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 DISPOSITION

Child's Name: R. B.

Date of Birth: [redacted]

Date of Hearing: October 28, 2014

OPEN HEARING

ODR File No. 15278-1415AS

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Rose Tree Media School District 308 North Olive Street Media, PA 19063	Craig D. Ginsburg, Esquire Levin Legal Group, P.C. 1301 Masons Mill Business Park 1800 Byberry Road Huntingdon Valley, PA 19006
Date Record Closed:	November 12, 2014
Date of Disposition:	November 25, 2014
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is beyond teenaged and previously was enrolled as a student in the Rose Tree Media School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq*. Student's Parent filed a due process complaint against the District[2] raising claims under the IDEA; Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794; and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq*.

By way of further background and to provide context for the instant proceeding and disposition, the Parent and Student originally filed an action against the District and various other defendants in the U.S. District Court for the Eastern District of Pennsylvania. That Court dismissed the Complaint for lack of subject matter jurisdiction for a failure to exhaust administrative remedies, and the Third Circuit affirmed. Following that affirmance, the Parent filed the current Due Process Complaint, which was amended twice pursuant to this hearing officer's Interim Rulings. Pending before the hearing officer is the District's Motion to Dismiss the Complaint in its entirety, on a number of grounds, one of which required development of a factual record.[3]

[1] Although this was an open hearing, in the interest of preserving Student's confidentiality and privacy, Student's name and gender are not used in the body of this Disposition which is treated as a final decision since it resolves all claims.

[2] The original Complaint named various individuals and the District's Board of School Directors as party-defendants; however, following a ruling of this hearing officer, the Complaint was amended and named only the District as the responding party. (Hearing Officer Exhibit (HO-) 1; ODR Amended Complaint at ¶ 4)

[3] The Parent and Student did submit an Offer of Proof at the direction of this hearing officer, and the District provided a response to that Offer of Proof. The Parent took exception to the District's response and particularly to an exhibit provided with that filing. In an abundance of caution, this hearing officer determined that a factual record was necessary given the parties' disagreement over documents that appeared to be important to the pending Motion. (HO-4) The hearing convened solely to address the applicability of the statute of limitations and its exceptions. (Notes of Testimony (N.T.) 40-42)

For the reasons set forth below, I will grant the District's Motion and dismiss the Due Process Complaint. In doing so, I will make formal findings of fact that are necessary to rule on the pending Motion based on the record that was developed.

ISSUE

Whether the District is entitled to dismissal of the Parent and Student's Due Process Complaint.

FINDINGS OF FACT

1. Student is beyond teenaged and was enrolled as a student in the District during the 2008-09, 2009-10, and 2010-11 school years. Student was disenrolled from the District by the Parent on or about July 11, 2011 and enrolled in a cyber charter school for Student's senior year (2011-12). (Notes of Testimony (N.T.) 86-87, 138, 166-67, 170-71; School District Exhibits (S-) 20, 21, 22, 23)

2. Student was evaluated by the District in early 2009, and an Evaluation Report (ER) was issued on March 10, 2009 and provided to the Parent on March 13, 2009. The ER determined that Student was not eligible for special education. The District did provide a Section 504/Chapter 15 Service Agreement dated April 15, 2009, which the Parent approved. (S-2, S-3, S-4, S-6)

3. An Individualized Education Program (IEP) was developed for Student in May 2010. The Parent and Student attended this IEP meeting, and the Parent signed acknowledgement of receipt of the Procedural Safeguards Notice (PSN) at the May 25, 2010 meeting. The Parent also signed the Notice of Recommended Educational Placement (NOREP) for itinerant learning support. (N.T. 96-98; S-7, S-8)

4. In February 2011, the Parent filed a Complaint with the Bureau of Special Education in which she asserted, among other things, that the District failed to comply with a prior settlement agreement and failed to properly implement Student's IEP. (S-17, S-18)

5. In April 2011, the Parent filed a civil complaint against the District in the County Magisterial District Court, alleging that it breached the settlement agreement. (S-19)

6. Student's IEP meeting convened again in May 2011, and the Parent and Student both attended. The Parent again signed acknowledgement of receipt of the PSN at the May 18, 2011 IEP meeting. (N.T. 99-100; S-10)

7. The District's PSN includes a letter from its Director of Elementary Teaching & Learning that offers help and clarification of the information contained in the PSN. The letter also

notes the right "to file a complaint with the Pennsylvania Department of Education and/or to initiate a due process complaint as described in" the PSN. (S-9 p. 1) The PSN itself is 35 pages in length. (N.T. 72-73; S-9)

8. The Parent did not approve the May 2011 NOREP, citing a failure to implement the IEP and to provide Student with a free, appropriate public education (FAPE). She also checked the box next to "I request…Due-process Hearing." The Parent's signature is dated June 15, 2011. (S-11)

9. A few days later, the Parent wrote a letter to a District representative dated June 19, 2011 and stated, in relevant part, that she was "strongly considering a request for a due process hearing" with respect to the most recently offered IEP (S-14 p. 1), and that Student would be transferring out of the District. (S-14)

10. The District responded to the Parent's disapproval of the NOREP through a letter dated June 30, 2011 and sent to the Parent's address, advising her that the District would convene a meeting if she wished and that it would not file a due process complaint for her. Another copy of the PSN was enclosed. The Parent did not follow up at any time on her due process request. (N.T. 83-85, 168-69, 172; S-15)

11. The District sent another letter to the Parent dated July 13, 2011, acknowledging Student's enrollment in the cyber charter school. Another copy of the PSN was enclosed with the letter to the Parent. (N.T. 87-88; S-16)

12. On October 27, 2011, the Parent and Student, through counsel, filed a Civil Complaint in the U.S. District Court for the Eastern District of Pennsylvania docketed at No. 11-6733. The defendants named were the District, its Board of School Directors, and several individuals employed by the District. The Complaint was amended twice. The Second Amended Complaint was filed on March 5, 2012, asserting claims under the IDEA, Section 504, and the ADA, as well as negligent infliction of emotional distress, civil conspiracy, and breach of contract. (N.T. 170; S-24, S-30)

13. Nearly all of the IDEA, Section 504, and ADA claims in that federal court action related to alleged actions during the 2009-10 and 2010-11 school years; the sole exceptions were the District's asserted failure to comply with the terms of the 2010 settlement agreement and refusal to permit Student to participate in extra-curricular activities as of the time of the filing of the Second Amended Complaint. (S-30)

14. On March 19, 2013, the Parent and Student, through counsel, filed a Complaint in the County Court of Common Pleas against the District and various other individuals employed by the District, pursuant to the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§ 951-953. That action followed a Complaint filed with the PHRA. (S-27, S-28, S-29)

15. On August 4, 2014, the Parent filed a Due Process Complaint with the Office for Dispute Resolution (ODR) on behalf of herself and Student. The Complaint consisted of a 4-page form Notice attached to a copy of the Amended Complaint filed in federal court at No.

11-6733. The only material difference between the Second Amended Complaint filed at No. 11-6733 and the ODR Amended Complaint was the addition of averments of intentional retaliation and deliberate indifference, rather than negligence, in the former pleading. (S-30; Parent and Student's ODR Due Process Complaint)

16. The Parent and Student's ODR Amended Complaint and ODR Second Amended Complaint asserted additional claims of retaliation on the basis of Student's disability in January, May and June 2012. (ODR Amended Complaint at ¶¶60-63; ODR Second Amended Complaint at pp. 1-2)

17. The Parent and Student's ODR Amended Complaint and ODR Second Amended Complaint asserted claims based on actions by the District in 2013 and 2014, and continuing through the present. (ODR Amended Complaint at ¶¶63-64; ODR Second Amended Complaint at pp. 1-2)

18. Student is no longer a school-aged student and currently is enrolled in a post-secondary educational program. (ODR Second Amended Complaint at p. 2)

DISCUSSION

The District's Motion to Dismiss is premised on several grounds: the IDEA statute of limitations; this hearing officer's lack of authority to award the relief requested (money damages); this hearing officer's jurisdiction over ADA claims; and the absence of any connection between the claims for incidents in 2012, 2013, and 2014 and Student's special education program.[4]

A. Statute of Limitations

With respect to the statute of limitations, the IDEA expressly provides that parties must be afforded the opportunity to file a due process complaint alleging "a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); *see also* 34 C.F.R. § 300.507(a)(2). In other words, a party "must request an impartial due process

[4] The District challenged the sufficiency of these later 2012-14 claims, and this hearing officer granted the sufficiency challenge on one occasion and denied it on another. (HO-2, HO-3)

hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(c); *see also* 34 C.F.R. § 300.511(e). This section provides for a two-year period for filing a due process complaint notice, accruing from the time the filing party "knew or should have known" of the events giving rise to the claims asserted.

The IDEA also expressly provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local education 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); *see also* 34 C.F.R. § 300.511(f).

The Third Circuit has clarified that the misrepresentation exception requires knowing and intentional conduct on the part of the school district. *D.K. v. Abington School District*, 696 F.3d 233, 245-46 (3d Cir. 2012). Similarly, the withholding exception requires a finding that the school district failed to provide "statutorily mandated disclosures[.]" *Id*. at 246. For both exceptions, the *D.K.* Court further emphasized that invoking either exception includes a causation element; in other words, the misrepresentation or withholding must have *caused* a parent's failure to request a hearing sooner. *Id*. Further, claims that are based upon and interrelated with the IDEA claims, as asserted here, are subject to the same limitations period. *See P.P. v. West Chester Area School District*, 585 F.3d 727, 737 (2009) (applying the IDEA statute of limitations to Section 504 education claims). And, as recognized by *D.K.*, the statutory limitation provisions in the IDEA preclude application of common law doctrines such as

minority tolling and the continuing violations doctrine. 696 F.3d at 248. Accordingly, the scope of all of the Parent's and Student's claims must be considered based solely on the limitations period in the IDEA.

Following review of the factual record developed in this matter, there can be no question that the claims for actions during the 2009-10 and 2010-11 school years, as well as those during the 2011-12 school year, are barred by the IDEA two-year statute of limitations. The initial ODR Complaint was not filed until August 4, 2014. Unless an exception applies, the Parent and Student had two years from the dates they knew or should have known of the actions that formed the basis of their complaint, the latest of which occurred in June 2012, to file for an administrative hearing through ODR. There is no suggestion in the record that the Parent was unaware of any of the District's actions about which she now complains at or near the time they occurred. Thus, for purposes of the Motion, the time limitations must be assessed based upon the dates of the conduct in question during the 2009-10, 2010-11, and 2011-12 school years.

The Parent asserted that the withholding exception serves to permit her to proceed. Specifically, she believes that she did not receive the District's June 30, 2011 letter (S-15) which advised her that it would not file a due process complaint for her. (N.T. 142-43) While the Parent may not recall getting the letter, there is no reason to suspect that it did not reach her through the normal course of postal delivery. (Finding of Fact (FF) 10) Even if she did not receive that particular letter, however, it is simply unreasonable for her to fail to ever follow up on the June 15, 2011 request for due process on the NOREP. (FF 9, 10) The evidence, including the Parent's own testimony (N.T. 145, 153-54), clearly establishes that the Parent was provided with the PSN each time the District proposed to initiate or change Student's special

education programming. (FF 3, 6, 7, 10, 11) The District, thus, did not withhold information it was statutorily required to provide to the Parent.

The gist of the Parent's contention that the statute of limitations should not bar the claims is that the District failed to explain the PSN to her (N.T. 149-50, 155-57). However, the IDEA does not impose such an obligation on school districts, nor do the federal and state regulations implementing the IDEA or the cases interpreting those laws. Moreover, the District invited, and demonstrated a willingness to provide, any necessary clarification of the PSN if the Parent wished.[5] (FF 7, 10) Furthermore, the Parent clearly exhibited an ability to pursue several avenues of resolving her disagreements with the District; first, through a complaint to the Bureau of Special Education "using the procedure from the procedural safeguards notice" (N.T. 158), and in filing additional complaints against the District, both with and without counsel, in various forums. (FF 4, 5, 12, 14) Having availed herself of a number of dispute resolution options, this hearing officer cannot conclude that the Parent was prevented from pursuing administrative due process in a timely manner based on the withholding exception.

Even if one were to accept the Parent's argument that her confusion over the procedural safeguards during the 2009-10 and 2010-11 school years should operate to deny application of the IDEA statute of limitations (which this hearing officer does not), there can be no question whatsoever that the Parent knew, or should have known, of the actions that formed the basis of her complaints against the District, as well as her ability and right to seek redress, as of the date the first Civil Complaint was filed on her and Student's behalf in federal court asserting those

[5] There is some support for the proposition that the procedural safeguards in special education should be clearly communicated. *See, e.g.*, Mandic, C.G., Rudd, R., Hehir, T., & Acevedo-Garcia, D., *Readability of Special Education Procedural Safeguards*, 45 J. Spec. Educ. 195 (2012). The Parent here, however, did not take advantage of the opportunity offered by the District for clarifying any uncertainties.

very claims.[6] (FF 12) At the very latest, then, the Parent had two years from that date, or by October 27, 2013, to file a Due Process Complaint. She did not. Similarly, all of the alleged actions during the 2011-12 school year were committed at least by June 2012; and, again, a two-year limitations period applied. Thus, all of the Parent and Student's claims for the 2009-10, 2010-11, and 2011-12 school years are time-barred.

The Parent also contended that the Third Circuit decision involving the parties, *B. v. Rose Tree Media School District* 759 F.3d 266 (3d Cir. 2014), expressly provided her with the ability to proceed in this administrative forum. (N.T. 37-38; HO-3) That Court did explain, among other things, the strong policy reasons for requiring administrative exhaustion in IDEA cases, and suggested that there "may" be a basis for relief at this level. 759 F.3d at 278 n. 14, 15. The Court did not, however, address the applicability or non-applicability of any defenses to the Parent's and Student's claims. This hearing officer having determined that the Parent and Student have not established any reasonable justification for failing to file their claims at the administrative level within the statutory limitations period, "the expiration of the period reflects only on the individual's choice" rather than serving as an excuse for failing to do so. *J.B. v. Avilla R-XIII School District*, 721 F.3d 588, 595 (8th Cir. 2013).

B. Remaining Claims

Finally, this hearing officer lacks jurisdiction to consider the claims relating to the challenged actions by District representatives in 2013 and 2014 and continuing into the present. This hearing officer's authority arises under the IDEA and the federal and state regulations

[6] The Parent conceded that her counsel was acting on behalf of her and Student. (N.T. 170) Certainly their pleadings in, and arguments to, the District and Circuit Courts that exhaustion of administrative remedies was not required provide evidence of the requisite knowledge the Parent now claims she did not possess. *See, e.g.,* S-30 p. 6 at ¶ 12. Further, to the extent that the Parent is attempting to fault the District for decisions she and her counsel made, her argument is wholly untenable.

implementing that statute, as well as the state regulations implementing Section 504. *See* 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500-300.520; 22 Pa. Code §§ 14.162, 15.1, 15.8. Special education due process hearing officers have authority to decide issues relating to a proposed or refused initiation of or change in the child's identification, evaluation, or educational placement; or the provision of FAPE to a child, under the IDEA. 34 C.F.R. §§ 300.503, 300.507, 300.511. In Pennsylvania, they are also granted authority to decide FAPE and related issues under Section 504, including discrimination against a student based upon disability, in accordance with the procedures provided by the IDEA and Pennsylvania's Chapter 14. 22 Pa. Code §§ 15.1 - 15.11.

Student is no longer school-aged (FF 1, 18); and, the more recent claims for 2013 and 2014 lack even a tangential relationship to Student's special education programming or status as a child with a disability. Accordingly, all of the remaining claims are not within the jurisdiction granted to this hearing officer under federal or state law, and must also be dismissed.

ORDER

In accordance with the foregoing, it is hereby **ORDERED** that the Parent's and Student's ODR Complaint, including the ODR Amended Complaint and ODR Second Amended Complaint, are dismissed in their entirety.

It is **FURTHER ORDERED** that any claims not specifically addressed by this Final Disposition and Order are denied and dismissed. This Order constitutes a final and complete disposition of all claims against the District by both Parent and Student.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: November 25, 2014