Denial of Parent Participation*

In the Complaint under Claim A, Parent alleges that Student was denied a FAPE when District made changes to Student's electronic transcript between June 1, 2016 and June 15, 2016, the two weeks after Student transferred out of the District. Parent alleges that she did not know or have reason to know that the District made changes to Student's records until Parent received records on October 22, 2019, pursuant to a public records request.

The crux of Parent's claim appears to be that Parent was denied meaningful participation in the development of Student's IEP at some unspecified point or points in time after Student left the District, because Parent was unaware that the District made changes to Student's transcript between June 1, 2016 and June 15, 2016. In other words, Parent's participation in the IEP process thereafter was not meaningful because she was participating with outdated knowledge of Student's grades. (*See* Complaint at 30.)

a. *District's Position*

The District contends that Parent's claims are time-barred under the IDEA because Parent knew or should have known the facts underlying the claims more than two years prior to the filing of the May 26, 2020 Original Complaint. This contention has merit.

b. *IDEA Statute of Limitations and the Avila Discovery Rule*

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." In *Avila v. Spokane School Dist. 81*, 852 F3d 936 (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:[3]

> (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

[3] 34 CFR § 300.507(a)(2) similarly provides:

> 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).

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.

Relying primarily on the discovery rule laid out in *Avila*, the District notes that that the Ninth Circuit recently provided further clarification of the rule in *J.K. v. Missoula County Public Schools*, 71 IDELR 181 at 2 (9th Cir. 2018) ("this standard requires only that a parent become aware of a school district's actions or inactions, *not* that a parent become aware of a legal theory or claim or that the actions of the school district were even wrong." (Motion at 6.)

c. *Parent's Response*

Parent, in the Response, does not attempt to deny the events cited by the District as evidence that she knew or should have known of the facts forming the basis of the Complaint in 2016. Rather, Parent contends that either an exception to the two-year statute of limitations applies based on equitable tolling, or in the alternative that the evidence shows merely that Parent "requested proof of [IEP] implementation," which did not amount to an event proving that she 'knew or should have known' of an alleged denial of a FAPE. (Response at 7.)

Proper Standard of Review and Availability of Equitable Tolling

Parent states that the District's Motion is "also referred to as a motion for summary judgment," and cites the Motion at page three. (Response at 2.) This is an inaccurate characterization of the District's filing. In the Motion at page three, the District correctly terms its Motion as "a motion for summary determination." (Motion at 3.) The distinction is an important one in that these two different types of motions are governed by different procedural rules and standards.

Parent incorrectly cites to the Federal Rules of Civil Procedure as the framework within which the Motion must be analyzed. (Response at 2.) The Federal Rules of Civil Procedure are inapplicable in this proceeding. Pursuant to OAR 581-015-2340, the applicable procedural rules for due process hearings are the Department of Justice's model rules for administrative hearings, OAR 137-003-0501 through 137-003-0700. And, for purposes of analyzing the District's Motion, the pertinent rules are OAR 581-015-2345 and OAR 581-015-2395 (hearing request and response) and OAR 137-003-0580 (motions for summary determination). The Complaint was filed under OAR 581-015-2345 pursuant to 20 U.S.C. §1415(b)(6). (Complaint at 4.)

Application of the correct standard of review impacts Parent's position particularly because Parent attempts to employ an "equitable tolling" exception to the statute of limitations. (Response at 5, 6.) Parent provides no support for the proposition that equitable tolling is an exception available under OAR 581-015-2345(3). Rather, the case cited by Parent to support the equitable tolling exception is one brought under laws governing employment opportunity. *See Krushwitz v. Univ. of Cal*, No. C11-04676 LB (N.D. Cal. Nov. 5, 2012), citing *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002); *Santa Maria v. Pacific Bell*, 202 F.3d 1170 (9th Cir. 2000).

Parent puts forth no argument or explanation as to how the *Krushwitz* case or the cases it references should apply to the statute of limitations defined by OAR 581-015-2345(3). The ALJ declines to extend the holding of *Krushwitz* in that way, particularly because OAR 581-015-2345(3)(b) includes its own specific exceptions to the two-year statute of limitations. Recent case law at the district court level has explicitly held as such. *See Vandell v. Lake Washington School District*, 74 IDELR 6 at *6 (W.D. Wash. March 12, 2019).[4] It is not necessary or appropriate to look beyond the exceptions laid out in OAR 581-015-2345(3)(b) when determining whether a special education claim pursuant to 20 U.S.C. §1415(b)(6) may be brought outside the two-year statute of limitations. Equitable tolling is not available to Student as an exception to the two-year statute of limitations defined by the Complaint's filing date of May 26, 2020. Therefore, Claim A can have merit only if Parent did not know or have reason to know of the facts forming the basis of the claim prior to May 26, 2018.

Whether Parent Knew or Should Have Known Prior to the Statute of Limitations Period of Facts Forming the Basis of the Complaint

The facts as put forth in the Complaint squarely contradict Parent's claim that she did not know or have reason to know of any alleged improper grading undertaken by the District until October 22, 2019. The Complaint states, "*On October 8, 2016*, Parent filed a discrimination complaint against [the District and another school district] with the Office of Civil Rights (OCR). Parent alleged that [District] discriminated against Student when * * * Staff improperly computed Student's grades in second semester." (Complaint at 14 (emphasis added).) This fact in the Complaint establishes that by October 8, 2016, Parent knew or should have known of the facts forming the basis of Claim A – that the District allegedly engaged in improper activity with regard to Student's educational records in June 2016. October 8, 2016 is well outside the two-year statute of limitations established by the May 26, 2020 filing of the Complaint. No facts indicate that Parent was prevented from requesting the hearing in a timely manner due to misrepresentations of the District or withholding of information the District was required to provide. Therefore, as a matter of law, Claim A is untimely and must be dismissed.

3. *Claim B.1: Denial of FAPE by Failing to Implement BSP and Adult Support Accommodations*

In the Complaint under Claim B.1, Parent alleges that Student was denied a FAPE during the 2015-2016 school year when the District failed to implement the BSP and adult support accommodation. (Complaint at 33.) Parent contends that based on *Krushwitz*, equitable tolling should apply to Claim B.1. As noted above, *Krushwitz* does not address equitable tolling in a claim brought pursuant to the IDEA and OAR 581-015-2345, and the ALJ declines to apply the *Krushwitz* holding in this case.

[4] In *Vandell*, the parents argued that even if the exceptions to the statute of limitations were inapplicable, the court should apply equitable tolling or equitable estoppel to allow their claims to survive. The court, interpreting the State of Washington administrative rule equivalent to OAR 581-015-2345(3), held that the two exceptions to the IDEA's statute of limitations are exclusive and bar any common law or equitable tolling of the limitations period. The court noted that where there is an adequate remedy at law, the court cannot act in equity to apply equitable tolling or equitable estoppel to the statute of limitations.

Absent an exception under the doctrine of equitable tolling, Parent's remaining argument appears to be that she did not know, nor should she have known, of facts forming the basis of the Complaint, because Parent's actions in 2015 and 2016 of having "asked for evidence" and "requested proof of implementation" did not amount to knowing, or having reason to know, of the facts forming the basis of the claim. (Response at 7.) The facts, as alleged in the Complaint, belie this contention. The Complaint contains numerous examples of instances in 2015 and 2016 in which Parent did significantly more than simply ask or request proof of the District's activities. For example, the Complaint states that on October 18, 2015, Parent emailed the District with concerns about how the District was providing accommodations and supports to Student. During the January 25, 2016 IEP meeting, Parent again expressed concerns that the District was not offering adult assistance and allegedly not implementing Student's accommodations. (Supporting Exhibit 4).

Parent hired an attorney to address her concerns regarding Student's education and informed the District of that fact on May 3, 2016. According to Parent's own statement to the District, her concerns about Student's educational program and the way the District implemented it were so significant that she proactively removed Student from school as of April 22, 2016, and then shortly thereafter, from the District altogether. On May 16, 2016, Parent filed a tort claim letter alleging that the District failed to implement Student's IEP. (Complaint at 11.) On May 31, 2016, Parent's attorney emailed the District and "requested justification for failing to follow accommodations recorded on Student's IEP." (Complaint at 12.)

Perhaps most significantly, Parent filed an OCR complaint on October 8, 2016 alleging that the District failed to implement Student's BSP during the 2015-2016 school year. (Complaint at 14.) Short of filing a due process complaint, Parent in 2015 and 2016 took virtually every other step one could expect to see by a parent who knew or should have known that their child may have been experiencing a denial of a FAPE at the hands of the child's school district. Therefore, no genuine issue of material fact exists as to whether Claim B.1 is untimely. Parent knew or had reason to know of the facts alleged as the basis of Claim B.1 at the time of filing the OCR complaint on October 8, 2016, if not earlier. Consequently, as a matter of law, Claim B.1 is untimely and must be dismissed.

4. *Claim B.2: Denial of FAPE by Failing to Modify Coursework and Assessments in Accordance with Modified Diploma Choice*

In the Complaint under Claim B.2, Parent alleges that Student was denied a FAPE during the 2015-2016 school year when the District failed to modify his coursework and assessments. (Complaint at 37.) As above, Parent asserts that based on *Krushwitz*, equitable tolling should apply to Claim B.2. Also as noted above, *Krushwitz* does not address the question of whether equitable tolling is available to a petitioner in a claim brought pursuant to OAR 581-015-2345, and the ALJ declines to apply the *Krushwitz* holding in Student's case.

Absent an exception under the doctrine of equitable tolling, Parent's remaining argument appears to be that she did not know, nor should she have known, of facts forming the basis of Claim B.2, because Parents' actions in 2015 and 2016 of having "asked for evidence" and "requested proof of implementation" did not establish that Parent knew or should have known of

the facts forming the basis of the claim. (Response at 7.) According to the facts stated in the Complaint, "Parent asked repeatedly for an explanation to Student's grades and academic progress" and made the requests "at IEP team meetings (January 25, 2016) and via emails to Mr. Horn (October 18, 2015) and Mr. Davisson (April 21, 2016), among other communications." (Complaint at 34.) Additionally, on May 16, 2016, Parent filed a tort claim letter alleging that the District failed to implement Student's IEP. (Complaint at 11.) Further, on May 31, 2016, Parent's attorney emailed the District and "requested justification for failing to follow accommodations recorded on Student's IEP." (Complaint at 12.)

As discussed above, the *Avila* discovery rule does not require knowledge of a specific cause of action or specific legal violation. Rather, as clarified in *J.K. v. Missoula County Public Schools*, 71 IDELR 181 at 2 (9th Cir. 2018), the time period runs from the point at which the parent had knowledge of, or reason to know of, an action or failure to act on the part of the school district. Parent's repeated inquiries about explanations for Student's grades and academic progress is clear proof that Parent knew, or had reason to know, of the facts forming the basis of the claim that Student's IEP was not being implemented in terms of the modified diploma plan at least as of April 21, 2016. (Complaint at 34.) Therefore no genuine issue of material fact exists as to whether Claim B.2 is untimely. Parent knew or had reason to know of the facts alleged in support of Claim B.2 by the time Parent's attorney emailed the District on May 31, 2016, alleging failure to implement IEP accommodations, if not sooner. Consequently, as a matter of law, Claim B.2 is untimely and must be dismissed.

5. *Claim C.1: Discrimination in Violation of the ADA and Section 504 via Retaliation in the form of False Statements*

In the Complaint, Parent alleges that the District discriminated against Student based on disability, in violation of the ADA and Section 504, through retaliation in the form of false statements. (Complaint at 43.)

The Oregon Department of Education provides the opportunity for a parent or guardian to file a claim on behalf of a qualified student with a disability regarding some violations of Section 504. The types of claims that can be addressed through a hearing brought under Section 504 are detailed in OAR 581-015-2395(1), which states:

> The parent or guardian of a qualified student with a disability under Section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent will conduct a hearing.

The Complaint lacks any claim that the alleged "Retaliation: False Statements" made by the District in violation of Section 504 pertains in any way to the "identification, evaluation, provision of a free appropriate education, or education placement" of Student. Instead, the

Complaint argues that a Section 504 violation occurred in terms of Student's right to engage in the protected activity of receiving a fair investigation by the Office of Civil Rights. While this undoubtedly is a right guaranteed to Student, an administrative hearing in the area of special education due process – a hearing held under OAR 581-015-2395 – is not a forum available in which to bring such a claim. Thus, Claim C.1 falls outside the purview of OAR 581-015-2395 as a matter of law and must therefore be dismissed.

6. *Claim C.2: Discrimination in Violation of the ADA and Section 504 via Retaliation in the form of Grades*

In the Complaint under Claim C.2, Parent alleges that the District discriminated against Student based on disability, in violation of the ADA and Section 504, through retaliation in the form of "Grades." (Complaint at 46.) Student alleges that the "harm" caused by the District's retaliation in the form of grades was twofold: first, that Student did not graduate with Student's general education peers in June 2019, and second, that Student was not eligible to receive an Oregon Promise Grant, which is a scholarship for college tuition, due to Student's GPA. (Complaint at 49.)

Neither of the alleged harms to Student caused by the District's alleged actions regarding grade entries pertain to the "identification, evaluation, provision of a free appropriate education, or education placement" of Student, as required for a claim brought under OAR 581-015-2395. The Complaint makes no reference to Claim C.2 pertaining to the identification, evaluation, or education placement of Student, and the ALJ can identify no means by which those aspects of Student's educational program are implicated by the facts of the case. Therefore, Claim C.2 must be analyzed through the lens of whether it pertains to the provision of a FAPE to Student. Claim C.2 fails with respect to both types of harm alleged.

Regarding the fact that Student was unable to graduate with Student's general education peers in June 2019, neither the IDEA nor state special education law guarantee graduation at the same time as one's general education peers (i.e. to "graduate with one's class," as the Complaint describes it at page 49) as part of the provision of a FAPE to a special education student. This is particularly true for students whose educational program designates that the student is working toward a modified diploma, as Student was. (Complaint at 8; *see also* OAR 581-022-2010, defining "modified diploma").

Concerning the claim that Student was harmed by not being eligible to apply for an Oregon Promise Grant, neither the IDEA nor state special education law include receipt of, or even eligibility to apply for, post-secondary grants or scholarships as a necessary component of a FAPE to a child. As with Claim C.1, above, Claim C.2 falls outside the purview of OAR 581-015-2395 as a matter of law and must therefore be dismissed.

7. *Claim C.3: Discrimination in Violation of the ADA and Section 504 via Intentional Interference with Student's Civil Rights*

In the Complaint under Claim C.3, Parent alleges that the District discriminated against Student based on disability, in violation of the ADA and Section 504, through intentional

interference with Student's civil rights. (Complaint at 50.) As with Parent's other two claims under the ADA and Section 504, Claim C.3 does not pertain to the "identification, evaluation, provision of a free appropriate education, or education placement" of Student, as required for a claim brought under OAR 581-015-2395.

As with Claim C.1, in Claim C.3 the Complaint alleges that Student's "right to achieve appropriate determinations of civil rights violations" was violated by the District's alleged actions regarding Student's educational records and allegedly false statements made by a District employee as part of the OCR investigation undertaken on Student's behalf. (Complaint at 51.) While, as noted earlier, Student certainly had the right to thorough and fair investigation by the Office of Civil Rights, as would any student, a special education administrative due process hearing held under OAR 581-015-2395 does not offer an opportunity to revisit, or collaterally attack, the outcome of an OCR investigation, which is in essence what Parent attempts to do here. Thus, Claim C.3 lacks any genuine issue of material fact pertaining to a legal issue which can be raised under OAR 581-015-2395 and must therefore be dismissed, as a matter of law.

8. *Applicability of Minority Tolling Regarding Student's ADA and Section 504 Claims*

In the Response, Parent states that the ADA and Section 504 claims should have been tolled while Student was a minor. (Response at 10.) Because Student's claims under the ADA and Section 504 fall outside the realm of actionable claims brought under OAR 581-015-2395, for the reasons addressed above, it is not necessary to analyze the timeliness of the claims, and the ALJ declines to do so.

9. *Applicability of Continuing Violation Doctrine to Student's ADA and Section 504 Claims*

Similarly, Parent contends that the alleged violations of the ADA and Section 504 constitute continuing violations. (Response at 16.) The District, for its part, disputes that characterization. Again, because Parent's claims under the ADA and Section 504 fall outside the realm of actionable claims brought under OAR 581-015-2395, it is not necessary to analyze whether the claims represent continuing violations, and the ALJ declines to do so.

10. *FERPA Claim*

In the Motion, the District contends that Parent's claims under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g; 34 C.F.R. Part 99, must be dismissed as no private right of action exists under FERPA. (Motion at 13.) Parent, in the Response, contends that she did not claim any violation of FERPA in the Complaint. (Response at 12.)

The Complaint plainly contains the statement, "Plaintiff [Student] files this request for a due process hearing pursuant to * * * the Family Educational Rights and Privacy Act ('FERPA') 20 U.S.C. 1232g codified at 34 CFR Part 99." (Complaint at 4.) The U.S. Supreme Court has held that no private right of action exists against an educational institution for an alleged FERPA violation. *Gonzaga University v. Doe*, 536 U.S. 273 (U.S. 2002).

Aside from the invocation of FERPA in the introductory portion of the Complaint, Parent does not appear to meaningfully pursue that as a legal issue. However, based on the statement on page four of the Complaint, the District had reasonable grounds to raise an objection to a FERPA issue being alleged in the Complaint. Ultimately, because the Complaint is dismissed for failure to state a timely and/or viable claim under the IDEA and Section 504 in the context of OAR 518-015-2345 and OAR 581-015-2395, the ALJ declines to further analyze whether Parent improperly attempted to raise a FERPA claim.

RULING AND ORDER

The District's Motion for Summary Determination is GRANTED.

Parent's Request for Due Process Hearing filed May 26, 2020 (DP-108) is DISMISSED and all calendar dates associated with case number DP-108 are hereby vacated.

Jessica E. Toth
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. § 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 18th day of December 2020, with copies mailed to:

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

CERTIFICATE OF MAILING

On December 18, 2020, I mailed the foregoing RULING ON DISTRICT'S MOTION FOR SUMMARY DETERMINATION AND FINAL ORDER issued on this date in OAH Case No. 2020-ABC-03785**.**

BY: CERTIFIED MAIL:

Parent(s) of Student
2664 NW Laura Vista Drive
Albany OR 97321

Kim Sherman
Education, Environmental, & Estate Law Group, LLC
P.O. Box 728
Eugene OR 97440

Melissa Goff
Superintendent
Greater Albany Public School District 8J
718 7th Ave SW
Albany OR 97321

Rich Cohn-Lee
Attorney for School District
Hungerford Law Firm
P.O. Box 3010
Oregon City OR 97045

BY: ELECTRONIC MAIL:

Mike Franklin
Agency Representative
Department of Education
255 Capitol Street NE
Salem OR 97310

Anesia N Valihov
Hearing Coordinator