The University of the State of New York

The State Education Department
State Review Officer
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No. 15-052

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Ben Kinzler, Esq., attorney for petitioners

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their due process complaint notice as untimely and denied their request to be reimbursed for their son's tuition costs at the Special Torah Education Program (STEP) for the 2012-13 school year. The appeal must be sustained and the matter remanded to the IHO for further administrative proceedings.

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

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, on April 16, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 2; Parent Ex. A).[1] The April 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in

[1] District Exhibit 2 and Parent Exhibit A are substantively identical copies of the April 2012 IEP. For purposes of this decision, citations to the IEP hereafter are made solely to District Exhibit 2.

a specialized school and related services including speech-language therapy, occupational therapy (OT), and counselling, as well as the provision of a full-time 1:1 paraprofessional (Dist. Ex. 2 at pp. 5-6).[2] By final notice of recommendation dated June 7, 2012, the district identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. C at p. 3; see IHO Ex. II at p. 1).

A. Due Process Complaint Notice

By due process complaint notice filed with the district on April 28, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1). More specifically, the parents alleged that the April 2012 CSE failed to adequately evaluate the student and, therefore, failed to recommend sufficient goals and services for the student (id. at p. 3). The parents further alleged that the speech-language and social/emotional goals contained in the April 2012 IEP lacked sufficient measurement criteria (id.). The parents also asserted that the IEP did not contain sufficient amounts of individualized instruction and support, counseling, and OT to address the student's needs (id.). Additionally, the parents contended that the proposed classroom in the particular public school site the district assigned the student to attend was "too large and distracting" for the student and the assigned school could not guarantee that it would provide meals consistent with the student's dietary requirements (id.). Lastly, the parents contended that their unilateral placement at STEP was appropriate for the student and that equitable considerations supported their request for direct funding or tuition reimbursement for the costs of the student's attendance at STEP for the 2012-13 school year (id. at p. 4).

On May 5, 2014, the district submitted a response to the parents' due process complaint notice that argued, among other things, that the placement recommended by the April 2012 CSE was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. B). On June 9, 2014, the district submitted an amended response to the due process complaint notice that argued that the parent's claims were time-barred by the two year limitations period and that there was no basis to toll the statute of limitations (Parent Ex. C).

B. Impartial Hearing Officer Decision

Prior to any hearing dates, the district moved to dismiss the parents' due process complaint notice, asserting that, because the due process complaint notice was filed on April 28, 2014, the parents' claims relating to the April 16, 2012 IEP were time-barred (IHO Ex. I at p. 2). The parents opposed the district's motion, asserting that, because the district did not raise the statute of limitations defense in its initial response to the due process complaint notice, it was waived (IHO Ex. II at p. 4). The parents also contended that, because they were not provided a copy of the student's IEP until on or about June 7, 2012, their claims did not accrue until that date and their due process complaint notice was therefore timely filed (id. at pp. 4-5). Furthermore, the parents asserted that an exception to the IDEA's limitations period applied, on the basis that the district withheld from the parents information required to be provided to them (id. at p. 5). By decision, dated April 7, 2015, the IHO dismissed the parents' due process complaint notice on the basis that

[2] The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8 [c][7]; 8 NYCRR 200.1[zz][8]).

it was not timely filed (IHO Decision).[3] According to the IHO's decision, the IHO directed that an evidentiary hearing be conducted for the purpose of providing the parents an opportunity to offer evidence regarding whether an exception to the limitations period applied (id. at p. 2). The IHO further indicated that the parents canceled the scheduled hearing date, subsequent scheduled evidentiary hearing dates were adjourned, and counsel for the parents waived the opportunity to present evidence of an exception to the timeline to request an impartial hearing during a conference call (id. at pp. 2-3; see IHO Ex. III). With regard to the parents' position that their claims did not accrue until they received a copy of the April 2012 IEP on June 7, 2012 and that their due process complaint notice was therefore timely, the IHO found that—based upon the description of events in the parents' due process complaint notice—the parents were aware of the contents of the student's IEP, and of their disagreement with its contents, at the time of the April 16, 2012 CSE meeting and that the parents' claims with respect to the IEP accrued at that time (IHO Decision at pp. 3-4). The IHO also found that the remaining claims in the due process complaint notice were directed at the sufficiency of the particular public school site to which the student had been assigned by the district, and that such claims were speculative as a matter of law and could not be considered even if timely raised (id. at pp. 4-5). Lastly, the IHO found that the district did not waive the right to assert a statute of limitations defense by not raising the defense in its initial response to the due process complaint notice (id. at pp. 5-6). Accordingly, the IHO granted the district's motion and dismissed the parents' due process complaint notice (id. at p. 6).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that the claims raised in their due process complaint notice were untimely. First, the parents contend that their claims did not accrue until after the April 2012 CSE meeting because they had no actual knowledge of the contents of the student's IEP or the location of the particular public school site recommended for the student until June 2012 when they receive a copy of the IEP and the final notice of recommendation from the district. In the alternative, the parents contend that their claims accrued only when they unilaterally placed the student at personal expense. Next, the parents argue that the district waived its statute of limitations defense because it failed to raise the defense "at the earliest possible moment" by failing to assert the defense in its May 2014 response to the due process complaint notice. The parents also assert that the IHO erred in finding that they had waived the opportunity to assert that an exception to the limitations period applied, and that an exception to the timeline to request an impartial hearing applies in this case because the district withheld information required to be provided to the parents until June 2012, thereby tolling the accrual of their claims and the running of the limitations period until that time.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

V. Applicable Standards—Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state

[3] The IHO issued a decision on March 24, 2015, declining to consolidate the impartial hearing regarding the 2012-13 school year with a subsequently filed proceeding involving the 2013-14 school year (Interim IHO Decision).

establishes a different limitations period, the party must request a due process hearing within two years of that date (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 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003];).[4] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]). 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 the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]).

VI. Discussion

As an initial matter, the district did not waive its statute of limitations defense by failing to assert the defense in its initial May 5, 2014, response to the due process complaint notice. Contrary to the parents' assertion that a statute of limitations defense must be raised "at the earliest possible moment," case law indicates that a statute of limitations defense is timely interposed so long as it is raised at some point during the impartial hearing (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B., 2011 WL 4375694, at *4-*6 [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). Here, the district raised a limitations defense in an amended response to the due process complaint notice, and then in its motion to dismiss (Parent Ex. C at p. 3; IHO Ex. I at p. 2). Accordingly, as the district raised the defense prior to any scheduled hearing dates, it was not waived for not being included in the district's initial response to the due process complaint notice.

Nonetheless, in this instance there is insufficient evidence in the hearing record to determine when each of the claims raised in the parents' due process complaint notice accrued. For example, although the IHO found that the parents' due process complaint notice demonstrated that they were aware of all of their claims at the April 2012 CSE meeting, several of the parents' claims challenging the sufficiency of the student's IEP concern the adequacy of the annual goals set forth within the IEP (IHO Decision at p. 4; Dist. Ex. 1 at pp. 2-4). The due process complaint notice, by itself, does not establish whether the annual goals were discussed in detail at the CSE meeting, or whether the parents only learned of their disagreement with the goals after receiving a

[4] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

copy of the completed IEP in June 2012 (Dist. Ex. 1 at pp. 2-4), and the IDEA does not require that goals be drafted in final form during the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. 2009]). Similarly, although the due process complaint notice would appear to establish that the parents were aware at the time of the April 2012 CSE meeting that the CSE recommended OT and counseling, as well as a 12:1+1 special class placement, the due process complaint notice does not, by itself, establish that the parents were aware of the specific amount or intensity of the recommended related services prior to their receipt of the completed IEP in June 2012, and it is possible that the parents have particularized claims that did not accrue until that time (for example, if the final IEP did not reflect the parents' understanding of the CSE's recommendations based on the discussions held at the CSE meeting) (see Dist. Ex. 1 at pp. 2-3).

While summary disposition procedures akin to those used in judicial proceedings are an effective mechanism for resolving certain proceedings under the IDEA, they should be used with caution and are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]). As discussed above, there are genuine issues of fact regarding when the parents' claims relating to the April 2012 IEP accrued, and additional evidentiary proceedings would have been useful in making such a determination. Accordingly, this matter should be remanded to the IHO to determine, based upon an adequate hearing record, when the parents knew or should have known about the facts underlying each claim in their due process complaint notice to establish the date of accrual for their claims (Somoza, 538 F.3d at 114-15; M.D., 334 F.3d at 221) and—if necessary—to address the merits of the parents' claim that the district denied the student a FAPE for the 2012-13 school year.[5] With respect to development of the hearing record, the IHO indicated in his decision that the parents declined an opportunity to present evidence concerning whether an exception to the timeline applied (IHO Decision at pp. 2-3); however, it does not appear that district similarly declined to present evidence regarding accrual of the statute of limitations, for which it held the

[5] On appeal, although the parents do not directly assert that the IHO erred in dismissing their claims concerning the assigned public school site as speculative, they do argue that their claims concerning the assigned public school site could not have accrued until their receipt of an FNR and were, therefore, wrongly dismissed. If, after remand, the IHO determines that the parent's claims concerning the assigned public school site are not time-barred because they did not accrue until June 2012, he is not precluded, if deemed appropriate, from revisiting his determination (made in the alternative) that the parents' claims were wholly speculative (see IHO Decision at pp. 4-5; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 195 [2d Cir. 2012]; see also E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and permitting the parents to submit evidence to, for example, attempt to establish that their claims are of the type that may be non-speculative (see, e.g., N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [noting that "[t]here should be few circumstances, however, in which parents can, if there is an adequate IEP, successfully challenge a placement if their child never attended the school"]).

burden of proof (K.H., 2014 WL 3866430, at *15).[6] It is left to the sound discretion of the IHO to determine whether or not a similar summary procedure with a limited hearing is sufficient in order to make the necessary findings of fact and of law relative to the district's statute of limitations defense and whether or not it is appropriate to allow the parents another opportunity to present evidence to support their assertion that, because the district did not provide them with information required to be provided by the IDEA until June 2012, they satisfied the withholding of information exception to the timeline to request an impartial hearing.[7] To invoke the exception, the parents will be required to establish that the district's alleged withholding of information required to be provided caused their inability to timely file the due process complaint notice (20 U.S.C. § 1415[f][3][D][ii]; D.K., 696 F.3d at 246-47).

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO to take evidence relevant to the accrual of the claims raised in the parents' due process complaint notice, determine whether the claims are timely and, if any claims remain, render a decision on the merits of the parents' claims and the parents' request for relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the matter be remanded to the same IHO who issued the April 7, 2015 decision to take evidence and determine when each of the claims raised in the parents' April 29, 2014 due process complaint notice accrued, whether these claims are time-barred by the statute of limitations and, if any claims remain, reach a determination on the merits; and,

IT IS FURTHER ORDERED that, if the IHO who issued the April 7, 2015 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
July 10, 2015

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[6] To the extent that either the district or the parents declined to submit evidence when given an opportunity, such circumstances would support a determination by the IHO that such party or parties waived certain defenses or arguments. However, in addition to the inadequate evidence in this matter, no transcript or written record was made of the proceedings that did take place, thereby precluding meaningful review of even such procedural bases for the IHO's determinations.

[7] The parents cite to the requirement that a district provide parents with prior written notice, which has been recognized as one of the required sources of information that can support the exception (D.K., 696 F.3d at 246).