

**DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

Petitioner)
v.)
Delaware College Preparatory Academy, Inc.) Date of Hearing-5/16/16

(“Charter School”) Respondent; and)
State of Delaware Department of Education(“State”))
Co Respondent) DE DP 16 -25

DECISION AND ORDER

INDEX OF NAMES FOR DECISION AND ORDER

ACTUAL NAME	REPLACEMENT NAME/TERM USED
	Student
	Mother
	Father
Delaware College Preparatory Academy, Inc.	Charter
State of Delaware Department of Education	State
	Charter Executive Director
	State Director of Special Education
	Red Clay District Director Special Services
	Red Clay Child Find Coordinator for School Aged Children
	Hearing Officer for First Complaint
Red Clay Consolidated School District	Red Clay

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DECISION AND ORDER

A. SUMMARY

Petitioner brought a due process case for compensatory education against the Charter and State (collectively "Respondents") for the period of September, 2013-September, 2014. This Complaint against both Respondents is dismissed as not timely under the IDEA and for the additional reasons of laches with regards to the State.

B. PROCEDURAL BACKGROUND

1. Petitioners', Student, Mother and Father, filed this Due Process Hearing Request on Friday, April 1, 2016, with the State of Delaware Department of Education ("Complaint").
2. In their Complaint, Petitioners alleged that Charter has denied Student a Free and Appropriate Public Education ("FAPE") under the IDEA and the corresponding Delaware Law by:
 - Not providing Student Speech and Languages Services and testing
 - Failing to provide Student appropriate cognitive testing, tests of academic achievement, tests of Student's social/emotional/ behavioral functioning, adaptive skills testing, tests of executive functioning tests of memory and learning;
 - Failure to timely conduct an annual review of Student's IEP;

- Failure to implement Student’s preexisting IEP from Red Clay District when Student entered Charter
3. The Complaint alleges that not only is Charter liable, but so is the State as primarily responsible for supervising public schools in Delaware and for failing to ensure that Student received FAPE and or the State had notice of Student not receiving FAPE due to the above and had a reasonable opportunity to cure the same, but failed to do so.
 4. As relief Petitioners sought against Charter and State, Petitioners requested:
 - full days of compensatory education to Student including Extended School Year Services for the summer of 2014 for the 2013 -2014 School Year at Charter via the creation of a funds for educational purposes;
 - payment of Petitioners reasonable attorney’s fees Declaratory Relief in the form of an adjudication that Student’s Rights under IDEA and 504 were violated.
 5. This Panel was appointed April 4, 2016 and notified of their appointment on April 5, 2016.
 6. As it was not clear to the Panel whether Petitioners were naming the State as a party in the Complaint, the Panel Chair requested that Petitioners’ counsel clarify this in an order issued April 11, 2016 and in doing so copied the same attorney for Charter School that Petitioners’ counsel had sent the Complaint. This attorney that day, April 11, 2016. promptly indicated to Panel and Petitioners that as of that time his firm had not been retained by Charter and was not counsel of record.¹

¹ The fact that Charter later retained this firm as its attorney does not mean on April 11, 2016 the relevant law firm was representing Charter.

7. Petitioners' counsel similarly on April 11, 2016 in an email indicated that they had mailed Charter's Executive Director April 1, 2016 and that they had been informed that the attorney who they copied Charter School had not been retained yet.

8. On April 11, 2016, State filed a Motion to Dismiss in relevant part alleging the Complaint was not timely filed under 14 DE Admin Code § 926.7.2 and 20 U.S.C. § 1415(f)(3)(C) specifically noting that there was no allegation in the pleadings for the exceptions to this 2-year requirement under 14 DE Admin Code §. 926.11.91-11.92 and 20 U.S.C. § 1415(D). Alternatively, the Motion alleged the Complaint should be dismissed due to laches or waiver. In essence, State argues that this is the 3rd complaint over the same facts with the first complaint being filed on February 20, 2014 more than two years prior to the filing of the present complaint and thus, untimely.

9. Also on April 11, 2016 State filed a Response to the Complaint (without waiving its motion to dismiss) and a Motion to Join Red Clay (which was denied²).

10. In calculating the timelines for this hearing, the Panel Chair issued an initial Order subject to any parties right to request reconsideration in relevant part indicating Charter was served April 4, 2016. Charter through counsel objected to this and indicated that Charter's Executive Director only received the Complaint upon return from School Break (and attending an out of state school conference after) on April 6, 2016 and in that request for Clarification, Charters then counsel indicated it desired until the following Monday to respond to the Complaint (since the 10-day deadline to respond ended on a Saturday) and following the analogous Federal and State rule.³

² This was objected to by Red Clay District on April 21, 2016

³ While this request was granted, Charter filed the Motion and Response that Saturday.

11. Since there was no objection, an extension was granted. The Compliant was served on Charter April 6, 2016.

12. On April 16, 2016, Charter, through its then counsel⁴, filed a Motion to Dismiss arguing the Complaint alleged violations more than two (2) years after the Parent knew or should have known about the violation that forms the basis for the complaint (the “KOSHK “date. 20 U.S.C. §1415(f)(3) (C), 14 DE Admin Code § 926.7.2 and *G. L. v. Ligonier Valley Sch. Dist.*, 802 F.3d 602, 626 (3d Cir. Sept. 22, 2015)). This was supplemented⁵ with a copy of the actual complaint filed by Petitioners on February 21, 2016. Also on April 16, 2016 Charter filed a Response to the Complaint (without waiving its motion to dismiss) averring affirmative defenses a statute of limitations and laches.

13. On April 18, 2016 Petitioners (without an affidavit or Petitioners signatures) responded to the State Motion to Dismiss in essence admitting that the Complaint they filed was the 3rd Complaint they had filed against Charter, but that the first complaint filed on February 21, 2014 was of limited scope, the second filed on August 13, 2014 concerned a different request for relief and that the KOSHK date was August 13, 2014 (and the Complaint timely)⁶ and that even if this Panel found otherwise, there was an exception that extended this deadline as specifically Charter misrepresented services that were going to provide pursuant to the resolution of the First Complaint

⁴ It is irrelevant that this is the same counsel who Petitioners emailed with a copy of the complaint upon filing as there was clear indication by Petitioners and Charter said counsel had indicated that he had not been retained yet. There is no obligation for an unretained attorney who is later retained by a client to accept service prior to retention. That is not to say that civilities should be ignored or that lawyers play games. However, there is no proof of this in this case and ultimate counsel are agents and not able to act without a client’s authorization.

⁵ The Panel Chair on April 22, 2016 gave Charter leave to submit a copy of the Parents First Complaint filed on February 21, 2014 as this was not in the record for determination as to whether this was indeed the same as the Present Third Complaint in these proceedings.

⁶ And thus timely as within 2 years of the present complaint filed on April 1, 2016

(filed February 21, 2014) withheld information from parents they were required to provide and never provided the Parents a copy of the procedural safe guards. They further argued that the State's argument of no supervisory liability was incorrect for a mixed reason of fact and law and State had not established laches.

14. On April 22, 2016 (at 10:32 a.m.) in an order, a teleconference concerning the pending matters was scheduled with the agreement of all counsel as well as granting Charter leave to supplement its Motion to Dismiss.

15. On April 22, 2016, with leave of the Panel, Charter filed a supplementation of its Motion to Dismiss that included the First Complaint of Petitioners.

16. After Charter filing its supplementation of its Motion to Dismiss that included the First Complaint of Petitioners and after 5:00 p.m. Friday normal business hours, Charter's counsel noticed the Panel and parties that Charter had terminated them as their counsel and that they would be proceeding without counsel. This was emailed before the teleconference that had been scheduled with their input.

17. On April 25, 2016, Petitioners responded to Charters Motion to Dismiss arguing the same matters it had in its Response to State's Motion to Dismiss.

18. On April 26, 2016, a teleconference ensued. Charter though counsel ⁷appeared as did the other parties and Red Clay School District. In that teleconference, it appeared to the Panel Chair that there were competing equities. On the one hand, Petitioners in fairness should be given a last chance to explain via testimony and exhibits at a 1 day hearing why its Complaint was not time barred (or otherwise barred by laches) and on the other hand, Charter had filed a Motion to Dismiss which should be promptly adjudicated as it lacked funds for counsel and at the end of the school year, would not exist, and lastly the

⁷ While Charter did not initially appear they did join in after recontact.

prospect of a Charter closing made the need for a hearing sooner while the Charter was open and evidence available in fairness to both Petitioners and State. To accomplish this, in the April 29, 2016 pre hearing order, expedited discovery was allowed to the parties and the hearing scheduled for May 16, 2016 with the focus that day on whether the Complaint was time barred or relocation of Student acts as a defense (with a primary issue being the timeliness of the Complaint). That is the hearing was bifurcated and only if the Complaint found timely would there be a necessity for further hearings. However, the parties could engage in discovery to preserve the evidence as to all issues alleged. During this time Charter was notified that a possible ramification of a corporation proceeding without counsel was a default.

19. On April 28, 2016, Charter indicated it was a corporation and supplied its corporate name.

20. Charter requested that Red Clay and State pay for its defense on May 3, 2016. No sufficient basis for the request was supplied or found.

21. On May 4, 2016 the Panel, granted Charter's counsel's Motion to Withdraw. Charter was reminded of the ***potential*** for a default judgment if it proceeded without counsel. In repeatedly reminding Charter of a potential default, the Panel was merely reminding Charter of a potential consequence and not stating that would be the consequence.

22. On May 9, 2016 Charter indicated to the parties and panel that no representative had been designated as its corporate representative.

23. On May 12, 2016, Petitioners filed a Motion for Default Judgment against both the State and Charter.

24. On May 13, 2016, Charter, without counsel through its Board President requested a continuance of the hearing so it could obtain counsel. That request was denied. Charter also in this request misread or misconstrued the Panel's prior order.

25. The Panel Chair indicated to all on May 13, 2016 it expected them to proceed.

26. On May 16, 2016 the Executive Director of Charter attended the hearing and the hearing took place.

27. As neither Student nor Parents were in attendance at the start of the hearing at 9 a.m. a recess was taken with the agreement of the counsel and hearing started at 9:34 a.m. with Petitioners counsel being present, but Petitioners being absent. N.T. 5/16/16 at 3-8. When the hearing reconvened at 9: 34 a.m., May 16, 2016 Petitioners remained absent and their counsel was there and the State moved to dismiss. Parents appeared on or about 12:55 p.m. ⁸ State's Motion to Dismiss was denied and the hearing proceeded until conclusion.

B. TESTIMONY AND EXHIBITS

In reaching this decision there was a little less than a day of testimony including all witnesses and all admissible exhibits were considered. Rather than recite all of the same, for the sake of brevity only the relevant portions are set forth in the following section.⁹

⁸ N.T. 5/16/16 at 184-185. Petitioners Counsel had indicated they were delayed by an accident at 11 a.m. N.T. 5/16/16 at 73-74.

⁹ In this decision, references to the transcript are cited as N.T. Date, page. Citations to Petitioners' Exhibit are cited as Petitioners' Exhibit # and citations to State's Exhibit are done as DEX 1-# or 2-#.

C. **FINDINGS OF FACTS**

1. Mother and Father and Student filed their first complaint against Charter signed by an attorney on February 21, 2014¹⁰ (“First Complaint”). Mother and Father filed a Second Complaint against Charter on August 13, 2014.¹¹ This is the 3rd Complaint against Charter.
2. Petitioners filed this Third Complaint on April 1, 2016 (a Friday) and it was served on Charter April 6, 2016.
3. Charter’s license was not renewed for next year and will close its doors with the close of the present school year. The reason for the nonrenewal was for financial reasons.¹²
4. Student was born on Month, Day, Year. Student was last actually educated¹³ at Charter in June 6, 2014¹⁴ when Student was in kindergarten. Student started at Charter in late summer, 2013 and Petitioners testimony that they informed Charter that Student had an IEP was not regarded as credible.¹⁵
5. At the time of the First Complaint and Second Complaint, State and Parents had no knowledge that Charter was going to lose its charter to operate as a school and neither did State.¹⁶

¹⁰ DEX 1- 3.

¹¹ DEX2-1 The Second Complaint was withdrawn by Petitioners September 10, 2014 and the First Complaint was withdrawn by Petitioners May 5, 2014.

¹² N.T. 5/16/16 at 210-211.

¹³ AS will be seen later there was an offer of services in the summer of 2015 which Petitioners did not pursue

¹⁴ N.T. 5/16/16 at 135.

¹⁵ N.T. 5/16/16 at 144. While Mother claims to have informed District, her testimony is not believed. N.T. 5/16/16 at 227. A parent should receive a copy of the IEP and if so, wouldn’t it have been logical for Mother to provide the copy? Mother did not remember the name of who she told this to.

¹⁶ N.T. 5/16/16 at 41-42. Also there was no proof submitted that Charter had any way of knowing it would be closed over a year after the withdraw of Second Complaint.

6. While the language in the First, Second and this Complaint, the Third Complaint differ¹⁷, the degree of knowledge that Petitioners possessed as to the nature, extent, and adverse effect¹⁸ on Student of the Charter’s violations of the IDEA (or Student’s injuries therefrom) **was the same at the filing of the First Complaint on February 21, 2014 as it was in filing this Third Complaint on April 1, 2016.** As non-exclusive examples, there is clear documentary evidence as set forth in Petitioners Exhibit binder that Mother on February 21, 2014 more than 2 years prior to the instant complaint, knew the Student’s IEP was not being implemented and needed to be tested as “not being educated properly” as well as Student not receiving speech and language testing and services.¹⁹ Charter sent out a permission to evaluate Student more than 2 years prior to the Third Complaint.²⁰ Mother herself testified that she knew in December, 2013 that Charter did not have an IEP for Student.²¹ Mother testified that the testing Parents were requesting in the First Complaint on February 21, 2014 concerned not only testing for speech and language deficits but also for other learning disabilities as Student could

¹⁷ N.T. 5/16/16 at 46-45 N.T. 5/16/16 at 52

¹⁸ N.T. 5/16/16 at 250-251 Mother indicated Student was making Honor Roll but “couldn’t do Student’s own homework, Student couldn’t make left from right from the pages that Student had.” The time Mother is talking about in this statement can be gleaned from the date on the Student’s Exhibit 19 she was talking about; This was on February 21, 2014 as that Exhibit is a letter dated “2/21/14” in Mother’s handwriting.

¹⁹ Petitioners Exhibit 19, S-19-45 and S-19-46. Mother testified that in December, 2013 she knew that Charter did not even have a speech pathologist there in December, 2013. N.T. 5/16/16 at 237. It follows that Mother knew that Student was not receiving Speech and language services at Charter since it had nobody to provide them as of December, 2013

²⁰ N.T. 5/16/16 at 148. Mother does not know when she received it but indicated she did not sign it, because educational advocate told her not to.

²¹ N.T.5/16/16 at 234. Mother even prior to the First Complaint was asking about the IEP. N.T. 5/16/16 at 235.

not read or spell.²² That is the KOSHK date is prior to February 21, 2014 and most likely in December, 2013.

7. When the First Complaint was filed, the State sent Petitioners then counsel on February 27, 2014 a 15-page document titled the Due Process Hearings via their then counsel that “The Due Process complaint must be filed within 2 years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. However, this timeline does not apply if the parent could not file a due process complaint within the timeline because: (1) the LEA specifically misrepresented it had resolved the problem that formed the basis of the complaint; or (2) the LEA withheld information it was required to provide parent.”²³ **That is not only was the KOSHK date more than 2 years prior to the Complaint, but that Petitioners knew that any Due Process Complaint had to be filed within 2 years, more than 2 years to filing the Complaint.**
8. Mother and Father as well as their counsel on or about February 27, 2014 received the Delaware Procedural Safeguard Notice set forth as DEX 1-22,²⁴ and the Voluntary Mediation Notice set forth as DEX 1-2. Mother admitted getting a copy of the Delaware Procedural Safeguard Notice even before she made a request on February 21, 2014 in the First Complaint albeit not from Charter.²⁵

²² N.T. 5/16/16 at 240

²³ DEX 1-3 at 5, N.T. 5/16/16 at 55-56

²⁴ N.T. 5/16/16 at 54-59

²⁵ N.T. 5/16/16 at 266

9. Charter also sent Petitioners a copy of the Procedural Safeguards on (or about) February 24, 2014 at the same time they sent a permission to evaluate to Parents.²⁶
10. By May 5, 2014, Petitioners withdrew their First Complaint.²⁷
11. Petitioners filed another Due Process Complaint, Second Complaint, through a different and their present counsel on August 13, 2014.²⁸ DEX 2-2.
12. Again the hearing manual went out as well as the Delaware Procedural Safeguards Notice (DEX 1-22)
13. Petitioners withdrew both their First and Second Complaint and had they not withdrawn these Complaints, they could have proceeded to a hearing even on allegations in an amended complaint (had they amended the complaint) which were not in the First Complaint or Second Complaint²⁹ and possibly received (if the facts merited it) the relief requested in this case.³⁰
14. Charter School did participate in the hearing and the Charter's Executive Director was called as a witness initially by Petitioners (who seek dismissal for the lack of counsel) and was subject to examination by all the parties.
15. Charter's Executive Director testified that until December of 2013, it was not aware that Student had an IEP, and that it did not hold an IEP meeting on December 12, 2013 when it became aware of the Student's IEP or at any

²⁶ N.T. 5/16/16 at 152

²⁷ N.T. 5/16/16 at 69.

²⁸ N.T. 5/16/16 at 70

²⁹ N.T. 5/16/16 at 87-89

³⁰ N.T. 5/16/16 at 90. There was later testimony that qualified this as to meaning they could have received an independent educational evaluation had Student not transferred to another school. N.T. 5/16/16 at 95/

time during the school year of 2013-2014 and never reported this to the State.³¹

16. After it learned of the prior IEP and the need of Student for Speech and Language services, in the latter part of November or December, 2014, Charter lost the services of its speech and language therapist and did not deliver speech and language therapy to Student when it returned to School from winter break in January, 2014³². Parents knew of this omission more than two years prior to filing this Complaint.
17. Charter, after the First Complaint, provided Student 195 minutes of Speech and language Therapy to Student of the amount of Speech and language therapy due under the former IEP and offered to make up any omitted services during the summer of 2014.³³
18. During the summer of 2014, District made attempts to contact Mother directly who did not talk to Charter directly as to transportation for the receipt of summer services.³⁴ These services included a Speech and Language Evaluation of Student.³⁵
19. There was insufficient competent evidence that Student could not be transported to take advantage of the compensatory services offered Student by Charter in the summer of 2014 and Student could have and would have been transported in the Summer of 2014 had Mother and Father contacted Charter. It is found that in the Summer of 2014, Charter not only offered the

³¹ N.T. 5/16/16 at 101.

³²

³³ N.T. 5/16/16 at 106-111

³⁴ N.T. 5/16/16 at 119.

³⁵ N.T. 5/16/16 at 134.

services but attempted to bridge any issues as to transportation by repeated calls and letters without response directly from Petitioners.³⁶ It believed that the taxi transportation services were offered not necessarily to student alone but also to be accompanied by a trusted adult whether it be Mother, Father or Parents' designee.³⁷ Lastly, there was no proof that Charter knew or should have known at the time the sort of transportation was offered, would effectively prevent Student from accessing the services offered.

20. In the Second Complaint, seeking an individualized educational evaluation and Charter counter claimed and Petitioner withdrew that Second Complaint as well. In the instant complaint, Petitioners claims as stated in this Third Complaint could have been addressed but for the withdraw of the First Complaint and separately, but for the withdraw of the Second Complaint.

21. Petitioners provided no proof that they ever filed a separate action with the State of Delaware Department of Education under 14 DE Admin. Code §§923.51.0 through 923.53.0 for enforcement of the IEP Student had when Student entered Charter or for the failure to review that IEP or for Speech and Language Services under that IEP or otherwise.³⁸ This is a separate administrative procedure with the State of Delaware and does not prohibit the filing of a Due Process Complaint and the very notices sent to

³⁶ N.T. 5/16/16 at 164. Se also, Student Exhibit 12. Mother's testimony in this was not regarded as credible as Charter's as Mother at time said she could not go in cab due to medical restrictions and at other times she said she asked to go in cab and was told she would have to find her own way home. Even if both are the case why couldn't another person Father perhaps or another trusted adult go with Student?

³⁷ N.T. at 282

³⁸ N.T.5/16/16 at 276-277. The evidence shows that Mother received DEX 22, the Delaware Procedural Safeguards Notice more than 2 years prior to the filing of this Complaint and page 17-19 of DEX 22 specifically describes this procedure indicating the same is not mutually exclusive with the Due Process Request (meaning both can be done) and Appendix B of DEX 22 sets forth a form for Petitioners or Lawyers to use. Had this been done simultaneously with the filing of the First Complaint, the State would have had a separate obligation concerning this procedure,

Petitioners more than two (2) years prior to the April 1, 2016 Complaint informed Petitioners of this.

22. Neither Charter or State specifically misrepresented that it had resolved the problems that Petitioner's knew of on or before February 21, 2014 which form the basis of this Complaint. Nor did Charter or State withhold from the parent information that it was required to provide. Neither State or Charter did anything that would otherwise equitably to extend this two-year period.

23. Petitioners moved out of State in September 22, 2014 and provided no proof at the hearing that they took any further action with regard to the matters averred in this action until filing this action.

24. Mother became aware that Charter would be closed on December 15, 2015.³⁹

D. DECISION

Parents knew of all of the sundry omissions of Charter as to FAPE under IDEA for the Student, including but not limited to, the failure to provide speech and language services, the failure to implement the former IEP Student had in Pre School, the failure to review the former IEP, the failure to test Student in any manner requested by Parents **before February 21, 2014** when Parents filed their First Complaint. That is more than two years prior, to the filing of this Complaint on April 1, 2016 and served on Charter April 6, 2016, Petitioners knew or should have known about the alleged action which forms the basis of the Complaint.

³⁹ N.T. 5/16/16 at 263

Neither Charter or State specifically misrepresented that it had resolved the problems that Petitioner's knew of on or before February 21, 2014 above which form the basis of this Complaint. Nor did Charter withhold from the parent information that it was required to provide. Charter did nothing otherwise equitably to extend this two-year period. Rather the omissions of Charter were not only actually known but would have been apparent to a reasonable person placed in Petitioners' position who could have reasonably sought and pursued relief.

Accordingly, this Complaint is dismissed and the State's and Charter's Motion to Dismiss are granted as the Complaint is untimely pursuant to 14 DE Admin Code §. 926.11.7, 20 U.S.C. §. 1415(f)(3)(C), and the exceptions set forth under 14 DE Admin Code §. 926.11.8, 20 U.S.C. §1415(f)(3)(D) do not apply.

As to the Petitioners' Motion for a Default Judgment, that Motion is denied for the unique combination of facts and procedural matters in this case. These include, but not limited to, the following: (1) Charter filed its Motion to Dismiss with counsel; (2) Charter did participate in the hearing albeit without their own counsel, but with a counsel that stood in the shoes of their counsel as they had the same interest as Charter in showing the untimeliness of the filing of the Complaint, the State of Delaware Department of Justice; (3) the untimeliness of the Complaint was revealed through Mother's testimony in the hearing.

All other claims are denied. This Complaint is dismissed as time barred and further proceedings would be futile.

E. RATIONALE

The seminal issue in this bifurcated case was whether the Petitioners Complaint was timely under the IDEA. The relevant provisions of the IDEA 20 U.S.C. § 1415(f)(3) (C) and (D) state:

(C) Timeline for requesting hearing

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**, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline. 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.

(emphasis and underlining added)

The State of Delaware’s rule, 14 DE Admin Code §§ 926.11.8-926.11.9 is the same as the above federal statute as it says:

11.8 Timeline for requesting a hearing: **A parent or agency shall request an impartial hearing on their due process complaint within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.**

11.9 Exceptions to the timeline; **The timeline described in 11.8 does not apply to a parent if the parent was prevented from filing a due process complaint due to:**

11.9.1 **Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or**

11.9.2 **The LEA’s withholding of information from the parent that was required under these regulations to be provided to the parent.**

(emphasis and underlining added)

The Third Circuit in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015) says: “§ 1415(f)(3)(C) bars claims that are not filed within two years after the parents “knew or should have known” about the injury.”⁴⁰ Here, Mother (and Petitioners) clearly knew about all the injuries Student suffered more than two years before filing the incident complaint as Mother testified on May 16, 2016 at this hearing as to knowing about these injuries before she filed the First Complaint on February 21, 2014.

This Complaint in this case says:

- a. Charter made no effort to obtain the educational records that concerned Student’s IEP from the prior year at the Red Clay School District before December 12, 2013. However, Mother says she knew Charter was not administering this IEP and Charter told her it did not have the IEP as early as December, 2013.⁴¹ The injury arising from this Third Complaint thus, occurred more than two (2) years before its filing.
- b. Charter was not implemented the Red Clay IEP⁴² in the Spring of 2014 which required Student receive additional Speech and Language service.⁴³ However, Mother knew this earlier than the Spring, 2014, Mother even knew that Charter was not providing Speech and Language Pathology services as early as December of 2013 as she knew Charter had no speech and language service provider to provide services then.⁴⁴

⁴⁰ This is often referred to as the KOSHK date.

⁴¹ N.T. 5/16/16 at 234.

⁴² This allegation is not correct. Charter was providing Speech and language services in the Spring of 2014, it had simply not made up all of the hours required. See Petitioners’ Exhibit 14.

⁴³ Charter

⁴⁴ N.T. 5/16/16 at 236-237. Moreover, Charter took adequate steps to remediate this in its provision of speech and language therapy, its offer of compensatory services and an evaluation in Summer Which Petitioners did not take advantage of. As to the evaluation, Charter offered this in February 2014 and Mother admitted to not returning the same before the end of the school year.

- c. Mother knew that Charter did not timely review the Red Clay IEP as she had a copy of the IEP set forth as State Exhibit 2 which explicitly says that it ends on “11/20/13”. Moreover, Mother testified she inquired about its review in December, 2013 when she called School then as she knew she was getting calls about another of her child’s reviews from Charter and wondered why she had not heard from Charter as to the review of this IEP.⁴⁵ Furthermore, this was specifically a part of Petitioners First Complaint filed on February 21,2014 set forth as DEX 1-3
- d. Charter failed to provide Student speech services. This is a part of Petitioners First Complaint filed on February 21,2014 set forth as DEX Exhibit 1-3 and Petitioners knew of this injury more than two (2) years prior to their Complaint.
- e. Charter failed to comprehensively evaluate Student. However, Mother testified that she knew about this injury and had requested this in her letters to Charter sent in her handwriting in February, 2014.
- f. Charter failed to evaluate for speech and language services. This again was known by Mother as early as December 2013 and a part of the First Complaint. Essentially, Petitioners argue that the two-year limitation should be extended as Charter indicated it would evaluate Student for Speech and Language and provide compensatory service after the First Complaint. While this is part true and Charter admits that it sent out a Permission to Evaluate Student for speech and language services in February, 2014, Mother admits she failed to send this back until the end of the 2013-2014 school year because her advocate told her not to. Mother signed the Permission to Evaluate on May 29, 2014 and it was

⁴⁵ N.T. 5/16/16 at 234.

received by Charter on May 30, 2014. Petitioners Exhibit 13. This led Charter to have to offer the evaluation in the Summer, 2014 as school was ending.⁴⁶

Simply put Charter could not evaluate Student until it received parental permission and the Parents chose not to promptly return that permission, perhaps under bad advice, but not at the fault of Charter.⁴⁷

Petitioners base their failure to avail themselves as to the speech and language evaluation and speech and language services on their allegation that Charter was insisting that Student (a young child) take a cab alone. However, this is not accepted as credible. Charter testimony that it had no objection to Mother riding with Student is more credible than Mother's testimony. Mother testified that she had restrictions because of pregnancy and later Mother testified that she asked for permission to ride and Charter refused. However, we all have taken cabs and why would Charter decline? Is there a significant monetary difference for the second passenger? No. As to Mother's claim of health reasons from her pregnancy, even if this were true⁴⁸, Mother could have relayed that there would be a surrogate to go with Student to the Speech and Language Evaluation and Speech and Language Therapy offered in the summer of 2014 such as Father or another trusted adult.

This brings us to the contention that Petitioners makes that a Taxi is inappropriate due to a lack of a car seat or background checks on a taxi driver.

⁴⁶ N.T. 5/16/16 at 134

⁴⁷ While it is true that Charters notice to as to offering compensatory speech services in summer does not explicitly mention counseling (see Exhibit 11- 2d request dated June 16, 2014), the Director of Charter stated that there were a series of calls also made to Petitioners. Also it is clear from a comparison of the dates of Petitioners Exhibits 11,12, and 13 that Charter was attempting to contact Petitioners promptly and that any fault at the failure to return these attempts to return the contact have to be charged to Petitioners

⁴⁸ There is a contradiction in Mother saying she could not ride a Taxi with Student due to a pregnancy and saying that she asked Charter about this who said no.

First as to the lack of a car seat, there is no testimony that one would not be provided at all for Student in this hearing. Second, as to the lack of a background check of the driver, similarly there was no proof provided that taxi drivers in Delaware do not have to have such clearances.⁴⁹ More important than both of these reasons, however, is the lack of competent proof that Charter knew about the issue of the taxi as the communication by Petitioners counsel was not to Charter but to a former counsel and there was insufficient proof of the relay.

Now as to the effect of the Second Complaint, there were no allegations set forth by Petitioners that the withdraw of this was in any way based on a promise by Charter or otherwise. Rather the evidence points to the reason for withdraw being the move of Petitioners to Philadelphia. Now as to Charter's withdraw of its counterclaim, there seems no logical reason that should serve as a basis. Charter sought that Student do the Evaluation it was going to do if Student had taken advantage of its offer. Petitioners withdrew their request for evaluations. The logical reason that Charter did not pursue its request was that Charter had nothing to gain except to unnecessarily expend attorney's fees.

Petitioners also argue that they did not receive the Notice of Procedural Safeguards. However, the credible evidence is that both before Student started at Charter and when they filed the First Complaint and Second Complaint, Petitioners received these. These were sent more than two (2) years prior to the filing of the Instant Complaint by Charter as well as the State.

⁴⁹Indeed, while not part of the record, isn't this the Taxi Driver's consistent argument although the locale they were discussing is not known as why Uber to deliver services.

This brings us to an argument that since Charter did not have counsel at the Hearing that Petitioners Motion for a Default should be issued. While a corporation needs counsel to proceed in Delaware, Charter, as a corporation, had counsel at the time it filed the Motion to Dismiss. The hearing was set forth so that Petitioners could explain why the 2-year period to file a complaint should be tolled or what their degree of knowledge was as to the injuries two years to the filing the Complaint and when they came into that knowledge or the KOSHK date as set forth in Ligonier, Supra. Mother and Father came to the hearing. Petitioners chose for Father not to testify and from Mother's testimony alone, it was clear that the KOSHK date was more than 2 years prior to this April 1, 2016 Complaint. This was established even without the Charters input.

Secondly, State made the same argument as Charter did as to the untimeliness of the Complaint. State made it earlier than Charter. State made it at the hearing with counsel, and had the same interest as Charter as to the timeliness of the Complaint (if it were untimely filed, the State prevails). For this reason, while not representing Charter at the hearing, the States attorney pursued the very same arguments Charter made in its Motion and in fact protected Charter's interest.

Third, Charter did send Charter's Executive Director to the hearing. So it cannot be said that they made no effort.

It is well established that a judgment on issues after evidence presentation is preferable to a Default Judgment. In this case, the unique balance of the equities favors not issuing a Default Judgment and reaching the core issue of whether or not the Complaint filed on April 1, 2016 was timely. *Poulis v. State Farm*, 747 F. 2d 863

(3rd Cir. 1984) set forth six factors to consider as to whether or not to issue a default judgement.

The first factor under *Poulis* is the extent of the parties' personal responsibility. As the only evidence was that Charter had its charter revoked for financial reasons, there is simply not enough evidence presented to give this factor much weight. It is simply not known what caused Charter's professed dire financial situation, malfeasance or simply a lack of enrollment.

The second factor in *Poulis* is prejudice to the adversary. There was no prejudice to Petitioners. Charter participated in a deposition prior to trial and attended trial. This favors not granting a default.

The third factor in *Poulis* is a history of dilatoriness. There is no evidence that the lack of counsel delayed this case or of any dilatoriness. This favors not granting a default.

The fourth factor in *Poulis* is whether the conduct was willful or in bad faith. There is no evidence of bad faith or willfulness just a lack of funds. This favors not granting a default.

The fifth factor in *Poulis* is the lack of appropriate other sanctions. In the prehearing order expedited discovery was allowed to all parties this was done so that this matter could proceed on the facts. Moreover, this decision is not making a decision as to Charter of whether or not there is laches.

The sixth factor in *Poulis* is the relative merit of the claims. Charter position in its Motion to Dismiss (filed with counsel) as supplemented as to the untimeliness of the claim is ultimately meritorious. This favors not granting a default.

The vast majority of the factors above in *Poullis* favor not issuing a default judgment against Charter.

This brings us to the alternative basis for dismissal Laches or Waiver. First laches typically follows the applicable limitations period which is 2 years from the KOSHK date. Laches applies where there is (1) inexcusable delay in bringing the action and (2) prejudice. *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 327 (3d Cir. 2004). Prejudice requires showing that the delay caused "a disadvantage in asserting and establishing a claimed right or defense." *Id.* at 337 (citing *United States Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 208 (3d Cir. 1999)).

First, there is undue delay in bringing this action against State. No reason was averred or testified at trial as to why Petitioners did not bring this action sooner. It appears the reason is that State did nothing wrong previously and that was why the action was not pursued against them.

Second, the delay by bringing this action does unduly prejudice State. The Petitioners could have availed themselves of a separate administrative remedy requiring the former IEP and speech services be implemented by requesting the same of the State in a separate administrative proceeding other than a Due Process Request under 14 DE Admin. Code §§923.51.0 through 923.53.0. Additionally, Petitioners could have requested in the First or Second Complaint the State be made a party. Yet neither was done. The failure to do this while simultaneously requesting State to be responsible for a failed Charter school is a delay leaving the State without recourse to the responsible party the Charter School when it is going out of business and lacks the very funds to pay for the damages. That is there is a prejudice to State.

There is no evidence that State knew or had reason to know Red Clay would not renew its Charter as that was up to Red Clay at the time. All that was required of State or asked of State in the First and Second Due Process Complaints was done. There is no allegation or testimony otherwise. The State has no role and played no factor in Petitioners choice to withdraw the two prior due process actions and none has been alleged or testified to. Nor has it been alleged that the State failed in its administrative function in appointing a panel. For the State to be found liable under these unique circumstances is tantamount to strict liability without recourse. That is the unique omissions in these pleadings, the failure to timely file a separate administrative action(s), coupled with the failure to include State in either prior Due Process was a choice of Petitioners, one which should not be permitted to “Monday Morning Quarterbacked” in these circumstances.

Now as to Laches for the Charter or waiver of Charter, the Panel declines to reach this as the issue with regard to Charter only as the issue is moot not likely to reoccur as Charter will not exist.

V. ORDER.

After a hearing, Charter's and State's Motion to Dismiss is granted and the entire Complaint of Petitioners is dismissed as untimely both under the IDEA and with regard to State laches.

As this matter is dismissed this is a final order and pursuant to 14 Del. Admin. Code §§ 926.16.1 and 926.16.2, any party aggrieved by the findings and decision may appeal to the Family Court in and for the State of Delaware or the United States District Court for Delaware if done within ninety (90) days of this decision.

So Ordered this 16th day of June, 2016.

/s/Gary R. Spritz
Gary R. Spritz, Esq.

/s/Dr. Harold M. Tarriff
Dr. Harold M. Tarriff

/s/John Werner
John Werner

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