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STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EDC 02149

[redacted] by and through his parents [redacted] and [redacted] Petitioner, v. Chapel Hill-Carrboro Board of Education Respondent.	**FINAL DECISION**

This matter comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of Respondent Chapel Hill-Carrboro Board of Education's ("Board" or "CHCCS") Motion to Dismiss, and Notice of Insufficiency filed with the Office of Administrative Hearings ("OAH") on May 16, 2019, as well as Petitioner's response thereto filed with OAH on June 17, 2019. Respondent filed further rebuttal with OAH on June 24, 2019.

Respondent's Motions are filed pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, 26 NCAC 03.0115, and the Notice of Insufficiency pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(b)(6); 34 CFR 300.507(A)(1).

Rule 12(b)(1) requires the dismissal of a petition when there is a "[l]ack of jurisdiction over the subject matter." N.C. R. Civ. P. 12(b)(1). "Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 586, 725 S.E.2d 373, 377 (2012) (*citing McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)). It further "cannot be conferred by consent or waiver and a court cannot create it where it does not already exist." *Id.* (*citing Burgess v. Burgess*, 205 N.C. App. 325, 326–29, 698 S.E.2d 666, 668–69 (2010)).

In comparison, Rule 12(b)(6) tests the legal sufficiency of the allegations in the petition. *See, e.g*., *Skinner v. Reynolds*, 237 N.C. App. 150, 152, 764 S.E.2d 652, 655 (2014). The question is whether, as a matter of law, "the allegations state a claim for which relief may be granted." *Id.* Although a petition is viewed liberally in the petitioner's favor, a petition "must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Id.* (internal citations omitted).

Although the tribunal is required to treat all factual allegations as true when considering a motion to dismiss, an ALJ is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cumberland Cty. Hosp. Sys. v. N.C.*

HHS, 242 N.C. App. 524, 535, 776 S.E.2d 329, 337 (2015) (citing *Good Hope Hosp., Inc.*, *supra*).

Based upon the matters of record appropriate for consideration in disposing of the pending motions, the Undersigned makes the following mixed findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 23, 2018, Petitioners filed a Petition for a Contested Case Hearing against Respondent with the Office of Administrative Hearings ("OAH"), file number 18-EDC-00375. In that Petition, Petitioners alleged that Respondent failed to provide [redacted] with a free and appropriate public education ("FAPE") pursuant to the IDEA.

2. Respondent filed a Notice of Insufficiency of Petition on February 5, 2018. Presiding Administrative Law Judge Stacey Bawtinhimer found the Petition insufficient and granted Petitioner leave to amend the Petition within thirty (30) days of the February 6, 2018 Order of Insufficiency. Petitioner failed to amend, and the case was closed on April 17, 2018.

3. The current Petition for Contested Case Hearing was filed with OAH on April 15, 2019. Service was completed on April 30 by OAH. The Petition and April 30 Order were received in the office of the Superintendent of CHCCS on May 1, 2019. The Board submitted a Response to the Petition on May 10, 2019.

Partial Motion to Dismiss

4. Respondent contends that all claims prior to April 16, 2018 are barred by the one-year statute of limitations.

5. The IDEA allows states to specify their own statute of limitations for due process complaints. 20 U.S.C. § 1415(b)(6)(B). N.C. Gen. Stat. § 115C-109.6(b) establishes the North Carolina statute of limitations, stating "[n]otwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition." A cause of action under the IDEA arises when petitioners "knew of the facts that gave rise to th[e] injury, whether or not they knew they were actionable." *Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992). *See also D.C. v. Klein Indep. Sch. Dist.*, 711 F. Supp. 2d 739, 745 (S.D. Tex. 2010) (holding that plaintiffs "knew or should have known" of facts giving rise to action where plaintiffs attended meeting at which challenged IEP was developed).

6. The instant Petition raises allegations that could have been raised in the January 2018 Petition or an amendment to that petition but were not.

7. In the current petition, Petitioner alleges various violations of the IDEA that fall outside the North Carolina one-year statute of limitations, including the following:

a. Respondent violated its "Child Find" obligation under the IDEA when it failed to evaluate and identify [redacted] as a child with a disability as defined by the IDEA between February and May 2017;

b. Respondent failed to develop appropriate Individualized Education Programs ("IEP") on September 8, October 3, and December 18, 2017, and January 8, February 27, April 3, and April 9, 2018; and

c. Respondent failed to appropriately implement [redacted]s September, October, and December 2017 IEPs.

8. The Board denies Petitioners' allegations of IDEA violations and seeks dismissal of all claims arising from events outside North Carolina's one-year statute of limitations.

9. There are two narrow exceptions to the statute of limitations. North Carolina's one-year statute of limitations for IDEA claims "shall not apply to a parent if the parent was prevented from requesting the hearing due to (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the petition, or (2) the LEA's withholding of information from the parent that was required under State or federal law to be provided to the parent." N.C. Gen. Stat. § 115C-109.6(c). *See also* 20 U.S.C. § 1415(f)(3)(C),(D); 34 C.F.R. §300.511(e), (f).

10. To properly invoke an exception to the statute of limitations, a plaintiff must sufficiently allege and prove supporting facts. *See I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012). Petitioner bears the ultimate burden of proof as to the applicability of these exceptions to the statute of limitations. *See J.L. v. Ambridge Area Sch. Dist.*, No. 06-cv-1652, 2008 WL 2798306, at *10 (W.D. Pa. July 18, 2008) (applying *Schaffer v. Weast*, 546 U.S. 49 (2005)). *See also Swope v. Cent. York Sch. Dist.*, No. 1:10-CV-2541, 2012 WL 10583, at *3 (M.D. Pa. Jan. 3, 2012).

11. For the misrepresentation exception, petitioners "must show that the school intentionally misled them or knowingly deceived them regarding their child's progress." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 246 (3d Cir. 2012). To invoke this exception, petitioners must show the Board committed a misrepresentation "akin to intent, deceit, or egregious misstatement." *Abington*, 696 F.3d 233, 245; *Ms. S. v. Reg'l Sch. Unit 72*, No. 2:13-CV-453-JDL, 2015 WL 1486757, at *16 (D. Me. Mar. 31, 2015), *aff'd in part, vacated in part, remanded*, 829 F.3d 95 (1st Cir. 2016). Mere negligence by a school is not enough to justify this exception.

12. For the withholding exception, "only the failure to supply statutorily-mandated disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations." *Id.*

13. It is not enough to show that the school intentionally misrepresented or withheld information. In addition, a petitioner "must also show that the misrepresentations or withholding *caused* her failure to request a hearing or file a complaint on time." *Id.* (emphasis in original).

14. Where a petitioner alleges IDEA violations falling outside the applicable statute of limitations and does not invoke an exception, courts will dismiss the claims as time-barred. *See, e.g., T.P. ex rel T.P. v. Bryan Cty. Sch. Dist.*, 9 F. Supp. 3d 1397, 1401 (S.D. Ga. 2014), *vacated and remanded on other grounds*, 792 F.3d 1284 (11th Cir. 2015); *Hooker v. Dallas Indep. Sch. Dist.*, No. 3:09-CV-0676-G-BH, 2010 WL 4025776, at *11 (N.D. Tex. Sept. 13, 2010), *report and recommendation adopted*, No. 3:09-CV-0676-G-BH, 2010 WL 4024896 (N.D. Tex. Oct. 13, 2010).

15. In this contested case, Petitioners knew or should have known of the facts which formed the basis of the Petition when they occurred. The Petition is devoid of any allegation that Petitioners did not know of the actions forming the basis of their Petition. Neither have Petitioners invoked either exception to the one-year statute of limitations.

16. Corresponding to the allegations in the current petition as set forth in paragraph 7 above, Petitioners first asserted all claims regarding Child Find, and IEP development and implementation in their January 2018 Petition (18-EDC-00375), as follows:

a. Respondent "fail[ed] to identify [redacted] as a 'child with a disability' despite having sufficient information to do so;"

b. Respondent "fail[ed] to develop an IEP for [redacted] despite having sufficient information to know that, by reason his disabilities, [redacted] requires special education and related services to access the curriculum and to make appropriate educational progress;"

c. Respondent "fail[ed] to educate [redacted] in the Least Restrictive Environment in which [redacted] could be educated satisfactorily;"

d. Respondent "fail[ed] to provide the supplementary aids and services that, by reason of his disabilities, [redacted] requires in order to make appropriate progress as required by IDEA…;"

e. Respondent "fail[ed] to implement material elements of the IEP;"

f. Respondent "chang[ed] [redacted] IEP placement on the LRE continuum to a more restrictive environment without amending his IEP;" and

g. Respondent "remov[ed] [redacted] from the regular education setting for more than 10 days without convening an IEP team to establish an IEP for [redacted] or modify his existing IEP to address the unaddressed needs that caused Respondent to repeatedly remove [redacted] from the regular education setting and from school altogether."

17. Thus, Petitioners affirmatively declared their knowledge of the alleged facts when they filed a Petition in January 2018. Petitioner had the opportunity in January 2018, and again in

February 2018, to plead facts sufficient to allege IDEA violations, but neglected to do so. They may not do so now.

18. When Petitioners filed their Petition in January 2018, had it been sufficient, many of their claims would have been within the statute of limitations. However, Petitioners failed to timely amend their Petition. Petitioners cannot now assert that they were unaware of the facts that formed the basis of both the January 2018 and April 2019 Petition now that the statute of limitations has run.

19. Even if Petitioners could somehow allege that they were unaware of the facts that form the basis of their Petition when they occurred, Petitioners failed to invoke either exception that would toll the statute of limitations. There are no factual allegations that Respondent knowingly deceived Petitioners into believing that it had resolved the problem forming the basis of the petition, that Respondent failed to supply statutorily mandated disclosures, or that Respondent in any way prevented Petitioners from timely requesting a due process hearing. 20 U.S.C. § 1415(f)(3)(D); N.C.G.S. § 115C-109.6(c).

20. In this contested case, the record clearly shows that Petitioners were aware of their complaints more than one year prior to filing; the current petition does not specifically invoke either exception to the statute of limitations; and the petition does not contain factual allegations sufficient to apply either statutory exception under 20 U.S.C. § 1415(f)(3)(D) or N.C.G.S. § 115C-109.6. Thus, dismissal of those claims beyond the statute of limitations is appropriate

21. Petitioners' contention that failure of the service of the Order to Amend was in some manner a causal connection to failure to amend the original petition is without merit. All attempts at service have been to the same address of record and it is the same address being used by Petitioners' counsel in the current petition.

22. Petitioners state in their response that they continued to attempt to resolve matters and chose to refile, if necessary, within one year. The usual rules of N.C. R. Civ. P. 41(a) concerning re-filing within one year are not applicable to the facts of this case. In this matter, the original petition was insufficient and was not amended. The allegations remained insufficient and could not simply be resurrected one year later. They had to have been amended in the 2018 petition. There is no "relation back" to breathe new life into the claims that have exceeded the statute of limitations.

Petitioners Fail to State a Claim under Rule 12(b)(6) Regarding the 2018-2019 School Year

23. In paragraph 41 of the contested case petition, Petitioners allege that when [redacted] became a parentally placed private school student, Respondent failed to "modify the IEP in any way" and that "[redacted] would not be safe if he returned to the school environment without an effective plan of supports."

24. When Petitioner enrolled [redacted] in home school on April 17, and thereafter, [redacted] a private school located outside of the jurisdiction of CHCCS, [redacted] became a

"parentally-placed private school student" as defined by the IDEA and NC Policies. *See* 34 C.F.R. § 300.130; NC 1501-6.1 Registered home schools are recognized as private schools in North Carolina.

25. A private school student is not entitled to an IEP but is entitled only to a Private Service Plan. The IDEA places two obligations on CHCCS with regard to children with disabilities enrolled by their parents in private schools within the district:

a. "locate, identify, and evaluate" such children (34 C.F.R. § 300.131(a)); and

b. "[t]o the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district," make provision "for the participation of those children in the program assisted or carried out under Part B of the Act". 34 C.F.R. § 300.132(a).

26. Unlike services to public school students with disabilities, services to parentally placed private school students are limited to a "proportionate amount of Federal funds" provided to the local educational agency ("LEA") under the IDEA. 34 C.F.R. § 300.133 *et seq.*

27. Respondent is not required to provide a FAPE to parentally placed private school students. "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a); *see also Gary S. v. Manchester Sch. Dist*., 241 F. Supp. 2d 111, 114 (D.N.H. 2003), *aff'd*, 374 F.3d 15 (1st Cir. 2004) ("it is now beyond reasonable dispute that a disabled child who has been placed by his parents in a private school does not have an individually enforceable right to receive special education and related services"); *accord, D.L. ex rel. K.L. v. Baltimore Bd. Of Sch. Commissioners*, 706 F.3d 256, 260 (4th Cir. 2013); *Bd. of Educ. of Appoquinimink Sch. Dist. v. Johnson*, 543 F. Supp. 2d 351, 358–59 (D. Del. 2008) ("the IDEA imposes no obligation on the District to provide related services on an individualized basis to a parentally-placed private school student").

28. Rather, the IDEA requires school districts to spend a proportionate amount of the district's IDEA funds on "equitable services" to students enrolled by their parents in private schools located in the school district served by the LEA. The proportionate amount of Federal funds available depends upon how many parentally placed children with disabilities are attending private schools located in the particular LEA. The LEA must consult with private school officials in the district and develop a service delivery plan, including a plan for "how special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children." 34 C.F.R. 300.134(d).

29. The LEA makes the final decision regarding the services to be provided to an eligible child in accordance with that child's proportionate share of Federal funds. 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.132, 137. However, the appropriateness of those services may not be contested through a petition for due process. 34 C.F.R. § 300.132(a); 34 C.F.R. § 300.140(a).

30. The claim that Respondent may have failed to provide FAPE or even equitable services after Petitioners withdrew [redacted] and unilaterally placed him in private school is not properly before this tribunal. Once Petitioners unilaterally enrolled [redacted] in a private school outside the school district served by Respondent, Respondent was not required to provide FAPE, nor equitable services to [redacted] If Petitioners had had a viable denial of FAPE claim, they could have sought reimbursement for the private school tuition; however, any such claim is barred by the statute of limitations as set forth above.

31. The allegation is, on the face of the pleading, insufficient to state a claim upon which relief may be granted, and thus subject to dismissal under Rule 12(b)(6). Because there is no law to support the claim that [redacted] was entitled to FAPE after Petitioners unilaterally placed him in a private school, this claim must be dismissed for failure to state a claim upon which relief may be granted. *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted) (holding that dismissal under Rule 12(b)(6) is proper where "the complaint on its face reveals that no law supports the plaintiff's claim").

Notice of Insufficiency

32. Respondent contends that Petitioner's sole reviewable claim fails to meet minimal sufficiency requirements of the IDEA. Because this matter is being dismissed pursuant to Rule 12(b)(6), it is not necessary to address this issue.

Based upon the foregoing Findings of Fact, this Tribunal makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has both personal and subject matter jurisdiction over this contested case. The parties are properly before this Tribunal. The pending motions are properly before this Tribunal and are ripe for disposition. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Respondent's Motions are filed pursuant to Rules 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and 26 NCAC 03.0115, and the Notice of Insufficiency pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(b)(6); 34 CFR 300.507(A)(1).

3. Rule 12(b)(1) requires the dismissal of a petition when there is a "[l]ack of jurisdiction over the subject matter." N.C. R. Civ. P. 12(b)(1). "Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 586, 725 S.E.2d 373, 377 (2012). It further "cannot be conferred by consent or waiver and a court cannot create it where it does not already exist." *Id.*

4. The record clearly shows that the Petitioners were aware of their complaints more than one year prior to filing; the current petition does not specifically invoke either exception to

the statute of limitations; and the petition does not contain factual allegations sufficient to apply either statutory exception under 20 U.S.C. § 1415(f)(3)(D) or N.C.G.S. § 115C-109.6.

5. N.C. R. Civ. P. 41(a), concerning re-filing within one year, is not applicable to the facts of this case. Allegations in the original petition were found by Administrative Law Judge Stacey Bawtinhimer to be insufficient, and they were not amended as ordered by Judge Bawtinhimer. The allegations remained insufficient and could not simply be resurrected one year later. There is no "relation back" to breathe new life into the insufficient claims that have exceeded the statute of limitations.

6. Dismissal of those claims beyond the statute of limitations is appropriate. All claims prior to April 16, 2018 are barred by the one-year statute of limitations. Accordingly, all claims regarding events prior to April 16, 2018 are dismissed as untimely.

7. In comparison, Rule 12(b)(6) tests the legal sufficiency of the allegations in the petition. The question is whether, as a matter of law, "the allegations state a claim for which relief may be granted." Although a petition is viewed liberally in the petitioner's favor, a petition "must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).

8. Although the tribunal is required to treat all factual allegations as true when considering a motion to dismiss, an ALJ is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cumberland Cty. Hosp. Sys. v. N.C. HHS*, 242 N.C. App. 524, 535, 776 S.E.2d 329, 337 (2015).

9. When Petitioner enrolled [redacted] outside of the jurisdiction of CHCCS, [redacted] became a "parentally-placed private school student" as defined by the IDEA. Services to parentally placed private school students are limited to a "proportionate amount of Federal funds."

10. The LEA makes the final decision regarding the services to be provided to an eligible child in accordance with that child's proportionate share of Federal funds. However, the appropriateness of those services may not be contested through a petition for due process before OAH.

11. The claim that Respondent may have failed to provide FAPE or even equitable services after Petitioners withdrew [redacted] and unilaterally placed him in private school, is not properly before this tribunal.

12. The allegation is, on the face of the pleading, insufficient to state a claim upon which relief may be granted, and subject to dismissal under Rule 12(b)(6). Because there is no law to support the claim that [redacted] was entitled to FAPE after Petitioners unilaterally placed him in a private school, this claim must be dismissed for failure to state a claim upon which relief may be granted. Dismissal under Rule 12(b)(6) is proper where the complaint on its face reveals that no law supports the Petitioners' claim.

13. Since claims in this contested case petition are being dismissed pursuant to Rules 12(b)(1) and (6), it is not necessary to address the issue of insufficiency.

Now therefore, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Respondent's Motion to Dismiss is **GRANTED** in its entirety.

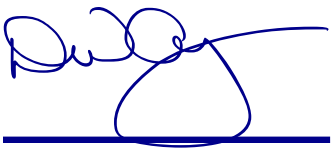
NOTICE OF APPEAL

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this dismissal.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices and/or additional timelines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

SO ORDERED, this the 13th day of August, 2019.



Donald W Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 13th day of August, 2019.

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