

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

CLOSED HEARING

ODR File Number:

21992-18-19

Child's Name:

T.J.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

Date of Decision:

07/08/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student, (hereafter Student),¹ is a late teenaged student who resided in the School District (District) between the fall of 2011 and Student's graduation in January 2017. Student was throughout that time period eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In March 2019, Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes. Specifically, they challenged the educational program provided by the District to Student for the entire period of time Student was enrolled and continuing until Student reaches age twenty-one, alleging that the District violated its obligations under the applicable laws in failing to develop and

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213.

implement an appropriate program to meet all of Student's special education needs.

In response, the District filed a Motion to Dismiss or Limit the scope of the claims, contending that all claims prior to March 29, 2017 (two years prior to the date of the Complaint) are barred by the applicable statute of limitations. An evidentiary hearing on the Motion convened,⁵ with the parties' filings on this issue made part of the record.⁶ The Parents asserted that they should be permitted to proceed based on application of an exception to the statute of limitations, and further that they did not know, and had no reason to know, of the basis for their claims until early 2018. The District countered that the Parents had the requisite knowledge no later than January 2017 and that neither exception to the statute of limitations applied.

For the reasons set forth below and following careful review of the record, the District's Motion must be sustained and the claims of the Parents dismissed in their entirety as untimely filed. Accordingly, this ruling on the District's Motion is set forth as a final decision.

ISSUE

Whether the Parents' claims were timely filed; and, if they were not, should they be dismissed.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and the single Hearing Officer Exhibit (HO-1). References to Parents in the plural will be made where it appears that one was acting on behalf of both.

⁶ The parties' offers of proof on the present scope of the claims issue together with a preliminary ruling are contained in HO-1.

FINDINGS OF FACT

1. Student is a late teenaged student who was a resident of the District during the time period in question through graduation in January 2017. (N.T. 19-21.)
2. While a student in the District, which began in September 2011 (seventh grade), Student was eligible for special education on the basis of an Other Health Impairment and a Specific Learning Disability. (N.T. 21, 230; S-2.)
3. The Parents and Student's special education teacher for the 2014-15, 2015-16, and 2016-17 school year engaged in regular communications. (N.T. 24, 50, 52, 138.)
4. Student exhibited anxiety over and difficulty attending school, particularly during the 2015-16 and 2016-17 school years. (N.T. 27.)

2014-15 School Year

5. The District conducted a reevaluation and issued a report (Reevaluation Report, RR) in January 2015 (Student's tenth grade year). The Parents agreed with that RR. (N.T. 158-59; S-2.)
6. The 2015 RR contained input from teachers indicating that Student was easily distracted, and had difficulty remaining on task and completing work; required frequent redirection and sometimes one-on-one assistance; and engaged in task avoidance. (S-2 at 2.)
7. The 2015 RR summarized previous evaluation results including an achievement battery from 2009. At that time, Student had earned low average to average range scores in all areas. (S-2 at 2.)
8. The 2015 RR noted that an assessment of cognitive ability (Wechsler Intelligence Scale for Children – Fourth Edition) in 2013 yielded a Full

Scale IQ score of 71 (3rd Percentile, borderline range), with borderline scores on all Indices except Processing Speed (13th Percentile, low average range). (S-2 at 3-4.)

9. The 2015 RR included an assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition) from 2013 reflecting some variability among subtests but overall below average range scores. In the area of Reading, Student earned a standard score of 78 on the Reading Comprehension Subtest (7th Percentile, Grade Equivalency (GE) of 2.1)⁷; a standard score of 82 on the Word Reading subtest (12th Percentile, GE of 4.7); and a standard score of 81 on the Pseudoword Decoding subtest (10th Percentile, GE of 2.9). In the area of Mathematics, Student attained a standard score of 64 on the Math Problem Solving subtest (1st Percentile, GE 2.6); a standard score of 67 on the Numerical Operations subtest (1st Percentile, GE 3.2); and standard scores ranging from 75 – 91 on Math Fluency subtests (between 5th and 27th Percentiles, GE 4.2 – 6.9). Student earned a standard score of 84 on the spelling subtest (28th Percentile, GE 5.4). (S-2 at 4-5.)
10. The 2015 RR summarized scores of social/emotional/behavioral functioning assessed through a variety of rating scales in 2013.
 - a. On the Conners – Third Edition, the Parents indicated very elevated concerns with inattention, hyperactivity/impulsivity, learning problems, and executive functioning; Student’s self-report reflected very elevated concerns with inattention and hyperactivity/impulsivity and an elevated concern with learning

⁷ The utility of grade equivalency scores is discussed more fully *infra*. They are provided here for context in light of the Parents’ contentions.

problems. Student's teachers rating scales revealed concerns with inattention, hyperactivity/impulsivity, learning problems/executive functioning, defiance/aggression. All raters' results suggested symptoms consistent with Attention Deficit/Hyperactivity Disorder (ADHD). (S-2 at 6-9.)

- b. On the Behavior Assessment System for Children – Third Edition (BASC-3), clinically significant concerns were endorsed in the following areas: Anger Control (teachers); Bullying (teachers); Developmental Social Disorders (Parents); Emotional Self Control (teachers); Executive Functioning (one teacher); Negative Emotionality (one teacher); Resiliency (teachers); and Mania (Student). At-risk concerns were also noted by others in many of these areas. (S-2 at 11.)
 - c. On the Behavior Rating Inventory of Executive Function (BRIEF), concerns with Working Memory, Planning/Organizing, and Initiating were notable. Teacher scales also reflected concerns with Inhibiting, Shifting, Emotional control, Organization of Materials, and Monitoring. (S-2 at 13-15.)
11. The results of an Autism Spectrum Rating Scale from 2013 were summarized for the 2015 RR, with scores consistent with Autism Spectrum Disorder (Parents and a teacher). (S-2 at 11.)
 12. A report of a Functional Behavioral Assessment (FBA) conducted in 2013 was also reported for the 2015 RR. The FBA identified targeted behaviors as inappropriate vocalizations, task avoidance, and non-compliance. (S-2 at 15-16.)
 13. The 2015 RR also summarized Student's performance on classroom-based assessments. At the time, Student was answering reading comprehension questions and demonstrating moderate success in

practicing reading skills at a Lexile level of 750, similar to that attained in November 2014 at level 4. Student's reading fluency skills were assessed at an eighth grade reading level and Student had met that goal. In the area of written expression, Student was writing two- to four-sentence paragraphs with a graphic organizer. In mathematics, Student's performance was variable on Level 7 probes. (S-2 at 16-17.)

14. Transition information in the 2015 RR reflected Student's goals of attending a four year college and competitive employment. Student had identified a number of accommodations for post-secondary education that would be helpful. (S-2 at 16-17.)
15. Recommendations by teachers in the 2015 RR were for test and assignment accommodations and modifications (extra time, tests read aloud, reduced choices, word banks, separate environment, spelling not graded, short answer rather than essays for written work); repeated directions, and teacher provided notes. Small group direct reading and mathematics instruction were also recommended. (S-2 at 18, 21.)
16. At an IEP meeting in February 2015, attended by Student and one of the Parents, the IEP team discussed Student's reading skills including Student's then-current sixth grade reading level on various assessments. (N.T. 59-60, 164-65; S-3 at 1-5, 7.)
17. The Parents did not provide written input into the February 2015 IEP, and no concerns by them were noted. (S-3 at 14.)
18. The February 2015 IEP summarized information from the recent RR including performance on classroom-based and other assessments. This IEP also included performance demonstrated during the 2013-14, reflecting that Student was maintaining reading comprehension skills

at a level 4; and that Student had difficulty with Level 8 mathematics probes. (S-3 at 10-14.)

19. The February 2015 IEP indicated that Student was participating in regular education with modifications including the test and assignment accommodations and other supports identified in the 2015 RR, as well as chunking of assignments, use of an agenda, visual supports, prompts and reminders for redirection, and use of a calculator. (S-3 at 14-15.)
20. Needs identified in the February 2015 IEP were for further development of reading fluency skills, reading comprehension skills, written expression skills, and problem solving (mathematics) skills. (S-3 at 15.)
21. The transition section of the February 2015 IEP indicated that Student was at that time in Fundamental English and Fundamental Algebra classes as well as Biology and U.S. History, among other courses. Student would move to Fundamental English 11 and Fundamental Geometry in the fall in addition to World Cultures among other courses. Student was reportedly undecided on post-secondary education and training goals. (S-3 at 16-17.)
22. Annual goals in the February 2015 IEP addressed written expression (writing an expository essay); reading comprehension (increasing Lexile score); and mathematics applications (using sixth grade probes). Program modifications and items of specially designed instruction mirrored those in the 2015 RR and additional current supports identified earlier in the document. (S-3 at 25-26.)
23. The February 2015 IEP provided for supplemental learning support, with Student receiving a replacement curriculum in English/Language Arts and Mathematics and not participating in regular education for

those courses. The Parents approved the accompanying Notice of Recommended Educational Placement (NOREP), and were aware that the English/Language Arts and Mathematics classes had replacement curricula. (N.T. 47, 69-70, 161; S-3 at 28-29, 31-34.)

24. Student took the Keystone Exams in the spring of 2015 and scored in or near the upper end of the Below Basic range on the Literature, Biology, and Algebra I portions of that assessment. Student could have but did not need to take those tests again. (N.T. 71-72; S-7 at 10; S-11 at 5-10.)
25. Progress monitoring reports were provided by the District to the Parents quarterly during the 2014-15 school year. (N.T. 73, 184; S-13.)

2015-16 School Year

26. Student's IEP team met in January 2016 when Student was transitioning to a partial hospitalization program. At the time that determination was made, Student was exhibiting significant anxiety over attending school. (N.T. 24, 61, 126-27, 168; S-4; S-5 at 1-9.)
27. Parent input into the January 2016 IEP reflected concern with the partial hospitalization program and future placement. They also completed a transition survey prioritizing the following areas/skills: friendships and social relationships, personal care needs, recreational/leisure skills, shopping skills, and laundry. They expressed least priority to: academic skills for post-secondary education; basic academic skills; decision making/goal setting; and skills for self-advocacy, money management, and vocational and career exploration. (S-5 at 16.)
28. Also in the present levels sections of the January 2016 IEP, Student's own input was that Student was considering a trade school but had not

decided on a field. Needs in daily living skills were also noted by Student, with specific challenges in mathematics and writing in addition to remembering identified. (S-5 at 11-16.)

29. The January 2016 IEP reiterated academic performance demonstrated during the prior school years in reading, writing, and mathematics. (S-5 at 12-13.)
30. The January 2016 IEP indicated that Student was participating in regular education with modifications including most of those in the previous IEP; added were a behavior modification system, extended time for assessments and assignments, clarified directions, a limit on the amount of material presented at one time, and use of notes for tests and quizzes; eliminated were small group instruction and use of a calculator. (S-5 at 16-17.)
31. Needs identified in the January 2016 IEP continued to include further development of reading comprehension skills, written expression skills, and mathematics application skills. Newly added were using appropriate language, and accepting direction and redirection. (S-5 at 17.)
32. The transition section of the January 2016 IEP indicated that Student would have Literacy and Comprehension, Integrated Math, History, and Life Management Skill classes, among other courses. Student would move to English 12, Consumer Mathematics, and Senior History in the fall. Student was reportedly undecided on post-secondary education and training. (S-5 at 18-20.)
33. Annual goals in the January 2016 IEP addressed written expression (writing an expository essay); reading comprehension (increasing Lexile score); and mathematics applications (using sixth grade probes). A behavior goal was added based on that in the partial

hospitalization program. Program modifications and items of specially designed instruction mirrored those modifications identified earlier in the document, and added counseling. (S-5 at 26-27.)

34. The January 2016 IEP provided for full time emotional support, with Student receiving a replacement curriculum in English/Language Arts and Mathematics and not participating in regular education for those courses. The Parents approved the accompanying NOREP. (S-5 at 30, 32-35.)
35. Progress monitoring reports were provided by the District to the Parents quarterly during the 2015-16 school year. (N.T. 73, 184; S-14.)

2016-17 School Year

36. Student returned to the District in the fall of 2016 pursuant to a new NOREP at the Parents' request. Prior to the start of the school year, the District Director of Special Education spoke with the Parents about Student's return and some options for the 2016-17 school year, including early graduation and remaining at school through June 2017. (N.T. 63, 173, 212-14; S-6.)
37. An IEP meeting was held in September 2016, attended by Student and one of the Parents. The team reviewed Student's present levels which reflected, among other things, that Student was attaining reading comprehension scores at an early-sixth grade level. (N.T. 65, 177; S-6; S-7 at 1-5, 7.)
38. At the September 2016 IEP meeting, the team discussed the possibility of Student attending a local community college following graduation, including the need for Student to investigate and undergo placement testing. They also discussed an option of Student remaining in the District in the spring of 2017 but also taking one or more college

classes. Another option discussed was Student remaining in the District beyond the 2016-17 school year through age twenty-one. (N.T. 38, 41-44, 55, 68-69.)

39. The Parents did not provide written input into the September 2016 IEP, and no concerns by them regarding the placement were noted. (S-7 at 14.)
40. The present levels sections of the September 2016 IEP reflected at that time that Student was undecided on post-secondary education and training but had a goal of competitive employment. Student's transition interests and needs were consistent with those in January. (S-7 at 10, 11-13.)
41. The September 2016 IEP summarized academic performance. Student was reportedly demonstrating progress on IEP goals and had passing grades. At that time, Student had answered reading comprehension questions at the sixth grade level at the 15th Percentile. In the area of written expression, Student attained a scores between the 5th and 8th Percentile for eighth grade level expectations. In mathematics, Student's performance was at the 10th Percentile on sixth grade application probes. (S-7 at 10-11.)
42. The September 2016 IEP indicated that Student would participate in regular education with all of the modifications from the January 2016 IEP with the exception of counseling. (S-7 at 14.)
43. Needs identified in the September 2016 IEP continued to include further development of reading comprehension skills, written expression skills, and mathematics application skills including geometry and algebraic equations. (S-7 at 14.)
44. The transition section of the September 2016 IEP indicated that Student had Fundamental English 12, Fundamental Consumer

Mathematics, Senior History, Business Law, and a wellness course. Student remained undecided on post-secondary education and training. (S-7 at 15-16.)

45. Annual goals in the September 2016 IEP addressed written expression (writing an increased number of total words); reading comprehension (using sixth grade probes); and mathematics applications without a calculator (using sixth grade probes). A behavior goal was added pursuant to the partial hospitalization program. Program modifications and items of specially designed instruction were continued from the January 2016 IEP and added small group English/Language Arts and Mathematics instruction, and opportunities for breaks and to stand when completing assignments. (S-7 at 25.)
46. The September 2016 IEP provided for supplemental learning support, with Student receiving a replacement curriculum in English/Language Arts and Mathematics and not participating in regular education for those courses. The Parents signed the accompanying NOREP. (S-7 at 28-29, 31-35.)
47. Also at the IEP meeting in September 2016, Student's team discussed Student graduating in the spring of 2017. The decision that Student would graduate in January 2017 was made by the IEP team, including the Parents, in the fall of 2016 in part because of Student's anxiety over attending school. The District members of the IEP team considered that Student was ready to graduate. (N.T. 26-28, 46, 53-54, 66-67, 87-88.)
48. Progress monitoring reports were provided by the District to the Parents quarterly during the first semester of the 2016-17 school year. (N.T. 73, 184.)

January 2017 Graduation and Beyond

49. Students in the District are required to earn 27 credits in order to graduate and are permitted to graduate early in January. Student had earned 28 credits by January 2017 and graduated at that time. (N.T. 21, 33-34, 68, 182.)
50. The District issued a Summary of Academic Achievement and Functional Performance dated January 26, 2017 to the Parents and to Student. The District included a NOREP with that document, both of which were sent on February 6, 2017. (N.T. 65-66, 77-78, 215-16, 219-20.)
51. The Summary of Academic Achievement and Functional Performance noted that Student completed all requirements to graduate, and had had Fundamental English and Mathematics courses. This document spelled out the accommodations/modifications provided to Student; Student's interest in a two-year program at the local community college and next steps in meeting with its disability services department were also included. (S-8.)
52. The Parents were not expected to and did not return the NOREP in February 2017. They may not have seen the Summary of Academic Achievement and Functional Performance at the time it was provided. (N.T. 141, 222; S-9 at 1.)
53. After Student graduated, Student was not successful in obtaining employment or applying to college, and exhibited symptoms of depression. With the help of the Parents, Student ultimately enrolled in a training program through the Office of Vocational Rehabilitation (OVR). In July 2017, OVR provided the Parents with a report of that training. (N.T. 90-91, 93-94, 145, 149-50, 188, 207; P-4.)

54. In the OVR training program, Student worked at three work sites: a farm, a hardware store, and a department store. Student reportedly was attentive and put forth effort at all of the sites, though not entirely at one. However, Student exhibited difficulties in all three settings, including following directives especially those with multiple steps (described as forgetfulness at times); requiring frequent redirection and prompting; and verbally expressing self. In one setting, where Student had reportedly spent time the previous summer, Student also was preoccupied with personal circumstances. The OVR report recommended “an extensive evaluation” due to described significant “dependence on prompts [and] limitations” (P-4 at 13) and attributed other difficulties to lacking the ability to retain information. (P-4.)
55. The Parents were surprised by much of the information in the OVR report, such as regarding the tasks that Student was not able to perform. They had been aware, however, of Student’s need for redirection. (N.T. 95-98, 147, 201.)
56. The Parents had Student undergo a neuropsychological evaluation, which was completed in February 2018 with a report and meeting in March 2018. (N.T. 100-01; P-5.)
57. The OVR evaluation included a summary of interviews with Student and the Parents and a review of medical and mental health history. (P-5.)
58. Cognitive ability was assessed for the OVR evaluation (Wechsler Adult Intelligence Scale – Fourth Edition), yielding a Full Scale IQ of 75 at the 5th Percentile (borderline range). (P-5 at 6-7.)
59. On the Woodcock Johnson Tests of Academic Achievement, Fourth Edition, for the OVR evaluation, Student earned composite scores as follows: Reading Composite score of 69 (2nd Percentile, GE 3.8

(Passage Comprehension was a standard score of 66, GE 2.8));
Written Language Composite score of 80 (9th Percentile, GE 5.7); the
Total Achievement Composite was in the borderline range (GE 4.7).
(P-5 at 9-11.)⁸

60. Assessment of memory for the OVR evaluation revealed scores on the Wide Range Assessment of Memory and Learning, Second Edition ranging from low average to extremely low ranges with some variability among subtests and composites. Short term memory was reportedly a relative strength compared to long term memory. (P-5 at 8-9.)
61. On the BASC-3 for the OVR evaluation, the Parents endorsed significant concerns with inattention and depression, functional communication, activities of daily living, leadership, and adaptive behavior; lesser concerns were noted for hyperactivity and anxiety. Related assessments suggested additional symptoms related to Student's mental health. (P-5 at 12-14.)
62. Additional assessments for the OVR evaluation reflected deficits with attention and impulsivity, executive functioning, and sensory motor skills. Student's difficulty remaining on task and need for frequent redirection during testing was also noted. (P-5 at 6. 10-12.)
63. The OVR evaluation made a number of diagnoses including Bipolar Disorder and also noted use of cannabis. The evaluation recommended that Student's primary focus be upon stabilizing mental health, followed by another community-based work assessment.

⁸ The report itself provides some discussion of the assessment results and, while the scores themselves are also reported in table format, the document contains significant shading that renders illegible some information such as additional Composite scores.

Other suggestions were made to address various areas of Student's life. (P-5.)

64. The Parents were surprised by some of the results in the report of the OVR evaluation. (N.T. 98-99, 101, 103-04.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of this discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, and any discrepancies in the testimony is attributed to lapses in memory rather than deceit. Credibility is discussed further as necessary below.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

Relevant IDEA Principles

This hearing officer's authority arises under the IDEA and the federal and state regulations implementing that statute, as well as the state regulations implementing Section 504. More particularly, 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 of, or the provision of FAPE to, a child under the IDEA. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.503, 300.507, 300.511; 22 Pa. Code § 14.162. 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.

Under the IDEA, children who are eligible for special education on the basis of a disability are entitled to a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.28, 300.101. The IDEA expressly provides that a party "must request an impartial due process 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). As an additional preliminary matter, it is clear that the IDEA statute of limitations applies to claims under Section 504. *D.K. v. Abington School District*, 696 F.3d 233, 244 (3d Cir. 2012); *P.P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009). By analogy, the same limitations apply to the related and intertwined ADA claims.⁹

⁹ Neither party asserted that the IDEA statute of limitations only applied to certain of the Parents' claims.

The IDEA provides two explicit 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 burden is on the Parents to establish one of the exceptions, which requires a "highly factual inquiry to determine if application of either exception is warranted." *J.L. v. Ambridge Area School District*, 2009 U.S. Dist. LEXIS 35403 at *14, 2009 WL 1119608 at **4-5 (W.D. Pa. April 27, 2009).

The Third Circuit has clarified that the misrepresentation exception requires knowing and intentional conduct on the part of the school district. *D.K.*, *supra*, 696 F.3d at 245-46.

*In the absence of a showing of "misrepresentation" akin to intent, deceit, or egregious misstatement, any plaintiff whose teachers first recommended behavioral programs or instructional steps short of formal special education might invoke the exception. Mere optimism in reports of a student's progress would toll the statute of limitations. The allegations comprising a claim that a FAPE was denied or that Child Find obligations were not met would nearly always suffice to extend the timeframe beyond that dictated by the statute of limitations. See ... Evan H. [ex rel. Kosta H. v. Unionville-Chadds Ford School District, 2008 U.S. Dist. LEXIS 91442, 2008 WL 4791634, at *6 n.3 [E.D. Pa.*

2008] ("Plaintiffs would have the Court read 'misrepresentation' to include any occasion in which the actions of a local educational agency have failed to remedy an educational problem encountered by a student. Such an exception would swallow the rule established by the limitation period."). This cannot be the intent of the regulation. Rather, we conclude that a rule demanding at least a school's knowledge that its representations of a student's progress or disability are untrue or inconsistent with the school's own assessments best comports with the language and intent of the provisions. Therefore, we hold that in order to be excused from the statute of limitations based on § 1415(f)(3)(D)(i) because the school "specific[ally] misrepresent[ed] . . . that it had resolved the problem," plaintiffs must show that the school intentionally misled them or knowingly deceived them regarding their child's progress.

Id. (some citations omitted).

Additionally, the Third Circuit has further explained that the withholding exception requires a finding that the school district failed to provide "statutorily mandated disclosures[.]" *D.K.* at 246. "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," such as the procedural safeguards notice and prior written notice. *Id.* The IDEA specifies when such written documentation must be provided. See, e.g., 20 U.S.C. §§ 1415(b)(3) - (b)(8), 1415(c).

Furthermore, the Court in *D.K.* emphasized that there exists a causation element for both exceptions; the misrepresentation or withholding must actually cause a parent's failure to request a hearing sooner. 696 F.3d at 246. If one of these exceptions is established, the statute of limitations is

tolled; in other words, the limitations period does not apply. *Id.*; 20 U.S.C. § 1415(f)(3)(D).

Beyond the above exceptions, “[t]he IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint.” *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, * 28-29, 2008 WL 2798306 (W.D. Pa. July 18, 2008). Hearing officers must “make determinations, on a case by case basis, of factors affecting whether the parent ‘knew or should have known’ about the action that is the basis of the complaint.” *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. at 46706 (August 14, 2006)). This process requires a “highly factual inquiry.” *Id.*; see also *E.G. v. Great Valley School District*, 2017 U.S. Dist. LEXIS 77920, *25, 2017 WL 2260707 (E.D. Pa. 2017).

The Third Circuit recently reaffirmed the importance of the KOSHK date or dates in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 606 n. 4 (3d Cir. 2015). The KOSHK question, however, is often complicated by disagreement over what it is that a parent must “know” that invokes a duty to act. In this context, the precise language of the IDEA (quoted above at 20 U.S.C. § 1415(f)(3)(C)) references the time period following the “action” on which a due process complaint is based. As is also set forth in the IDEA, the “action” that may form the basis of a complaint is the proposal or refusal to initiate or change the identification, evaluation, educational placement, or provision of FAPE to, a child. 20 U.S.C. § 1415(b)(6).

The language in *G.L.* focuses on the accrual of a cause of action “once...a reasonably diligent plaintiff would have discovered the facts constituting the violation.” 802 F.3d at 614. *G.L.* also cited to *Beauty Time, Inc. v. VU Skin Systems, Inc.*, 118 F.3d 140 (3d Cir. 1997). There, the Court explained that,

the plaintiff is expected to exercise reasonable diligence in attempting to ascertain the cause of any injury. Reasonable diligence has been defined as follows: "A fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity."

G.L., 802 F.3d at 614 (citing *Beauty Time*, 118 F.3d. at 144). *G.L.* went on to quote *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), which in relevant part stated that, "but the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation,' including scienter--irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *G.L.*, 802 F.3d at 614 (quoting *Merck* at 653). See also *E.G.*, *supra*, 2017 U.S. Dist. LEXIS at *21, 2017 WL 2260707 at ___ (agreeing with hearing officer that the term "action" means the LEA's initiation of or change to the identification, evaluation, educational placement, or provision of FAPE).

The Parents' Complaint raises claims that the District failed to properly address Student's education-related needs over the course of many school years. In this context, there are circumstances where knowledge of a particular "action" may not be sufficient to trigger the KOSHK date, such as "where the issue is one that requires specialized expertise a parent cannot be expected to have." *Avila v. Spokane School District 81*, 852 F.3d 936, 944 (9th Cir. 2017). Similarly, in *E.G.*, *supra*, 2017 U.S. Dist. LEXIS 77920 at **22, the Court observed that, "[i]t is particularly troublesome when the District's challenged action is the 'provision of free appropriate education'," because the parents must become aware that the District's actions arguably

amounted to a denial of a FAPE; and, that knowledge may occur sometime after the actions were taken.

The Third Circuit also cogently explained in *G.L.* that there is obvious tension between the obligation to timely pursue a claim against an LEA as a diligent plaintiff and the need for participation in the parent/LEA collaboration process that is inherent in the IDEA:

On the one hand, although a child's right to special education under the IDEA does not turn on parental vigilance, M.C. [v. Central Regional School District,] 81 F.3d [389,] 397 [3d Cir. 1996], parental vigilance is vital to the preservation and enforcement of that right. As we made clear in D.K., claims that are known or reasonably should be known to parents must be brought within two years of that "knew or should have known" date, and parents may not, without satisfying one of the two statutory exceptions, knowingly sit on their rights or attempt to sweep both timely and expired claims into a single "continuing violation" claim brought years later. 696 F.3d at 248. Parents are often in a position to be forceful advocates for their children and through their vigilance and perseverance to help fulfill the IDEA's promise of a free appropriate public education. That "cooperative process . . . between parents and schools" that results from a parent's action, after all, is at the very "core of the statute" itself. Schaffer, 546 U.S. at 53. Thus the sooner parents start that process and secure appropriate intervention and remedial supports after they discover or reasonably should have discovered the need for it, the better for the well-being of the child, the goals of the school district, and the relationship between the family and school administrators.

G.L., 802 F.3d at 625.

Misrepresentation Exception

The Parents contend that the District misrepresented Student's preparedness to graduate and that it misled them into believing Student was ready to go on to college. This assertion falls short of establishing the District's "knowledge that its representations of a student's progress or disability are untrue or inconsistent with the school's own assessments." *D.K., supra*, 696 F. 3d at 246. Student had earned the required number of credits to graduate and, like other students in the District may do, elected to do so in January of the senior year of high school. The testimony of the two District witnesses who specifically recalled discussing options with the Parents prior to graduation was convincing and persuasive, and overcomes any lack of such recollection of those conversations on the part of the Parents. The record is devoid of any suggestion that the District misrepresented Student's progress or its own assessments. Student's IEP team had provided recommendations for next steps should Student pursue additional education beyond high school, particularly as to the impact of Student's disabilities thereon. Moreover, Student's anxiety over attending school clearly was a factor in the graduation decision such that it was not made in a vacuum with no possible alternatives. There is simply no preponderant evidence to support a conclusion that the District misrepresented Student's abilities in any manner and particularly during the 2015-16 and 2016-17 school years. The Parents may not now proceed based on an exception to the statute of limitations.¹⁰

¹⁰ To the extent that there may be an argument that the withholding exception applies, the evidence clearly does not support a finding that the District failed to provide the Parents with any of the information required by the IDEA, including the procedural safeguards and prior written notices.

KOSHK Date(s)

The major focus of the hearing was the Parents' asserted lack of understanding of Student's actual abilities and skills as reflected by the OVR evaluation in early 2018. In essence, they contend that they did not know and had no reason to know of the true extent of Student's disabilities and how they would manifest into the future until they received that evaluation.

It cannot be doubted from the heartfelt testimony of the Parents that were indeed stunned and even devastated by the OVR evaluation, and that they did not truly grasp the scope of Student's functional weaknesses prior to that time, assuming those results to be valid a year after Student's graduation considering Student's presentation at the time. That they had high hopes and expectations for Student is wholly understandable. Additionally, the transition to life after IDEA services end can be difficult and even shocking to many families of children with disabilities. But the Parents' surprise by the results of the 2018 OVR evaluation simply cannot be attributed to the District's failure to apprise them of Student's aptitude and functional performance.

The evaluations between 2013 and 2015 included assessment of cognitive ability that was in the borderline range at the 3rd Percentile. In 2013 (when Student was in eighth grade), Student earned below average academic achievement scores in Reading between the 7th and 12th Percentile, with GE scores reportedly ranging from 2.1 to 4.7. Mathematics achievement scores ranged from the 1st to 27th Percentile with GE scores reportedly ranging between 2.6 and 6.9. In the area of Written Expression, Student's achievement score on a spelling subtest was at the 28th Percentile and at a reported GE of 5.4. Student's difficulties with inattention, hyperactivity, impulsivity, and executive functioning across settings were also well documented, as were problematic behaviors such as task avoidance

and noncompliance with directives. Updated information on Student's performance was provided in 2015.

In addition, the IEPs developed, reviewed, and provided to the Parents over the course of the 2015-16 and 2016-17 school years summarized Student's present levels of academic achievement and functional performance, which consistently did not meet grade level expectations; those were also discussed at IEP meetings. For both of those school years, the Parents were aware both from the IEP meetings and the documents themselves that Student was provided a replacement curriculum in fundamental Reading and Mathematics classes. Even with IEP goals that ambitiously targeted expectations at higher levels, Student essentially maintained academic skills in those subjects that were not on grade level over a multi-year period. In addition, Student's progress in the general education curriculum was dependent upon use of a number of modifications and accommodations, including some reduced expectations; all of these were detailed in the various IEPs. Student also did not attain even basic level scores on the Keystone exams, which was known in 2015. The record as a whole supports the conclusion that the Parents had ample and accurate information as time went on, and certainly no later than the date of Student's graduation, to question Student's readiness for post-secondary life and to make inquiries in connection with the District's provision of FAPE to Student. They had two years from that date to file an administrative complaint.

It is not apparent from the OVR evaluation whether the evaluator discussed with the Parents the meaning of grade equivalency scores. Grade equivalency scores are derived scores that must be interpreted with caution;

they do not mean that a student is performing at the grade level specified.¹¹ In any event, the academic and other deficits reported in the OVR evaluation are not materially discrepant from those Student exhibited in the District between January 2015 and January 2017, with the exception of a significant need for mental health stabilization. Thus, the OVR evaluation did not truly reveal new information that the Parents did not, but should, have had during the time Student attended school in the District.

The Parents point to what they perceive as the District's concession that Student was prepared to go on to college because Student was ready to graduate. The record reflects that the District recommended that Student investigate placement testing at the local community college and also contact its disability services office, if Student chose such a program. Many post-secondary education institutions today provide programming for students with disabilities that accommodate their abilities and needs, as well as their interest in pursuing options similar to those to which children without disabilities may transition. In the fall of 2016, Student remained undecided on post-secondary education goals, but Student and the Parents were given suggested steps to undertake depending on Student's election. These circumstances do not rise to the level of providing a basis for circumventing the statute of limitations.

The Parents will undoubtedly find this conclusion harsh. But Congress saw fit in 2004 to include a statute of limitations for IDEA claims; and, whether or not one agrees with that decision, the statutory language cannot be ignored.

¹¹ See, e.g., Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

For all of these reasons, this hearing officer concludes that January 31, 2017¹² is the KOSHK date for all of the Parents' claims. Under all of the specific circumstances presented in this matter, the record convincingly establishes that the Parents knew or had reason to know of any alleged flaws in the District's identification of and programming for Student's asserted needs at least by the date of Student's graduation. The Parents did not file their Complaint until March 2019. As such, and having found no exception to the statute of limitations applies, the Complaint must be dismissed in its entirety.

ORDER

AND NOW, this 8th day of July, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's Motion to Dismiss must be GRANTED, and the Parents' Due Process Complaint is DISMISSED.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21992-1819

¹² The actual date of graduation was not identified in the record; thus, the last day of that month is considered to be the KOSHK date.