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

FINAL DECISION AND ORDER

Student's Name: T. W.

Date of Birth: [redacted]

ODR No. 13587-1213AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Dean M. Beer, Esq. 30 Cassatt Avenue Berwyn , PA 19312
People for People Charter School 800 N. Broad Street Philadelphia, PA 19130	Maureen Fitzgerald, Esq. 620 Freedom Business Center Suite 300 King of Prussia, PA 19406-1330

Date of Hearing: August 19, 2013

Record Closed: September 13, 2013[1]

Date of Decision: September 20, 2013

Hearing Officer: Brian Jason Ford, Esq.

[1] The record closed upon the Hearing Officer's receipt of the parties closing briefs.

Introduction

The Student attended the Charter from the start of the 2005-06 school year through the 2008-2009 school year.[2] On February 28, 2013, the Parent requested this due process hearing, alleging a number of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (IDEA) and Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. Part 104.4 (Section 504). The Parent claims that the Student was denied a free appropriate public education (FAPE) during this time and, as a remedy, the Parent demands "Full days of compensatory education from September 2005 through June 2009." *Complaint* at 3.

The Charter has moved to dismiss the Parent's Complaint as untimely, arguing that the Parent's claims are time-barred by the IDEA's two year statute of limitations, codified at 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). The Parent denies that the Complaint is untimely, and argues that exceptions to the IDEA's statute of limitations apply even if the Complaint is untimely.

I bifurcated this matter to address the statute of limitations first. An evidentiary hearing was convened on August 20, 2013. Both parties submitted evidence and testimony during that hearing. I also granted the parties' request to submit post-hearing briefs, which were submitted on September 13, 2013.

For reasons set forth below, I will grant the District's motion and dismiss the Parent's complaint as untimely.

Issues

Was the Parent's Complaint timely?

If the Parent's Complaint was untimely, does the withholding exception to the IDEA's statute of limitations permit the otherwise untimely filing?

Findings of Fact and Discussion

Certain facts are pertinent to certain issues, and so I have grouped findings of fact with discussion sections for context and flow. All findings of fact are numbered sequentially, regardless of which discussion section they appear in.

In several instances, I note the Parent's general allegations without making specific findings of fact. I do this only when assuming the facts that the Parent urges me to find does not alter the outcome of this decision.

The Burden of Proof

[2] Except for the cover page of this Decision, identifying information had been omitted to the greatest extent possible.

There was some discussion at the outset of this hearing as to which party bore the burden of proof. The Charter raised the IDEA's statute of limitations as an affirmative defense. Therefore, the Charter must establish that the statute of limitations applies, barring the Parent's claims in absence of an exception. As discussed below, case law provides an unambiguous standard by which the timeliness of the Complaint is assessed: the date that the Complaint was filed is controlling.

If the Charter establishes that the Parent's claims are time-barred, it becomes the Parent's burden to establish that any of the exceptions to the IDEA's statute of limitations excuse the untimely filing. Exceptions must be established by preponderant evidence. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

The Statute of Limitations – Applicability

The IDEA includes a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e). Pursuant to the statute of limitations, a parent must request a due process hearing within two years of "the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." *Id*.

The IDEA's statute of limitations applies to Section 504 claims when both causes of action arise out of the same facts. *P.P. v. West Chester Area School District*, 585 F. 3d 727 (3rd Cir. 2009)

In other contexts, there is a well-developed body of case law regarding the "discovery rule" or the "knew or should have known" standard. *See, e.g. Gleason v. Borough of Moosic*, 609 Pa. 353, 364, 15 A.3d 479, 485-86 (2011); *Wilson v. El-Daief*, 600 Pa. 161, 175, 964 A.2d 354, 362 (2009); *Assembly Technology v. Samsung Techwin Co., Ltd.*, C.A. No. 09-00798, 2009 WL 4430020, at *2 (E.D.Pa. Nov. 16, 2009). Under current Third Circuit jurisprudence, factors established by that body of law are not considered. Rather, in IDEA cases, the question of whether a claim is timely is simplified: the date of the *complaint* is controlling. IDEA claims arising more than two years before a complaint is filed are time-barred, unless an exception applies. *D. K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. Pa. 2012); *Steven I. v. Central Bucks School Dist*., 618 F.3d 411, 417 (3rd Cir., 2010).

Absent an exception, to determine if an IDEA claim is time-barred requires only a comparison of the date of the alleged violation and the date of the complaint itself. If the alleged violation occurred more than two years before the complaint was filed, the claim is untimely unless an exception applies.

In this context, very little fact finding is required to determine that the statute of limitations applies. I find that:

The Complaint alleges violations of both the IDEA and Section 504 arising in the 2005-06, 2006-07, 2007-08, and 2008-09 school years.

To remedy these alleged violations, the Parent demands compensatory education from September of 2005 through June of 2009.

The Complaint was filed with ODR on February 28, 2013.

Based on the date of the Complaint, claims arising before February 28, 2011 are untimely. Consequently, the entirety of the Complaint is untimely, unless an exception applies.

The Statute of Limitations
Withholding Exception – Notice of Procedural Safeguards

There are two, codified exceptions to the IDEA's statute of limitations: the "misrepresentations" exception, found at 20 U.S.C. § 1415(f)(3)(D)(i), and the "withholding" exception, found at 20 U.S.C. § 1415(f)(3)(D)(ii). The Parent argues that the withholding exception applies in this case and, consequently, the statute of limitations does not.

Under the withholding exception, the IDEA's statute of limitations "shall not apply to a parent if the parent was prevented from requesting the hearing due to... the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D)(ii). The Third Circuit examined this language in *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. Pa. 2012):

> The text of subsection (ii) plainly indicates that 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.

D.K. 696 F.3d at 246, italics original.

The court went on to explain that "District courts in this Circuit have properly limited this [withholding] exception to such circumstances" in which LEAs have failed to provide statutorily mandated disclosures. *Id.* The difficulty with this part of the *D.K.* decision is that the district court opinions cited with approval do not all say the same thing about what disclosures are mandated by statute.

The IDEA, as a whole, requires school districts to send information, notices, forms and paperwork to parents under various circumstances and at various times. One such notice is the procedural safeguards notice, which is described at 20 U.S.C. § 1415(d).

In *D.K.*, the court approvingly cites to cases concluding that an LEA's failure to provide the §1415(d) procedural safeguards notice is the only thing that can trigger the withholding exception. *See D.K.* at 246 *citing I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F.Supp.2d 762, 775 (M.D.Pa. 2012) and *Evan H. ex rel. Kosta H. v. Unionville–Chadds Ford Sch. Dist.*, No. 07–4990, 2008 WL 4791634, at *7 (E.D.Pa. Nov.4, 2008). In *D.K.*, the court also approvingly cites to a case concluding that other types of notices, such as those required by 20 U.S.C. § 1415(b)(3) and (c)(1), could trigger the withholding exception. See *D.K.* at 246 citing *D.G. v. Somerset Hills Sch. Dist.*, 559 F.Supp.2d 484, 492 (D.N.J.2008).

The subtle difference between cases like *Evan H.* and *D.G. v. Somerset Hills* notwithstanding, the Third Circuit clearly held that an LEA's failure to provide critical items like the procedural safeguards notice and permission to evaluate forms will only trigger the exception if there is a clear legal obligation to provide such information. *D.K.* at 247-248. Under this framework, I must determine whether the Charter was obligated to provide information ("statutorily mandated disclosures" in the language of *D.K.*) and failed to do so.

To begin this analysis, I look first to the Complaint. The Parent alleges a denial of FAPE as a result of a Child Find violation. Under the IDEA's Child Find obligation, which is imposed upon charter schools through 22 Pa Code § 711.21, the Charter is obligated to locate and identify IDEA-eligible students, regardless of the severity of the disability, and even if the student is advancing from grade to grade. *See* 34 CFR § 300.111.

The Parent argues that the same facts that would establish a Child Find violation also trigger the withholding exception. Generally, the Parent alleges that 1) the Charter was placed on notice that the Student had emotional problems via enrollment forms in October of 2004; 2) the Student's behavior in school and academic performance should have prompted the Charter to evaluate the Student; 3) the Student [redacted] while in school; and 4) that either or both of these attempts should have prompted the Charter to evaluate the Student.[3] Alternatively, the Parent argues that each time that the Charter should have evaluated the Student but chose not to, the Charter was obligated to provide a procedural safeguards notice, as required by 20 U.S.C. § 1415(d).

There is no dispute that the Student was never identified as IDEA-eligible while attending the Charter. Further, there is no dispute that the Charter never proposed to evaluate the Student to determine IDEA eligibility, and never provided a procedural safeguards notice. The Parent, therefore, argues that the Charter's failure to provide a procedural safeguards notice whenever it should have evaluated the Student but did not do so gives rise to the withholding exception.

The Third Circuit considered and rejected a substantively identical argument in *D.K.* In *D.K.*, the parents argued that the student's presentation and performance in school were red flags that should have prompted the district to propose an evaluation. Despite the red flags, "the School District provided [the parents] with neither a permission to

[3] The Charter vigorously disputes these factual allegations.

evaluate form nor a procedural safeguards notification until after they requested an evaluation..." *D.K.,* 696 F.3d at 247. Under these circumstances, the Third Circuit determined that the LEA was not obligated to provide a procedural safeguards notice pursuant to 20 U.S.C. § 1415(d). *Id.* Rather, the Third Circuit found that 20 U.S.C. § 1415(d) requires LEAs to provide procedural safeguards notices "only when: (1) the student is referred for, or the parents request, an evaluation; (2) the parents file a complaint; or (3) the parents specifically request the forms." *D.K.*, 696 F.3d at 247; *see also, D.K.* at footnote 5. The LEA did not refer the student for an evaluation, and so it was not required to provide the form.

It is strange that an LEA can be excused from sending a procedural safeguards notice because it did not propose a necessary evaluation. Even so, in *D.K.*, the Third Circuit's analysis of the school district's obligation to issue a procedural safeguards notice was not contingent upon the presence or absence of a child find violation. Instead, while strictly interpreting the withholding exception, the court took an equally narrow view of the circumstances under which a procedural safeguards notice must be issued –placing great emphasis on the fact that the notice must be *statutorily mandated* to trigger the exception.

Were I to give absolute credence to the Parent's testimony (NT at 22-103) and interpret every piece of evidence as the Parent suggests I should, there would be no question that the Charter should have proposed evaluations, and should have issued procedural safeguards notices. Under current, binding case law, those facts make no difference. Current jurisprudence calls for a narrow interpretation of the withholding exception, predicated upon a narrow interpretation of when procedural safeguards notices must be issued. Consequently, the Charter was not obligated to provide a procedural safeguards notice because it did not propose to evaluate the Student, regardless of the necessity of any such evaluation.

For the forgoing reasons, the Charter had no statutory mandate to issue a procedural safeguards notice, whether or not it violated Child Find. The Charter's failure to issue a procedural safeguards notice, therefore, will not support the withholding exception in this case.

The Statute of Limitations
Withholding Exception – Permission to Evaluate Forms

In *D.K.*, the parents alleged that the school district's failure to provide permission to evaluate forms (PTEs) also triggered the withholding exception. Unlike the procedural safeguards notice, the Third Circuit's conclusions about PTEs was explicitly linked to the absence of a Child Find violation. Regarding PTEs, the Third Circuit concluded that the student's presentation and performance did not warrant an evaluation, and so the school district was not statutorily mandated to issue PTEs. *D.K.*, 696 F.3d at 247-248. It seems clear and logical that if the school district in *D.K.* was statutorily obligated to provide PTEs, its failure to do so could have triggered the withholding exception.

I note, again, that a direct conversion from the Parent's testimony to findings of fact would compel a conclusion that the Charter was obligated to propose an evaluation but failed to do so.[4] The Third Circuit provides a template for analysis of this situation in *D.K.* as well. Immediately after concluding that the school district had no statutory mandate to issue PTEs, the Third Circuit discusses what would happen if the PTEs were necessary:

> Even if the regulations did require such anticipatory notice, [the parents] have not established causation; D.K.'s parents were not "prevented from requesting the hearing" by any such omission. Their own unprompted request for an evaluation in January 2006 demonstrates that they were aware of their right to seek one. Additionally, in December 2005, although the School District encouraged postponing a formal evaluation, it made D.K.'s parents aware of that option by noting that it might be an appropriate step down the road.

D.K. v. Abington Sch. Dist., 696 F.3d 233, 247-248 (footnote omitted).

In *D.K.*, the Third Circuit makes it clear that withholding a statutorily mandated document will not excuse an untimely filing by itself. Rather, parents must also prove that the withholding caused the caused the delay. As such, *D.K.* establishes a two part test for the withholding exception: 1) was a statutorily mandated disclosure withheld and, 2) did the withholding cause the untimely filing. *D.K.* does not, however, require those parts to be analyzed in order and, in fact, suggests that there is some merit in examining the causation element regardless of whether a disclosure was withheld.

In light of this, I will examine the evidence and testimony presented regarding causation. In doing so, *I will assume that the Charter was obligated to issue PTEs and violated that obligation.*

The Parent cites to *Centennial Sch. Dist. v. S.D.*, No. 10-CV-4129, slip op., at 13; 2011 U.S. Dist. LEXIS 140968 (E.D. Pa. Dec. 7, 2011) to argue that the Charter's failure to provide PTEs precluded the Parent from learning about the right to an evaluation, the range of services that could be made available to the Student, and the right to request a hearing. The Parent argues, albeit indirectly, that these factors establish the requisite causation needed to satisfy the second prong of the *D.K.* test. Ultimately, I must respectfully disagree with the Parent's analysis.

The IDEA, through several interconnected sub-parts, establishes mandatory content for PTEs. PTEs are provided because LEAs must obtain parental consent before conducting an initial evaluation to determine eligibility for special education. 20 U.S.C. § 1414(a)(1)(D)(i)(I). PTEs must provide a notice to parents "that describes any evaluation procedures such agency proposes to conduct." 20 U.S.C. § 1414(b)(1). That notice must be "in accordance with subsections (b)(3), (b)(4), and (c) of section 1415." *Id.*

[4] I also note, again, that the Charter vigorously denies the factual allegations in this case.

The reference within 20 U.S.C. § 1414(b)(1) to 20 U.S.C. § 1415(b)(3) and (b)(4) is straightforward. First, 20 U.S.C. § 1415(b)(3) provides in pertinent part that LEAs must provide "Written prior notice to the parents of the child ... whenever the local educational agency ... proposes to initiate ... [an] evaluation ... of the child." Second, 20 U.S.C. § 1415(b)(4) requires the notice to be in the parents' native language. Consequently, the description of the evaluations that an LEA proposes must be in writing and in the parents' native language.

The reference within 20 U.S.C. § 1414(b)(1) to 20 U.S.C. § 1415(c) requires more detailed analysis. 20 U.S.C. § 1415(c) has two sub-parts: § 1415(c)(1) and § 1415(c)(2). The first subpart – (c)(1) – describes the mandatory content of all prior written notices. The second subpart – (c)(2) – establishes procedural rules concerning the sufficiency of due process complaints, amendments, and responses. Moreover, § 1415(c)(2) applies only when a complaint has been filed. Consequently, in the absence of a complaint, PTEs must comply with 20 U.S.C. § 1415(c)(1) and § 1415(c)(2) is inapplicable.

In its entirety, 20 U.S.C. § 1415(c)(1) reads as follows:

> (c) Notification requirements
> (1) Content of prior written notice. The notice required by subsection (b)(3) shall include—
> (A) a description of the action proposed or refused by the agency;
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
> (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
> (F) a description of the factors that are relevant to the agency's proposal or refusal.

Putting all of these requirements together, when an LEA proposes an initial evaluation of a student to determine eligibility for special education, the LEA must send a PTE that 1) is in writing, 2) is in the parents' native language, 3) describes the proposed evaluation to a degree sufficient for the parents to give informed consent, 4) complies with 20 U.S.C. § 1415(c)(1).

In this case, the requirement under 20 U.S.C. § 1415(c)(1)(C) is the most concerning. When issuing a PTE, LEAs must tell parents that they *have* procedural safeguards. In

cases of initial evaluations, when issuing PTEs, LEAs must actually provide the procedural safeguards. And yet 20 U.S.C. § 1415(c)(1)(C) does not compel LEAs to incorporate the procedural safeguards notice into the PTE. Rather, the PTE and the procedural safeguards notice are separate things. This is easily seen in practice.

In Pennsylvania, LEAs generally provide prior written notice through a document called a "Notice of Recommended Educational Placement" (NOREP). When proposing an evaluation, LEAs provide prior written notice through a "Permission to Evaluate - Consent Form" (PTE-Consent). When necessary, LEAs also provide a "Procedural Safeguards Notice" (Notice), which is a separate document. The NOREP, PTE-Consent and Notice are all promulgated by the Pennsylvania Training and Technical Assistance Network (PaTTAN), an initiative of the Bureau of Special Education (BSE), Pennsylvania Department of Education (PDE).

The PTE-Consent form (the document that the Parent claims that the Charter failed to provide on multiple occasions) includes the following language:

> Please read the enclosed Procedural Safeguards Notice that explains your rights, and includes state and local advocacy organizations that are available to help you understand your rights and how the special education process works.

The NOREP includes the following language:

> You have rights and protections under the law described in the Procedural Safeguards Notice. If you need more information or want a copy of this notice, please contact: [blanks are provided for the LEA to fill out]

The Notice is a 29 page document that includes a through description of all procedural safeguards, contact information for parent resources, a form for requesting mediation, and a due process complaint form. *See* http://pattan.net-website.s3.amazonaws.com/images/2011/12/21/PSN_010611.pdf.

I take judicial notice of all three of these standard, common documents and forms.

Again, unlike the Notice, I have assumed that the Charter was required by statutory mandate to issue a PTE-Consent form. Given the language of the form, I must conclude that the Charter's failure to issue a PTE-Consent form denied the Parent an opportunity to know that the Notice exists.

Alternatively, the Parent argues that the Charter made a conscious decision to not evaluate, triggering the Charter's obligation to send a NOREP. This alternative scenario yields the same result. Based on the NOREP's language, the Charter's failure to provide a NOREP denied the Parent an opportunity to know that the Notice of Procedural Safeguards exists.

Given all of the forgoing, the question of causation hinges upon whether the Charter's failure to provide documents that would have given the Parent notice about the Notice caused the untimely filing. Nothing in the record supports such a claim. In the case of the PTE-Consent form, the form would have referenced the Notice but, under the facts of this case, the Charter's failure to provide the Notice cannot support the withholding exception. In the case of the NOREP, the form would have advised the parent that the Notice exists, and nothing more. Nothing in the Parent's testimony suggests that she would have sought out the Notice had she received a PTE-Consent form or a NOREP. As such, the causation element is not supported, and so the withholding exception cannot excuse the untimely filing.

Fundamental Fairness

Finally, the Parent argues that it is fundamentally unfair to apply *D.K. v. Abington* in Child Find cases. The Parent, via counsel, says as follows:

> "Additionally, this Hearing Officer should reject the logic of *D.K.* as applied to a Child Find situation like the present. This holding theoretically allows districts to completely ignore their obligation to initiate an evaluation for years, so long as the parents do not make a specific written request for an evaluation. This presents a classic "Catch 22". Parents cannot invoke the exception if they do not make a specific written request for an evaluation, but they cannot make such a request because they lack the knowledge to do so. Applying the *D.K.* analysis in such a context would encourage schools to ignore a child's needs because, so long as it does not propose an evaluation and parents do not clearly request one, the district will entirely escape liability."

The Parent's argument concerning the practical implications of *D.K.* in Child Find cases is important. Even so, current case law compels me to find as I have found. In court, parties may argue that jurisprudence should be changed, and that a different analysis should apply when there has been a Child Find violation. Similarly, the IDEA instructs courts to "grant such relief as the court determines is appropriate" when adjudicating civil actions brought under the IDEA. 20 U.S.C. § 1415(i)(2)(C)(iii).

This administrative-level due process hearing officer, however, is obliged to abide by the binding precedent established by the Third Circuit. That precedent, as it stands today, does not include any special carve out or exemption for Child Find violations. It applies even when a Child Find violation is assumed. I can neither ignore, nor decline to follow, binding authority.

Conclusion

The entirety of the Parent's Complaint concerns alleged violations of the IDEA arising more than two years before the Complaint was filed. The IDEA's two-year statute of limitations bars those claims. The withholding exception to the IDEA's statute of limitations does not excuse the untimely filing, even assuming that a Child Find violation occurred, and taking all evidence and testimony in the light most favorable to the Parent.

An order consistent with the forgoing follows.

ORDER

And now, September 20, 2013, it is hereby **ORDERED** as follows:

The Charter's Motion to Dismiss is hereby **GRANTED.**

The Parent's Complaint is **DISMISSED** as untimely.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER