

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: E.G.

Date of Birth: [redacted]

ODR No.17867-1516AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro se

Springfield Township School
District
1901 Paper Mill Road
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Dates of Hearing: N/A

Record Closed: July 18, 2016

Date of Decision: July 18, 2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

This special education due process hearing concerns the educational rights of a [beyond teenaged] student (Former Student) who graduated from the Springfield Township School District (District) in June of 2014. The Student's father (Father) requested this due process hearing against the District, alleging violations of the Student's special education rights.

The Complaint raises claims concerning the Former Student and another of the Father's children. Claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its federal and state implementing regulations. The matter was bifurcated, and claims concerning the other child are captioned under a separate ODR file number.

The District filed a motion to dismiss (MTD), raising two bases for dismissal. First, the District argues that the claims raised in Complaint are barred, at least in part, by a prior settlement agreement. Second, the District argues that the Complaint is untimely.

For the reasons stated below, I grant the District's MTD and dismiss this matter.

Procedural History

For context, the Father lives in [another state]. The Complaint does not specify where the Former Student lives. It appears from the Complaint that the Former Student does not live with the Father or the Former Student's mother.

In December 2014, just less than six months after the Student graduated, the Father filed a complaint with the Pennsylvania Department of Education (PDE). PDE investigated the Complaint and issued a Complaint Investigation Report (CIR) on January 22, 2015. In the CIR, PDE found that the District violated special education regulations concerning evaluation procedures and parental notice.¹

On June 1, 2016, the Father filed the instant Complaint with the Office for Dispute Resolution (ODR). The Father demands reimbursement for all expenses he incurred as a result of the District violating special education regulations, as found in the CIR.

On June 24, 2016, the District filed the MTD described above.

On June 27, 2016, and July 8, 2016, the parties and I participated in conference calls regarding the MTD, and another MTD that the District filed in the matter concerning the Former Student's sibling. I provided procedural guidance to the Father, and set a timeline for the Father to respond to the MTD.

On July 11, 2016, the Father responded to the MDT, and to another MDT that the District filed in the case concerning the Former Student's sibling (Response).

Facts

¹ Parents can choose either the state complaint process by filing a complaint with PDE, or an administrative due process hearing by filing a complaint with ODR. The PDE process ends with a CIR. The ODR process ends with a final decision and order.

These are not findings of fact. For purposes of this decision, I will assume that all facts alleged in the Complaint and Response are true, regardless of whether they are disputed by the District. Not all facts stated in the Complaint and Response are stated below. No alleged facts occurring before May 20, 2013 are repeated here because, as discussed below, claims arising out of such facts have been waived via a settlement agreement.

Some facts alleged by the District are either 1) not disputed by the Father or 2) confirmed by the Father during conference calls. These facts are also assumed to be true. An undisputed settlement agreement between the parties, submitted by the District with its MTD, is also taken as true.²

The District submitted a Section 504/Chapter 15 Service Agreement (504 Plan) dated September 27, 2013. The Father refers to the 504 Plan in his pleadings, and raises no objections to the copy submitted by the District. For purposes of this decision, I will accept the 504 Plan and construe it in the light most favorable to the Father.³

The District submitted a copy of the January 22, 2015 CIR. I take judicial notice of the CIR.

I take judicial notice of prior due process hearings between the parties. Dates are specified as exactly as possible, given the pleadings.

All facts are construed in the light most favorable to the Father. Those facts are:

1. After a lengthy history of acrimony and litigation, the Father, the Former Student's mother, and District resolved outstanding claims through a Confidential Settlement and Release Agreement dated May 20, 2013 (Agreement).
2. Through the Agreement, in exchange for consideration, the Father and Former Student's mother gave the District the following release (*Agreement* at ¶ 4):

"Father and Mother, on behalf of their heirs and assigns, do hereby release, hold harmless and discharge District, its directors, employees and agents, their successors and assigns from any claims, damages of all kinds (including without limitation, compensatory, consequential, punitive and exemplary damages), fees (including claims for attorney's fees), costs, expenses, liabilities (including liability for compensatory education and/or tuition reimbursement), judgements, decrees, awards, obligations, contracts, torts, demands, causes of action or suits at law or in equity, of whatever character, known or unknown, fixed or contingent, whether asserted or unasserted, that Father or Mother, in their individual capacity and/or on behalf of the minor child, Student, ever had, now has, or hereafter can, shall or may have, arising out of or related in any way to the District's obligation to provide educational programming, services and evaluation to Student and/or other claims arising from or related to, and including but not limited to, the [IDEA] and its implementing regulations, ... Section 504 of the Rehabilitation Act of 1973... the Americans with Disabilities Act of 1990 ... [and several other laws] ... from the beginning of the world through the date the last party signs this

² See Discussion, below.

³ There is some ambiguity in the 504 Plan about the frequency and circumstances under which the District was supposed to contact the Father. For purposes of this decision, I construe that ambiguity in the Father's favor.

agreement. All parties agree that nothing in this Agreement shall be construed to waive claims that might arise after the date of this agreement.”

3. The last date on Agreement is May 20, 2013.
4. The Former Student started the 2013-14 school year (12th grade) under a 504 Plan dated September 27, 2013.
5. The Former Student’s 504 Plan required the District to communicate with Former Student’s parents (including the Father) weekly by phone or email regarding “any current concerns about specific timelines.” *504 Plan* at 1.
6. The Former Student’s 504 Plan also required the District to call the Father if the Former Student was sick during the school day. *504 Plan* at 2.
7. The Former Student’s 504 Plan provided several other accommodations.
8. Giving the Father every benefit of the doubt, I read the Complaint to include an allegation that the Student was improperly placed on homebound instruction starting sometime prior to May 31, 2014 and continuing through the end of the 2013-14 school year. I will assume that fact to be true for purposes of this decision.
9. Between December 31, 2013, and March 20, 2014, the Father filed three due process complaints with ODR. Taken together, these complaints generally raise objections to the 504 Plan, seek additional evaluations, and object to placement in homebound instruction. (ODR Nos. 14557-1314KE, 14650-1314KE, 14815-1314KE).⁴ (Collectively, the 2013-14 Complaints).
10. The 2013-14 Complaints were consolidated and assigned to Hearing Officer Linda M. Valentini, Psy.D., CHO.
11. On May 30, 2014, the Father wrote to Dr. Valentini stating that the parties had “agreed on a resolution” and that the Father was withdrawing the 2013-14 Complaints.
12. On May 31, 2014, Hearing Officer Valentini closed the 2013-14 Complaints and relinquished jurisdiction over the matters.
13. The Student graduated in June 2014. According to the Complaint, the District improperly waived “educational requirements” in order to give the Former Student a diploma.
14. On December 5, 2014, the Father filed a complaint with PDE. That complaint concerned parental consent for, and the District’s failure to conduct, a Functional Behavior Assessment (FBA). PDE investigated the complaint and drafted a CIR dated January 22, 2015.
15. According to the CIR, the District sought parental consent to conduct an FBA on January 20, 2014. The Father provided consent on February 12, 2014. The Former Student’s mother withheld consent on February 18, 2014. The District did not conduct the FBA because the

⁴ The pleadings suggest other hearings were requested during the 2013 calendar year, but these appear to be the three filed in the 2013-14 school year after the Agreement was signed.

Former Student's mother withheld consent. In the CIR, PDE found that the District should have conducted the FBA because it was unnecessary to obtain consent from both parents.⁵

16. The only corrective action required by the CIR was for the District to circulate a memorandum to inform staff of how to address similar circumstances in the future.
17. On June 1, 2016, the Parent filed the Complaint in this matter.
18. The Father's current Complaint was drafted on a Due Process Complaint form, to which the Father attached a letter. The letter is substantively similar (nearly identical) to the Father's pleadings in the 2013-14 Complaints.
19. The only substantive difference between the current Complaint and the 2013-14 Complaints is that the current complaint makes reference to the January 22, 2015 CIR. In fact, the Father's only demands are for (*Complaint* at 3):
 1. "Reimbursement for all expenses I am entitled to under the law that I would not have had to incur if the District had complied with regulations cited in the CIR."
 2. "Compensatory Education."
20. The current Complaint says nothing about what expenses the Father incurred as a result of the District's failure to conduct an FBA after receiving the Father's consent in February 2014. For purposes of this decision, I will assume that the Father incurred such expenses.
21. The current Complaint says nothing about how the District's failure to conduct an FBA after receiving the Father's consent in February 2014 resulted in a substantive denial of FAPE for which compensatory education is owed to the Former Student but, for purposes of this decision, I will assume that such a denial occurred.
22. To the extent that the current Complaint raises the same issues presented in the 2013-14 Complaints, for purposes of this decision, I will assume that the Father is demanding compensatory education for the Former Student in regard to those issues as well.

Discussion

As noted above, the District filed an MTD, asserting two basis for dismissal. First, the District argues that the Father waived all claims arising prior to May 20, 2013, when he signed the Agreement. Second, the District argues that the remaining claims are untimely.

The Agreement

In Pennsylvania, special education due process hearing officers may determine if the parties are bound by settlement agreements. See, e.g. *I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013). In this case, during a conference call, the Father acknowledged that he signed the Agreement and that it is binding. The Father's interpretation of the agreement, however, is wrong. During the conference call, the Father expressed his belief that the agreement only prevented him from raising claims in certain courts in Montgomery County, Pennsylvania. Similarly, in the Response, the Father says, "I do understand that I am bound by

⁵ PDE considered the parents' custody order when making this determination.

the May 2013 Confidentiality Agreement I signed. At the time I signed it I was unaware that the District was in violation of state and federal disability statutes in regard to parental consent.”

As stated above, the waiver in the Agreement is broad. The waiver applies to claims raised in any venue and equally applies to known and unknown claims.

The Agreement means what it says. The Father and the Former Student’s mother have waived all claims against the District, including special education claims, arising prior to May 20, 2013.

Above, I construed the Complaint to include disputes raised in the 2013-14 Complaints. Those disputes include issues going back to 2010.⁶ I will not consider, however, any claims arising on or before May 20, 2013. Those claims were waived in the Agreement.

Timeliness

The IDEA includes a two-year statute of limitations. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d, 2015). The first step to determine the timeliness of an IDEA complaint is to establish the date when the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C). This date is referred to as the KOSHK date. Parents have two years from the KOSHK date to request a due process hearing. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d, 2015). If the complaint was filed within two years of the KOSHK date, it is timely. *Id.* If the complaint is timely, the IDEA imposes no limitation on remedies. *Id.* However, if the complaint was filed more than two years after the KOSHK date, it is untimely. *Id.* Untimely complaints may be dismissed.

The District argues that the KOSHK date (or, perhaps, dates for different claims) are all more than two years before the current filing. At the most basic level, the District argues that the Father had knowledge of the actions forming the bases of the claims at least by the time those claims were raised in prior proceedings. I agree. It cannot be disputed that the Father had knowledge of the actions forming the basis of his complaints at least before he raised them.

Construing all facts in favor of the Father, the latest possible KOSHK date for the claims raised in the current complaint that overlap with the 2013-14 Complaints is March 20, 2014. As such, the Father had until March 20, 2016, to re-raise those issues. To whatever extend the current Complaint presents the same issues, it is too late.⁷

The only issues in the current Complaint that may not overlap with the 2013-14 Complaints are those related to the CIR. Specifically, the Father claims that he incurred costs associated with the District’s failure to conduct an FBA after he provided consent on February 12, 2014. The

⁶ The Response lists issues going back to 2002, as part of the Father’s attempt to establish a pattern of violations.

⁷ The actual KOSHK date, by necessity, must be sometime well before March 20, 2014. The Father had to have known about the actions forming the basis of the complaints before the complaints were drafted and filed. In fact the 2013-14 Complaints are quite similar, and so the actual KOSHK date is likely sometime well before December 31, 2013. Even so, for purposes of this decision, I will use March 20, 2014, extending time as far forward as possible to favor the Father. Despite this, the Complaint is still too late. It makes no difference if a complaint is years or months or days or hours too late. An untimely complaint is untimely, and subject to dismissal.

Father also claims that the Former Student is entitled to compensatory education to remedy the District's failure to conduct an FBA.⁸

The Father does not directly respond to any of the District's timeliness arguments. Rather, the Father argues that he did not understand that the District's failure to conduct an FBA constituted a violation of particular laws. The Father argues that he became aware of his rights and the Former Student's rights when he received the CIR. I reject this argument.

The Father provided consent for an FBA on February 12, 2014. When the District failed to conduct the FBA, the Father filed a complaint with PDE on December 5, 2014. I reject any assertion that the Father learned that the District actions violated special education laws *after* filing a complaint with PDE accusing the District of violating special education laws. One does not file a complaint to find out if any law has been broken. One only files a complaint to accuse another of breaking the law.

More importantly, the date that the Father learned that the District's actions are violations of special education laws is irrelevant. In the *G.L.* case, the Hearing Officer made a KOSHK determination. That determination was never appealed. As a result, questions about how to find the KOSHK date were not before the court in *G.L.* Consequently, *G.L.* is precedent only to the extent that it holds the IDEA does not limit remedies when complaints are timely. Any *dicta* in *G.L.* about how to find the KOSHK date is just that. To find the KOSHK date, I turn to the statute. The statute refers to knowledge of the *action* forming the basis of the complaint – not knowledge that the action amounts to a violation.

In this case, the Father provided consent for an FBA on February 12, 2014. Then, sometime before December 5, 2014, the Father knew that the District refused to conduct an FBA (this knowledge is evidenced by the Father's complaint to PDE). Therefore, the KOSHK date for claims related to the District's failure to conduct an FBA in the 2013-14 school year is sometime between February 12, 2014 and December 5, 2014. This aspect of the current Complaint may be timely depending on the actual KOSHK date.

The District argues that the KOSHK date for all claims, including claims related to the 2013-14 FBA failure, is May 30, 2014 at the latest (the day that the Father withdrew the 2013-14 Complaints). I have reviewed the 2013-14 Complaints to determine when the Father first raised the District's failure to conduct an FBA after February 12, 2014. This claim was first raised in the last of the 2013-14 Complaints on March 20, 2014.⁹ In that complaint, the Father claims that the District "failed to perform a promised expedited Functional Behavioral Assessment...".

Given the foregoing, the PDE complaint was not the first time that the Father raised the issue concerning the District's failure to conduct an FBA after he provided consent on February 12, 2014. That issue was first raised in a March 20, 2014 ODR complaint. The Father necessarily knew of the District's action (refusing to conduct the FBA) sometime before raising that issue on March 20, 2014. Although the actual KOSHK date for this issue is sometime before March 20, 2014, the current Complaint is untimely even using that date.

⁸ I have already noted several times, but it is worth repeating, that these claims are derived from the broadest, most generous reading of the Complaint.

⁹ A correct copy of the March 20, 2014 due process complaint is found at Exhibit C to the District's MTD. Like the current Complaint, the March 20, 2014 complaint was sent using a form with a letter attached. The form is correctly dated March 20, 2014. The letter is incorrectly dated March 20, 2013.

Conclusion

The Father's current Complaint raises issues from 2010 through the end of the 2013-14 school year. Claims arising before May 20, 2013 have been waived by an Agreement. All other claims are duplicative to claims raised in due process complaints filed between December 31, 2013, and March 20, 2014. This includes claims about the District's failure to conduct an FBA in the 2013-14 school year. That claim was also subject to a CIR issued by PDE on January 22, 2015. The CIR, however, is irrelevant to the timeliness of the claims raised in the current Complaint. In fact, the latest possible KOSHK date for claims concerning the District's failure to conduct an FBA is March 20, 2014. The current Complaint is untimely for this reason.

ORDER

Now, July 18, 2016, it is hereby **ORDERED** as follows:

1. The District's June 28, 2016 Motion to Dismiss is **GRANTED**.
2. The Father's June 1, 2016 Complaint is **DISMISSED**.
3. This Order constitutes the final administrative order in this matter, and is subject to appeal. Information concerning appeal rights are enclosed with this Order. The matter is hereby closed and jurisdiction is hereby relinquished.

/s/ Brian Jason Ford
HEARING OFFICER