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

Student's Name: J.M.

Date of Birth: [redacted]

ODR No. 2166-11-12-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Sonja Kerr, Esquire Monica Lawrence, Esquire Elizabeth S. Morgan, Esquire Public Interest Law Center of Philadelphia 1709 Benjamin Franklin Parkway, 2d Floor Philadelphia, PA 19103
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Brian E. Subers, Esquire Fox Rothschild, LLP 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001
Date of Hearing:	September 27, 2011
Record Closed:	October 3, 2011
Date of Decision:	October 15, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the School District of Philadelphia (District), and attended its elementary schools during the time relevant to the captioned matter. (NT 22-23.) Student is not identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 24.) The District has provided a service contract on account of disability as defined and provided by the Vocational Rehabilitation Act of 1973, Section 504 (section 504). (NT 24.)

On August 1, 2011, the Parent filed a Complaint Notice (complaint) requesting due process and asserting, among other things, that the District failed to identify Student under the IDEA in the categories of Hearing Impairment and Other Health Impairment (allegedly required due to Student's diabetes), thus depriving Student of a free appropriate public education (FAPE). The complaint seeks relief for an alleged period of deprivation beginning in September 2005, including a period more than two years prior to the date of filing. (NT 13.)

The District asserted the statutory limitation of actions set forth in the IDEA, 20 U.S.C §1415(f)(3)(C). By order dated September 1, 2011, I bifurcated the matter, retaining under the present caption only the issue of the IDEA limitation defense, and directing the opening of a new matter, ODR case number 2282-11-12-KE, in which I will address all of the remaining, substantive, issues raised by the complaint.[1]

The hearing was conducted in one session and the record closed upon receipt of transcript. I conclude that the Parents' claims should be limited to alleged actions or inactions of

[1] The parties had requested that the merits of the matter be postponed because a new evaluation was pending and the parties sought an opportunity to attempt settlement once that evaluation should be received. I concluded that these rationales did not affect the limitations issue and that an immediate decision on that issue would be beneficial to the parties.

the District that occurred or did not occur during a period no more than two years prior to the date of filing of the request for due process.[2]

ISSUES

1. Did the Parent know, or should the Parent have known, of the District actions or inactions of which Parent complains, more than two years prior to the date of filing?

2. Did the District prevent Parent from filing for due process within two years of knowledge or notice of any alleged action or inaction of the District, through a specific misrepresentation that the District had addressed the problem alleged regarding the action or inaction of the District?

3. Did the District prevent Parent from filing for due process within two years of knowledge or notice of any alleged action or inaction of the District, by withholding any information that the IDEA requires to be disclosed?

FINDINGS OF FACT

1. Student has a reported history of hearing loss. (J-1, 2, 13.)

2. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), asthma, slight hearing loss, poor eyesight, and, as early as 2009, diabetes. (J-1, 2, 13, 14 p. 57-65.)

3. Since kindergarten, Student has exhibited a history of attention and behavioral difficulties, including physical restlessness, inability to sustain attention, and oppositional and defiant behaviors. (J-1, 2, 13.)

4. Private medical evaluations in January 2005, April 2006 and December 2007 noted a history of slight hearing loss but did not find hearing impairment to be a significant causal factor in Student's school performance or home behavior. These evaluations made no recommendations for accommodations or correction with regard to the hearing loss. These evaluations made no mention of diabetes. (J-1, 2, 13.)

5. Parent was aware that Student had a hearing loss as early as 2005, and requested an evaluation of Student's hearing in 2005 and 2006. (NT 114-123, 129, 170-174; J-1, 2, 13; S-1.)

[2] I base this conclusion upon an analysis of the IDEA statutory limitation of actions that applies to both IDEA and section 504 claims. P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009).

6. December 2006, the District provided Parent with an initial evaluation report. Noting a history of "mild" hearing loss, and making no mention of diabetes, the District declined to identify Student as a child with a disability in need of special education and related services. (NT 59, 62, 124; J-4.)

7. The report form expressly indicated that Hearing Impairment is a "disability category." (J-4 p. 6.)

8. In December 2006, the District provided to Parent a Notice of Recommended Educational Placement (NOREP) showing that the District declined to identify Student as an eligible child with a disability, and indicating that Student did not need special education services. (NT 63, 126; J-5 p. 2.)

9. In January 2007, the District convened a meeting with Parent and reviewed the evaluation report with Parent. The Parent knew of, understood and indicated disagreement with the District's action in not identifying Student under the IDEA, and requested an independent educational evaluation at public expense; Parent did not express a concern with Student's hearing loss at this meeting. The District agreed to provide the IEE. (NT 65-72, 87, 126, 129; J-6; S-3.)

10. The independent evaluation noted the history of "slight" hearing loss but did not identify a disability in hearing or recommend any specially designed instruction or accommodations due to the hearing loss; there was no mention of diabetes. Parent did not raise hearing loss with the private evaluator as a problem to be evaluated. (NT 75-76, 127-128; J-10.)

11. The private evaluator noted good receptive language skills and relatively strong performance in tests that "loaded heavily on auditory aspects" of verbal processing. (J-10 p. 6.)

12. The private evaluator concluded that the previous evaluation had been "generally comprehensive and thorough." (J-10 p. 3.)

13. In March 2007, the District provided a Functional Behavior Analysis, which indicated that Student was not receiving special education services. (J-11 p. 10-14.)

14. In May 2007, the District offered a section 504 service plan with Parent's participation. The plan did not offer any accommodations for hearing loss or diabetes. Parent did not express concern about Student's hearing loss in any of the meetings for planning the section 504 service agreement. (NT 76-80, 87, 129; J-11.)

15. Parent received forms from the District indicating the availability of procedural safeguards, including due process, in May 2006, December 2006, January 2007, and February 2007. The District's forms also referred Parent to agencies, and eventually Parent was referred to attorneys for legal assistance in effectuating Parent's right to procedural safeguards. (NT 57, 63, 66-75, 131-136; J-3 to 9.)

16. District personnel who had direct contact with Student did not detect any reason to be concerned that a hearing loss was interfering with Student's performance at school. Prior to February 2008, Student failed one hearing screening given by District personnel, but passed three subsequent District-administered screenings. In February 2008, Student failed a private hearing screening and was referred for an audiological evaluation. Parent did not obtain the audiological evaluation for three years. (NT 87-88, 114-118, 176-178, 181-186, 193-202, 211, 226-227, 229, 246-247; J-20, 21.)

17. District personnel did not explain to Parent that hearing loss could be the basis of identification and special education services under the IDEA. (NT 90, 93-94, 101, 102, 106-107, 108, 137-146, 176-178, 186-187.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).[3] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

With regard to the merits of the Parent's claims, the burden of persuasion rests upon the Parents, who initiated the due process proceeding, now captioned in the companion matter, ODR Number 2282-11-12-KE. If the Parents fail to produce a preponderance of the evidence in support of their claims in Number 2282-11-12-KE, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

With regard to the present matter, however, the burden is on the District in the first instance. The present matter is triggered by a District motion asserting a statutory defense. This is classified as an "affirmative" defense, because it asserts a new issue based on additional facts that are not merely asserted by way of denial of the facts or legal authorities in the complaint. Accord, J.L. v. Ambridge Area School District, 2008 WL 2798306, *9-10 (W.D. Pa. 2008); see also, Sechler v. Ensign-Bickford Co., 322 Pa. Super. 162, 166 (1983); Pa.R.C.P. 1030. Thus, the District has the burden of persuasion to prove that the IDEA statutory limitations defense applies in this matter. The District must prove that the Parent filed the complaint more than two years after the Parent knew or should have known of the actions or inactions of the District of which Parent complained.

Nevertheless, the burden shifts yet again where the Parent seeks to avoid the application of the IDEA limitation provision by asserting the IDEA's statutory exceptions to that limitation provision. This assertion requires Parents to assert yet additional facts - that the District has uttered misrepresentations or withheld information within the meaning of the statutory exceptions. This shifts the burden to Parents to prove those facts. J.L, above.

LEGAL STANDARD FOR APPLICATION OF THE IDEA STATUTORY LIMITATION OF ACTIONS

The IDEA, 20 U.S.C. 1415(f)(3)(C), provides for limitation of actions as follows:

> 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 accrues from the time the filing party "knew or should have known" of the events giving rise to the claim asserted in the complaint notice. In other words, once the Parent knows or should know of certain events, the Parent has two years in order to file a complaint requesting due process about those events. If the Parent waits more than two years, the IDEA bars Parent from filing and therefore the hearing officer may not hear the claim.

WHAT CONSTITUTES THE ALLEGED ACTION THAT FORMS THE BASIS OF THE COMPLAINT

The IDEA is specific as to what events the Parent must know about or have reason to know before the two year limitation period begins to run. The statute uses the word "action". 20 U.S.C. 1415(f)(3)(C). In particular, this is the "action" which "forms the basis of the complaint". Ibid. Reading this language in context with the operative subsections of IDEA procedural safeguards provision, 20 U.S.C. 1415, I conclude that this word "action" refers to the statutory clause found in the provisions for prior written notice: "initiate or change … the identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child." 20 U.S.C. §1415(b)(3)(agency initiation or change requiring written prior notice); 20 U.S.C. §1415(c)(1)(A), (B)(characterizing agency initiations or changes as "action[s]"); 20 U.S.C. §1415(b)(6)(A)(agency actions subject to complaint and request for due process); 20

U.S.C. §1415(b)(6)(B)("alleged action" subject to due process as read in pari materia with 20 U.S.C. §1415(b)(6)(A)). Thus, the "action that forms the basis of the complaint" refers to an agency's "initiat[ion] or change [of]… the identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child."

Once the parent knows or should know that the agency has initiated or changed the student's identification, evaluation, or educational placement, or the services offered or provided to the student, the two years start to run within which the parent must file a complaint for due process to challenge such action. See also, 34 C.F.R. §300.503, 34 C.F.R. §300.507 (equating initiation or change with "action"); Hall v. Knott County Bd. Of Educ., 941 F.2d 402, (6th Cir. 1991)(applying common law "notice" rule to special education limitations case, court found that parental knowledge or notice that the educational agency was not providing certain educational services constituted notice tolling the limitation period, even where record showed that parents were unaware of their rights); Cf. James v. Upper Arlington City Sch. Dist., 228 F. 3d 764, 771 (6th Cir. 2000) (Guy, U.S.C.J., concurring), cert. den., 532 U.S. 995, 121 S.Ct. 1655, 149 L.Ed.2d 637 (2001) (parental notice that services were not being provided). If the District can prove that the two year "look forward" period expired after the "knew or should have known date" (the date on which Parent knew or should have known of a District action), I must dismiss Parent's complaint to the extent that it requests due process relief regarding such action.

In order to establish the "knew or should have known" date, I must identify the "action" "which forms the basis of the Parent's complaint … ." 20 U.S.C. 1415(f)(3)(C). Here, two relevant "actions" were pled. First is the District's omission in September 2005 to identify Student as a child with a disability for IDEA purposes. Parents assert that the District

wrongfully ignored evidence that Student had a unilateral hearing loss and diabetes[5] that could interfere with Student's ability to benefit from regular education.[6] Second is the District's omission to offer or provide special education and related services regarding the hearing loss and diabetes. Therefore, I must determine when, if at all, Parent knew that the District had omitted to identify Student as a child with a disability and provide Student with special education and related services.

Parent argued that the "action" in question includes the District's alleged failure to explain to Parent that the hearing loss could have an impact on learning, and that either the hearing loss or the diabetes could be a basis for identifying the Student under the IDEA. (FF 17.) I do not accept this interpretation of the statutory word "action." As noted above, I conclude that that term refers only to the actions of identification, evaluation, placement and provision of a FAPE.

Parent argues that it is inequitable to so construe the IDEA's term, "action." Parent asserts that this construction in effect requires a lay person to know the implications of the District's acts and omissions – to know that the hearing loss, for example, could interfere with learning or that the diabetes could legally constitute an appropriate basis for identification as a child with a disability. Parent cites Draper v. Atlanta Pub. Sch. Sys., 518 F.3d 1275, 1288 (11th Cir. 2008); accord, K.P. v. Juzwic, 891 F. Supp. 703 (D. Conn. 1995) and Gwinnett County SD v. A.A., 54 IDELR 316 (N.D. Ga. 2010). These and other federal district court cases construe

[5] Parent asserted at the hearing that the District similarly failed to identify Student on account of diabetes. (NT 37-41.) The Parent had mentioned this allegation in Parent's eleven page offer of proof, through a conclusory, two line reference, (HO-4 p. 9), and District counsel indicated that the District was not fairly on notice that the allegation regarding diabetes would be considered at the hearing, (NT 40-41). Parent did not offer to introduce any specific evidence concerning District actions or inactions regarding diabetes, nor did Parent introduce evidence concerning diabetes during the hearing. Although the record is sparse on this issue, I conclude that there is sufficient evidence to find that the Parent failed to file a timely complaint with regard to diabetes.

[6] This allegation implies, and I will infer for purposes of this motion that it asserts, that the Student's hearing loss was so substantial that special education and related services were required to enable Student to receive meaningful educational benefit.

the statutory term "action" as meaning "injury." I find little discussion of this construction in any of the cases taking this approach; the courts seem to have assumed this construction and offer no reasoning for it. As an administrative hearing officer, I am obligated to hone close to the language itself, which is "action" not "injury"; thus I decline to follow these cases or to impute "equitable" concerns into the construction of the statutory language.

KNEW OR SHOULD HAVE KNOWN DATE

The District proved by a preponderance of the evidence that the Parent knew or should have known of the District's actions and omissions as of December 2006, when the District provided Parent with an initial evaluation report. (FF 1-9, 13, 14.) Student was in third grade at the time. Ibid. In its evaluation report, the District informed parent that the District would not identify Student or provide special education services. (FF 6.) The report explicitly noted that the Student had a history of "mild hearing loss." (FF 6.) Thus, the report on its face showed that the District had concluded that the hearing loss was not a reason to identify Student and provide special education services to Student. The report also expressly indicated that Hearing Impairment is a "disability category." (FF 7.)

On the same date, the District provided to Parent a Notice of Recommended Educational Placement (NOREP) that listed the "action proposed or refused" to be "student is not eligible or in need of special education." (FF 8.) It stated that the "action was proposed or refused" because "there is no disability that requires special education services." (FF 8.)

In January 2007, the District convened an Individual Education Program (IEP) team meeting and reviewed the evaluation report with Parent. (FF 9.) The Parent disagreed with the evaluation because it did not identify Student as a child with a disability. (FF 9.) The District

agreed to provide an independent educational evaluation at public expense. (FF 9.) The independent evaluation noted the history of "slight" hearing loss but did not identify a disability in hearing or recommend any specially designed instruction or accommodations due to the hearing loss; there was no mention of diabetes. (FF 10.) Parent was included in these interventions and discussions. (FF 5, 9, 10, 14.) I conclude, based on more than preponderant, undisputed evidence, that Parent either knew or should have known that the District had taken the "actions" of not identifying Student and not providing special education services.

In March 2007, the District provided a Functional Behavior Analysis, which indicated that Student was not receiving special education services. (FF 13.) In May 2007, the District offered a 504 service plan with Parent's participation. (FF 14.) These events provided additional communication through which Parent either knew or should have known that the District continued to decline to make Student eligible for special education services under the IDEA.[7]

My above conclusion is based in part upon a finding that the Parent knew of the Student's hearing loss. (FF 1, 4, 5.) This finding is itself based upon a credibility determination. I find that the Parent's contrary testimony, as to what Parent knew and when, was unreliable. Parent's manner of answering questions suggested a pre-arranged and self - serving narrative on these issues. Parent's testimony was self-contradictory and contradicted by the record – especially insofar as Parent attempted to maintain that Parent did not realize that Student had a hearing loss until recently, even though the record shows that Parent received numerous evaluation reports

[7] The record is sufficient to raise an inference that the Student's diabetes was discovered later, but was known at least as early as 2007, and that Parent knew that the District was aware of the diabetes at that time. (FF 6, 14.) The Parent's knowledge that the Student was not identified or receiving special education services applies equally to the claims involving diabetes; thus, Parent was subject to a two year time frame within which to request due process from at the latest September 2007. Having failed to do so, Parent is barred from raising this issue in due process now.

reflecting a hearing loss, under circumstances from which an inference arises that Parent was the source of the information. (FF 1, 4, 5.)

LEGAL STANDARD FOR APPLYING IDEA EXCEPTIONS TO LIMITATION OF ACTIONS

The IDEA at 20 U.S.C. 1415(f)(3)(C) is subject to only two explicit exceptions, set forth at 20 U.S.C. §1415(f)(3)(D):

> 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's withholding of information from the parent that was required under this subchapter to be provided to the parent.

Parent, seeking the application of these statutory exceptions, is required to prove such misrepresentations and withholding. Parent must also show that such behavior "prevented" the Parent from filing for due process. School District of Philadelphia v. Deborah A., 2009 WL 778321 at *4. The plain language of the IDEA indicates that misrepresentations and withholding of information alone are not sufficient without proving their causal relationship to the failure to timely file for due process.

SPECIFIC MISREPRESENTATION

Not every misrepresentation triggers the IDEA exception. The language of the exception specifies that it only applies in the case of agency misrepresentations that are both "specific" and

to the effect "that [the agency] had resolved the problem forming the basis of the complaint." 20 U.S.C. §1415(f)(3)(D)(i).

What constitutes "specific misrepresentations" under 20 U.S.C. §1415(f)(3)(D)(i) is "within the purview of the hearing officer." 71 F.R. §46540-01 at 46706 (declining to amend the regulations implementing the 2004 amendments to the IDEA for the purpose of defining the statutory term "misrepresentation".) There is no "bright line" test, ibid., and there is little judicial guidance on what constitutes "misrepresentation". See, e.g., P.P. v. West Chester Area School District, 557 F. Supp. 2d 648,661 (E.D. Pa. 2008), aff'd in part and rev'd in part on other grounds, 585 F. 3d 727 (3rd Cir. 2009) (agency "misconduct", including misleading notices, delayed evaluation and discouraging third parties from making referrals, did not constitute misrepresentation as defined in IDEA); Deborah A., above, 2009 WL 778321 at *4 (imputing intent into statutory term.)

The courts differ on whether the statutory term "specific misrepresentation" requires proof of intent. As the District Court for the Eastern District of Pennsylvania noted, imputing intentionality into that term requires a parent to prove that agency personnel subjectively knew that the representation was false and intentionally represented a falsehood. Deborah A., above, 2009 WL 778321 at *4. On the other hand, the District Court for the Middle District of Pennsylvania rejected this intentionality standard for a negligence standard, importing Pennsylvania common law into the term to provide a measure of the necessary proofs. J.L. v. Ambridge Area School District, 2009 WL 1119608 at *12. These differences in the courts' interpretations of the statutory language suggests that the statutory term does not plainly convey a requirement of intentional misrepresentation.

Nor does the term "misrepresentation" plainly convey an implication of intentionality. Pennsylvania courts have long recognized that there are different kinds of "misrepresentation" – the term encompasses not only intentional misrepresentation, but also negligent misrepresentation and innocent misrepresentation. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

As noted above, at least one federal district court has rejected the argument that the term "specific misrepresentation" as used in the IDEA refers only to the "intentional" form of misrepresentation. In light of this authority, and the traditionally broader definition of the term that includes non-intentional forms as well, I conclude that "misrepresentation" as used in the IDEA includes non-intentional misrepresentation. Thus, Parent need not prove subjective intent in order to avoid the IDEA limitations provision based upon "misrepresentation."

In the present matter, Parent has failed to prove even a negligent misrepresentation, because Parent has failed to prove any "representation" or statement at all. I note that the IDEA requires proof of a "specific" misrepresentation. The record is devoid of a specific statement made to Parent that the District was addressing the problem that Parent raises in the complaint: that the Student was in need of special education due to either a hearing loss or diabetes. On the contrary, the District clearly stated or represented that it was not addressing that problem because it found that there was no such problem – that the Student did not suffer from either disability to the extent that Student required special education. (FF 6-14.) The District was clear that it was not providing special education, and I have concluded that the Parent knew this. Thus, the record is preponderant that the District did not make a specific misrepresentation that it had resolved the problem alleged in the complaint – non-identification and a refusal to provide special education services.

The Parent argues that the District made a "specific" misrepresentation by offering a section 504 plan of accommodations for Student's diagnosed disabilities, such as ADHD and ODD, and stating that such plan would address Student's needs. The record does not support this argument, for two reasons. First, there is not preponderant evidence in the record that any District personnel made any explicit statement or representation that the section 504 plan would address Student's educational needs, such as attention, behavioral and social problems that were interfering with Student's ability to benefit from education. Second, there is not preponderant evidence in the record that District personnel made any statement or representation that the section 504 plan would address any educational needs arising from Student's hearing loss or diabetes. Indeed, the section 504 plan, even as amended, did not address hearing loss at all during the period that was two years or more before the filing date. The plan did eventually include monitoring on account of diabetes in 2007, but the plan did not address educational accommodations due to diabetes. If the statutory term "specific misrepresentation" is to have any meaning at all, I cannot find that it is satisfied on this record, where no actual statement was ever proved concerning hearing loss or diabetes. Mere implication from the offer of a section 504 plan is insufficient to prove "specific misrepresentation."

WITHHOLDING OF INFORMATION

The second exception applies only when the agency is charged with "withholding" of information "that was required under this subchapter to be provided … ." 20 U.S.C. 1415(f)(3)(D)(ii). The question remains as to what kinds of information are "required … to be provided" so that their "withholding" obviates the IDEA limitation period.

Literally, any information required to be disclosed pursuant to Part B of the IDEA would, if withheld, engage this exception for withholding of information. An agency's withholding of information "required by this subchapter to be disclosed" (emphasis supplied) would bring the matter within the exception for limitation purposes. 20 U.S.C. 1415(f)(3)(D)(ii). The IDEA is contained within Title 20 of the United States Code, entitled "Education". 20 U.S.C.A. (Table of Contents)(West 2010). This title is divided into 78 chapters of which Chapter 33, "Education of Individuals with Disabilities", contains the IDEA. Ibid. Section 1415 of the Chapter, "Procedural Safeguards", which contains the limitation provision and its exceptions, is located in Subchapter II of Chapter 33 ("Assistance for Education of All Children With Disabilities"). Ibid. This subchapter contains all of Part B of the IDEA. See, El Paso Independent School District v. Richard R., 567 F. Supp. 2d 918, 944-45 n. 35 (exception refers to entire Part B) (W.D. Tex. 2008), vac. in part on other grounds, 591 F. 3d 417 (5th Cir. 2009). Thus, the IDEA exception to limitation of actions arises from the withholding of any information required by Part B to be disclosed to a parent.

The record is preponderant that the District disclosed to Parent that the Student had a hearing impairment. (FF 5, 6, 9.) It is also preponderant that the District disclosed that it was not identifying Student or providing special education services to Student on account of that hearing impairment. (FF 6, 8.) Thus, there was no evidence of withholding of information as to what the District was doing or not doing with regard to hearing impairment.[8]

Parent argues that the District's non-identification of Student constituted a representation that the Student's hearing impairment was not a cause of Student's educational difficulties, and

[8] There was no evidence regarding either representations or disclosure of information about diabetes. Thus, I find that Parent has failed to provide a preponderance of evidence supporting application of either of these exceptions with regard to diabetes, and I will not apply either of these exceptions to the limitation period with regard to diabetes. Thus, the IDEA limitation period applies to Parent's claims about diabetes.

that this representation was made negligently. Parent argues that the representation was negligent because the District did not itself conduct or obtain a full audiological evaluation of Student after Student failed hearing screenings in 2005 and 2008, and thus had an inadequate basis upon which to conclude that the hearing loss was not causing a need for special education. Assuming for the sake of this decision that the evaluation report, NOREP and section 504 agreements constituted a representation[9], I find this argument to be unavailing.

The record preponderantly demonstrates that the District personnel were not negligent in declining to identify Student in the absence of a full audiological evaluation. District witnesses credibly explained that the single failure of a hearing screening could have been attributable to congestion and other causes other than physical hearing impairment[10]. All District witnesses testified that they never had any reason to think that Student's hearing loss was interfering with Student's functioning in school. (FF 16.) Multiple evaluators, both public and private, had declined to suggest that hearing loss – known to them and recited as part of the history – had any causal relationship to Student's school problems, which were largely behavioral in nature. (FF 2-5, 10-13.)

I find no legal basis for the argument that the IDEA compels agency personnel to disclose everything that they did not do to evaluate a student, when they have appropriately disclosed everything that they did do. 20 U.S.C. §1415(c)(1)(B); 34 CFR §300.503(b)(3)(prior written notice must include description of each evaluation procedure, assessment, record or report the agency uses as a basis of the proposed or refused action). Here, I find by a preponderance of the

[9] The record is preponderant that District personnel did not make any specific statements to Parent orally that the Student's hearing loss was not a cause of educational problems. (FF 9, 14, 17.)

[10] District personnel also testified that the proper procedure upon such a screening failure would be to retest in two weeks. The documentary evidence did not reflect that this was done. There was no evidence as to whether or not this was in fact done, and, if not done, no explanation as to why it was not done. While this in itself was some evidence of negligence, it was not preponderant evidence of negligent misrepresentation, in light of the preponderant evidence that Student passed subsequent hearing screenings, and that multiple evaluators and educators had no reason ever to suspect that Student's hearing loss was negatively impacting Student's performance at school.

evidence that the District's NOREP, coupled with the Evaluation Report and discussions with Parent, complied with this mandate to disclose what the District did to evaluate Student and reach its conclusion that hearing impairment was not a basis for identification or special education. (FF 6, 8, 9, 14.)

The Parent argues that the District withheld information by failing to advise Parent that a hearing impairment or diabetes can have a negative impact upon a child's educational performance and that the two disabilities can be a basis for identification of a child under the IDEA. (FF 17.) Parent argues that the District was legally obligated to make such statements to Parent even though the District had concluded that these disabilities were not impacting upon Student's educational performance and therefore did not require special education or related services. Parent cites no section of the IDEA, Part B, that requires any such statements. I have failed to find any section of the law that requires an agency to provide advice of such nature to a parent.

Parent argues that the District withheld information by failing to both refer Student for complete audiological testing and ensure that such screening was done, after Student failed two audiological screening tests separated by several years. The parties introduced evidence regarding Pennsylvania policy and procedures on referrals for audiological testing. I find that this argument is beside the point. The IDEA defines the withholding exception in terms of information required to be provided pursuant to Part B of the IDEA – not state law or policy. Part B does not impose rules on when an agency must refer for audiological evaluation. The District's personnel plainly did not consider further evaluation of hearing necessary, and their evaluation report does not conceal that fact. Thus, there is no preponderant evidence that the District withheld information required to be provided to Parent according to federal law.

Consequently, Parent has failed to prove an exception to the IDEA limitations provision due to withholding of information.

Parent's argument fails for another, alternative reason. As discussed above, the withholding and misrepresentation exceptions operate only insofar as they are shown to have prevented the Parent from requesting due process within two years of Parent's knowledge or notice of the District action about which Parent later complained. Here, there was little evidence that the Parent failed to request due process within two years due to the actions of District personnel. Moreover, the District showed by a preponderance of evidence that Parent was well aware of Parent's right to utilize procedural safeguards as early as 2006. The evidence shows that Parent requested one of those safeguards - the IEE - and received it, in 2006. (FF 9-12.) In addition, Parent received information about procedural safeguards in 2006, 2007 and 2008. (FF 15.) Thus, I conclude that Parent either knew or should have known that Parent could request due process if dissatisfied with the District's actions or inactions. Even if there were misrepresentations or withholding of information within the meaning of the IDEA exceptions to the limitation period, they did not prevent Parent from requesting due process.

CONCLUSION

I conclude that the Parent knew or should have known of the District's decision not to identify Student due to hearing loss or diabetes as early as 2006, and that Parent failed to file a complaint requesting due process within two years of Parent's knowledge or notice. I further conclude that the exceptions to the IDEA statutory limitation of actions do not apply based upon the record in this case. The claims to be decided in ODR Number 2282-11-12-KE will be

limited to those based upon the alleged occurrence or non-occurrence of actions or inactions of the District after August 1, 2009.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The Parent knew, or should have known, of the District actions or inactions of which Parent complains, more than two years prior to the date of filing.

2. The District did not prevent Parent from filing for due process within two years of knowledge or notice of any alleged action or inaction of the District, through a specific misrepresentation that the District had addressed the problem alleged regarding the action or inaction of the District.

3. The District did not prevent Parent from filing for due process within two years of knowledge or notice of any alleged action or inaction of the District, by withholding any information that the IDEA requires to be disclosed.

4. The claims to be decided in ODR Number 2282-11-12-KE are hereby limited to those based upon the alleged occurrence or non-occurrence of actions or inactions of the District after August 1, 2009.

William F. Culleton, Jr. Esq.

_____

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

October 15, 2011