The University of the State of New York

The State Education Department
State Review Officer
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No. 18-104

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Ardsley Union Free School District

Appearances:
Mary Jo Whateley, Esq., attorney for petitioner

Jaspan Schlesinger LLP, attorneys for respondent, by Carol A. Melnick, Esq.

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 a decision of an impartial hearing officer (IHO) which determined that the parent's claims were barred by the IDEA's statute of limitations and dismissed her due process complaint notice. The appeal must be sustained.

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 matter, the parties have introduced little evidence into the hearing record. Accordingly, the following background is derived from factual allegations in due process complaint notices filed involving the student.[1] The student was identified as a child with autism in 2004 and received services before reaching school age through the Early

[1] The parent filed a due process complaint notice dated September 23, 2017, which was amended on October 2, 2017 (see Sept. 2017 Due Proc. Compl. Not.; Oct. 2017 Due Proc. Compl. Not.). The September 2017 due process complaint notice and October 2017 amended due process complaint notice are the subject of another impartial hearing.

Intervention Program and the Committee on Preschool Special Education (Parent Ex. A at p. 3; Oct. 2017 Due Proc. Compl. Not. at p. 4). In June 2007, the student was declassified by a district CSE upon reaching school age, and thereafter received speech-language consultation services through an accommodation plan developed pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794[a]) (Section 504 plan) from September 2007 to January 2008 (Parent Ex. A at p. 3).

According to the parents, the student began to have emotional and physical issues in 2013 which prevented him from attending school on a consistent basis (Parent Ex. A at pp. 4-5; Oct. 2017 Due Proc. Compl. Not. at pp. 5-6).[2] Following a parent referral, a CSE convened in June 2015 to determine whether the student was eligible for special education services (Parent Ex. A at pp. 4-5; Oct. 2017 Due Proc. Compl. Not. at pp. 8-9). The CSE determined that the student was eligible for special education and related services as a student with an emotional disturbance (Parent Ex. A at p. 5; Oct. 2017 Due Proc. Compl. Not. at p. 9). Following continued difficulties during the 2015-16 school year, the parent unilaterally placed the student at the Westfield Day School in April 2016 (Oct. 2017 Due Proc. Compl. Not. at pp. 11-22).

A. Due Process Complaint Notice

The parent, by due process complaint notice dated June 11, 2018, asserted that the student was denied a free appropriate public education (FAPE) for the 2007-08 through the 2017-18 school years (Parent Ex. A). The parent related the student's difficulties between the time he was declassified from special education in June 2007 and the time he was found eligible again in 2015 (id. at pp. 3-5). The parent argued that the district misrepresented its obligation to teach the student certain skills, specifically social and self-management skills, in accordance with the New York State Learning Standards and that the parents relied on those misrepresentations (id. at p. 6). Upon further researching the New York State Career Development and Occupation Studies (CDOS) Learning Standards between fall 2017 and December 2017, the parent asserted that she became aware that the district failed to assess the student's progress with respect to the CDOS learning standards and continued the promote the student from grade to grade "notwithstanding evident failure to achieve learning standards deemed to have been appropriately mastered at the Elementary grade levels" and that this constituted an "impressible curriculum modification" of which the parent was not provided prior written notice (id. at pp. 6-7). The parent further asserted that the district's failure to appropriately assess the student's level of functioning with respect to the CDOS learning standards led to the CSE declassifying the student from special education without first obtaining a comprehensive evaluation (id. at pp. 7-8).

Specifically, the parent argued that she was denied meaningful participation in the decision-making process by the district's failure "to inform her of the true scope of the general curriculum, including the CDOS Learning Standards, and of the [d]istrict's obligation to teach towards all 28 learning standards"; the district's failure in 2007 to assess the student's "level of functioning with respect to all areas of the general curriculum, including the CDOS Learning Standards"; and the district's failure to provide prior written notice that the student's reported

[2] The parent alleged that in middle school, she received communications from the student's teachers that the student was not turning in his homework (Parent Ex. A at p. 5).

progress was in a modified curriculum that did not consider grade level expectations with respect to the CDOS learning standards (Parent Ex. A at p. 8).

Additionally, the parent contended that the student was denied a FAPE and educational opportunities by the district's failure to properly evaluate the student under its child find obligations in 2007 and again during the student's sixth and seventh grade school years when the student failed to demonstrate "achievement of grade level expectations in the CDOS Learning Standards" (Parent Ex. A at p. 9). Also, the parent asserted that the district denied the student a FAPE by promoting him from grade to grade under the modified curriculum; failing to provide the student with special education and related services with respect to his deficits in the CDOS Learning Standards; failing to provide special education and related services which would have allowed the student to access accelerated courses; and "[f]ailing to recognize behaviors and actions stemming from [the student's] disabilities and subjecting [the student] to disciplinary action instead of providing accommodations" (id.).

The parent requested the IHO find that the student was denied a FAPE for all school years from 2007-08 until 2017-18 and award compensatory education in the form of counseling and training in self-management skills (Parent Ex. A at p. 9).[3]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing. During a prehearing conference held on July 9, 2018, the district argued that the parent's June 2018 due process complaint notice should be dismissed in its entirety as the claims were beyond the two-year statute of limitation, duplicative of the claims raised in the parent's prior October 2017 due process complaint notice, and constituted an impermissible attempt to amend that complaint (Tr. pp. 4-6). The parent argued against the district's motion, asserting that the parent did not know or have reason to know of the district's violations with respect to curriculum modifications until December 2017 (Tr. pp. 7-8). The IHO permitted both parties to submit briefs on the district's motion to dismiss (Tr. pp. 85-88; see Dist. Mot. to Dismiss; Parent Opp'n to Mot. to Dismiss).

In its motion to dismiss, the district identified seven claims raised in the June 2018 due process complaint notice and argued that each was time-barred as the "triggering events" occurred more than two years prior (Dist. Mot. to Dismiss at pp. 1-3).[4] With respect to the parent's claims relating to the district's alleged failure to comply with its obligations to assess the student's progress toward the CDOS learning standards, the district asserted that the claims accrued "at the time of the triggering event(s)" rather than when the parent learned of the standards (id. at p. 3). The district further asserted that neither exception to the limitations period applied (id. at pp. 4-5). Finally, the district contended that the June 2018 due process complaint notice constituted an impermissible attempt to amend the September 2017 due process complaint notice (id. at p. 5). In

[3] The parent requested that the compensatory education be granted during the summer or outside of regular school hours "so not to deprive [the student] of the full opportunity to take classes offered during school hours" (Parent Ex. A at p. 9).

[4] It appears that both the parties and IHO used the term "triggering event" to refer to when the parent's claims accrued (Tr. pp. 10-11).

opposition, the parent argued that her claims did not accrue until she knew that the district had not assessed the student with respect to the CDOS learning standards (Parent Opp'n to Mot. to Dismiss at p. 5).

In an order of dismissal dated August 15, 2018, the IHO dismissed the parent's June 2018 due process complaint notice "in its entirety" (IHO Decision at p. 5). The IHO found that the parent's claims were outside the two-year statute of limitations and the parent did not allege that either of the two exceptions to the statute of limitations applied (id. at pp. 4-5). The IHO determined that the triggering event for the statute of limitations was the parents' knowledge of her son's functioning, not her subsequent discovery of the CDOS Learning Standards, and held that the parent admitted in the due process complaint notice having knowledge of the student's difficulties in school in the areas measured by those standards at times outside the two-year statute of limitations (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in determining the parent's due process complaint notice raised claims that were outside the statute of limitations. The parent argues that the statute of limitations did not begin to run until she had knowledge of the district's obligations regarding the CDOS Learning Standards in October 2017. The parent contends that the district withheld information regarding the learning standards that prevented her from knowing that the student was entitled to receive special education as necessary to make progress toward the learning standards.

The parent next argues that the IHO demonstrated bias by directing both parties to submit memoranda on the district's motion to dismiss on the same day and by limiting the submissions to five pages. The parent contends that the district should have been required to submit its motion first. The parent asserts that the IHO's direction "deprived [her of] the opportunity to specifically address the argument of the District and [that she] was left to basically 'shoot in the dark' and hope to hit the mark," effectively shifting the burden of proof to the parent. Moreover, the parent contends that limiting the submission to five pages caused her prejudice. The parent contends that the IHO relied on disputed facts to render her decision and that the IHO failed to resolve all facts the parent's favor when deciding the district's motion to dismiss. Additionally, the parent asserts that the IHO demonstrated bias by relying on discussions from the prior impartial hearing.

The parent requests that the IHO's decision dismissing the parent's June 2018 due process complaint notice be annulled and the matter remanded for a hearing.

In its answer, the district generally argues to uphold the IHO's dismissal of the June 2018 due process complaint notice. The district argues that the parent's claims regarding the 2007-08 through 2014-15 school years are untimely as the parent has not set forth a basis to extend the two-year statute of limitations or established that one of the exceptions to the statute of limitations applied. Further, the district argues that the parent is improperly attempting to amend the October 2017 due process complaint notice.

In a reply, the parent argues that the district improperly raised affirmative defenses in its answer.

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 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]).[5] 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. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]).

VI. Discussion

A. IHO Bias

The parent argues that the IHO demonstrated bias by requiring the parties to submit their briefs on the same day and limiting them to five pages. On review, the hearing record does not support a finding that the IHO demonstrated bias. The IHO's direction regarding the briefs fell within the IHO's broad discretion (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *7-*8 [S.D.N.Y. Mar. 30, 2017]). Further, the hearing record demonstrates that the parent did not object to the IHO's direction and therefore, the parent's assertions are waived (Tr. pp. 85-88). As discussed below, however, the parent correctly asserts that the IHO should not have relied on information from the other impartial hearing involving this student in dismissing the parent's complaint on statute of limitations grounds and the matter must be remanded so that a record can be established. However, this error in the conduct of the impartial hearing does not rise to the level of establishing bias by the IHO.

B. Motion to Dismiss

Turning to the parties' dispute regarding the limitations period, as a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA; however, 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]). State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public

[5] 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]).

education by such agencies," including the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Sch. Comm. Of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 361 [1985]; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA requires that parents be provided the "opportunity for an impartial due process hearing" relating to complaints they have with regard to their child's educational placement or the provision of a free appropriate public education to their child (20 U.S.C. § 1415[f]; see 20 U.S.C. § 1415[b][6]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]).

At the prehearing conference, the district requested the parent's due process complaint notice be dismissed as it raised claims that were beyond the statute of limitations and raised claims that were previously raised in the September and October 2017 due process complaint notices that were the subject of another impartial hearing (Tr. pp. 4-7). The parent was not provided an opportunity to present evidence regarding the accrual date of her claims or whether an exception to the statute of limitations applied. The IHO determined that the parent's due process complaint notice established that the parent knew of her son's struggles at a time more than two years prior to her filing of the June 2018 due process complaint notice and that her argument that the claims did not accrue until she learned of the CDOS learning standards was without merit (IHO Decision at pp. 4-5).[6] However, the lack of a hearing record in this case renders it impossible to determine whether the parent's claims are barred by the statute of limitations. Specifically, in the record before me, there is insufficient evidence to determine when the parent knew or should have known when her claims accrued or whether these claims fall under an exception to the state of limitations.[7] Notably, the district did not, during the prehearing conference or in its motion to dismiss, identify a date on which it asserted the parent's claims accrued, instead generally arguing that her claims accrued outside of the limitations period (see generally Tr. pp. 1-88; Dist. Mot. to Dismiss).[8]

[6] The IHO referenced arguments made during the proceedings in the impartial hearing relating to the parent's September and October 2017 due process complaint notices and cited to transcript pages not in the record of this proceeding (IHO Decision at pp. 2-3). Even if the facts regarding both proceedings are well-known to the parties and the IHO, a record must be established, in part to provide an adequate record for review. While consolidation of multiple due process complaint notices is permitted by State regulation (8 NYCRR 200.5[j][3][ii][a]), the IHO declined to consolidate the two proceedings based on the district's objection (Tr. pp. 34-36). Whether to consolidate multiple due process complaint notices is a matter committed to the IHO's discretion upon consideration of relevant factors relating to judicial economy and the interests of the student (8 NYCRR 200.5[j][3][ii][a][4]).

[7] The IHO indicated that the parent did not raise an exception to the statute of limitations; however, counsel for the parent clearly indicated at the prehearing conference that the parent would potentially raise the exceptions to the statute of limitations "in [the] alternative or together" with her argument relating to accrual of her claims, but that she was not prepared to present her case regarding the exceptions at that time and requested the opportunity to brief both the issue of accrual and the exceptions to the limitations period (Tr. pp. 24-25, 32-33, 39, 48, 59-61, 67-70).

[8] The district has the initial burden to present evidence regarding the accrual of the parent's claims to establish that they are barred by the statute of limitations (K.H., 2014 WL 3866430, at *15).

Based on the lack of information in the hearing record, the parent was not afforded an opportunity to complete her presentation of evidence and was thus deprived of her right to due process. Accordingly, this matter must be remanded for further administrative proceedings (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]).

As the matter must be remanded to permit the parties to present evidence, on remand, the IHO should address all issues raised in the due process complaint notice that require adjudication. I remind the parties that it is each party's responsibility to assist the IHO by identifying the issues that must be addressed.[9] The IHO is responsible for ensuring the orderly, efficient conduct of the impartial hearing and is afforded broad discretion in doing so. Moreover, upon remand, the IHO must determine, based upon an adequate hearing record, when the parent knew or should have known about the facts underlying each claim in her due process complaint notice to establish the date of accrual for her 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 from 2007-08 to 2017-18.

I am cognizant of the possibility that the parties and the IHO may have already covered some of this evidentiary ground in the proceeding arising from the parent's October 2017 due process complaint. For the sake of efficiency, the parties may agree to enter into the record relevant documentary or testimonial evidence from the other impartial hearing if the evidence would be pertinent to the issues in this matter. Additionally, as duplicative re-litigation of the 2017 proceeding is not required, the IHO may, in the interest of judicial economy, decide to admit relevant testimonial and documentary evidence from the 2017 proceeding into the record in this proceeding so long as the parties are given notice of what evidence is being admitted and a reasonable opportunity to be heard on any objections.

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 parent an opportunity to present further evidence to support her assertion that the withholding of information exception to the timeline to request an impartial hearing applies. To invoke the exception, the parent will be required to establish that the district withheld information required to be provided under the IDEA and that this withholding caused her 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). Further, as previously noted the district has the burden to present evidence regarding when the parent's claims accrued.

[9] In connection with this, it is unclear whether the parent or IHO agreed with the district's characterization of the parent's claims as set forth in its motion to dismiss (see Dist. Mot. to Dismiss at pp. 1-2). The parent should be prepared on remand to identify whether she agrees or disagrees with the district's statement of her claims.

VII. Conclusion

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dismissing the parent's June 2018 due process complaint notice, dated August 15, 2018, is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the August 15, 2018 decision, to address the parent's claims as discussed above; and

IT IS FURTHER ORDERED that if the IHO who issued the August 15, 2018 decision is not available, the district shall appoint a new IHO in accordance with its rotational selection procedures and State regulations.

Dated: **Albany, New York**
November 14, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER