The University of the State of New York

The State Education Department
State Review Officer
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No. 21-157

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Law Offices of Irina Roller PLLC, attorneys for respondent, by Benjamin J. Hinerfeld, 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 district) appeals from the decision of an impartial hearing officer which denied its motion to dismiss the parent's claims based on the applicable two-year statute of limitations for claims brought pursuant to the IDEA and Education Law 4404.

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

Given the limited nature of the parties' dispute on appeal and the parties' familiarity with this matter, the facts and procedural history will not be recounted in depth. Briefly, the CSE convened on March 18, 2015 to develop an IEP for the student for the 2015-16 school year, found the student eligible for special education and related services as a student with multiple disabilities and recommended that she attend a 12:1+1 special class in a specialized school with related

services of counseling, occupational therapy, speech-language therapy, and physical therapy (Parent Ex. S).[1]

Prior to the 2017-18 school year, the parent provided the district with a written ten-day notice, dated June 8, 2018, which stated that the district had failed to develop an IEP for the student or recommend a school placement for the 2018-19 school year and that the parent intended to enroll the student at the Cooke Center School ("Cooke") (Parent Ex. E).[2] On June 29, 2018, the parent filed a due process complaint notice, wherein she asserted that the district denied the student a FAPE by failing to convene a CSE, create an IEP, or recommend a school placement for the student and sought tuition reimbursement for her unilateral placement of the student at Cooke for the extended 2018-19 school year (District Ex. 2 at pp. 2-4).

An impartial hearing on the due process complaint notice was scheduled to commence on June 19, 2020 (District Ex. 5). On June 15, 2020, the parent filed a new due process complaint notice reiterating the claims contained in the original due process complaint notice; on June 16, 2020, the parent requested a withdrawal of the initial due process complaint notice dated June 29, 2018 (Parent Ex. C; Dist. Exs. 8; 10). On August 5, 2020, the IHO issued a termination order for the June 29, 2018 due process complaint notice (District Ex. 10). On October 23, 2020, a pre-hearing conference was held where the district asserted that the claims contained in the due process complaint notice dated June 15, 2020 were barred by the statute of limitations (Tr. pp. 3-5). On November 6, 2020, at a subsequent status conference, the district moved to dismiss the case on the ground that the parent's claims were barred by the applicable two-year statute of limitations (Tr. pp. 13-14). The IHO directed the parties to provide briefs on the statute of limitations and additional issues (Tr. pp. 14-15; see Dist. Exs. 15; 17; 19). In an interim order dated December 2020, the IHO denied the district's motion to dismiss (Interim IHO Decision). Without further elaboration, the IHO noted that "the two year period commence[d] . . . when the parent knew of or should have known about what the parent believed to be a violation of provision of a free and appropriate education (FAPE)" and determined "[t]here was no such violation until July 1, 2018, so . . . the parent had until July 1, 2020 to file a hearing request. As the hearing request was filed on June 15, 2020, this [wa]s within the statute of limitations" (id. at p. 2). The matter proceeded to an impartial hearing and the IHO issued a final decision on June 8, 2021 (IHO Decision). The IHO noted that he had addressed the statute of limitations issue in the interim decision denying dismissal of the matter, found that the district had denied the student a FAPE for the 2018-19 school year, and awarded the parent tuition reimbursement for the student's attendance at Cooke (id. at pp. 2, 6, 7).

[1] The student's eligibility for special education as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are similar or identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

IV. Appeal for State-Level Review

The district appeals on the ground that the parent knew or should have known the nature of her claims concerning the 2018-19 school year as of June 8, 2018, the date of the parent's 10-day notice. The district asserts that the claims articulated in the ten-day notice demonstrate that the parent knew the basis of her claims by that date and restated nearly identical claims in the due process complaint she initially filed in June 2018 and the subsequent due process complaint notice she filed in June 2020. The district contends that because the parent's claims accrued on June 8, 2018, she was required to file a due process complaint notice on or before June 8, 2020 and her due process complaint notice filed on June 15, 2020 was therefore untimely.

In an answer, the parent argues that although the ten-day notice was dated June 8, 2018, her claims did not accrue until June 15, 2018, the date when the parent actually sent the 10-day notice to the district and, accordingly, her due process complaint notice filed on June 15, 2020 was timely. Alternatively, the parent argues that her claims did not accrue until June 29, 2018, 10 business days after she sent her 10-day notice, at which point she knew that the district had ignored her concerns and failed to offer the student a FAPE.

In a reply, the district reiterates its argument that the parent's claims accrued on June 8, 2018, the date of the 10-day notice.

V. Discussion – 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]).[3] 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]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception 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]). A second exception may apply 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 (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

[3] 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]).

Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or at the latest upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd 2018 WL 3650185 [2d Cir. Aug. 1, 2018]), although the date of the CSE meeting is not determinative for statute of limitations purposes where the parent challenged the implementation of the IEP (K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995]; accord G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1130-35 [Or. 2011]).[4]

Here, the parent's claims do not concern the conduct of the CSE meeting, the contents of an IEP, or the implementation of an IEP. Rather the claims asserted by the parent relate solely to the district's failure to hold a CSE meeting or create an IEP prior to the start of the student's extended 2018-19 school year which commenced on July 1, 2018. Although the IHO did not explain his finding on this point, it can be presumed that in selecting July 1, 2018 as the date the parent's claims accrued, the IHO accepted the parent's argument that her claim that the district did not develop an IEP for the student could not accrue until after the start of the school year (IHO Interim Decision at pp. 1-2; see Dist. Ex. 17 at pp. 1-2).[5]

However, the parent's claims associated with the CSE's failure to convene and develop an IEP for the 2017-18 school year accrued at the time the parent knew about the district's failure. As argued by the district, the accrual date for statute of limitations purposes was June 8, 2018, the date of the parent's ten-day notice letter apprising the district of its failure to hold a CSE meeting or create an IEP for the 2018-19 school year. The claims and request for relief asserted by the parent in the due process complaint notice are indistinguishable from those initially stated in the 10-day notice (compare Parent Ex. C, with Parent Ex. E).

On appeal, the parent asserts that the accrual date should run from after the district failed to respond to the 10-day notice. However, the parent does not cite any authority to support such a contention and this contention runs counter to the general rule that a claim accrues when the parent is aware of it (see Application of the Dep't of Educ., Appeal No. 20-117). As an additional counterargument, the parent contends that she filed the 10-day notice on June 15, 2018, rather than on June 8, 2018 as asserted by the district. However, the parent does not assert that the June 8, 2018 notice is misdated. Accordingly, whether she filed the notice with the district on June 8 or

[4] Two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception 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]). A second exception may apply 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 (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). However, in this matter, neither the district nor the parent has raised either exception to the statute of limitations in their respective arguments.

[5] The parent actually argued that September 5, 2018 was the start of the school year for the student; however, the student had previously been recommended for 12-month services and attended a summer program at Cooke during the 2018-29 school year (Parent Exs. K; O at p. 1; S at p. 13; Dist. Ex. 17 at p. 2).

June 15 is irrelevant, as she was aware of the claims contained within the notice when it was executed, June 8, 2018 (see Parent Ex. E).

Given that the accrual date of her claims for the 2018-19 school year was, at the latest, June 8, 2018, the parent was required to serve a due process complaint notice asserting such claims on or before June 8, 2020. Accordingly, under normal circumstances, the parent's due process complaint notice dated June 15, 2020 would be barred by the statute of limitations (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]).

However, on March 20, 2020, in response to the unanticipated and unprecedented Covid-19 pandemic, the Governor of the State of New York issued Executive Order No. 202.8 (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8]), which provided:

> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID–19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

The Governor later issued a series of subsequent executive orders that extended the suspension or tolling period, eventually through November 3, 2020 (see Executive Order [A. Cuomo] 202.14 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67, 8.202.72]).

In a recent case, the Second Department discussed the Governor's authority to alter or modify a statute by tolling the time limitations and found that the executive orders constituted a tolling of the statute of limitations, as opposed to a suspension of the statute of limitations (Brash v Richards, 195 A.D.3d 582, 2021 WL 2213786, at * 3 [2nd Dept. 2021] [internal citations omitted]).

As codified in Education Law § 4404 and the State's implementing regulations, the statute of limitations applicable for filing a due process complaint notice falls squarely within the statutes and regulations tolled by Executive Order 202.8 through Executive Order 202.67 (see Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Consequently, the parents' June 15, 2020 due process complaint notice—which would otherwise have been untimely and subject to dismissal—remained timely pursuant to the tolling provisions in the executive orders. Accordingly, the IHO's determination that the statute of limitations did not bar the parents' claims related to the 2018-19 school year must be upheld.

VI. Conclusion

Having determined that the parent's claims are not time-barred by the two-year statute of limitations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 20, 2020

STEVEN KROLAK
STATE REVIEW OFFICER