Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of [Student]

v.

[District]

DHA Case No. DPI-18-0002
DPI Case No. LEA-18-0002

DECISION

The PARTIES to this proceeding are:

[Student], by

[Parents]

[District], by

Attorney Lori M. Lubinsky
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PO Box 1767
Madison, WI 53701-1767

PROCEDURAL HISTORY

On January 26, 2018, the Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Improvement Act (IDEA) from [Parents] (the Parents) on behalf of their child, [Student] (the Student), against the [District] (the District). DPI referred the matter to this Division for hearing. Following a prehearing conference on February 14, 2018 the District filed a Motion to Dismiss with supporting Memorandum of Law. A briefing schedule was set giving the Parents an opportunity to submit a written response in opposition to the Motion. The Parents' Brief in Response to School District's Motion to Dismiss and a the District's Reply Brief were thereafter received pursuant to the parties' briefing schedule. A hearing was held on April 13, 2018 to allow both parties an opportunity to present additional testimony and oral argument as to their respective positions. This written Decision follows.

ISSUE

The issue presented for consideration by the District's Motion to Dismiss is whether the Parents' Due Process Hearing Request is untimely under Wisconsin's one-year statute of limitations for filing such a request under Wis. Stat. §115.80(1)(a)1. The material facts relevant to the motion to dismiss are not in dispute. For the reasons set forth below, I grant the District's Motion to Dismiss.

FACTUAL BACKGROUND

On January 26, 2018 the Parents filed a Request for Due Process Hearing with the Wisconsin Department of Public Instruction (DPI) alleging that the [District] violated the Individuals with Disabilities Act (IDEA) resulting in a denial of a Free and Appropriate Public Education (FAPE) for their son (the Student). At the heart of the Parents' complaint is that the [District] did not having a participant at the January 2016 IEP who could interpret instructional implications of evaluation results referenced in the Student's then current IEP and that the [District] provided the [District 1], the Student's district of residence, with an incorrect IEP and inaccurate progress reports.

The Student is diagnosed with traumatic brain injury and was previously identified as a child with a disability eligible for special education under the IDEA. Although the Student is a resident of the [District 1], at the end of the 2014-2015 school year, he was open enrolled in the [District 2]. On August 19, 2015 the [District 2] prepared an annual Individual Education Plan (IEP) for the Student that was dated effective September 1, 2015 through August 31, 2016 (the "[District 2] IEP"). However, on September 9, 2015 the Student began attending [District] also through the open enrollment process where he remained through the 2015-2016 school year. At the outset of the Student's attendance at [District] the [District 2] IEP was adopted and implemented by [District].

In January 2016 the Student's IEP team at [District] prepared a new IEP. Shortly thereafter, the Parents filed a due process hearing request against the [District] alleging a denial of FAPE. As a result of that due process hearing request, [District] ceased implementation of the January 2016 IEP and continued to follow the [District 2] IEP. The Parents withdrew the Student from [District] on June 24, 2016. The Student attended his school district of residence, [District 1], for the 2016-2017 school year. As a result of the Student's withdrawal from [District] and enrollment at the [District 1], the Student's educational records were forwarded to the [District 1] prior to the start of the 2016-2017 school year.

By November 2016 the Parents had knowledge that the [District 1] was not implementing the [District 2] IEP. At the motion hearing in this matter [Parent] testified under oath that she spoke to an administrator at the [District 1] in November 2016 regarding the Parents' belief that the correct IEP to be implemented for the Student was the [District 2] IEP and not the January 2016 IEP created by [District] because the [District 2] IEP was the active IEP at the time that the Student withdrew from [District] and enrolled at [District 1]. On January 26, 2017 and January 27, 2017 the Parents participated in an IEP meeting with members of the [District 1] to discuss ongoing issues with the Student's IEP, including whether the active IEP should be the [District 2] IEP or the [District] IEP prepared in January 2016.

DISCUSSION

The District's motion to dismiss must be treated as a motion for summary judgment because it included evidentiary material for consideration. See *Rabideau v. City of Racine*, 2001 WI 57, ¶ 12, 243 Wis. 2d 486, 627 N.W.2d 975 (when matters outside the pleadings are considered, the motion should be treated as a summary judgment motion pursuant to Wis. Stat. §802.06). A party is entitled to summary judgment when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Further, when a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. §802.08(3). The court takes evidentiary facts in the record as true if not contradicted by opposing proof. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25 ,¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751.

The Wisconsin Supreme Court has set forth the methodology for deciding motions for summary judgment, which will be followed here. First the court must examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment. If the moving party has made a prima facie case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether dispute material facts or undisputed material facts exist from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. See *Voss v. City of Middleton*, 162 Wis. 2d 737, 470 N.W.2d 625 (1991).

As authorized under the IDEA, 20 U.S.C. §1415(f)(3)C, and federal regulations at 34 C.F.R. §300.507(a)(2), under Wisconsin law, the parent of a student who has been identified as a child with a disability under the IDEA must file a due process hearing request within one year from an alleged violation with only one exception. Wis. Stat. §115.80(1)(a). Wisconsin's explicit time limitation states as follows:

> A parent, or the attorney representing the child, may file a written request for a hearing within one year after the refusal or proposal of the local educational agency to initiate or change his or her child's evaluation, individualized education program, educational placement, or the provision of a free appropriate public education, except that, if the local educational agency has not previously provided the parent or the attorney representing the child with notice of the right to request a hearing under this subdivision, he or she may file a request under this subdivision within one year after the local educational agency provides the notice.

Wis. Stat. §115.80(1); see also, 34 CFR §300.503(a)(1) and (2) and 34 CFR §300.507(a)(1). The U.S. Court for the Eastern District of Wisconsin has recognized that the only exception to the one-year statute of limitations under Wis. Stat. §115.80(1)(a) is a school district's failure to provide parents with notice of procedural rights. *Vandenberg v. Appleton Area School Dist.*, 38 IDELR

240 (E.D. Wis. 2003) (declining to apply the continuing violation doctrine to extend the one year statute of limitations); see also, *Milwaukee Academy of Science*, 103 LRP 51102, LEA-02-028 (WI SEA 2003) (granting summary judgment and declining to extend Wisconsin's one year statute of limitation for filing a due process hearing request). The Parents acknowledge receipt of a Procedural Safeguards Notice, which states the Parents have one year to file a due process hearing request.

In response to the District's motion, the Parents raise multiple arguments against application of Wisconsin's one-year statute of limitation period, which I summarize as follows:

(a) The Student's complaint was filed within one year of the Parents' *discovery* of the alleged violations under 34 CFR §300.507 and §300.511; and further, that pursuant to the written notice of procedural rights provided by the District to the Parents, the "*discovery rule"* should apply allowing them to file for due process within one year from the date the Parents learned of the alleged violations raised in the complaint;
(b) The "continuation violation doctrine" should apply as an exception to the one-year statute of limitations period; and
(c) Discriminatory harassment occurred under the Americans with Disabilities Act, which must be addressed through the exhaustion of administrative remedies and procedures under the IDEA; and

The "discovery rule" is a legal concept that "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). The discovery rule "exists in part to preserve the claims of victims who do not know they are injured," *Gabelli v. Sec. & Exch. Comm'n*, 133 S. Ct. 1216, 1222 (2013). Whereas, the "continuing violation" doctrine extends a statute of limitations when the claim cannot "reasonably be expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Vandenberg*, 252 F. Supp. 2d at 790, citing *Hammond v. District of Columbia*, No. 99-1723 (D.D.C. March 1, 2001). However, "the mere fact that a violation may have been of a "continuing" nature is not enough to overcome the statute of limitations." *Vandenberg*, at 790.

The Parents do not cite to any legal authority from this jurisdiction that applies the "discovery rule" to extend Wisconsin's one-year limitations period for filing due process hearing requests under the IDEA nor have I located any such binding precedent. Regardless, application of the discovery rule in the present matter is unnecessary. In their due process hearing complaint the Parents' allege that the [District] failed to have a participant at an IEP meeting in January 2016 that could interpret test results referenced in the Student's IEP. The IEP in effect at [District] at that time was prepared by the [District 2]. The Parents subsequently filed a due process hearing complaint against the [District], separate from and prior to the present matter, alleging, in part, a failure to implement the [District 2] IEP. The Parents assert that they withdrew the Student from [District] in June 2016 due to a denial of FAPE. Although the Parents did not include an allegation of the lack of the IEP participant at the January 2016 in the prior due process hearing, they were

aware of the alleged omission by the [District] more than one year prior to the filing of the current due process hearing complaint.

Further, by November 2016 after the Student began attending his resident school district in [District 1] the Parents had knowledge that the IEP being implemented at [District 1] at the beginning of the 2016-2017 school year was not the 2015 "[District 2] IEP" (that they believed should be the Student's active IEP after his withdrawal from [District]). Therefore, the Parents' assertion that they did not became aware of a violation by [District] until an IEP meeting at the [District 1] in January 2017 is disingenuous. Moreover, I note that the [District] is not responsible for the actions taken by the [District 1] after the student had withdrawn from [District]; rather, the [District 1] was the LEA responsible for providing the Student FAPE at all times within one year of the Parents' due process hearing request in the present matter. Accordingly, the alleged violations of denial of FAPE raised in the present due process hearing complaint were known, and reasonably should have been known, by the Parents more than one year prior to the filing of the current due process hearing request. Therefore, the due process hearing request is untimely regardless of the discovery rule.

Similarly, the continuing violation doctrine is inapplicable to the present matter. See *Vandenberg*, supra. The last act taken by the [District] with regard to the Student was the transfer of the Student's educational records to the [District 1] after the Student withdrew from the [District] in June 2016 and enrolled in the [District 1]. [District] had no further involvement in the Student's education following his withdrawal and prior to the start of the 2016-2017 school year. Merely because the [District]'s prior actions may have continued to impact the Student as alleged by the Parents, does not result in a continuing violation that would extend the one-year statute of limitations. *Id.*

Finally, in the course of responding to the District's motion to dismiss, the Parents assert that discriminatory harassment resulted from the earlier violations by [District]. This issue was not only not raised in the due process hearing request but there are no facts alleged to support the claim. See also, 34 CFR §300.508(d)(3); *Unknown District*, LEA-06-0015 (WI SEA 2017). Furthermore, the allegations of discriminatory harassment do not amount to an issue upon which I would have jurisdiction to review under the IDEA and Chapter 115 of the Wisconsin Statutes nor do the allegations negate the one year statute of limitations period.

Based upon the evidence and legal arguments presented at the motion hearing, I find no genuine issue of material fact. Accordingly, the District is entitled to dismissal of the due process hearing request as a matter of law.

CONCLUSIONS OF LAW

The Request for Due Process Hearing filed on January 26, 2018 is untimely as it was filed beyond the one year statute of limitations period under Wis. Stat. §115.80(1)(a)1.

ORDER

For the reasons stated above, IT IS HEREBY ORDERED that the District's Motion to Dismiss is hereby granted. The Due Process Hearing Requested filed on January 26, 2018 against the [District] is dismissed with prejudice.

Dated at Madison, Wisconsin on April 27, 2018.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
Madison, WI 53705
Telephone: (608) 266-7709
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By: _____
Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.

c: [District]