The University of the State of New York

The State Education Department
State Review Officer
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No. 14-089

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:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 denied her request to be reimbursed for her daughter's tuition costs at the Cooke Center Academy (Cooke) for the 2011-12 school year. 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 300.514[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

Because of the procedural posture of this case, the factual history is taken in part from the parent's due process complaint notice, and all allegations therein are presumed to be true for purposes of this decision. Briefly, the student has been receiving special education services since the 2001-02 school year (Parent Ex. A at p. 2). In 2006, the student received diagnoses of an attention deficit hyperactivity disorder (ADHD), a nonverbal perceptual organization disorder, and "scattered cognitive abilities that include significant short term memory deficits" (id. at pp. 1-2).

On May 5, 2011, a CSE convened to develop an IEP for the student for the 2011-12 school year (Parent Ex. B).[1] At the time of the CSE meeting, the student was attending Cooke's Skills and Knowledge for Independent Living and Learning Program (Parent Ex. A at p. 2).[2] During the May 2011 meeting, the CSE recommended placement in a 15:1 special class in a community school for academic subjects on a ten month basis with related services of counseling and occupational therapy (OT) (Parent Ex. B at p. 1, 14). The parent, the student's aunt, and the student's teachers from Cooke attended the CSE meeting and objected to the recommended program (Parent Ex. A at p. 2). On June 30, 2011, the district issued a final notice of recommendation (FNR) informing the parent of the particular public school site to which the student had been assigned (id. at pp. 2-3).[3] By letter dated August 11, 2011, the parent informed the district that she had visited the assigned school the previous day and was informed by the assistant principal that the school did not have a 15:1 special class and that the student "would be eaten alive there" (Dist. Ex. 1 at p. 7). On August 16, 2011, the parent signed a contract with Cooke for the 2011-12 school year (Parent Ex. D). In a letter dated August 23, 2011, the parent again notified the district that the assigned school was not appropriate for the student, the student would continue to attend Cooke for the 2011-12 school year, and the parent would be seeking public funding for the costs of the student's tuition (Dist. Ex. 1 at p. 9).[4]

A. Due Process Complaint Notice

By due process complaint notice dated August 28, 2013, the parent alleged that the district denied the student a FAPE for the 2011-12 school year (Parent. Ex. A at p. 2). Among other things, the parent argued that the CSE failed to allow the parent or the student's Cooke providers to participate in the program recommendations or adequately consider the parent's objections (id. at p. 2-4). Relative to the May 2011 IEP, the parent contended that it did not accurately describe the student or her needs, that the recommendation for a 15:1 special class was insufficient to meet the student's needs, and that the transition services and goals were inadequate (id. at pp. 3-4). With regard to the assigned public school site, the parent alleged that the particular school listed in the FNR could not implement the May 2011 IEP because it did not offer any 15:1 special classes for the 2011-12 school year (id. at p. 3). In addition, the parent argued that the assigned school would be unable to provide the OT recommended in the May 2011 IEP (id.). Finally, the parent alleged that the large size of the particular school would prevent the student from making educational progress (id.).

B. Impartial Hearing Officer Decision

On February 7, 2014, the district filed a motion to dismiss the parent's due process complaint notice on the grounds that it was time-barred by the applicable two-year statute of

[1] Although the IEP was submitted to the IHO as Exhibit 1 to the parent's opposition to the district's motion to dismiss (Parent Ex. G), the IHO marked the IEP in evidence as Parent Exhibit B.

[2] The Commissioner of Education has not approved Cooke as a school with which districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d]; 200.7).

[3] This document was not included in the hearing record received by the Office of State Review.

[4] This letter erroneously misidentifies the parent as the student's aunt, and vice versa.

limitations (Dist. Ex. 1). In a response, the parent opposed the district's motion to dismiss and alleged that the tuition claim for the 2011-12 school year did not accrue until September 8, 2011, the start of the 2011-12 school year (Parent Ex. G).[5] By decision dated May 29, 2014, the IHO dismissed the parent's due process complaint as time barred (IHO Decision at pp. 9-10). In particular, the IHO found that the parent was advised of the district's recommendation for the 2011-12 school year by the district's June 30, 2011 FNR (id. at p. 10). Thus, the IHO found that the parent's claim that the student was denied a free appropriate public education (FAPE) accrued on June 30, 2011, as that was the date that the parent knew or should have known of the district's offered program (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in dismissing her complaint on the grounds that it was time barred. According to the parent, her claim for tuition reimbursement did not accrue until the first day of the 2011-12 school year because until that date, the CSE could have reconvened and prepared an appropriate IEP for the student. Thus, the parent asserts that she had until September 8, 2013 to timely file her due process complaint notice.

The district responds and argues that the parent knew of and expressed her objections with regard to the alleged deficiencies of the May 2011 IEP at the May 5, 2011 CSE meeting. Furthermore, while the district contends that challenges to an assigned school are speculative when the student doesn't attend the public school site, in any event, the district argues that the parent knew of the alleged deficiencies with the district offered placement upon receipt of the FNR dated June 30, 2011 or, in the alternative, when she visited the public school site on August 10, 2011, and discovered that the offered placement could not implement the IEP.

V. Applicable Standards and Discussion

Initially I note that no hearing was held below and consequently, I will accept as true all of the factual allegations set forth in the parent's petition to the extent they are not inconsistent with the documentary evidence in the hearing record and will view those factual allegations in the light most favorable to the parent and the student. 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 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.]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[6] An exception to the timeline to

[5] Although the copy of the parent's response received by this office is undated, the IHO indicated that the response was dated March 7, 2014 (IHO Decision at p. 2).

[6] New York State has not explicitly established a different limitations period.

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).[7]

In this case, the parent's due process complaint notice challenges aspects of the May 2011 IEP (Parent Ex. A). The due process complaint notice indicates that the parent was present at the May 2011 CSE meeting, understood the recommendations made by the committee, and objected to the recommended program at that time (Parent Ex. A at p. 2). Accordingly, the parent was aware of her concerns that the May 2011 IEP did not offer the student a FAPE at the time of the CSE meeting and thus her claim with respect to the IEP accrued on May 5, 2013 and was now time-barred at the time the parent filed her due process complaint notice (see G.W., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; Keitt v. New York City, 882 F.Supp.2d 412, 437 [S.D.N.Y. 2011]; G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1131 [D. Or. 2011]).

With regard to the parent's claims that the assigned public school site could not have implemented the student's IEP, I find that these claims accrued when she became aware that the particular school could not implement the IEP. According to the evidence in the hearing record, the district sent the parent an FNR listing the particular school site on June 30, 2011 (Parent Ex. A at p. 2). The parent visited the assigned school on August 10, 2011 and notified the district the next day of her concerns that the assigned school could not implement the student's IEP (Parent Ex. A at pp. 2-3; Dist. Ex. 1 at p. 7). On August 16, 2011, the parent signed an enrollment contract with Cooke for the 2011-12 school year (Parent Ex. D). By letter dated August 23, 2011, the parent notified the district that she was rejecting the offered placement and unilaterally enrolling the student at Cooke (District Ex. 1 at p. 9). Thus, even if I reject the IHO's conclusion that these claims accrued upon the parent's receipt of the FNR, the parent knew of the allegations that make up her claims that the district denied the student a FAPE on the basis of deficiencies in the assigned public school site by the time she wrote the August 11, 2011 letter indicating that the district could not implement the student's IEP. At the very latest, the parent's claims accrued when she sent the notice of unilateral placement on August 23, 2011. Thus, in light of the foregoing, I find that the evidence supports the IHO's holding that the claims raised in the parent's due process complaint notice, which was filed on August 28, 2013, were time barred by the two-year statute of limitations.

In any event, even if the parent's claims that the assigned school could not implement the May 2011 IEP were not untimely, it is irrelevant when the parent knew or had reason to know of this claim because the Second Circuit has made it clear that when an IEP is rejected before a district has an opportunity to implement it, the sufficiency of the district's offered program must be determined on the basis of the IEP itself, and not on speculative concerns as to whether it may have been properly implemented. Thus, challenges to the implementation of an IEP are speculative when the student never attended the recommended placement and are not an appropriate basis for a finding that the district denied the student a FAPE (F.L. v. New York City

[7] In this case, the parent does not argue that either of the exceptions applies.

Dep't of Educ., 552 Fed. App'x 2, 9 [2d Cir. 2014]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 195 [2d Cir. 2012]).

Having determined that the parent's claim is time barred, it is unnecessary to further address the merits of her appeal.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER