The University of the State of New York

The State Education Department
State Review Officer

No. 07-116

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Chappaqua Central School District

Appearances:
Mayerson & Associates, attorney for petitioners, Gary S. Mayerson, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Lisa S. Rusk, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which dismissed their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2005-06 school year. The appeal must be dismissed.

At the outset, a procedural matter will be addressed. In their petition for review, petitioners request recusal of the undersigned State Review Officer, alleging that there is an appearance of bias and partiality of the undersigned that was the subject of a newspaper article. Petitioners also allege that recusal is warranted because they sought judicial review of the decision issued in Application of the Bd. of Educ., Appeal No. 05-123, which concerned the student's 2004-05 school year.[1] Respondent denies petitioners' allegations and alleges a lack of independent knowledge that would support petitioners' claim.

Prior to July 1, 1990, the Commissioner of Education conducted state-level reviews of impartial hearings conducted in New York. In 1990, the Legislature amended the Education Law to provide that the decisions of locally appointed hearing officers would be reviewed by a State Review Officer of the State Education Department (Educ. Law § 4404[2]). The Commissioner of Education thereafter promulgated regulatory requirements for the impartiality of State Review

[1] On April 27, 2007, the United States District Court for the Southern District of New York issued a decision in favor of petitioners, overturning the decision in Application of the Bd. of Educ., Appeal No. 05-123 (IHO Ex. II at pp. 6-19). Respondent appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit, and as of the date of this decision, the matter has not yet been decided.

Officers (8 NYCRR 279.1[c]). As relevant to petitioners' contentions, a State Review Officer must have no personal, economic or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). A State Review Officer shall recuse himself or herself and transfer the appeal to another State Review Officer if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).[2] A State Review Officer also may not review hearing decisions in which the State Education Department is a party (8 NYCRR 279.1[c][1]) or review the actions of any officer or employee of the State Education Department (8 NYCRR 279.1[c][2]). The statutory and regulatory schemes for state-level review in New York were held not to violate federal law (Board of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc. 2d 539, 543-44 [Sup. Ct. Nassau County 1994]).

In this case, I am not personally familiar with the parties, nor do I have any personal, economic or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). The New York State Education Department is not a party in this matter, nor are the actions of a State Education Department officer or employee in dispute. Petitioners' contention regarding a newspaper article is of no relevance to the parties' dispute in this proceeding; however, even if it was relevant, newspaper articles do not form a basis for recusal (see Teichner v. W & J Holsteins, Inc., 161 A.D.2d 454 [1st Dep't 1990]), nor does the newspaper article affect my opinion of the matters before me in this appeal (see generally SEC v. Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 [2d Cir. 1988]; United States v. Greenough, 782 F.2d 1556, 1558-59 [11th Cir. 1986]; In re United States, 666 F.2d 690, 694-95 [1st Cir. 1981]; 22 NYCRR 100.3[B][1] [stating that judicial officials should not be swayed by partisan interests, public clamor or fear of criticism]). Furthermore, reversal of an earlier determination does not require recusal in subsequent proceedings (see Robert Marini Builder Inc. v. Rao, 263 A.D.2d 846, 848 [3d Dep't 1999]; Dwyer v. De La Torre, 260 A.D.2d 773 [3d Dep't 1999]). Petitioners' request also fails to allege any specific facts related to the parties or their dispute and thus is speculative in nature (see Levine v. Gerson, 334 F. Supp. 2d 376, 377 [S.D.N.Y. 2003]). Having given petitioners' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR Part 279 do not require recusal in this instance. In accordance with the forgoing, petitioners' recusal request is denied.

The student's educational history is discussed in a previous decision and will not be repeated here in detail (Application of the Bd. of Educ., Appeal No. 05-123). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute (IHO Ex. II; see 8 NYCRR 200.1[zz][8]). On June 15, 2005, a Committee on Special Education (CSE) meeting was convened to develop the student's individualized education program (IEP) for the 2005-06 school year (Pet. Ex. F). At that time, the student was attending Eagle Hill (id. at p. 8; see Application of the Bd. of Educ., Appeal No. 05-123). By letter dated July 25, 2005, petitioners notified respondent that they rejected the CSE's recommended program for the 2005-

[2] The third criterion for recusal extends to cases in which a State Review Officer has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

06 school year, were unilaterally placing the student at Eagle Hill for the 2005-06 school year and would seek reimbursement for the student's tuition costs from respondent (Pet. Ex. H).

By due process complaint notice dated July 24, 2007, petitioners requested an impartial hearing seeking tuition reimbursement for the 2005-06 school year (IHO Ex. I at p. 1). In their due process complaint notice, petitioners also stated that their demand was subject to amendment for the purpose of adding additional particulars and similar allegations for other school years (id.). By letter dated July 31, 2007, respondent moved to dismiss petitioners' complaint on grounds of timeliness and sufficiency of the due process complaint notice (Pet. Ex. D). In an interim decision dated August 5, 2007, the impartial hearing officer granted petitioners' request to amend their due process complaint notice and permitted the parties to submit briefs on the issue of timeliness (IHO Interim Decision at p. 2). Petitioners submitted an amended due process complaint notice dated August 9, 2007, which asserted the student's right to special education and services under pendency, and requested tuition reimbursement for the 2005-06 school year due to respondent's alleged failure to offer a free appropriate public education (FAPE) to the student (IHO Ex. II at pp. 2-4). In their amended complaint, petitioners indicated that they were not asserting allegations regarding the 2006-07 or 2007-08 school years "in order to address respondent's threshold motion to dismiss based on 'sufficiency' and 'statute of limitations'" (id. at p. 4). Petitioners stated that they "reserve[ed] the right to further amend [their] demand upon further ten-day notice" in order to later include allegations concerning additional school years (id.). The parties submitted written memoranda of law addressing the issue of timeliness to the impartial hearing officer (IHO Exs. III; IV). No hearing was conducted in this matter.

By decision dated September 5, 2007, the impartial hearing officer dismissed as untimely petitioners' tuition reimbursement request for the 2005-06 school year (IHO Decision at pp. 6-7). The impartial hearing officer found that, for purposes of accrual of their claim, the earliest that petitioners should have known of their disagreement with respondent was at the June 15, 2005 CSE meeting (id. at p. 4). In the alternative, the impartial hearing officer concluded that petitioners should have known of their disagreement with respondent on July 20, 2005 when they received a copy of the IEP (id. at p. 5). The impartial hearing officer determined that regardless of whether the claim accrued on June 15, 2005 or July 20, 2005, petitioners' due process complaint notice of July 24, 2007 was untimely whether a one or two year statute of limitations was applicable (id. at p. 5). The impartial hearing officer rejected petitioners' arguments that their claims accrued later in July 2005 or in September 2005 (id. at pp. 5-6). Consequently, the impartial hearing officer dismissed petitioners' claims with regard to the June 2005 IEP (id. at p. 7).

Petitioners appeal, contending that their claims did not accrue on June 15, 2005 because the IEP was not approved by respondent until its board meeting was conducted on July 12, 2005, which occurred after the amended Individuals with Disabilities Education Act (IDEA) became effective.[3] Petitioners argue that the earliest date on which their claim accrued was September 13, 2005, which was the effective date noted on respondent's updated procedural safeguards notice

[3] On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Some of the relevant events in the instant appeal took place prior to the effective date of the 2004 amendments to the IDEA, and therefore the provisions of the IDEA 2004 do not apply. The newly amended provisions of IDEA 2004 apply to the relevant events that took place after the July 1, 2005 effective date. Citations in this decision are to the newly amended statute unless otherwise noted.

that reflected the newly effective two-year limitations period. Petitioners argue that the statute of limitations was tolled and that their July 24, 2007 due process complaint notice was timely. In the alternative, petitioners argue, without citation to authority, that even if the limitations period was not tolled, "[t]here is an accepted review period for parents to consider a proposed IEP and to decide whether or not they will accept or reject that IEP." Petitioners further contend that the dispute did not arise until they provided respondent with written notice of their disagreement with the proposed IEP, which they assert occurred when they faxed and mailed a letter to respondent dated July 25, 2005.

In its answer, respondent denies petitioners' contentions. Respondent asserts that the due process complaint notice was untimely and urges affirmance of the impartial hearing officer's decision in its entirety. In their reply, petitioners note, among other things, that respondent incorrectly asserts that it was not under an obligation to notify petitioners of the newly enacted two-year statute of limitations. Petitioners argue that, according to respondent's answer, their claim did not accrue until May 16, 2006 when a revised procedural safeguards notice was sent to petitioners.[4]

The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 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]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221).

Here, the first step in determining whether a due process complaint notice is timely is to determine when petitioners' claim accrued. The student's mother participated at the June 15, 2005 CSE meeting (Pet. Ex. F at p. 8). Petitioners received a copy of the IEP by July 20, 2005 (Pet. Ex. H). By letter dated July 25, 2005, petitioners notified respondent that they were rejecting the IEP, and the letter indicates that petitioners previously communicated their dissatisfaction with respondent's recommended program (Pet. Ex. H). It is unnecessary to resolve the issue of whether petitioners' claim may have accrued at the time of the CSE meeting because the claim would nevertheless be untimely if accrual of petitioners' claim did not occur until they received the IEP

[4] In a letter to the Office of State Review dated November 8, 2007, respondent requests that petitioners' reply be stricken. Under the circumstances of this case, petitioners' reply is responsive to procedural defenses within the meaning of the Commissioner's regulations. Accordingly, I have considered petitioners' reply to the extent that it responds to procedural defenses raised in the answer (8 NYCRR 279.6).

on July 20, 2005. I am persuaded that the claims raised in their July 24, 2007 due process complaint notice accrued no later than July 20, 2005 because petitioners knew or should have known of their dissatisfaction with respondent's recommendations for the 2005-06 school year at that time. Thus, I will apply the two-year statute of limitations period in effect at the time that petitioners claim accrued. Absent an exception to the two-year statute of limitations period, petitioners were required to commence an impartial hearing within two years from July 20, 2005, or risk dismissal of their claim by virtue of respondent's assertion of the defense of untimeliness.

IDEA 2004 contains two statutory exceptions to the limitations period:

> The timeline described in [20 U.S.C. § 1415[f][3][C]] shall not apply to a parent if the parent was prevented from requesting the hearing due to –
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent

20 U.S.C. § 1415[f][3][D]. Petitioners do not allege that the first exception applies to the facts of this case (see 20 U.S.C. § 1415[f][3][D][i]). However, petitioners assert that the second exception should apply because respondent did not provide them with a procedural safeguards notice explaining the newly enacted two-year statute of limitations (see 20 U.S.C. § 1415[f][3][D][ii]). As further described below, I disagree with petitioners' argument that the exception to the limitations period applies.[5]

As relevant to the circumstances of this case, IDEA 2004 requires that a copy of the procedural safeguards notice be given to a parent one time per year, upon the first occurrence of the filing of a complaint, or upon request by a parent (see 20 U.S.C. § 1415[d][1][A]; see also 34 C.F.R. § 300.504[a]). Although the enclosures are not included in the hearing record, letters from respondent to petitioners dated June 10, 2005 and May 16, 2006 indicate that petitioners were provided with copies of the procedural safeguards notice at least once per year in compliance with IDEA 2004 (IHO Ex. IV at pp. 7, 9; see 20 U.S.C. § 1415[d][1][A]; 34 C.F.R. § 300.504[a]; 8 NYCRR 200.5[f][3]). Furthermore, petitioners cannot rely upon the argument that respondent withheld the procedural safeguards notice when petitioners had not yet filed their first due process complaint notice in this matter, only after which respondent's obligation to provide them with a copy of the procedural safeguards notice was triggered (IHO Ex. I; see 20 U.S.C. § 1415[d][1][A][ii]; 34 C.F.R. § 300.504[a][2]; 8 NYCRR 200.5[f][3][ii]). Moreover, there is no evidence in the hearing record that petitioners requested a copy of the procedural safeguards notice at any time relevant to this case (see 20 U.S.C. § 1415[d][1][A][iii]; 34 C.F.R. § 300.504 [a][4]; 8 NYCRR 200.5[f][3][iii]). I find that respondent complied with its obligation to provide petitioners with copies of the procedural safeguards notice (IHO Ex. IV at pp. 7, 9), and that petitioners' argument applying the exception to the two-year limitations period set forth in IDEA 2004 lacks merit (20 U.S.C. § 1415[f][3][D][ii]; 34 C.F.R. § 300.511[f][2]; 8 NYCRR 200.5[j][i]). Because

[5] Although petitioners do not appear to dispute receiving the revised procedural safeguards notice from respondent on May 16, 2006, they do not offer any additional reasons why they delayed until July 24, 2007 to transmit their due process complaint notice to respondent (IHO Exs. I; IV at p. 8; Pet. Ex. G).

petitioners commenced this proceeding on July 24, 2007 (IHO Ex. I),[6] more than two years after their claims accrued, I concur with the impartial hearing officer's conclusion that petitioners' claims are time-barred by the two-year statute of limitations.

I have considered petitioners' remaining contentions, including their assertion that there is an "accepted review period" between the time they received the IEP and the time that the statute of limitations began running, and I find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 30, 2007

PAUL F. KELLY
STATE REVIEW OFFICER

[6] In light of my determination herein, it is not necessary to reach the issue of whether a due process complaint notice that is deemed insufficient will suffice for purposes of timeliness (see IHO Interim Decision at p. 2).