The University of the State of New York

The State Education Department
State Review Officer
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No. 20-082

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:
The Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO), which denied her request to be reimbursed for the cost of her daughter's tuition at a nonpublic school (NPS) for the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's denial of its motion to dismiss the parent's claims based on the IDEA's statute of limitations. The appeal must be dismissed. The cross-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

The CSE convened on March 23, 2016 to develop an IEP for the student for the 2016-17 school year (kindergarten) and found the student eligible for special education and related services as a student with autism (Parent Ex. R at pp. 1, 15, 17).[1] The CSE recommended a 12-month program in a 6:1+1 special class placement in a specialized school with related services of occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent counseling and training (id. at pp. 12-13, 15).

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

The parent executed a contract to enroll the student at the NPS for the 2016-17 school year on June 14, 2016, and the school countersigned the contract on July 5, 2016 (Parent Ex. C at p. 3).

On August 23, 2016, the parent sent the district a notice indicating that the parent disagreed with the recommendations of the March 2016 CSE and that she intended to enroll the student at the NPS for the 2016-17 school year and seek tuition reimbursement from the district (Parent Ex. B at pp. 1, 3).[2] The student attended the NPS for the 2016-17 school year (see Parent Ex. J).

A. Due Process Complaint Notice

By a due process complaint notice dated September 2, 2018,[3] the parent asserted that the district "failed to provide" the student with a free appropriate public education (FAPE) for the 2016-17 school year and requested "prospective payment/tuition reimbursement" for both tuition and related services at the NPS (Parent Ex. A at pp. 1, 3).

The parent asserted that the March 2016 IEP was "procedurally and substantively flawed" (Parent Ex. A at p. 2). Specifically, the parent asserted that the CSE was not properly composed because it did not include a parent member (id.). The parent also indicated that "she was not provided with her due process rights" (id.). The parent further contended that the CSE denied her meaningful participation in the creation of the student's IEP because the CSE did not consider the parent's input, such as her request that the CSE consider placing the student in a State-approved nonpublic school (id. at p. 3). The parent also argued that the district did not conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (id. at p. 2). With respect to the March 2016 IEP, the parent alleged that the annual goals on the IEP were insufficient in that they did not address the student's sensory, behavioral, or safety needs and insufficiently addressed her academic needs; she also alleged the annual goals and short-term objectives were vague and lacked benchmarks and methods of measurements (id.). Further, the parent contended that the IEP did not contain applied behavior analysis (ABA) goals or methodology, although this was the methodology that had been successful for the student (id.). The parent argued that the IEP did not include a sensory diet, which was necessary for the student (id.). The parent further disputed the CSE's failure to recommend "1:1 ABA support" or a 1:1 paraprofessional to address the student's behavioral, safety, and activities of daily living needs (id.at p. 3).

Finally, the parent contended that she visited the particular public school to which the district assigned the student to attend and found that it would not have been appropriate to meet

[2] The parent's August 23, 2016 letter set forth several procedural and substantive concerns regarding the March 2016 CSE and resultant IEP, which the parent later asserted, almost verbatim, in her September 2, 2018 due process complaint notice, which is summarized below (compare Parent Ex. B at pp. 1-3, with Parent Ex. A at pp. 1-3).

[3] Previously, the parent filed a due process complaint notice dated January 17, 2017 (Parent Ex. T at pp. 18-23). The parent raised the same claims in this due process complaint notice as were raised in the prior one (compare Parent Ex. A with Parent Ex. T at pp. 18-23). The hearing record demonstrates that the parent withdrew the January 2017 due process complaint notice in September 2017 (Tr. pp. 13-14, 115; Parent Ex. T at pp. 31-32).

the student's needs (Parent Ex. A at p. 3). The parent asserted that the assigned public school site was on the fifth floor, with no elevator and no air conditioning in the stairwells, which would have been a problem for the student (id.). The parent also alleged that the school did not use ABA, there was no Board Certified Behavior Analyst (BCBA) on staff, the curriculum used in the particular classroom that the student would have attended was not appropriate for the student, the students at the school ate lunch in a crowded room without 1:1 support, and the school was a distance from the student's home (id.).

B. Procedural History Subsequent to Due Process Complaint Notice

The parties proceeded to an impartial hearing, which concluded on May 22, 2019 following five hearing dates (see Tr. pp. 1-75). A district representative did not attend the May 22, 2019 hearing (Tr. p. 37). The representative for the parent stated that she had a conversation with the district representative on the date of the hearing and that the district representative stated "we don't have a hearing today" in response to which the representative of the parent informed the district representative that there was a hearing noticed for today (Tr. p. 38).

On May 23, 2019, the district submitted a motion to dismiss the parent's due process complaint notice raising the defense of statute of limitations (Dist. Mot. to Dismiss at 3).[4] Included with the motion, the district representative indicated a district representative was available at the hearing office at the time of the hearing (id. at p. 2). In addition, the motion to dismiss indicated the district representative communicated the district's intention to raise the defense of statute of limitations to the representative for the parent and that neither party exchanged evidentiary disclosures believing that the parties would be given the opportunity to brief their positions as to the district's statute of limitations defense (id.).

The IHO rendered a decision on June 22, 2019 (Jun. 22, 2019 IHO Decision at p. 9). In the decision, the IHO found that the district waived its right to raise the defense of statute of limitations because the district failed to appear at the May 22, 2019 hearing date (id. at p. 1). According to the IHO decision, notice of the May 22, 2019 hearing date was sent on May 17, 2019 and "there was no inquiry" from the district (id.). The IHO found that the district did not raise the defense of statute of limitations until it submitted its motion to dismiss on May 23, 2019, which was after the close of testimony (id.). The IHO then determined that the parent failed to establish at the impartial hearing that the NPS was an appropriate unilateral placement for the student for the 2016-17 school year and, therefore, denied the parent's request for the cost of the student's tuition at the NPS (id. at pp. 5-9).[5]

[4] The motion to dismiss is incorrectly paginated, with the second page of the document labeled as page "1." For purposes of clarity, the motion to dismiss, along with the email to which the motion was attached, will be cited by reference to the first page of the document as page "1" and each page consecutively numbered thereafter, with the ninth and final page of the motion being the email (see Dist. Mot. to Dismiss at pp. 1-9).

[5] The IHO found that all the information "presented by the witness and documents [was] hearsay" and that, although hearsay could be admitted in an administrative hearing, it was "not as reliable" (Jun. 22, 2019 IHO Decision at p. 3).

The parent appealed from the IHO's decision to the Office of State Review and the district filed a cross-appeal. In Application of Student with a Disability, Appeal. No. 19-069, the SRO vacated the June 22, 2019 IHO decision. The SRO remanded the matter for further administrative hearings, in order to "receive evidence and to make a determination regarding whether the district waived or agreed to waive the defense of statute of limitations, and, if not, whether the parent's claims were barred by the IDEA's statute of limitations, including whether any exceptions to the statute of limitations may apply." The SRO held that there were inconsistencies regarding the district's failure to appear at the May 22, 2019 hearing. More specifically, the SRO noted that the district asserted that it had a representative at the hearing location; yet the IHO was informed by the parent's advocate that the district would not be attending the hearing.[6] The SRO also noted that the IHO did not attempt to contact the district, which he had done during prior hearings. Moreover, the SRO found that "it is unclear whether the IHO was presented with a full and accurate picture of the district's intentions for the case" and that "the responsibility for that lack of clarity certainly should fall on the district, particularly to the extent that the district failed to appear at a hearing date for which it received notice." However, since the agreed upon hearing date was rescheduled, the notice of the new hearing was not placed into the hearing record, conflicting representations existed regarding the hearing, and given the lack of any attempts to contact the district at the May 22, 2019 hearing, the SRO declined to "affirm the IHO's hard line on precluding the district from presenting its statute of limitations defense." The SRO held that "[b] ased on the conflicting assertions by the parties, the IHO's sua sponte determination that the district waived the defense as a consequence of its failure to appear at the May 22, 2019 hearing date or interpose its statute of limitations defense before that date is without sufficient support in the hearing record."

The SRO then remanded the matter back to the IHO for further development of the hearing record regarding the issue of statute of limitations, specifically "whether the district waived or agreed to waive the defense and whether any exceptions to the defense may apply."[7]

C. Impartial Hearing Officer Decision

Upon remand, three hearings were held (see Tr. pp. 76-142). The parties each presented evidence, including motions regarding the district's statute of limitations defense (see Parent Ex. T; Dist. Exs. 1; 3; 4). The IHO rendered a decision on March 15, 2020 (see Mar. 15, 2020 IHO Decision).

The IHO held that the district "did not submit any credible evidence as to this IHO making a decision on the statute of limitations time bar claim" and repeated his original finding that the district did not timely raise the defense of statute of limitations (Mar. 15, 2020 IHO

[6] Further, the SRO noted that the district asserted that it had informed the parent's advocate that it would raise the issue of statute of limitations at the May 22, 2019 hearing, yet the parent's advocate did not provide any such information regarding the alleged conversation to the IHO at the hearing (see Application of Student with a Disability, Appeal. No. 19-069).

[7] Because the district did not appeal from the IHO's decision that the district denied the student a FAPE for the 2016-17 school year, the SRO held that the IHO's finding as to that issue was final and binding on the parties (Application of a Student with a Disability, Appeal No. 19-069).

Decision at pp. 4-5). Nevertheless, the IHO addressed the substance of the district's statute of limitations defense finding that the parent's claims were outside of the two-year time period and that the defense was not tolled by negotiations between the parties (id. at pp. 4-5). The IHO indicated that it was unclear from the record as to the length of the negotiations between the district and the parent regarding settlement of the original due process complaint notice (id. at p. 4).[8] Further, the IHO determined that the parent was obligated to move forward in a reasonable time frame when the settlement stalled and that the parent failed to move forward as she allowed over a year and a half to pass (id.). However, because the IHO found that the district "did not put forth the claim with evidence of statute of limitations in the required time frame" during "the original substantive hearing," he denied the request to dismiss the case based on statute of limitations (id. at pp. 4-5).

The IHO then denied the parent's request to re-litigate the issue of appropriateness of the NPS with new evidence (Mar. 15, 2020 IHO Decision at p. 5). The IHO noted that she denied the district the opportunity to re-litigate the matter of statute of limitations and would not allow the parent to obtain a '"second bite of the apple'" when the evidence presented prior to the original decision was insufficient (id.). Therefore, the IHO adopted his previous findings "that the evidence presented was not an appropriate unilateral placement for the student" (id.). The IHO dismissed the parent's complaint (id.).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent asserts that the district failed to present evidence that it offered the student a FAPE for the 2016-17 school year and the IHO failed to discuss the issue of FAPE in the decision. Since the IHO adopted his prior findings, the parent asserts that it should be assumed that the FAPE issue was found in favor of the parent. The parent contends that the IHO erred by not considering the additional evidence and testimony presented. Specifically, the parent asserts that she presented additional information regarding the training of the student's paraprofessional, the progress the student made, and the ABA methodology used by the NPS.

Additionally, the parent argues that equitable considerations favor reimbursement. The parent contends that at all times her actions were reasonable. Moreover, the parent requests that all of the prior arguments made in connection with the original IHO decision be reconsidered. Based on all of these arguments, the parent requests an order finding that the NPS was an appropriate placement, finding that equitable considerations favor tuition reimbursement, and directing payment/reimbursement for the cost of tuition and related services at the NPS for the 2016-17 school year.

In an answer with cross-appeal, the district generally denies and admits the parent's allegations. As a cross-appeal, the district argues that the parent's appeal should be dismissed with prejudice as the claims are time-barred. The district contends that the IHO accepted the

[8] The IHO indicated that there was no evidence presented as to the length of the negotiations or when the parent withdrew the initial due process complaint notice (Mar. 15, 2020 IHO Decision at p. 4). However, upon remand the parent did present some information regarding the length of the negotiations (Parent Ex. T at pp. 24-29) and when the parent withdrew the initial due process complaint notice (id. at pp. 31-32).

parent's brief in opposition to the motion to dismiss. Therefore, "the IHO cannot contradictorily hold" its motion as untimely because "by accepting and considering [the parent's] papers in opposition, the IHO obviated the need to address the 'conflicting assertions by the parties' regarding the district's nonappearance on May 22, 2019, and whether that nonappearance constituted a waiver of the [statute of limitations] defense." The district argues that if an SRO disagrees with this assertion, the SRO should remand the matter to the IHO to address the conflicting information regarding waiver.[9]

The district argues that there is no basis for tolling the statute of limitations because the parent was not prevented from requesting an impartial hearing due to a specific misrepresentation. The district contends that the parent's assertion that the statute of limitations was tolled due to the settlement negotiations is incorrect and does not support a finding that an exception to the statute of limitations defense applies. The district asserts that the record does not demonstrate that the district represented that the matter had been resolved and settlement negotiations do not toll the statute of limitations period.

Should the SRO decline to find that the claims are time-barred, the district argues that the IHO correctly found that the NPS was not an appropriate placement for the student. The district contends that the IHO properly declined to consider additional evidence because the case was remanded on the issue of statute of limitations and the SRO did not authorize the re-opening of the hearing to provide the parent "another bite at the proverbial apple of proving the Prong 2 case that they failed to prove at the original hearing." As such, the IHO was justified in declining to consider the additional evidence. The district asserts that even if the new evidence is considered, it does not support a finding that the NPS was an appropriate placement for the student. The district requests that the parent's appeal be dismissed with prejudice.

In response to the district's cross appeal, the parent asserts the statute of limitations has been tolled due to the misrepresentations of the district. The parent contends that the IHO failed to consider the new evidence submitted regarding tolling of the statute of the limitations. Specifically, that there was a settlement in principle for the initial due process complaint notice dated January 2017, which raised the same claims as the subsequent one filed on September 2, 2018.[10] The parent asserts that she withdrew the January 2017 due process complaint notice due to the settlement in principle; however, for an unknown reason, the settlement was never completed. The parent agrees that settlement negotiations would not toll the statute of limitations but argues that the settlement in principle does. The parent further contends that the doctrine of equitable estoppel should apply.

Additionally, the parent argues that accepting the district's assertion that the statute of limitations period expired on August 26, 2018, the new due process complaint notice was dated just five days later on September 2, 2018. According to the parent, the district's delay in settlement negotiations supports either an equitable estoppel defense or at least, a finding of

[9] The district acknowledged that it did not present any information regarding waiver to the IHO upon remand (Answer with Cross at ¶ 14).

[10] The parent notes that the initial due process complaint notice was filed timely and that this fact is not in dispute.

equitable tolling of five days, which would be sufficient to defeat the district's statute of limitations defense.

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]).[11] 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]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Statute of Limitations

1. Waiver of Statute of Limitations Defense

Initially, the district asserts that the IHO erred in finding that the district's motion to dismiss the due process complaint notice based on the statute of limitations was not timely raised because it was submitted after the hearing took place.

As previously mentioned in Application of a Student with a Disability, Appeal No. 19-069, 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.

[11] 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]).

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. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [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., Smithtown Cent. Sch. Dist., 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"]).

Additionally, as decided in Application of a Student with a Disability, Appeal No. 19-069, the hearing record as of the time of that decision did not support the IHO's sua sponte determination that the district waived the defense of statute of limitations by failing to appear for the May 22, 2019 hearing date. In particular, the SRO noted discrepancies in the information provided to the IHO, the lack of notice of the rescheduled May 22, 2019 hearing date in the hearing record, and the fact that although the representative for the district had been called during prior hearings the district representative was not called on the May 22, 2019 hearing date. The SRO directed the IHO to receive evidence and make a determination as to whether the district waived or agreed to waive the defense of statute of limitations.

Upon remand, neither party clarified the hearing record as requested by the SRO. The district did not address the questions raised by the SRO upon remand. Instead, the district merely asserted that the parent's claims were time-barred as the date the statute of limitations began to run was August 23, 2016 and the parent's due process complaint notice was not filed until September 2, 2018 (see Tr. pp. 110-11; Dist. Ex. 1 at p 2). The parent also failed to present any evidence or arguments to contradict the district's prior assertions raised regarding waiver of the defense; the parent's advocate only asserted that the statute of limitations was tolled, not that the defense was waived (see Tr. pp. 112-17; see also Parent Ex. T). As such, the hearing record does not support deviating from the decision made in Application of a Student with a Disability, Appeal No. 19-069 and the IHO's decision to confirm his prior decision regarding waiver of the defense of statute of limitations without taking additional evidence on the issues identified in the prior SRO decision must be reversed. Based on the above, the defense of statute of limitations was timely raised.

2. Accrual

As outlined above, 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]).

In this matter, the parent's September 2, 2018 due process complaint notice raised issues regarding the March 2016 IEP and the school assigned for the student to attend for the 2016-17 school year (Parent Ex. A at pp. 2-3).[12] The parents sent the district a ten-day notice letter dated August 23, 2016 and raised the same issues as those in the September 2, 2018 due process complaint notice (compare Parent Ex. A, with Parent Ex. B). In its motion to dismiss and subsequent filings, the district argued that the parent's claims accrued as of the August 23, 2016 ten-day notice letter (Tr. p. 110; Dist. Ex. 1 at p. 2). In addressing the substance of the district's statute of limitations defense, the IHO found that the parent's claims were outside of the two-year time period and that the defense was not tolled by negotiations between the parties (March 15, 2020 IHO Decision at pp. 4-5). Overall, the similarity of the parent's claims between the August 23, 2016 ten-day notice and the September 2018 due process complaint notice supports finding that the parent knew or should have known about her claims as of the August 23, 2016 ten-day notice (compare Parent Ex. A, with Parent Ex. B). Since the parent's due process complaint notice was dated September 2, 2018, it was filed more than two years after the parent's claims accrued on August 23, 2016. Accordingly, the parent's claims are time barred under the two-year statute of limitations, unless one of the exceptions applies (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]).

3. Equitable Estoppel

Having determined that the claims raised in the parent's due process complaint notice fall outside of the two-year statute of limitations period, I next turn to the parent's argument that her claims should be tolled. The parent raised the doctrines of equitable tolling and equitable estoppel to support her argument that the September 2018 due process complaint notice was timely filed. More specifically, the parent argues that the district represented that the parent's claims from her earlier January 2017 due process complaint notice were settled and because of this representation, the district should be equitably barred from asserting a statute of limitations defense (Tr. p. 115; Parent Ex. T at pp. 4-5; Ans. to Cross at p. 6).

Initially, while the parent alleges equitable estoppel or equitable tolling, the IDEA statute of limitations contains only two exceptions. At least one circuit court has held that the inclusion of these exceptions precludes application of common law equitable tolling principles to save claims otherwise foreclosed by the IDEA statute of limitations (D.K. v. Abington Sch. Dist., 696 F.3d 233, 248 [3d Cir. 2012]).[13] However, one of these exceptions, the "specific

[12] On appeal, the parent has not disputed that her claims accrued outside of the two-year statute of limitations. However, in her response to the district's motion to dismiss, the parent alleged that her claims should not have accrued until September 7, 2016 when the student began attending the NPS, because up until the student began attending the NPS, "the district should have reconvened to address the parents' objections to the IEP and placement and considered other options" (Parent Ex. T at p. 9). While the district's response to a parent's ten-day notice could impact whether an exception to the statute of limitations should apply, it does not change the date on which the parent knew or should have known of the action that forms the basis of the complaint.

[13] The parent cited to Application of the Bd. Of Educ., Appeal No. 06-126, noting that was the only SRO case that discussed equitable estoppel regarding statute of limitations. However, as noted in that decision, the 2004 amendments to the IDEA enacted the two-year statute of limitations and included two statutory exceptions to the limitations period (Application of the Bd. Of Educ., Appeal No. 06-126). The SRO in that matter applied the statute of limitations that was in existence prior to the 2004 amendments and only assessed equitable tolling

misrepresentation" exception, is potentially applicable to the parent's equitable tolling and equitable estoppel claims (see 20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Accordingly, the parent's assertions regarding the withdrawal of her initial January 2017 due process complaint notice and the concurrent settlement negotiations will be assessed under the framework of this statutory exception to the statute of limitations.

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 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]; R.B., 2011 WL 4375694, at *6). In order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding a relevant fact (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; see also Application of a Student with a Disability, Appeal No. 13-215).

As discussed above, in arguing for an exception to the statute of limitations, the parent presented some additional information regarding her initial January 2017 due process complaint notice and the negotiations regarding the possible settlement of it (Parent Ex. T at pp. 24-32). Specifically, the parent points to an August 2017 email exchange with the district to support her argument (id. at pp. 27-29). In that exchange, the district made an offer of settlement to the parent's advocate, who immediately accepted the offer (id. at pp. 28-29). The parent asserts that she relied upon that settlement offer and acceptance and withdrew the January 2017 due process complaint notice on September 5, 2017 (Tr. p. 115; Parent Ex. T at pp. 30-32). The parent asserts that her reliance on the settlement offer and acceptance tolls the statute of limitations. Although the record does demonstrate that the district made an offer of settlement to the parent and that the offer was accepted, this alone does not support a finding that the district made a specific misrepresentation that the district had resolved the problem forming the basis of the complaint. Notably, the August 17, 2017 settlement offer from the district indicated that it was contingent upon approval from the comptroller (Parent Ex. T at p. 28). In addition, in responding to the offer on the same day, the parent's advocate asked whether she should draft the stipulation agreement (id. at p. 29). The parent withdrew the January 2017 due process complaint notice on September 5, 2017 (id. at p. 31). There is no further evidence in the hearing record of any communications between the parties regarding the proposed settlement; however, the parent asserted in her opposition to the district's motion to dismiss that she attempted to complete the settlement but did not receive a response from the district (id. at p. 5).[14] Further, there is no evidence in the record that a stipulation agreement was ever created or executed by

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under that framework (id.). The SRO further found that if the IDEA two-year statute of limitations applied, the SRO would have found that continuing efforts to negotiate a resolution did not constitute a specific misrepresentation that the district had resolved the problem forming the basis of the complaint (id.).

[14] Also, the parent's advocate indicated that she withdrew the January 2017 due process complaint notice "hoping that we can settle sooner" (Tr. p. 13). This demonstrates that as of the withdrawal in September 2017, the parent did not think the matter was fully settled.

either party. The parent had not heard from the district for a full year at the time the statute of limitations was set to expire on August 23, 2018.[15] Based on the above, I do not find that the proposed settlement subject to comptroller approval was a misrepresentation of the district's intentions sufficient for the parent to rely on it in failing to commence another proceeding for over one year. In addition, a contingent proposal for settlement is not the kind of statement that includes the characteristic of the intentional or knowing deception required for application of the "specific misrepresentation" exception to the statute of limitations (see D.K., 696 F.3d at 245-46).[16]

VII. Conclusion

Having determined that the parent's claims are time-barred and in sustaining the cross-appeal, it is unnecessary to address the merits of the parent's appeal.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

Dated: Albany, New York
August 24, 2020

STEVEN KROLAK
STATE REVIEW OFFICER

[15] The only other communication from the district submitted by the parent was a December 2018 email, in which the district counsel informed the representative for the parent that the matter was being transferred to another attorney (Parent Ex. T at pp. 5, 34).

[16] Even if I were to consider the parent's argument that equitable tolling or equitable estoppel should be applied to the IDEA's two-year statute of limitations, contrary to the persuasive precedent discussed above, the parent does not present a sufficient reason to depart from the IHO's determination that the parent was not reasonable in waiting until after the expiration of the limitations period to file the due process complaint notice in this matter. The same facts that warrant against applying the "specific misrepresentation" exception, warrant against a finding of equitable estoppel, i.e. the settlement offer was contingent on obtaining comptroller approval and the hearing record does not include any communications between the parties after the initial offer and acceptance prior to the expiration of the limitations period.