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v.

BRAZOS RIVER CHARTER SCHOOL

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR THE

STATE OF TEXAS

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

Petitioner, █ (“Student”), by next friend, █ (“Parent”), filed a complaint against Brazos River Charter School (“Charter School”) and requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). Petitioner alleged that Charter School failed to timely identify, locate, and evaluate Student as a child with a disability in need of special education services, thus denied Student with a free appropriate public education. The allegation is commonly referred to as “Child Find.”

At a telephonic pre-hearing conference, parent advocate, Debra Liva, and Parent appeared on behalf of Petitioner. Jose Martín and associate, Chris Schulz, attorneys, appeared on behalf of Respondent. Respondent filed its motion for summary judgment on February 17, 2015. On March 2, Petitioner’s advocate forwarded a response to the motion.

Factual Background

Based on the pleadings and exhibits, the following factual background is provided:

1. Student was admitted to the █, an outpatient treatment facility, on approximately December █, 2013. At that time, Charter School was on winter break. Its winter break falls between the school’s fall and spring semesters. See Exhibits 1 and 10 (“Ex.”) of Respondent’s Motion for Summary Judgment (“Motion for SJ”)
2. Charter School provides educational services to school-age students admitted to the █ through a Memorandum of Understanding. See Petitioner’s Request for Due Process Hearing and Required Notice (“Request for DPH”); Petitioner’s Response to Motion for Summary Judgment and Objections (“Response to Mot. SJ”)
3. Following winter break, Charter School resumed school on January █, 2014 and began to provide services to Student on that day. See Ex. 2, 3 of Motion for SJ

4. At the time Student began receiving services from Charter School, [REDACTED] was not identified as a child with a disability in need of special education. See Ex 5, 6 of Motion for SJ; February 2, 2015 prehearing conference transcript (“PHC”); Response to Mot. SJ
5. Student’s advocate made requests for an admission, review, and dismissal committee (“ARDC”) meeting on January [REDACTED] (a day before Student enrolled in Charter School) and [REDACTED] (Student’s first day of enrollment), 2014. See Ex. 9, 10 of Motion for SJ
6. During Student’s first week at Charter School, [REDACTED] grades were A’s, and [REDACTED] school behaviors were positive. During Student’s second week, January [REDACTED], 2014, [REDACTED] grades were A’s. Student’s behaviors were disruptive to classroom, and disrespectful to staff/peers. [REDACTED] refused work and [REDACTED] work was disorganized. See Ex. F of Resp. to Mot. SJ
7. Charter School held an admission, review, and dismissal committee (“ARDC”) meeting for Student on January [REDACTED], 2014. Advocate requested Charter School to determine Student eligible for special education services as a child with emotional disturbance (“ED”) based on [REDACTED] Independent School District’s full individual evaluation and other outside data submitted by Parent. Charter School offered to conduct an evaluation of Student on an expedited basis of 20 school days for completion. Parent refused to give consent. See Ex. 7 of Motion for SJ; Ex. B of Response to Mot. SJ.
8. District gave Notice of Proposal or Refusal on January [REDACTED], 2014, and again offered to conduct an evaluation of Student. See Ex. 8 of Motion for SJ; PHC, pages 6, 12
9. Parent did not give consent for Charter School to conduct an evaluation of Student. See Ex. 9, 10 of Motion for SJ
10. Parent withdrew Student from the [REDACTED] on January [REDACTED], 2014. Student attended Charter School for a total of [REDACTED] school days. See Ex. 3 of Motion for SJ; Ex. G of Response to Motion for SJ
11. Petitioner filed this request for due process hearing on January 15, 2015. See Request for DPH

One-Year Statute of Limitations

In its response to the complaint, Respondent raised the affirmative defense of the one-year statute of limitations. Respondent argued that the statute of limitations bars Petitioner’s claims for alleged violations that occurred prior to January 15, 2014. The running of limitations begins at the time a litigant is entitled to seek a remedy, and contemplates the exercise of reasonable diligence on the part of the litigant to discover the facts giving rise to the claim. *See, e.g., Trinity River Authority v. URS Consultants*, 889 S.W.2d 259 (Tex. 1994).

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the

complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.” 20 U.S.C. §1415(f)(3)(C). Texas has established a one-year time limitation within which a petitioner must request a special education due process hearing. 19 Tex. Admin. Code § 89.1151(c). The Texas legislature intended that special education disputes be resolved expeditiously. The one-year statute of limitations, and an expectation of the exercise of reasonable diligence on the part of the litigant, is consistent with that intent. *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.).

Petitioner’s complaint includes no allegations that Parent was prevented from filing a request for due process hearing due to specific misrepresentations by Charter School, or that Charter School withheld information from Parent that was required under Subpart E of the IDEA, such that the one-year statute of limitations should be tolled. 3 C. F. R. §300.511(f). After careful consideration, this hearing officer finds that there is no exception to the limitations rule, and that the one-year statute of limitations applies in the instant action. All allegations of failures by Charter School that occurred prior to January 15, 2014 are DISMISSED for lack of jurisdiction.

Summary Judgment Standard

A motion for summary judgment requires the Hearing Officer to determine if the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. Summary judgment is proper if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001). In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the non-movant. *Id.*

Discussion

During Student’s enrollment in Charter School, the following State rules regarding referrals for initial evaluations were in effect:

Referral of students for a full and individual initial evaluation for possible special education services shall be a part of the district's overall, general education referral or screening system. Prior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services. If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation. This referral for a full and individual initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student. 19 Tex. Admin. Code 89.1011 *amended to be effective November 11, 2007. (this rule was subsequently amended and became effective January 1, 2015)*

Assuming, *arguendo*, that Petitioner requested an initial evaluation on the day of enrollment (which was outside the one-year statute of limitations), there had been no time for Student to exhibit difficulty in the general classroom. Nor had there been time for Charter School to consider support services available to all students. Because Petitioner requested it, Charter School held an ARDC meeting on January █, 2014, seven school days after Student enrolled. Charter School offered to conduct an evaluation. Charter School offered to expedite the evaluation, waiving the full number school days allowed for completion 34 C. F. R. §300.301(c). Parent refused to give consent.

Petitioner suggests that certain evaluation data was in the possession of Charter School and such data was sufficient to determine eligibility under the IDEA. Even if Charter School had that data, a parent cannot force a school to rely solely on an independent evaluation. If Parent wanted Student to receive special education services, █ was required to allow Charter School to evaluate Student. *Andress v. Cleveland I.S.D.*, 64 F.3d 176 (5th Cir. 1995).

At no time during Student's enrollment at Charter School did Parent give consent for an initial evaluation. If a parent does not provide consent for an evaluation, a public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards under the IDEA. The public agency does not violate its obligation under the IDEA if it declines to pursue the evaluation. 34 C. F. R. §300.300(a)(3)(ii).

After review of the evidence in the light most favorable to Petitioner, I find that there is no genuine issue as to any material fact that relates to the Child Find issue brought by Petitioner. I find that Respondent, Brazos River Charter School, is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is GRANTED. IT IS ORDERED that the above styled and numbered request for due process hearing and complaint is DISMISSED WITH PREJUDICE.

SIGNED on March 4, 2015.

_____/s/
Brenda Rudd
Special Education Hearing Officer
For the State of Texas