**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re:** Student v. **BSEA #** 2003498

 Manchester-Essex Regional School District

**RULING ON MANCHESTER-ESSEX REGIONAL SCHOOL DISTRICT’S**

**MOTION TO DISMISS**

On September 30, 2019, Parent filed a Hearing Request in the above-referenced matter. Parent argued that Manchester-Essex Regional School District (Manchester-Essex) denied Student a free and appropriate public education (FAPE) by failing to place Student on a Section 504 Plan or an Individualized Education Program (IEP) in elementary and middle school.

Thereafter, on October 10, 2019, Manchester-Essex filed a Motion to Dismiss pursuant to Rule XVI(B)(4) of the Haring Rules for Special Education Appeals and Rule 7 of the Formal Rules of Adjudicatory Rules of Practice and Procedure, for failure to state a claim upon which relief may be granted. Specifically, Manchester-Essex argued that Parent’s (and Student’s) claim was not filed within the applicable statute of limitations period consistent with BSEA Hearing Rules, 20 U.S.C. 1401 et seq., and 29 U.S.C. 794 (Section 504 of the Rehabilitation Act of 1973). Manchester-Essex also requested an opportunity to be heard on its Motion, which request was Granted and the Motion Session was scheduled for November 19, 2019.

On October 21, 2019, Student requested an extension of time to file her opposition to the District’s Motion to Dismiss. The Request was granted on October 22, 2019 and the time for submission of Student’s Response was extended to October 29, 2019. Student’s Response opposing the Motion was received on October 29, 2019.

On November 19, 2019, the Parties were heard on the Motion to Dismiss via telephone conference. This Ruling is issued in consideration of the written and oral submissions of the Parties.

**Facts:**

The facts appearing herein are considered to be true for purposes of this Ruling only.

1. Student is a 16 year-old resident of Gloucester, Massachusetts. The period of time involved in Student’s claim involves incidents which allegedly occurred prior to December 2016, when Student was enrolled in Manchester-Essex.

1. Student attended Manchester-Essex from first grade through December of her seventh grade.
2. Parent’s initial concerns regarding Student’s performance were raised when Student was in the first grade. Thereafter, Parent communicated with Manchester-Essex staff when Student was in the second, third and fourth grades regarding homework completion.
3. Student was formally diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by Jennifer Kelly, Psy.D., at some point during the 2012-2013 school year when Student was in the fourth grade. Dr. Kelly recommended that Student be provided accommodations under a Section 504 plan. Subsequently, Student was also diagnosed with anxiety disorder, school refusal, depression, and possible mood disorder. She suffered from migraines and stomach ailments. Student also has been found to have slow processing skills and executive functioning deficits.
4. On or about January 3, 2013, Parent wrote to Manchester-Essex requesting that Student be evaluated. Manchester-Essex responded on January 10, 2013 proposing an evaluation of Student.
5. On February 26, 2013, Parent inquired about the status of the evaluation and on March 13, 2013, she received an invitation to attend a meeting to discuss Student’s initial evaluation/eligibility. The eligibility meeting was scheduled for April 2, 2013.

1. On or about March 25, 2013, Student participated in a psycho-educational evaluation at Manchester-Essex.

1. Student’s Team met in April 2013 and on April 29, 2013, Parent received Manchester-Essex’s finding of no eligibility.

1. Parent again expressed concern regarding Student’s difficulties and in January of 2014, while Student was in fifth grade, Parent had Dr. Kathy Pennoyer conduct a private neuropsychological evaluation. Dr. Pennoyer concluded that Student presented with slow processing speed and ADHD inattentive type. Parent shared this report with Manchester-Essex.

1. In March of 2014 Parent forwarded a letter from Dr. Kelly to Manchester-Essex recommending Section 504 accommodations for Student. On March 25, 2014, Suzanna South, school adjustment counselor at Manchester-Essex, wrote to Parent denying a Section 504 plan for Student. Parent wrote back the following day noting her disagreement with the School’s determination and disputing the District’s failure to re-evaluate Student in fifth grade.

1. During the summer of 2014, Parent met with Manchester-Essex’s middle school principal to discuss her concerns regarding Student’s need for services during her transition into middle school. Parent continued to correspond with Manchester-Essex during the 2014-2015 school year, Student’s sixth grade, requesting that Student be provided services and explaining that Student’s struggles were having a negative impact on Student’s mental health. In response, Manchester-Essex provided Student with an interventionist who met with Student once every six days.
2. In September 2015, the beginning of Student’s seventh grade year, Parent requested that Student continue to work with the “interventionist” with whom she had worked the previous year.

1. In October 2015, Parent retained a special education advocate to help her secure an IEP and a Section 504 Plan to address Student’s deteriorating mental health and academic struggles.

1. In October of 2015, Manchester-Essex agreed to conduct psychological and educational re-evaluations as well as a classroom observation of Student, and forwarded consent forms to Parent.
2. On November 13, 2015, Parent requested an emergency meeting with the counseling team to address Student’s deteriorating mental health as supported by a letter written by Student’s LICSW, Dana Modell, who diagnosed Student with school refusal/school phobia and noted her need for support.
3. Manchester-Essex held an emergency meeting on November 19, 2015 and the following day Parent was invited to an eligibility meeting to be held on December 7, 2015. The following week Student began to experience stomach-aches that kept her out of school, which Parent attributed to Student’s emotional and psychological decline, and Manchester-Essex recommended that Student be taken to an emergency room. Student was not seen at an emergency room.

1. On or about December 15, 2015, Manchester-Essex threatened to file a C.R.A. due to Student’s 8-day refusal to attend school. A CRA was filed on or December 4, 2015. After the CRA was filed, Parent attended Student’s eligibility meeting.
2. Lacking proof of an emotional disability, and in light of her academic progress (which Parent disputed as the teachers had waived Student’s missing assignments), the Team disagreed that Student was eligible to receive special education services.

1. On December 8, 2015 Student was brought to the psychiatric crisis center at Salem Hospital. She was found safe to return home that day. Student was also seen by her primary care doctor who wrote a request for Temporary Home and Hospital Education due to anxiety. He recommended that Student stay home until she was provided supports to accommodate her ADHD and slow processing speed.

1. Parent privately hired a teacher to provide Student home tutoring.

1. On December 15, 2015 Manchester-Essex wrote to Parent denying the accommodations sought pursuant to the Home Hospital Education request.

1. The CRA review was held in Court on December 16, 2015, and Student reported to school the remainder of that week. Friday of that week Student was prevented from leaving school when she reported having a headache and stomach-ache despite having a history of migraines.

1. Later in December 2015, Parent withdrew Student from Manchester-Essex and registered her in TEC Connections Academy (TECCA), a Massachusetts online public school.

1. Student began to experience depression due to her isolation from her peers.

1. In January 2016, Student participated in a neuropsychological evaluation with Dr. Susan Brefach.
2. Within three months of completion of Dr. Brefach’s testing, TECCA developed a Section 504 plan for Student. She was later found eligible to receive special education services under an IEP due to slow processing speed, executive functioning deficiencies and a social/emotional disability.

1. On or about April of 2016, Manchester-Essex allowed Student to participate in after-school clubs and dances. Student attended journalism club once a week. To increase opportunities for peer interaction, Parent enrolled Student in New Hope Tutorials toward the end of seventh grade.
2. On or about June 26, 2016, parent filed a complaint with the U.S. Department of Education Office of Civil Rights alleging multiple civil rights violations by Manchester-Essex.

1. Toward the beginning of the next school year (2016-2017), Parent met with Manchester-Essex’s school principal to discuss Student’s history at Manchester-Essex and the resources that Student would need. Parent also discussed the IEP and Section 504 plan developed by TECCA.
2. In October 2016, Parent enrolled Student in the Rockport School System, where she repeated seventh grade.

1. On or about October of 2016 Student requested permission to attend a Halloween dance at Manchester-Essex. She was initially granted permission, but later denied access by the Manchester-Essex School Committee/ Superintendent.

1. On December 13, 2017, Parent received a letter from OCR informing Parent that Manchester-Essex wished to resolve the complaint. Manchester-Essex proposed a resolution agreement “to comply with the requirements of Section 504 of the Rehabilitation Act of 1973”. The matter concluded with a Resolution Agreement between Manchester-Essex and OCR.

1. On December 3, 2018, Parent/ Student filed a lawsuit in federal district court for the District of Massachusetts.
2. On March 27, 2019, Manchester-Essex filed a Motion to Dismiss with the District Court for Failure to State a Claim.

1. On August 12, 2019, Judge Saylor dismissed Parent/Student’s complaint in federal District Court for failure to exhaust administrative remedies. Parent requested reconsideration of Judge Saylor’s determination and asked that the Court remand any claims requiring exhaustion to the BSEA. This matter is pending.
2. On September 30, 2019, Parent filed a Request for Hearing with the BSEA.
3. On October 10, 2019, Manchester-Essex filed the instant Motion to Dismiss on the basis that Parent had filed her Hearing Request outside the statute of limitations period applicable to IDEA and Section 504 claims.

**Manchester-Essex’s Position:**

Relying on the IDEA two-year statute of limitations, Manchester-Essex asserts that Parent’s (Student’s) claims are time barred because knowing about the alleged actions that form the basis of Parent’s complaint, Parent failed to request a hearing with the BSEA. None of the allegations in Parent’s (Student’s) Hearing Request, which involve Student’s struggles beginning in the first grade, occurred within the two-year period before the hearing request was filed, i.e., between September 30, 2017 and September 30, 2019. The alleged violations occurred prior to December of 2015 when Student was un-enrolled from Manchester-Essex.

Manchester-Essex notes that Massachusetts has enacted “an explicit time limitation” of two years. *Ms. S v. Reg’s Sch. Unit 72*, 916 F. 3d 41, 51 (1ist Cir. 2019) (citing *Michelle K. v. Pentucket Reg’l Sch. Dist*., 79 F. Supp. 3d 361, 372-73(D. Mass. 2015). Moreover, it argues that neither of the two exceptions stated under 20 U.S.C. 1415(f)(3) are applicable in the instant case because there is no allegation by Parent that Manchester-Essex misrepresented or withheld information that it was required to disclose under federal law.

Manchester-Essex further argues that the statute of limitations did not toll despite Student not having reached the age of majority. Similarly, the District argues that the filing of an “associate case” in federal court also fails to toll the statute of limitations, noting that Parent’s reliance on *Michelle K*., is misplaced. Moreover, according to Manchester-Essex, even if the date of filing in the District Court were to be found controlling, the case at the BSEA would be time barred as claims prior to December 3, 2016 would be precluded and the claims here date back to 2015 and earlier.

Manchester-Essex further argued that the Section 504 claim was also time barred. While Section 504 does not specifically provide a statute of limitations, the IDEA two-year limit is controlling as the most closely related statute of limitations in FAPE-based, Section 504 cases. *Katelin O. v. Massachusetts BSEA*, Civ. Act. 17-10473 (D. Mass.2018); *In Re: Student v. Dennis Yarmouth Reg’l Sch. Dist*., 22 MSER 256 (2016). Relying on Judge Saylor’s Decision, Manchester-Essex argued that all of Parent’s (and or Student’s) claims in Counts One through Five of the civil action case, involved a denial of FAPE, and that the case had failed the *Fry* test.[[1]](#footnote-1) See *Fry v. Napoleon Cmty. Sch*., 137 S.Ct. 734, 749 (2017) (noting that “[a] further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceeding”).

Lastly, Manchester-Essex argued that the BSEA lacks jurisdiction over claims related to the Americans with Disabilities Act (ADA) and 42 U.S.C. §1983. As such, those claims should be dismissed.

**Parent’s Position:**

Student argues that she is a child with a disability qualifying under mental and emotional impairments (i.e., ADHD, anxiety disorder, slow processing disorder and executive functioning deficits) and states that she has presented with those impairments since she was in fourth grade. Student states that her disabilities manifest in extreme anxiety about attending school and school refusal. Moreover, she asserts that Manchester-Essex had multiple reports of school and homework related meltdowns.

Student further states that she was a student at Manchester-Essex and TECCA until November of 2016, and during that time, Manchester-Essex refused to recognize how her anxiety disorder impacted her education, despite having knowledge of her impairments since she was in first grade. According to Student, Manchester-Essex’s actions caused her to require Home and Hospital Education in middle school. Furthermore, Student asserts that Manchester-Essex’s failure to timely identify and evaluate her precluded her from receiving the appropriate accommodations and related services she needed. According to Student, in addition to not finding her eligible to receive special education under the IDEA (or Section 504), Manchester-Essex excluded her from participating in extracurricular activities despite her enrollment in TECCA, and denied Parent’s request for Home Hospital Education on or about 2015. Student states that these deliberate, intentional actions by Manchester-Essex resulted in procedural and substantive denials of FAPE under both the IDEA and Section 504. As a result, Student seeks compensatory education including allowing her to repeat seventh grade and offer her transition services until her twenty-second birthday and offer her,

compensation to reimburse the family for their legal bills, special education advocate bills, online school bills, tutoring bills, medical and psychological treatment bills, and the like…(Parent’s Hearing Request).

Student concedes that the Statute of Limitations under the IDEA and Section 504 of the Rehabilitation Acts of 1973 (Section 504) is two years, but argues that the statute of limitations is tolled until she reaches the age of majority. Relying on *Michelle K v. Pentucket Regl. Sch. Dist*., 79 F.Supp. 3d 361, 372-73 (D. Mass. 2015), Parent argues that the statute of limitations is further tolled by Parent’s filing of an associated civil action in the United States District Court for the District of Massachusetts.

Student, while conceding that she is 16 years old, argues that her claims are not time barred because she has not yet reached the age of majority and therefore, the “statute of limitations has not yet begun to toll”. Student argues that the district has failed to recognize that Student, not Parent, brings this action.

In making this argument Student relies on G.L. c. 260, which provides that “if the person entitled is a minor or is incapacitated by reason of mental illness when a right to bring an action first accrues, the action may be commenced within the time hereinbefore limited after the disability is removed.” Relying on G.L. c. 260, the statute of limitations has not yet began to toll and therefore, nothing prevents her from reaching back to the time when she was in elementary school.

Student further concedes that her Section 504 claims were not originally raised with the BSEA, but rather, Parent filed a complaint for alleged Section 504 disability-based discrimination against Student with the Office of Civil Rights (OCR), which complaint was subsequently settled. Student alleges that OCR failed to notify Parent/Student that they “also had to exhaust those same claims through the BSEA”. According to Student, OCR’s failure to provide notice should result in a stay of the claims and operate to toll the provisions within the IDEA two-year statute of limitations due to “the specific misrepresentation”[[2]](#footnote-2), one of the exceptions under the IDEA.

Lastly, Student requests that the BSEA stay the determination on this Motion to Dismiss pending Judge Saylor’s decision on Parent’s request for reconsideration and request to remand any pending claims to the BSEA.

**Legal Standards**

**I. Motion to Dismiss:**

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[3]](#footnote-3) In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”[[4]](#footnote-4) These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”[[5]](#footnote-5)

**II. Jurisdiction of the BSEA:**

Pursuant to 20 U.S.C. § 1515(b)(6), the BSEA has jurisdiction over a timely complaint filed by a parent/guardian or a school district “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” See also 34 C.F.R. §300.507(a)(1)[[6]](#footnote-6).

In Massachusetts the responsibility and authority to resolve disputes involving the provision of special education among parents/students, school districts and state agencies lie with the BSEA. This authority is found both in M.G.L. c71B and the regulation promulgated under said statute. Specifically, 603 CMR 28.08(3)(a) provides that

A parent or a school district, except as provided in 603 CMR 28.08(3)(c) and (d), may request mediation and/or a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR 104.31-104.39.

As stated above, the Massachusetts Special Education Regulations expressly charge the BSEA with the responsibility to resolve education-based disputes pursuant to Section 504. Thus, Student’s (and Parent’s) claims involving the IDEA and Section 504 fall squarely within the scope of the BSEA’s jurisdiction.

I further note that the granting of authority to the BSEA pursuant to the IDEA and Section 504 is narrow and does not include authority to adjudicate constitutional, §1983 claims, or ADA claims. In their submissions both Parties concede the BSEA’s limitations. 20 U.S.C. 1401 *et. seq*. (IDEA), 34 CFR 300.00 *et seq*., G.L. c. 71B, 603 CMR 28.00 and Section 504 of the Rehabilitation Acts of 1973 (29 U.S.C. §794).

**III. Statute of Limitation:**

20 U.S.C. §1415 (f)(3)(C) addresses the permissible timeline for requesting an IDEA Hearing. The statute provides that

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 [20 USCS §§ 1411 et. seq.], in such time as the State law allows.

The language in the statute is unequivocal. Any proceeding involving IDEA-related allegations must be brought within two years from when parents know or should have known of the alleged transgression. The statute further provides two, very specific exceptions to the timeline for requesting an IDEA hearing; those are instances where the parent was prevented from requesting the hearing due to “specific misrepresentations by the local educational agency”, or because of the “local educational agency’s withholding of information that it was required to provide”.[[7]](#footnote-7) 20 U.S.C. §1415 (f)(3)(D).[[8]](#footnote-8) Massachusetts has adopted this federal standard.

Complaints for denial of FAPE brought under Section 504 are also subject to a two-year statute of limitations. While the statutory language of Section 504 does not specifically set forth a statute of limitations, courts have applied the same two-year time restriction as applied to the IDEA. Federal courts have explained that when a federal statute does not explicitly provide a statute of limitations, the court must apply the most closely related statute of limitations under the law. The IDEA is undoubtedly the most closely related statute in matters involving FAPE-based Section 504 claims. Since similar provision and purposes exist in IDEA and Section 504 statutes, it is reasonable to apply the IDEA two-year statute of limitations to FAPE-based Section 504 matters. See *P.P ex rel. Michael P. v. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009) (quoting *DelCostello v. Int’l Bhd. Of the Teamsters v. U.S. Steel Workers of Am*., 462 U.S. 151 (1983)); *Katelin O. v. Massachusetts BSEA*, Civ. Act. 17-10473 (D. Mass.2018); *In Re: Student v. Dennis Yarmouth Reg’l Sch. Dist*., 22 MSER 256 (2016).

**Discussion:**

In the instant matter, Manchester-Essex seeks dismissal of Parent’s (Student’s) claims, on the basis that they are time-barred. In order to survive Manchester-Essex’s Motion to Dismiss, Student’s (or Parent’s) Hearing Request needs only assert “factual allegations plausibly suggesting…an entitlement to relief.”

Taking Student’s (or Parent’s) allegations as true, as is required for purposes of evaluating a Motion to Dismiss, I find that Student’s/ Parent’s pleadings fail to meet the above-noted standard as to both the IDEA and Section 504 claims. The facts are undisputed: all of Student’s and Parent’s claims fall outside the applicable statute of limitations, and therefore the pleadings do not assert plausible claims for relief pursuant to the IDEA or Section 504 for the period in question. Here, Parent knew about the denials of eligibility and did not appeal them within the requisite two-year periods.

First, Student argued that the District failed to recognize that she, not Parent brought this action. While conceding that she has not yet reached the age of majority, Student argued that the “statute of limitations has not yet begun to toll” as to her. Student’s argument is unpersuasive and her reliance on *Keating* in this regard is misplaced. In *Keating*, Student turned eighteen years old shortly after Parent filed the Hearing Request, and consistent with the IDEA, all rights transferred to the Student at the age of 18. In the instant case Student is a 16 year-old, non-emancipated minor, and as such, she lacks standing to bring this action on her own. As stated by the United States Supreme Judicial Court in *Winkelman, et Al., v. Parma City School District*, 550 U.S. 516 (2007), the IDEA “sets forth procedures for resolving disputes in a manner that, in the Act’s express terms, contemplates parents will be the parties bringing the administrative complaints”, while students are minors.

The language in the IDEA expressly states that a student’s rights under the act transfer to the student when the student turns eighteen. Prior to the age of eighteen (barring legal emancipation), actions before the BSEA must be initiated by the parent or guardian. Nothing in the IDEA warrants tolling the statute of limitations until the student reaches the age of majority, nor does it exempt a student from the parent’s actions or inactions while the student is still a minor. Once the student turns eighteen the student steps into the proverbial shoes of the parent and assumes the rights and responsibilities that his or her parent had prior to the Student turning eighteen. Accepting the contrary argument would mean that a student would not be bound by any of the decisions made by the parent while the student was a minor. As explained in *Student v. Fall River Public Schools*, BSEA 000771 (Crane, 1999) ,“…to permit tolling on account of a student’s minority status would undercut the federal policy within the IDEA of assuring that student’s representative promptly asserts a student’s educational rights.” Allowing the parent to file on the student’s behalf ensures that students receive any service they need and to which they are entitled in a timely manner. Here, since Student is sixteen years old, Parent, not Student, bore the responsibility of filing a timely claim with the BSEA and Parent failed to do so.

Second, equally unpersuasive is Student’s/ Parent’s claim that the OCR’s failure to provide them notice of the requirement of filing at the BSEA when the OCR complaint was settled, is a violation constituting “specific misrepresentation” consistent with 20 USC §1415(f)(3)(D) staying Student’s claims and tolling the IDEA two-year statute of limitations. The language in 20 USC §1415(f)(3)(D) applies *solely* to misrepresentations by “the local educational agency”, not OCR. Therefore, 20 USC §1415(f)(3)(D) does not toll the statute of limitations on account of any OCR transgression, if one occurred. Also, the BSEA has no jurisdiction over OCR.

It is noteworthy that in October of 2015 Parent retained a special education advocate. The advocate should have been able to advise Parent of her rights to an appeal before the BSEA. Similarly, Parent/Student does not argue that Manchester-Essex failed to provide them with the Notice of Procedural Safeguards explaining their rights to file a request for hearing at the BSEA.

Manchester-Essex is correct that with regard to Student’s special education claims, the two- year statute of limitations controls. Moreover, the two-year limit applies to both IDEA and Section 504 claims. Since the instant Hearing Request was received on September 30, 2019, Student and/or Parent can only assert claims dating back to September 30, 2017.

Here, the facts as presented by Student/Parent show that in December of 2015, Student un-enrolled from Manchester-Essex and enrolled in TECCA. Student’s Section 504 claim alleges that Manchester-Essex excluded Student from Manchester-Essex’s extracurricular activities in 2016 (including the Halloween dance), unreasonably delayed an evaluation while Student was enrolled at Manchester-Essex, failed to act upon knowledge that Student had a disability while enrolled in the District, and that Student suffered physical and mental harm as a result of the alleged deprivation of special education services while enrolled at Manchester-Essex. All of these claims are FAPE related[[9]](#footnote-9) and therefore, as stated above, subject to a two-year statute of limitations.

Looking at the facts of this case in the light most favorable to Student (or Parent), the BSEA cannot grant the relief sought by Student or Parent pursuant to 20 U.S.C. 1400 et seq., M.G.L 71B, Section 504, or the regulations promulgated under those statutes. Therefore, Manchester-Essex’s Motion to Dismiss is hereby **GRANTED** and this matter is dismissed with prejudice.

Student’s claims at the administrative level are deemed to have been exhausted.

**ORDERS**:

1. Manchester- Essex’s Motion to Dismiss is **GRANTED**. BSEA # 2003498 is dismissed with prejudice.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: December 2, 2019

1. The District Court analyzed each of the retaliation allegations raised by Parent (the CRA filing, exclusion from the school dance and from the journalism club) and concluded that Parent’s claims were “inextricably intertwined” with their allegations of wrongful denial of FAPE. [↑](#footnote-ref-1)
2. “Exception to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to– (i) specific misrepresentations by the local educational agency, that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency withholding of information from the parent that was required under this part [20 USCS § 1411 et seq.] to be provided to the parent.” 20 U.S.C. §1415(f)(3)(D). Subparagraph C establishes the two-year timeline for requesting an IDEA administrative hearing. [↑](#footnote-ref-2)
3. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-3)
4. *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-4)
5. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-5)
6. “A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child). “ 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-6)
7. “(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to–

(i) specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency’s withholding of information from the parent that was required under this part [20 USCS 1411 et seq.] to be provided to the parent”. 20 U.S.C. §1415 (f)(3)(D). [↑](#footnote-ref-7)
8. See also 34 C.F.R. §300.507 (a)(1) and (2) addressing filing of a due process hearing, scope and the timeline for filing the complaint:

(1) A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) 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. [↑](#footnote-ref-8)
9. The District Court judge has found that Parent’s federal law claims (counts one through five) are FAPE-based, noting that “indeed the denial of a FAPE is the specific harm alleged in those causes of action”, further noting that all of the federal law counts failed the hypothetical questions test set out in *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017) to ascertain if a claim involves disability-based discrimination and not a denial of FAPE. See *Dizio v. Manchester-Essex Reg’l Sch. Dist*, United States District Court District of Massachusetts, Civ. Act. No. 18-12489-FDS at 17. [↑](#footnote-ref-9)