EXHIBIT C

M.P., Guardian A.G., Student v. School District of Philadelphia AND B.G., Parent T.R., Student v. School District of Philadelphia	ODR No. 15166-1314KE AND ODR No. 15181-1314KE CONSOLIDATED

CONSOLIDATED PRE-HEARING ORDER

Introduction and Procedural History

This consolidated pre-hearing order applies to both of the above-captioned due process hearings. Those hearings, described briefly below, have been consolidated. This pre-hearing order resolves two questions of law that are equally applicable in both cases. A third pre-hearing issue that applies only in ODR No. 15181-1314KE is also resolved. To the extent that this order applies to one case but not the other, that is explained herein. Prior pre-hearing orders in these cases speak for themselves and are not discussed.

On June 23, 2014, M.P. requested Due Process Hearing No. 15166-1314KE against the School District of Philadelphia (District). M.P. is the legal guardian of A.G., a student in the District.[1] M.P.'s Compliant raises claims under three statutes: the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*; Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4; and the Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 *et seq.*

On June 26, 2014, B.G. requested Due Process Hearing No. 15181-1314KE against the District. B.G. is the parent and legal guardian of T.R., a student in the District. B.G.'s Complaint raises claims under the same three statutes: the IDEA, Section 504, and the ADA.

M.P. demands, *inter alia*, a finding that the District "has a systemic practice of failing to timely evaluate students who are English Language Learners and who may have a disability, and further find that the [District] has a systemic practice of not informing parents of ELL students of the process for an initial special education evaluation." M.P. further demands a finding that the District "fails to fully inform parents, including [M.P.], of their rights and the [District's] responsibilities in situations where the parent does not speak English as a first language, and on information and belief, this is a systemic deficiency of the [District.]"

[1] It is not disputed that M.P. is A.G.'s "parent" for purposes of the IDEA.

B.G. demands, *inter alia*, a finding that the District "fails to fully inform parents, including [B.G.], of their rights and the [District's] responsibilities in situations where the parent does not speak English as a first language, and on information and belief, this is a systemic deficiency of the [District.]"

On July 3, 2014, the District filed an Answer and Motion to Dismiss (MTD) in Hearing 15166-1315KE . Through the MTD, the District seeks dismissal of M.P.'s ADA claims and the "systematic practice" claims. M.P. responded to the MDT on September 26, 2014.

On September 30, 2014, the District moved in Hearing 15181-1314KE to limit claims arising before the first day of the 2013-14 school year, arguing that those claims are barred by the IDEA's two-year statute of limitations. B.G. responded to that motion on October 15, 2014.

These cases were consolidated on September 11, 2014. After consolidation, the District essentially filed the existing MTD in both cases. The District also filed a reply to the Parent's response. The parents in both cases submitted a sur-reply to the MDT on October 15, 2014.

With this background, I now resolve questions of my authority to hear ADA claims in both cases, my authority to hear claims of systemic violations in both cases, and the applicability of the IDEA's statute of limitations in Hearing 15181-1314KE.

Jurisdiction to Hear ADA Claims

In its motion, the District argues that ODR lacks jurisdiction over ADA claims. In making this argument, the District points to 34 CFR §300.507(a)(1) as the basis of ODR's jurisdiction. This is an oversimplification. The referenced regulation establishes the right of a parent or public agency to request a due process hearing to resolve IDEA disputes. Were that the sole basis of ODR's jurisdiction, ODR would have no authority to hear claims arising under Section 504. The District does not challenge ODR's authority to hear Section 504 claims.

It is instructive, however, examine the basis of ODR's jurisdiction to hear IDEA claims as a starting point for an analysis of ODR's authority to hear ADA claims. Although the IDEA establishes the right to a due process hearing, much is left to the states to create a system of administrative dispute resolution. In Pennsylvania, the Commonwealth's special education regulations empower the Secretary of Education to establish such a system. *See* 22 Pa. Code § 14.162. Pursuant to this authority, Pennsylvania created ODR both to adjudicate IDEA claims, and to provide resources for parents and educational agencies to resolve educational disputes for children served by the early the intervention system, students who are gifted, and students with disabilities.

As with the IDEA, Pennsylvania also has its own regulations for the implementation of Section 504. These regulations cite back to the Commonwealth's special education regulations, establishing that ODR has jurisdiction over Section 504 claims.[2]

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[2] Pennsylvania's special education regulations, 22 Pa. Code § 14 (Ch. 14), has been updated more recently than Pennsylvania's regulations for "protected handicapped students," 22 Pa. Code § 15 (Ch. 15). As such, Ch. 15 cites to sections of Ch. 14 that are currently "reserved" but served the same function as 22 Pa. Code § 14.162.

Unlike the IDEA and Section 504, there is no clear statute or regulation that serves as the basis of ODR's jurisdiction to hear ADA claims. This conspicuous lack of authority strongly suggests that ODR has no ADA jurisdiction.

In light of the nonexistent state-level statutory basis for ODR's ADA jurisdiction, it is remarkable that the IDEA's federal regulations impose an administrative exhaustion requirement on ADA claims whenever the IDEA is implicated. Whenever a parent or student may seek relief under both the IDEA and the ADA, the parent or student must exhaust the IDEA's administrative procedures before brining an ADA civil action. 20 U.S.C. § 1415(l) provides:

> Rule of Construction
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

See also, 34 C.F.R. § 300.516.

I do not construe this language as a requirement to pursue ADA claims within an IDEA hearing. Rather, this provision stops ADA civil actions until IDEA claims are administratively exhausted. As discussed in detail below, however, my interpretation of this language is not compatible with current case law.

This case presents the circumstances anticipated at 20 U.S.C. § 1415(l). The Parent's ADA claims are entirely derivative of their Section 504 claims. Whether or not I dismiss the ADA claims, I will hear all of the same evidence. Moreover, the Parents are not seeking remedies under the ADA in addition to remedies under the IDEA and Section 504, with the exception of declaratory relief. Consequently, resolving this jurisdictional issue will have no impact whatsoever on what will actually happen during the hearing.[3]

Perhaps in recognition of this practical consideration, a number of judges have concluded that when parents assert ADA violations that are coextensive with IDEA violations, they are required to pursue the ADA claims during the special education due process hearing:

> Parents of children with disabilities are not limited to suing local educational authorities under the IDEA and may pursue actions under other laws, including the ADA and Section 504. However, "when parents choose to file suit under another law that protects the rights of handicapped children—and the suit could have been filed under the [IDEA]—they are first required to exhaust the [IDEA's]

[3] This is not to minimize the importance of declaratory relief. A declaration that the District has or has not violated the ADA may have a real-world impact upon the parties, and it is not proper for me to make such a determination absent jurisdiction to do so.

> remedies to the same extent as if the suit had been filed originally under the [IDEA's] provisions." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir.1987); *see also* 20 U.S.C. § 1415(l).

R.B. ex rel. L.B. v. Board of Educ. of City of New York, 99 F.Supp.2d 411, 415 (S.D.N.Y., 2000).

See, also, Hesling v. Avon Grove School Dist., 428 F.Supp.2d 262, 276 -277 (E.D. Pa., 2006):

> In count five of her complaint, Ms. Hesling asserts an attendant claim under §1983 for violation of the IDEA (as well as claims under §1983 for violations of the ADA and Section 504, discussed infra). She seeks both monetary damages and declaratory relief for violation of § 1983. Here again, some of the relief Ms. Hesling seeks is available under the IDEA and exhaustion is therefore required for Ms. Hesling to proceed with this claim. *Cf. W.B.,* 67 F.3d at 495 (finding that money damages are available in a § 1983 action premised on a violation of the IDEA, but "observ[ing] that the exhaustion requirement may not be circumvented by casting an IDEA claim as a § 1983 action predicated on IDEA").

Another clear indication that ODR has jurisdiction to hear ADA claims is found in *Swope v. Central York School District*, 796 F.Supp.2d 592 (M.D. Pa. 2011). In *Swope,* the parent requested a due process hearing, and raised only IDEA claims during the hearing. After the hearing, the parent raised derivative Section 504 and ADA claims for the first time in the district court. The district court dismissed the Section 504 and ADA claims because Parent had not included those claims in the due process complaint. In doing so, the district court explicitly rejected the parent's argument that administrative exhaustion of ADA claims was not required because he hearing officer lacked jurisdiction over the ADA. To the contrary, as in the *Hesling* case, the court concluded that administrative exhaustion was required if some of the relief demanded under the ADA was also available under the IDEA. *Id* at 599-600.

It would be exceedingly weird for a court to force parents to present ADA claims within a special education due process hearing if ODR had no jurisdiction over ADA claims. Such a result would place parents in an awkward position: they would have to present ADA claims to hearing officers knowing that those hearing officers had no jurisdiction to hear those claims, or risk losing the right to bring an ADA civil action at the conclusion of the due process hearing.

The *Swope* court never explicitly says that ODR has jurisdiction to hear derivative ADA claims (meaning that the ADA claims arise out of the exact same actions or omissions as the IDEA and § 504 claims, and the same relief is sought). However, the only logical way to read *Swope* – the only way that avoids an absurd result – is that parents do not get two bites at the apple. If relief is available under the IDEA or Section 504, parents may not double their total remedy by seeking the same relief a second time through an ADA civil action. For this reason, ADA claims that are derivative of IDEA or Section 504 claims must go to ODR first. That way, a hearing officer may award all of the relief that a parent may be entitled to at the administrative level, satisfying all administrative exhaustion requirements in one fell swoop.

The focus on the coextensive relief available for derivative ADA claims is apparent not only in *Swope*, but also in every other case in Pennsylvania to consider the issue. All of the case law on this issue clearly indicates that when the entirety of the demanded relief can be obtained administratively, all claims must proceed through a due process hearing before going to court. In

Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. LEXIS 44250(E.D. Pa., 2013), the court dismissed ADA and Section 504 claims for failure to exhaust administrative remedies because the parents could obtain all relief through an IDEA due process hearing. This focus on the availability of relief at the administrative level is further emphasized in *Gaudino v. Stroudsburg Area Sch. Dist.*, 2013 U.S. Dist. LEXIS 102382 (M.D. Pa., 2013). In *Gaudino,* the court found that a parent could bring a civil action under the ADA and Section 504 without first going through ODR *only because the parent was seeking relief that is not available under the IDEA. Id* at 23-24.

The most blunt statement on the issue is found in *D.F. v. Red Lion Area Sch. Dist.*, 2012 U.S. Dist. LEXIS 6925, 2012 WL 175020, (M.D. Pa., 2012):

> Defendants contend, and Magistrate Judge Methvin agreed, that because Plaintiffs did not raise their ADA or Rehabilitation Act claims at their due process hearing, that those claims are now barred. Plaintiffs counter that they were not required to exhaust their ADA and Rehabilitation Act claims at the IDEA due process hearing because the IDEA claims raised at the due process hearing were nearly identical to the ADA and Rehabilitation Act claims. The Court cannot agree. The statute and case law make clear that "IDEA-related claims brought under the ADA or the Rehabilitation Act [must] be submitted in the first instance to administrative review." *R.R. v. Manheim Twp. Sch. Dist.*, 412 F. App'x 544, 549-50 (3d Cir. 2011); *see also Swope v. Cent. York Sch. Dist.,* No. 1:10-cv-02541, 796 F. Supp. 2d 592, 2011 U.S. Dist. LEXIS 65804, at *19 (M.D. Pa. June 21, 2011)

D.F. at *18[4]

Apart from one unpublished decision, this issue has not been addressed by Pennsylvania state courts. The unpublished decision, however, is in total agreement with the referenced federal cases. *Collins v. State,* 2013 Pa. Commw. Unpub. LEXIS 797(Pa. Commw. Ct.2013).

In sum, there is no explicit statutory or regulatory foundation for ODR's jurisdiction to hear ADA claims. However, every court in Pennsylvania to have considered the issue has concluded that when ADA claims are entirely derivative of IDEA or Section 504 claims, the ADA claims must go through ODR before going to court. Although my reading of the applicable statutes and regulations may differ from the analysis of the various courts (particularly in regard to 20 U.S.C. § 1415(l); 34 C.F.R. § 300.516), I will not substitute my own legal analysis for the analysis of every judge to consider the issue. Consequently, the District's motion to dismiss the ADA claims is denied in both cases.

Systematic Violations

There is a world of difference between consolidating two cases for the sake of efficiency and convenience, and certifying a class action at the administrative level. In her complaint, M.P. asks me to find that the District violated not only her rights, but the rights of all other similarly situated parents. M.P. demands remedies not only for herself, but for all parents within the District who

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[4] *R.R. v. Manheim Twp. Sch. Dist.* is not precedential, per Rule 5.7. The same is not true for *D.F. v. Read Lion Area Sch. Dist.*

do not speak English as a first language. Similarly, B.G. seeks a finding that the District systemically violates the rights of parents who do not speak English as a first language. Both case include allegations that the District not only violated the rights of the named students, but also of other similarly situated students.

I have no authority to make such findings. The scope of claims that I may hear may be broader that what is indicated in a strict reading of applicable statutes (e.g. ADA claims, discussed above). Yet for each type of claim that I have jurisdiction over, my inquiry is limited to whether the rights of an *individual* student or parent have been violated.

The IDEA gives parents, not classes of parents, the right to request a due process hearing. 34 CFR §300.507(a)(1). If a systemic policy or practice yields a violation of an individual student or parent's rights, it is within my purview to take evidence regarding the policy or practice. Further, it is appropriate for me to enjoin schools from implementing a policy that yields a violation. 20 U.S.C. § 1415(f)(3)(E)(iii). However, at the administrative level, such remedies must be awarded on a student-by-student or parent-by-parent basis. *See, e.g., M.M. v. Sch. Dist. of Phila.*, ODR No. 01539-1112KE (Ford, 2011); *P.V. v. Sch. Dist. of Phila.*, ODR No. 01541-1112KE (Ford, 2011). *See also P.V. v. Sch. Dist. of Phila.,* 2011 U.S. Dist. LEXIS 125370 (E.D. Pa. Oct. 31, 2011) (in which Judge Davis took note of my conclusion that I lacked authority to order wholesale changes to the District's procedures) *and P.V. v. Sch. Dist. of Phila.,* 289 F.R.D. 227 (E.D. Pa. 2013) (in which Judge Davis did what I lacked authority to do: certifed a class).

In both of these cases, if the District's policies or practices violated either parent/guardian or either students' rights, evidence of those polices or practices my be relevant – along with other evidence to show how those polices or practices were applied to the individual complainants. Further, if a policy or practice resulted in a violation, I am empowered to order the District to correct procedural violations on a case-by-case basis. I have no authority to find that a policy or practice results in violations *per se*, or results in violations for all similarly situated students or parents. Similarly, I have no authority to order wholesale changes in the District's policies or practices. Therefore, I grant the District's motion to dismiss claims of systemic violations.

Statute of Limitations - Hearing 15181-1314KE

In sum, the IDEA imposes a two-year statute of limitations, and then carves out two exceptions to the statute of limitations. The Third Circuit has resolved exceptions are narrowly construed. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. Pa. 2012). Currently, in the Third Circuit, there is much debate over whether the statute of limitations bars claims arising more than two years before a due process hearing is requested, or if the IDEA should be construed to create a longer period of time. This debate is coming to a head in the Third Circuit Court of Appeals.[5] In this case, none of this matters, given B.G.'s claims and demanded relief.

The IDEA's statute of limitations never precludes evidence or testimony *per se*. Evidence that falls outside of the potential liability period is always admitted to establish necessary background and context. Rather, the statute of limitations bars relief that accrues outside of the liability period. In this case, the Complaint was filed on June 6, 2014. By the District's method,

[5] An appeal of a decision from the U.S. District Court for the Western District of Pennsylvania, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 2013 U.S. Dist. LEXIS 180923, 2013 WL 6858963 (W.D. Pa.Dec. 30, 2013), is currently pending in the Third Circuit Court of Appeals.

claims arising before June 6, 2012 are barred. Assuming, *arguendo*, that the District is correct, the first inquiry is whether B.G. seeks a remedy that accrued before June 6, 2012.

None of B.G.'s demands specify a period of time. For example, B.G. demands a finding "that the [District] has wholly failed to comply with its responsibilities to provide [T.R.] a free appropriate public education designed to meet [T.R.'s] unique educational needs and order compensatory education accordingly." That demand, by itself, sheds no light on when compensatory education allegedly began to accrue.

The complaint alleges that T.R. attended school in the District from kindergarten through the present, although a portion of that time was spent in a District school that became a charter school. It is not clear exactly when T.R. started attending the charter school, but T.R. returned to the District sometime in the first half of the 2013-14 school year, according to the Complaint. There is also no dispute that T.R. is currently a 17 year old high school student. This information is presented in a portion of the Complaint titled "[T.R.'s] Educational Background." *Complaint* at 5-9. The next section of the Compliant is titled "Nature of the Problem." *Complaint* at 9-10. In this section, B.G. alleges a denial of FAPE during the fall term of the 2013-14 school year through the present (ongoing). All of this falls within the statute of limitations, according to the District. The "Nature of the Problem" section also alleges that the District denied B.G. meaningful participation in the IEP development process, but this section concerns the period of time starting in the fall of 2013. This time period syncs with the time period referenced in the section of the Complaint titled "Claims."

Despite the extensive background information, in the language of the IDEA, the Complaint includes a description of the nature of the problem occurring from the fall of 2013 through the present.[6] The entirety of this period falls within the IDEA's statute of limitations, according to the District's calculation. Therefore, the District's motion to limit claims is denied as moot.

An order consistent with the foregoing follows.

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[6] In her "Answer to District's Motion to Limit," B.G. argues that the District's obligations to T.R. are not limited by T.R.'s enrollment, and that the District's interpretation of the IDEA's statute of limitations is wrong. This Answer does not specifically allege violations occurring before the fall of 2013 and, moreover, I am confined by the four corners of the Complaint. 20 U.S.C. § 1415(f)(3)(B). Although claims can be amended, B.G.'s Answer is not an amendment. *See* 20 U.S.C. § 1415(c)(2)(E).

ORDER

Now, October 22, 2014, it is hereby **ORDERED** as follows:

1. The District's motion to dismiss ADA claims is **DENIED** in both ODR No. 15166-1314KE and ODR No. 15181-1314KE.

2. The District's motion to dismiss claims of systemic violations is **GRANTED** in both ODR No. 15166-1314KE and ODR No. 15181-1314KE.

3. The District's motion to dismiss claims falling outside of the IDEA's statute of limitations in ODR No. 15181-1314KE is **DENIED** as moot.

/s/ Brian Jason Ford
HEARING OFFICER