This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: T.B.

Date of Birth: [redacted]

ODR No. 01184-0910 KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Council Rock School District Chancellor Center 30 North Chancellor Street Newtown, PA 18940	Grace M. Deon, Esquire Eastburn and Gray P.C. 60 East Court Street P.O. Box 1389 Doylestown, PA 18901-0137

Date of Hearing:	October 29, 2010
Record Closed:	November 1, 2010
Date of Decision:	November 11, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is [a beyond teen-aged] graduate[1] of the Council Rock School District (District), who at all relevant times resided within the District (District). (NT 9-23 to 12-15.) The Student was never identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 9-5 to 6.) Parent requests due process, alleging a Child Find violation, denial of a free appropriate public education (FAPE), inappropriate graduation, failure to identify as gifted, retaliation and discrimination. Parent rests his claims upon numerous statutes, including the IDEA and the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504). In a pre-hearing motion, the District challenges Parent's standing, asserts the bars of res judicata or claim preclusion and statutory and equitable limitations of claims, and challenges the hearing officer's authority to award damages.

The hearing was conducted and concluded in one session in which the parties argued the outstanding District motions. Although I find it unnecessary to reach all of the District's arguments, I find that the District's motions relying upon the doctrine of res judicata and the various limitations of actions are determinative and I dismiss the complaint.

ISSUES

In his Complaint Notice (complaint) dated May29, 2010, Parent makes the following claims:

[1] The Student is attending [a college]. (NT 11-18 to 12-3.)

1. In 2006 and 2007, the District inappropriately failed to timely evaluate and identify the Student as a child with a disability, thus failing to comply with its Child Find obligation. (NT 14-2 to 8.)

2. From 2006 to the date of graduation, the District failed to offer or provide a FAPE to the Student, specifically with regard to post secondary transition services, and services for needs in the areas of academic, social, emotional and behavioral education. (NT 14-9 to 16.)

3. The District inappropriately graduated the Student in June 2008, without taking into account [Student's] alleged disability (Specific Learning Disability) and [Student's] alleged failure to make meaningful educational progress by the time of graduation. (NT 14-17 to 15-1.)

4. Since 2006, the District inappropriately failed to identify the Student as gifted. (NT 15-2 to 4.)

5. District personnel engaged in retaliation against the Student due to Parents' advocacy for the Student. (NT 14-2 to 15-15.)

6. From 2006 until graduation, District personnel engaged in discrimination against the Student due to [Student's] disability or due to belief that [Student] had a disability with regard to [Student's] participation in [an] extracurricular activity. (NT 18-8 to 19-20, 18-8 to 23-13.)

The District moves to dismiss these claims on six grounds:

1. Parent does not have standing to file a due process complaint, for two reasons. First, the Student has not been identified as a child with a disability under the IDEA; therefore, the standing granted to parents under the IDEA does not apply to the Parent. Second, the Student is over the age of 18; therefore, the Parent no longer has standing to seek an administrative review of any non-IDEA claims, such as the section 504 claims.

2. All of the issues raised in the complaint, including the request for reimbursement of the costs of attorney fees and an IEE obtained by the Parent in 2007, are barred by the doctrines of res judicata and collateral estoppel. The District claims that Hearing Officer DeLauro disposed of all of the Parent's issues in her decision dated September 4, 2009 in the due process administrative adjudication of issues between the same parties, ODR number 10111-08-08-KE.

3. All of the claims of the complaint are barred by the applicable statutory and judicially created limitations of actions:

a. The IDEA claims are barred by the IDEA two year limitation period;
b. The section 504 claims are barred by a judicially created two year limitation period that is imputed to section 504 in the absence of an explicit statutory limitation period;
c. The claims for identification as a gifted child are barred by an equitable one year limitation period imputed to the Pennsylvania law creating gifted status;

4. The Student's graduation could not have been inappropriate because at the time of graduation, the Student had acquired the requisite credits and was not identified for special education services;

5. Compensatory damages, if requested by the Parent, are unavailable in administrative due process proceedings under IDEA or section 504;

6. Parents should not be allowed to seek a determination regarding the provision of FAPE with regard to some services, and then seek a determination with regard to FAPE subsequently, with regard to other educational services.

DISCUSSION AND CONCLUSIONS OF LAW

ISSUES PRECLUDED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA

The doctrine of res judicata bars claimants from re-litigating issues already resolved by a final judgment in another proceeding. Knox v. Pa. Board of Probation and Parole, 588 A.2d 79, 81 (1991); see also, Office for Dispute Resolution Special Education Dispute Resolution Manual §1201. This doctrine applies to proceedings before administrative agencies. Ibid. The doctrine applies not only to issues expressly adjudicated by a previous administrative agency, but also to issues which the claimant had an adequate opportunity to raise before the previous agency but failed to raise. U.S. v. Utah Construction and Mining Company, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).

To apply the doctrine, the administrative agency must determine that the following are true:

1. That there is identity of issues between the two proceedings – that is, that the issue being asserted in the second proceeding is identical to that being asserted in the first proceeding;
2. That there is identity of causes of action – that is, that the claimant relies upon the same legal grounds for his or her claim in the second proceeding as in the first;
3. That there is identity of persons – that is, that the same parties are before the second agency or tribunal as were before the first; and
4. That there is identity of quality and capacity of the parties – that is, that the parties have not changed in their ability to pursue and defend the claims.

Montour School Dist. v. S.T., 805 A.2d 29 (Pa. Cmwlth. 2002), Knox, 588 A.2d above at 82.

In the present case, I have reviewed the transcript of proceeding before Hearing Officer DeLauro, her decision dated September 4, 2009 (Decision), which the District asserts as the previous ruling that bars this one due to the res judicata doctrine, and the Commonwealth Court appellate decision affirming that decision. The following are my conclusions as to the scope of the Hearing Officer's Decision as it affects the Parent's claims in the present matter.

The Decision found that the District did not inappropriately evaluate the Student from 2006 until [Student's] graduation in 2008, and that the Student was not in fact a child with a disability within the meaning of either the IDEA or section 504, from the beginning of the period covered by that decision until the Student graduated. Prior to the hearing in this matter, the Commonwealth Court affirmed the Decision, and the Court's affirmance was not appealed. Therefore, the Parent's claims that somehow there was fraud in the presentation of the 2006 evaluation or the 2007 re-evaluation and that this

vitiates the Decision are barred by the doctrine of res judicata. The Decision squarely rejects any impropriety in the evaluations when taken together; the Decision also finds that there was no harm to the Student from the evaluations when taken together. Thus the Decision constitutes an adjudication that disposed of the Parent's present claims of fraud or misleading in the evaluation process as a whole.

Similarly, the Parent's arguments challenging the findings set forth in the Decision are barred. The Parent argues that the Decision was contrary to the facts in evidence, that exclusion of evidence was inappropriate, that a letter cannot be considered an evaluation within the meaning of the IDEA, that the Hearing Officer failed to consider evidence of a medical or other diagnosis of Specific Learning Disability, and that the Appeals Panel failed to review the Decision adequately. All of these arguments are a direct challenge to the Decision itself, as appealed, and as such they should have been raised before either the Hearing Officer, the Appeals Panel or the Commonwealth Court. The doctrine of res judicata bars them from being raised in this collateral due process proceeding, either because they were raised and rejected in the previous due process proceeding and appeals, or because they could and should have been so raised.

I rule that the res judicata doctrine does apply in this matter according to the criteria set forth in the law. The issues asserted here with regard to the Decision, as described above, are identical to those either decided or that should have been raised in the previous due process proceeding and appeals. They are premised upon the same legal grounds here as there – IDEA and section 504. Parent is the same party who raised these issues once before, and the same District is involved. Parent's capacity is the same, as a Parent appearing pro se.

Therefore I dismiss as barred by the doctrine of res judicata Parent's first issue as listed above, the Child Find issue. This is a challenge to the gravamen of the Decision. It is clearly barred by res judicata.

In addition and consequently, I also dismiss the Parent's second issue, failure to provide a FAPE with regard to post secondary transition services, and services for needs in the areas of academic, social, emotional and behavioral education. This issue logically depends upon a challenge to the Decision, because the Student would not be entitled to a FAPE unless the Student were a child with a disability under either IDEA or section 504, sometime before graduation, and the Decision denied such status to the Student to the date of graduation. The record discloses no other contrary finding or ruling.

Since there is a previous decision that the Student was not a child with a disability within the meaning of IDEA or section 504 – a decision that cannot be challenged before me – the Student was not entitled to a FAPE within the meaning of those statutes. To the extent that the Parent could assert any right to post secondary transition services, or services for needs in the areas of academic, social, emotional and behavioral education, based upon other law, I do not have jurisdiction or authority to convene a due process hearing to adjudicate any such right; as an administrative hearing officer for special education matters, I have jurisdiction only over IDEA, section 504 and Gifted matters. Therefore I dismiss the Parent's second issue.

The Parent's third issue must likewise be dismissed on grounds similar to those requiring dismissal of the second issue. The only basis that the Parent asserts in support of his assertion that the graduation was inappropriate was that the District had not provided a FAPE to the Student, and that the Student had not made educational progress

by the time of graduation. As to the first ground, this depends upon a challenge to the Decision, which cannot be made before me. As to the second, the same logic applies, at least for any claim of which I have jurisdiction. Any claim not based upon the assumption that the Student is a child with a disability would be outside my jurisdiction. Therefore I dismiss the Parent's third issue.

The same analysis applies to the Parent's fifth issue, that the District engaged in retaliation. The Parent alleges that the Student was a child with a disability and the Parent was advocating for the Student on that basis. The only kind of retaliation over which I would have jurisdiction is that which also denies a FAPE; any other retaliation would be a common law tort not within my cognizance. Since the Student was not disabled, and therefore had no right to a FAPE, I have no jurisdiction over the fifth issue.

As to the sixth issue, there could not be 504 discrimination on account of disability, because the Decision held that the Student was not a child with a disability within the meaning of section 504. Again for this reason, I dismiss the sixth issue.

APPLICABILITY OF THE IDEA LIMITATION OF ACTIONS

In the alternative, I find that the IDEA provision limiting the filing of actions bars most of the Parent's claims. The IDEA, 20 U.S.C. 1415(f)(3)(C), provides:

> (C) Timeline for requesting hearing
>
> 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 … .

This section provides a two year "look forward" limitations period for filing a due process complaint notice, which begins when the filing party "knew or should have

known" of the events giving rise to the claim asserted in the complaint. The courts also look to this provision to limit actions under section 504 to two years from knowledge or notice of the discrimination. The Third Circuit has held definitively that this IDEA provision is the applicable law for limitation of actions under section 504 as well. P.P. v. West Chester Area School District, 585 F.3d 727, 735-37 (3d Cir. 2009).

In this matter, Parent's first issue challenges District actions in 2006 and 2007. The Parent filed his complaint on May 29, 2010. Thus, any claim arising from events in 2006 and 2007 is barred by the IDEA limitation period. Thus, even if any such claim is not barred by the doctrine of res judicata, it is barred by the IDEA limitations period.

The second issue asserts a denial of FAPE from 2006 to graduation. I view this claim as asserting that on each school day from the beginning of the year 2006 to the date of graduation, the District failed to provide the Student with a FAPE. If any of this claim survives the bar of res judicata, then, at least part of it is barred by the IDEA limitation period, because the claim for each day expired two years after that day. In effect, the Parent lost his right to file a complaint regarding these alleged deprivations with regard to each day prior to May 29, 2008 (two years prior to the date of filing the complaint); prior to this day, the claims for the deprivation of a FAPE were all barred because May 29, 2010 is more than two years after the occurrence of the claim. The remainder of the days covered by this claim were not barred by the IDEA limitation period, but as I ruled above, they are barred by the doctrine of res judicata.

The third issue is not barred by the limitations period. The Student graduated in June 2008, so the Parent had two years to file a complaint challenging the graduation. The Parent filed on May 29, 2010, less than two years after the graduation; thus his

complaint about graduation is not time barred. However, as set forth above, the claim is barred by the doctrine of res judicata.

The fourth issue is not barred by the IDEA limitation of actions; however, it is barred by an equitable limitation period applicable to state the created rights of students thought to be gifted. In Montour School Dist., 805 A.2d at 40, the Commonwealth Court held that a request for compensatory education brought under the IDEA is subject to an equitable limitation period of one year from the time of the alleged denial of a FAPE, or two years if mitigating circumstances are shown. One year later, in Carlynton School Dist v. D.S., 815 A.2d 666, 669 (Cmwlth Ct. 2003), the Court applied this equitable limitation period to gifted cases brought under Pennsylvania law. Three years later, in B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 648 (Cmwlth Ct. 2006), the Court held itself bound by the previous cases, determining them applicable to requests for compensatory education. Id. at 645. Thus, it limited such a claim to a one year period prior to filing of the complaint.

This equitable limitation period applies in the present matter. Although the original application of Montour to IDEA claims appears to be abrogated by the 2004 amendments to the IDEA, which established the statutory limitation period discussed above, Montour's equitable limitation period for gifted claims is unaffected by the change in federal law. Since the Student graduated in June 2008, I could award compensatory education at most for the period between May 29, 2008 and the date of graduation in the next month, if the Parent could show mitigating circumstances, which the Parent has not even alleged in his complaint or in his motion papers, and which the Parent did not raise during his hearing on the District's motions. After the date of

graduation, the Student was no longer eligible for gifted educational services. 16 Pa. Code §16.1(gifted student defined as child of school age); 22 Pa.Code §11.12 (school age ends at graduation from high school).

Assuming for purposes of this motion to dismiss that the Parent could show mitigating circumstances and thus extend the equitable limitation period for compensatory education in gifted cases to two years, the period between May 29, 2008 and graduation in June 2008 was well within any reasonable period of discovery and rectification, and thus would not under any circumstances reasonably raised here merit an award of compensatory education. This period of rectification is uniformly applied in compensatory education cases under the IDEA, and I find no reason not to apply it here in the exercise of my equitable discretion which has been invoked by the Parent through his request for compensatory education. See, e.g., B.C., 906 A.2d at 646 (acknowledging applicability of the reasonable period of rectification to compensatory education claim in a gifted case).

For the above reasons, therefore, I dismiss the Parent's fourth issue, failure to identify Student as gifted, as barred in large part by the Pennsylvania equitable limitations period and as otherwise rendered moot by application of the equitable period for reasonable rectification.

Similarly, the Parent's fifth issue is barred in part by the application of the IDEA two year statute of limitations. The allegation of retaliation, which is cognizable by me only with regard to a denial of a FAPE, as explained above, escapes the operation of the limitations period only for the final few weeks before the Student graduated. Although the Parent argues that such retaliation is asserted for the entire period before graduation,

the only form of retaliation that Parent asserts is denial of equal participation in the extracurricular [redacted] program. While I note that that most school [redacted] programs end well before the end of May in a typical school year, I find that, for the short period of time to which it is applicable, the parent's claim is not barred by the limitation period, but is barred by the operation of res judicata, as discussed above.

Regarding the claim of discrimination, the same reasoning applies, as the only form of discrimination alleged is with regard to participation in the [redacted] program.

CONCLUSION

For all of the reasons stated above, I dismiss the Parent's request for due process in its entirety. Any claims not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

_____

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

November 11, 2010