The University of the State of New York

The State Education Department
State Review Officer
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No. 12-125

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed her due process complaint notices that challenged the implementation of respondent's (the district's) recommended educational program for her daughter for the 2008-09 and 2009-10 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.51[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

On June 30, 2008, the CSE convened to develop the student's IEP for the 2008-09 school year and recommended a general education class placement with special education teachers support services (SETSS) eight hours per week (see Dist. Ex. 4 at p. 1; Parent Ex. E at p. 2).[1] The parent enrolled the student in a non-public school for the 2008-09 school year (Parent Ex. E at p.

[1] No testimony was taken in this matter. For the purposes of the motions to dismiss, the district advised the IHO that the factual allegations in the parent's motion papers would not be contested (Tr. p. 19). Therefore, for the purposes of this decision, the recitation of the facts shall be based primarily on the parent's motion papers (see Parent Exs. A; E; Dist. Exs. 1; 4). However, to the extent that the parent attached exhibits to her motion papers, copies of which are otherwise included and separately alphabetized in the hearing record, the individual hearing exhibits will be cited.

2). During the 2008-09 school year, the district was not able to provide the student with a SETSS provider or to recommend a SETSS provider who was able or willing to provide such services to the student (see Parent Exs. E at p. 8; I at p. 1). As a consequence, during the 2008-09 school year, the student received services from independent providers paid for by the parent (Parent Exs. E at pp. 2-3; I). The parent subsequently requested reimbursement of her expenditures from the district (Parent Exs. G; H).

On June 9, 2009, the CSE convened to develop the student's IEP for the 2009-10 school year (Parent Ex. A. at p. 3). The June 2009 IEP recommended a general education class placement with SETSS five hours per week (see Dist. Ex. 1 at p. 1; Parent Ex. A at p. 3). The parent again enrolled the student in a non-public school for the 2009-10 school year (Parent Ex. A at p. 2). The district provided the parent with information regarding district-approved SETSS providers (id. at p. 3). The parent contacted or made efforts to contact the recommended providers but was not successful in finding a district-approved provider to provide the student with SETSS (id. at pp. 2-3). Therefore, the student again received services from independent providers paid for by the parent, for which the parent requested reimbursement from the district (see Parent Exs. A at p. 4; D at p. 2; see Dist. Ex. 7 at pp. 5-6).

By letter dated January 29, 2010, the CSE chairperson requested, among other things, that the parent provide copies of State certification documents for two of the SETSS providers who had provided the student with services during the 2008-09 and 2009-10 school years (Parent Ex. C). The CSE chairperson also advised the parent that "[u]pon receipt of the necessary and corrected documentation," the CSE would "facilitate [the parent's] request for reimbursement of funds" (id.). By letter dated February 11, 2010, the parent informed the district that the subject SETSS providers for the 2008-09 and 2009-10 school years did not possess State certificates but that the district had previously reimbursed her for the costs of services of an uncertified SETSS provider during the 2007-08 school year (see Parent Ex. B).[2] By letter dated March 3, 2010, the CSE chairperson informed the parent that the district's earlier reimbursement for an uncertified provider had been an error and that the district could not authorize payment for a provider who did not have appropriate certification (id.). With respect to the 2008-09 school year, the CSE chairperson indicated that the August 5, 2009 provider affidavit and parent's verification of services forms, submitted by the parent, stated that the subject SETSS providers were licensed by the State of New York (id.; see Dist. Ex. 7 at pp. 3-4, 7-8). The CSE chairperson asked that copies of the providers' State certifications be provided (Parent Ex. B). The CSE chairperson also indicated that the parent had not yet submitted provider affidavits and parent verification of services forms relative to the 2009-10 school year and requested that such forms be submitted, along with copies of the providers' State certifications (id.). The CSE chairperson again advised that "[u]pon receipt of the necessary documentation," the CSE would "facilitate" the parent's request for reimbursement (id.).

The parent replied to the CSE chairperson by letter dated March 22, 2010 (see Parent Ex. D). With respect to the 2008-09 school year, the parent stated that she notified the CSE chairperson "16 months ago" that she would be using the subject SETSS providers and that she had "made it

[2] The parent's February 11, 2010 letter is not included in the hearing record. Information regarding the content of that letter is provided in the CSE chairperson's March 3, 2010 letter, which was written in response to that letter (see Parent Ex. B).

clear on the SETSS form that they did not have certificates" (id. at p. 1). The parent stated that the CSE chairperson's March 3, 2010 letter "was the first indication that [the district] would not reimburse for their services" (id.). The parent stated that the district's reimbursement for payments to an uncertified provider for the 2007-08 school year was "not an error" and that the parent "had several conversations with [district] personnel specifically about this" (id.). The parent further indicated that she had "relied on the district's prior conduct," the CSE chairperson's "silence for 16 months," as well as the district's inability to provide the student with SETSS, and contended that the CSE Chairperson could not now "first protest" that the SETSS providers were not State certified (id. at p. 2). Regarding the 2009-10 school year, the parent stated that she had already submitted the requested forms, but that she would be "happy to have the documents re-signed" (id.). The parent also requested the appropriate forms to request an impartial hearing "as soon as possible" (id. at pp. 1, 2).

A. Due Process Complaint Notice

In due process complaint notices, dated January 11, 2012 and February 3, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years (Dist. Exs. 2 at p. 1; 5 at pp. 1-2).[3, 4] In particular, the parent alleged that the June 2008 and June 2009 CSEs recommended that the student receive SETSS; that the district failed to provide the student with the recommended SETSS; that, as a consequence, the parent obtained services for the student from providers, some of whom did not hold New York State certificates; that the parent submitted information to the district and requested reimbursement of the costs of the SETSS providers; and that the district refused to reimburse the parent for the costs of the uncertified SETSS providers (Dist. Exs. 2 at pp. 1-3; 5 at pp. 2-3). The parent further asserted that the student's services for both the 2008-09 and 2009-10 school years were appropriate and that the privately obtained SETSS providers afforded the student an educational benefit consistent with her educational needs and the IEP mandates (Dist. Exs. 2 at p. 3; 5 at p. 4). As relief, the parent requested that the IHO order the district to reimburse her for the costs of the privately obtained SETSS during the 2008-09 and 2009-10 school years (Dist. Exs. 2 at p. 3; 5 at p. 4).

With respect to the two year time period during which she was required to file her due process complaint notice pertaining to the 2008-09 school year, the parent alleged that the CSE chairperson's March 3, 2010 letter "was the first indication" that the district would not reimburse her for the services of the uncertified SETSS providers (Dist. Ex. 5 at p. 3). Thus, the parent contended that her claims were not time-barred because the statute of limitations "did not begin to run until March 11, 2010, when the parent received the March 3 letter" (id.). Furthermore, the parent asserted that her claim fell within a statutory exception to the two year statute of limitations, in that, "given the [d]istrict's previous payment for services to non-certified providers as well as their 16 months of silence on the certificate issue after receiving provider documentation," the

[3] On April 17, 2012, the due process complaint notices were consolidated (see IHO Decision at p. 3; Tr. p. 4; Parent Ex. E at p. 1).

[4] The parent withdrew a May 11, 2011 due process complaint notice relative to the 2009-10 school year, at the request of the district, so that the parties could discuss settlement (see Tr. pp. 16-17, 26; Parent Ex. A at p. 5; see also Dist. Ex. 3). However, the settlement discussions were not successful and the parent subsequently filed her February 3, 2012 due process complaint notice (Parent Ex. A at p. 5).

district represented that the problem forming the basis of the complaint was resolved, thereby preventing the parent from requesting an impartial hearing (id.).

B. Impartial Hearing Officer Decision

On April 30, 2012, an impartial hearing convened in this matter (Tr. pp. 1-32). No testimony was adduced at the impartial hearing, but the IHO admitted documentary evidence, as well as submissions relative to the district's motion to dismiss the parents' due process complaint notices (see Tr. pp. 1-32; Dist. Exs. 1-7; Parent Exs. A-I). In a decision dated May 8, 2012, the IHO granted the district's motions to dismiss on the basis that the claims in the parent's two due process complaint notices were barred by the statute of limitations (see IHO Decision at p. 12). The IHO found that both the parent's January 11, 2012 and February 3, 2012 due process complaint notices were not filed in a timely fashion and that neither of the two statutory exceptions to the IDEA's statute of limitations applied (id. at pp. 10, 11-12).

With respect to the January 11, 2012 due process complaint notice, the IHO held that the parent was aware that the district did not offer the student a FAPE at the beginning of the 2008-09 school year and, as such, the parent's claim arose at that time (IHO Decision at pp. 7-8). The IHO further concluded that the parent had two years thereafter, until September 2010, to file a timely claim (id. at p. 8). The IHO found that the parent failed to do so and that, as a consequence, the IDEA statute of limitations barred the parent from seeking relief for any alleged failure by the district to provide the student with a FAPE for the 2008-09 school year (id.).

Also regarding the January 11, 2012 due process complaint notice, the IHO found that the parent was not "entitled to any exception" relevant to the IDEA's statute of limitations (IHO Decision at p. 10). First, the IHO found that there was "nothing" in the hearing record "to substantiate any claim" by the parent "that there was ever a specific misrepresentation" by the district "that it had resolved anything" (id.). With respect to the parent's contention relating to the district's reimbursement for the costs for an uncertified provider during the 2007-08 school year, the IHO concluded that there was nothing in the hearing record except the parent's statements regarding this and that the district might have reimbursed the parent for other reasons, such as in order to avoid a hearing, given the small amount sought by the parent (id. at pp. 8-9). Furthermore, the IHO pointed out that no evidence was presented as to what forms the parent submitted to the district relative to the 2007-08 school year, noting that the same incorrect statement about the SETSS provider's certification as appeared in the August 2009 provider affidavit and parent's verification of services forms could have been submitted to the district (id. at p. 9).

The IHO also rejected the parent's contention that the district's extended silence, after the parent informed it that the SETSS providers were not certified, constituted a misrepresentation (IHO Decision at p. 9). First, the IHO rejected the parent's claim that the district became aware that the SETSS providers were not certified in December 2008 when the parent did not fill in the requested provider certificate number on the independent provider authorization form or include a copy of the provider's State certificate (id.). Further, the IHO indicated that, because the independent provider authorization form requested that the parent attach a copy of the provider's State certification, the parent "should have been aware" or at least "alerted to the possibility" that State certification was required (id.). As a consequence, the IHO determined that the parent was not misled by the district's silence in 2008 (id.).

The IHO also considered the second statutory exception to the IDEA statute of limitations and concluded that the district did not withhold information that it would not reimburse the parent for the costs of uncertified providers but that the district simply did not provide that information to the parent until March 2010 (IHO Decision at p. 10). The IHO also held that this information was not the type that the district was required to provide to the parent under the relevant State regulations (id.).

Turning to the parent's February 3, 2012 due process complaint notice, the IHO concluded that, "even more clearly," the parent's February 3, 2012 due process complaint notice alleged that the district failed to provide the student "with her recommended and mandated SETSS" services and that, according to the parent's own statements, this failure occurred in August 2009 at the commencement of the 2009-10 school year, which placed the burden on the parent to secure the personnel to meet this mandate at that time (IHO Decision at p. 11). The IHO concluded that, "such being the case," the parent had two years from this time to commence her due process proceeding (id.). Regarding the applicability of the statutory exceptions to the IDEA statute of limitations, the IHO stated that "for the same reasons" that those exceptions did not apply to the parent's January 11, 2012 due process complaint notice, he found and determined that the parent was "not entitled to any exception" with respect to the February 3, 2012 due process complaint notice (id. at pp. 11-12).

With respect to the parent's earlier, May 2011 due process complaint notice, which related to the same facts and sought the same relief as the parent's February 3, 2012 due process complaint notice, but which was withdrawn at the request of the district so that the parties could discuss settlement, the IHO noted that such claim was timely filed (IHO Decision at p. 12). However, the IHO held that, once withdrawn, the parent was required to refile the due process complaint notice within the relevant statute of limitations and that the parent did not do so (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's findings that the parent's January 11, 2012 and February 3, 2012 due process complaint notices were barred by the statute of limitations. In particular, the parent asserts that the IHO erred in finding that the IDEA's two year statute of limitations was triggered when the parent knew or should have known that the district failed to offer the student SETSS for the relevant school year. The parent asserts that conduct about which she complained in her two due process complaint notices was the district's failure to reimburse her for privately obtained services. The parent contends that she filed the January 11, 2012 and February 3, 2012 due process complaint notices within two years of the district's March 3, 2010 letter, when the district first advised that it would not reimburse her for payments to the uncertified providers who had delivered services to the student during the 2008-09 and 2009-10 school years.

The parent additionally objects to the IHO's "failure to find" that the district's payment for the services of an uncertified provider during the 2007-08 school year, as well as the district's failure to object to the parent's use of uncertified providers for a number of months, misled the parent into believing that the district would reimburse her for the services of the uncertified providers during the 2008-09 and 2009-10 school years. The parent further asserts that the IHO failed to consider statements by a district employee, which the parent interpreted as the district's implied authorization that the parent hire the uncertified providers after she had exhausted her efforts to hire a provider from the list of names provided by the district employee.

Further, the parent states that her initial timely May 11, 2011 due process complaint notice relating to the 2009-10 school year was withdrawn at the request of the district, at a time when the district knew that it could not be refiled in a timely manner, suggesting bad faith on the part of the district.

In its answer, the district asserts that the IHO properly dismissed the parent's January 11, 2012 and February 5, 2012 due process complaint notices. In particular, the district asserts that the IHO correctly determined that the respective statute of limitations began at the time each IEP was to be implemented. The district contends that, since the parent determined by the beginning of each respective school year that she could not find a district-approved provider, the IHO correctly held that she knew or should have known at that time that she had a claim. The district further contends that the IHO properly determined that the statutory exceptions to the IDEA's statute of limitations did not apply. Additionally, the district agrees with the IHO that, under the circumstances, the timeliness of the parent's February 3, 2012 due process complaint notice was not affected by the fact that the parent filed and withdrew an earlier timely due process complaint notice relating to the same issue.

V. Discussion

A. 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[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 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]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 (S.D.N.Y. Mar. 29, 2013); R.B. v. Dept. of Educ., 2011 W.L. 4375694, at * 2, *4 [Sept. 16, 2011 S.D.N.Y.]). 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]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 W.L. 4375694, at * 6).

1. Accrual of Parent's Claims

In this case, the IHO correctly determined that the parent's claims began to accrue upon the district's failure to provide the student with an approved SETSS provider at the beginning of the respective school years. The parents' unsuccessful attempts to secure district-approved SETSS providers, prior to the beginning of each school year, reveal that she was aware of the district's failure (see Parent Exs. A at p. 3; E at p. 8; I at p. 1). With respect to the parent's contention that the district's failure to provide reimbursement was the relevant injury, as the IHO correctly noted, the parent obtained the private services and sought reimbursement for her expenditures in response to and as a potential remedy for the district's failure to provide the student with SETSS in accordance with the mandates of the student's IEP (see IHO Decision at pp. 8-11; see also Dist. Exs. 2 at pp. 1-3; 5 at pp. 1-2). The foregoing establishes that the parent "knew or had reason to

know" of the injury at the time she became aware that she would risk "substantial monetary loss" as a result of her decision to obtain private providers to deliver SETSS to the student and seek reimbursement (see M.D., 334 F.3d at 221).

The IHO also correctly determined that the timeliness of the parent's February 3, 2012 due process complaint notice was not affected by the parent's timely filed, but subsequently withdrawn, May 11, 2011 due process complaint notice (IHO Decision at p. 12). The parent's May 11, 2011 due process complaint notice was voluntarily discontinued, prior to a determination on the merits. As a consequence, the statute of limitations continued to run as if that earlier due process complaint notice had never been filed (Application of a Child with a Disability, Appeal No. 06-126; see A.B. Dick Co. v. Marr, 197 F.2d 498, 502 [2d Cir. 1952] ["voluntary dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought, thus vitiating and annulling all prior proceedings and orders in the case, and terminating jurisdiction over it for the reason that the case has become moot"] [internal citations omitted]; Long v. Card, 882 F. Supp. 1285, 1288-89 [E.D.N.Y. 1995] [finding a claim time-barred after plaintiff's voluntary discontinuance]; see also Hollenberg v. AT&T Corp., 2001 WL 1518271, at *1-*2 [S.D.N.Y. 2001]). It is noteworthy that the parent was represented by counsel when she filed her May 2011 due process complaint notice and that the parent herself is an attorney (see Dist. Ex. 3; Parent Exs. D; G; H; I). At the impartial hearing, the parent expressed her reluctance to withdraw the May 2011 due process complaint notice, which indicates that she possessed an awareness of the consequences of that decision (Tr. p. 26). Moreover, there is no evidence in the hearing record that in any way indicates that the district's invitation to the parent to withdraw the May 2011 due process complaint notice was made in bad faith. Thus, since the parent withdrew her timely due process complaint notice and refiled outside of the two year IDEA limitations period, the parent's claim is time-barred (see 20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 W.L. 4375694, at * 2, *4).

2. Specific Misrepresentation Exception

In order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding the relevant fact (see D.K. v. Abington Sch. Dist., 696 F.35 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar.24, 2009], aff'd 2011 WL 1289145 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; see also Application of a Student with a Disability, Appeal No. 11-121).

In the present case, the parent first asserts that the district's reimbursement of the parent's payments to an uncertified SETSS provider during the 2007-08 school year constituted a specific misrepresentation that the same reimbursement would occur during the subsequent school years. The IHO dismissed this contention on the basis that there was nothing in the hearing record regarding the reimbursement during the 2007-08 school year, except the parent's statements (IHO Decision at p. 8). However, even if the evidence in the hearing record offered more detail in this regard, such prior reimbursement does not constitute a specific misrepresentation that would have prevented the parent from filing a timely claim relative to 2008-09 and/or 2009-10 school years. Here, a review of the evidence in the hearing record shows that the district requested information from the parent regarding the SETSS services obtained by the parent during the 2008-09 and 2009-10 school years but never represented that it would ultimately provide reimbursement in the same manner as the 2007-08 school year (see Parent Exs. B; C; E at p. 2; see also Dist. Ex. 7). In any

event, it was unreasonable for the parent to interpret the district's reimbursement for the privately obtained SETSS during the 2007-08 school year as a representation that the related claims for the 2008-09 and 2009-10 school years were resolved, particularly given the fact that she sought and was granted reimbursement for privately obtained SETSS for the student through the impartial hearing process for the 2005-06 and 2006-07 school years (see Parent Exs. A at p. 2; E at p. 2).

Next, the parent asserts that she was misled until the district's March 3, 2010 letter because the district did not object to the use of uncertified providers for 18 months, a period of time from September 2008 to March 2010.[5] The parent states that the district was silent for 15 or 16 months on the issue of certification after the parent informed the district that the providers did not hold certificates (Parent Ex. A at p. 6; see also Parent Exs. A at p. 4; D at p. 1). However, as the IHO correctly found, the evidence in the hearing record shows that the parent did not affirmatively communicate to the district that any SETSS provider was not certified, but only relayed such fact by omission of the requested certification information on the independent provider authorization form accompanying the parent's December 9, 2008 letter (see Parent Exs. E at p. 3; G at p. 4). The parent does not allege that, prior to her February 11, 2010 letter, she affirmatively communicated to the district, verbally or in writing, that the providers at issue were not certified or that the district indicated that it understood or knew that the subject providers were not certified. Further, the allegation in the parent's March 22, 2010 letter that she notified the district in December 2008 ("16 months ago") that she would be using both uncertified providers is not substantiated (Parent Ex. D). Contrary to this claim, the second uncertified provider commenced providing services to the student in February 2009, three months after December 2008, and the parent did not advise the district of this until six months later, in August 2009 (Parent Exs. E at p. 3; H at pp. 1, 2; I at p. 2; Dist. Ex. 7 at p. 7). Furthermore, provider affidavits submitted by the parent to the district during this period also erroneously set forth that the subject providers were certified by the State (Dist. Ex. 7 at pp. 3, 7).[6] Even if the district realized that the parent's providers were not certified, no evidence in the hearing record indicates that, under such circumstances, the district, by failing to object, intended to mislead or deceive the parent (see D.K., 696 F.35 at 247). In fact, the evidence in the hearing record indicates that, less than a month after clarifying in writing that the student's two providers were not in fact certified, the district advised the parent that it would not authorize payment for such uncertified providers (Parent Ex. B).

With respect to the 2009-10 school year, the parent also asserts that the IHO should have considered statements by a district employee, which the parent interpreted as implied authorization to rehire the uncertified providers after she exhausted her attempts to hire district-approved providers. With respect to this, the parent indicates that she made 50 unsuccessful phone calls in an attempt to hire a provider from the "extensive list" offered by the district; made additional attempts to hire district-approved providers, whose names she received from the district employee;

[5] The parent's motion papers before the IHO stated that the district was silent for 15 or 16 months and not 18 months as now claimed in the parent's petition (see Parent Exs. A at p. 6; E at p. 3). Regarding this, the district could not have been silent for 18 months, as the parent did not advise the district regarding the first provider, who was not certified, until December 2008 (see Parent Ex. G). As indicated above, the period of time between December 2008 and March 2010, the date the parent says the district first objected, is 15 months, not 18.

[6] At the impartial hearing, the parent indicated that, at her request, the uncertified SETSS providers signed the provider's affidavit, which stated that each was licensed by the State of New York (Tr. p. 24; see Dist. Ex. 7 at pp. 3, 7). The parent stated that she "didn't see" this sentence in the form affidavit (Tr. p. 24).

and, upon advise of the district employee, made an additional 32 phone calls to providers in other boroughs in the district's directory (Parent Exs. A at p. 3; E at p. 9). The parent then reported back to the district employee, who then sent the parent affidavits for the providers and the parent to complete (id.). Based on this, the parent indicates that she "understood that the [district] would reimburse [her] as it had in prior years" (Parent Exs. A at p. 4; E at p. 10). While the parent may have believed from her conversation with the district employee that the district would reimburse her for payments to uncertified providers, the parent's description of the employee's statements does not support a finding that the district employee made such a specific misrepresentation. Instead, the discussions related to the parent's continuing search for district-approved providers (see Parent Exs. A at p. 3; E at p. 9).[7] Further, while the parent asserts in her petition that she told the district employee that the student's existing providers were not certified, this allegation was not included in the parent's papers before the IHO (see id.).

3. Withholding of Information Exception

The IHO also held that the second exception to the IDEA's statute of limitations did not apply (IHO Decision at p. 10).[8] Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K., 696 F.35 at 246; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F.Supp.2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7; R.B., 2011 W.L. 4375694, at * 6). Such safeguards include the prior written notice and the procedural safeguards notice, the latter which, among other things, contains information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Furthermore, if a 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 does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945; see also Application of a Child with a Disability, Appeal No. 07-116).

Upon review of the evidence in the hearing record, this exception also does not apply to the facts and circumstances of this case. In particular, the parent does not assert that the district prevented her from requesting an impartial hearing by not providing her with procedural safeguards information. Nor does the parent assert that she was not aware that she had a right to an impartial hearing. On the contrary, not only did she participate in impartial hearings relating to the student's special education and services in previous school years, but she indicated in her March 22, 2010 letter to the district her intent to request an impartial hearing and, thereby, revealed her

[7] Nothing in this decision should be construed to suggest that the parent's diligent efforts to find an approved provider to deliver SETSS to the student were anything but laudable or to find that the district should have been in any way excused from its obligation to provide the student with the SETTS program recommended in her IEPs for the 2008-09 and 2009-10 school years.

[8] While the parent states broadly that she appeals the IHO's decision, the petition does not specifically address this exception. Notwithstanding this, I have reviewed the IHO's decision and the parent's papers with respect to this exception.

awareness of that right (see Parent Exs. A at p. 2; D at p. 1; E at p. 2). Accordingly, the exception to the statute of limitations defense does not apply.

VI. Conclusion

In sum, under the circumstances, the IHO correctly found that the district's defense to the parent's claims was valid— namely that the parent's January 11, 2012 and February 3, 2012 due process complaint notices are barred by the statute of limitations. Although I am sympathetic to the parent's good faith efforts to obtain the missing SETSS services for her daughter and attempts to make arrangements with the district for reimbursement, these efforts cannot be construed as a substitute for the requirement to timely initiate and maintain a due process proceeding to protect her rights. Nor do those efforts form a basis for finding that either of the exceptions to the two-year limitations period applied under the circumstances of this case.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 12, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER