The University of the State of New York

The State Education Department
State Review Officer
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No. 11-157

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Morrison & Foerster, LLP, attorneys for respondent, Matthew D'Amore, Esq., and Ariel Ruiz, Esq., of counsel

Advocates for Children of New York, Inc., attorneys for respondent, Anishah Cumber, Esq., and Kimberly Madden, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer the student a free appropriate public education (FAPE) from 2005 through 2011 and awarded the student compensatory education services following his discharge from high school. The appeal must be sustained.

Background

As further discussed below, I find that the parent's claims in her June 28, 2011 due process complaint notice regarding the 2005-2011 time period are barred by the two-year statute of limitations period as set forth in the Individuals with Disabilities Education Act (IDEA). However, the student's educational history will be briefly summarized as relevant to provide a context for addressing the statute of limitations.

Briefly, the student was first classified by the district as a student with a learning disability in May 2001 (Dist. Ex. 9; see 8 NYCRR 200.1[zz][6]; 34 C.F.R. § 300.8[c][10]). It is not clear from the record when or under what circumstances the student left the district's school; however, he was discharged from the district's schools at some point between January 2009 and March 2009 (Tr. pp. 98-102; Dist. Ex. 31; Parent Ex. P). More specifically, the hearing record demonstrates

that the student attempted to enter the district's high school in January 2009 for the purposes of taking a Regent's exam, and was denied entrance to take the exam, and that the student reported this was the first time he understood that he could not attend the high school any longer (Tr. pp. 101-02). Next, on March 18, 2009, the student (then 18 years of age) signed a district "Planning Interview Form," which noted that the student had "decided to leave [his] current school" and further stipulated that he understood that he had "the right to return to school until [he was] twenty-one years old" (Dist. Ex. 31). The form further noted that as a student eligible to receive special education services, the student understood that he could request a copy of the procedural safeguards notice and listed the website where such document could be obtained (id.). The form was signed by the student, a "[s]chool [o]fficial," and a district "[s]pecial [e]ducation [r]epresentative;" it was noted that the signature of a parent or guardian was not required as the student was 18 years old (id.). The form also noted that the student had received a "planning interview information packet" and that the planning interview had been conducted at the student's home (id.). An April 15, 2009 "notice of discharge" from the district, shows that the student was discharged by the district effective February 5, 2009, for "voluntary w[i]thdrawal" or discharge after 20 consecutive absences (Parent Ex. P). The notice further shows that the student was absent 81 days and late 16 days, only attending school for 21 days (id.).

Due Process Complaint Notice

In a due process complaint notice dated June 28, 2011, the parent requested an impartial hearing pursuant to the IDEA and Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l] [1998]) (Dist. Ex. 1). The parent asserted, among other things, that the student had been denied a FAPE for "the school years 2005-06 through 2010-11" (id. at p. 3). The parent asserted that although the district had determined the student to be eligible for special education services "as early as the fifth grade," it failed to assess the student's continuing needs by not holding individualized education program (IEP) meetings (id.). The parent further contended that the district "demonstrated a pattern" of failing to inform the parent of her due process rights, and that the district "wrongfully discharged" the student from school and failed to re-enroll him when he sought reentry into the school system in Fall 2009 (id.). As relief, the parent requested that the student be placed in an appropriate high school or GED program;[1] be provided with compensatory services "in the form of prospective funding for community college or [a] vocational program" once the student receives his GED or high school diploma; that the district fund a comprehensive neuropsychological evaluation; provide "appropriate" 1:1 remedial instruction; and provide transportation (id.).

An impartial hearing convened on August 11, 2011 and concluded on October 11, 2011, after four days of hearing (Tr. pp. 1, 60, 219, 274). During the first day of hearing, the district filed a written motion to dismiss the parent's claims (Tr. p. 4; Dist. Ex. 32). In its motion, the district asserted, among other things, that the parent's IDEA claims were time barred by the two year statute of limitations (Dist. Ex. 32 at p. 6). The parent submitted a written opposition to the district's motion to dismiss on August 25, 2011, and the district thereafter submitted a reply on September 2, 2011 (IHO Exs. I; II). During the third day of hearing, September 15, 2011, the

[1] Although not defined in the hearing record, it is clear from the context that "GED" refers to the Tests of General Education Development (see 8 NYCRR 100.7; http://www.acces.nysed.gov/ged/about_us.html).

impartial hearing officer deferred decision on the district's motion to dismiss until the conclusion of the hearing (Tr. p. 221; IHO Decision at p. 6).

Impartial Hearing Officer Decision

In a decision dated October 24, 2011, the impartial hearing officer denied the district's motion to dismiss and determined that the district committed a "gross violation of the [s]tudent's rights to a special education" and that compensatory education was appropriate (IHO Decision at pp. 6-11, 13-18). In making his determination, the impartial hearing officer noted, among other things, that the statute of limitations had not yet accrued for the 2005-09 school years because the district had not provided the parent with any procedural safeguards notices during that time period (id. at pp. 8-11). The impartial hearing officer also determined that the parent was not notified that the district was either attempting to, or had already discharged the student, in violation of State regulations and that the student's discharge from high school violated Education Law § 3202 (id. at pp. 10, 15-16). The impartial hearing officer further found that there was no evidence that the committee on special education (CSE) met, developed IEPs, or considered the student's needs for the 2005-06 school year "and beyond" (id. at p. 13). For relief, the impartial hearing officer ordered the CSE to, among other things, determine which evaluations and assessments needed to be performed to assess the student's needs; offer the student the opportunity to either complete high school or obtain a GED and be provided with vocational training; and offer the student up to 100 hours of 1:1 tutoring per year until he reaches an eleventh grade reading and math level or until he graduates high school, receives his GED or until 2015, whichever comes first (id.).

Appeal for State Level Review

The district appeals, asserting among other things, that the impartial hearing officer erred by not dismissing the parent's due process complaint notice because the parent's claims were barred by the statute of limitations. In the alternative, the district contends that the student's withdrawal from the district's high school was proper and that the remedies awarded by the impartial hearing officer were inappropriate. Specifically, the district asserts, among other things, that while the hearing record does not contain evidence that the parent was provided her due process rights from August 30, 2005 to January 3, 2008, the parent conceded that she had received her due process rights both orally and in writing from 2001 through 2005 and further, she received a copy of her due process rights in January 2008, and as such the parent was aware of those rights. The district requests that the impartial hearing officer's decision be vacated.

The parent answers, asserting general denials and admissions, and requests that the impartial hearing officer's decision be upheld. Specifically, the parent asserts that the impartial hearing officer correctly determined that the district withheld "legally required information" from the parent and wrongfully discharged the student from its high school.

Discussion and Conclusion

Statute of Limitations

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[e]; 8 NYCRR

200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]).[2] An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]).

As further described below, the district correctly asserts that the impartial hearing officer erred in finding that the parent's claims were not barred by the statute of limitations because the parent did not receive procedural safeguards notices. For the following reasons, I find that the parent's claims accrued no later than March 2009 and that the exception to the limitations period does not apply in this instance.

The hearing record shows that the student was discharged from the district's high school effective February 5, 2009 (Parent Ex. P), and that the parent notified the district on March 10, 2009 that the student was returning to school in order to sign out and "withdraw from school" (Tr. p. 298; Dist. Ex. 35 at p. 6). The record also shows that on March 13, 2009, the district notified the parent that a meeting was scheduled for March 31, 2009 because the student had missed over 20 days of school and that the student "might benefit from a discussion about other educational options" (Dist. Ex. 34). On March 18, 2009, the district's "attendance" teacher met with the student at his home and noted that she offered a list of "the alternative GED program[s] in the neighborhood," but the student decided to sign the planning interview form for the "discharge process" (Dist. Ex. 35 at p. 7; see Dist. Ex. 31). Based on the above, I find that the latest the parent knew or should have known about her claim that the student was improperly discharged from the district's schools was March 2009. Regarding the parent's claim for compensatory education, the parent knew or should have known during the 2005-06 school year when she did not receive an IEP for the student that she could assert such a claim (see Tr. p. 151). Therefore, the parent's due process complaint notice dated June 2011 is barred by the two year statute of limitations, unless an exception applies (see 20 U.S.C. § 1415[f][3][D][i]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]).

With regard to the impartial hearing officer's determination that the district withheld information from the parent and her finding that an exception to the statute of limitations applies, case law interpreting the "withholding of information" exception to the statute of limitations has found the phrase to apply only to the requirement that parents be provided with certain procedural safeguards (C.H. v. Northwest Indep. Sch. Dist.., 2011 WL 4537784, at *7 [E.D. Tex. Sept. 30, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; Tindell v. Evansville-Vanderburgh School Corp., 2011 WL 3273203, at *11 [S.D. Ind. July 29, 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa Nov. 4, 2008]; see 20 U.S.C. § 1415[d]; 34 C.F.R. § 300.504; 8 NYCRR 200.5[f]). In this case, I am not persuaded by the parent's assertion that an exception to the limitations period applies because the district failed to

[2] I note that New York State has not explicitly established a different limitations period since Congress adopted the two-year limitations period.

provide procedural safeguards notices under the IDEA (20 U.S.C. § 1415[c][1], [d][2]; see 34 C.F.R. § 300.503[b]; 300.504[c]). If the parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards notice does not under all circumstances prevent the parent from requesting an impartial hearing (R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945; see Application of a Child with a Disability, Appeal No. 07-116). The parent testified and the hearing record reflects that the parent had received her due process rights both orally and in writing from 2001 through 2005 (Tr. pp. 176-93; Dist. Exs. 8 at p. 2; 12 at p. 3; 16; 19; 20). Although the district concedes that it did not provide procedural safeguards notices to the parent from August 2005 through January 2008, the hearing record includes two notices from the district dated January 2008, both indicating that the parent received copies of her due process rights (Dist. Exs. 25; 27). Likewise, notices from the district dated December 2008 indicate the same (Dist. Exs. 28; 29). The student has a long history of receiving special education services and the parent has participated in CSE meetings (see, e.g., Dist. Exs. 9; 15; 20). Accordingly, I find that the evidence supports the conclusion that the parent was not prevented from timely requesting the instant due process proceeding on the basis that the district did not provide her with required procedural safeguard notices.

In summary, under these circumstances, permitting revival of otherwise stale claims does not comport with the IDEA's goal of quickly and efficiently resolving disputes between parents and school districts (Sellers v. School Bd. of City of Mannassas, Va., 141 F.3d 524, 527-28 [4th Cir. 1998]). Thus, the parent's claims are barred by the statute of limitations.

I have considered the parties' remaining contentions, including the district's assertion that the compensatory services awarded by the impartial hearing officer were inappropriate, and find that I need not reach them in light of my conclusion above that the parent's claims are barred by the statute of limitations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision and order dated October 24, 2011 is hereby annulled.

Dated: **Albany, New York**
February 6, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER