The University of the State of New York

The State Education Department
State Review Officer
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No. 24-001

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his 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 Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General 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 granted respondent's (the district's) motion to dismiss the parent's claims pertaining to her son's educational program for the 2021-22 school year based on the IDEA's statute of limitations. The appeal must be dismissed.

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 state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of the appeal.[1] Briefly, in October 2019, the parent referred the student for an initial evaluation to determine if he was eligible for special

[1] It is unclear from the hearing record if the parties' exhibits were entered into evidence as there was no impartial hearing date at which documentary or testimonial evidence was offered and the matter was dismissed on the district's motion; however, the IHO relied on district exhibits to explain the facts of the matter within her order of dismissal (see IHO Decision at p. 1). As such, in the interest of judicial economy, I will consider the parent's one exhibit and the district's five exhibits on appeal (see Parent Ex. A; Dist. Exs. 1-5).

education services (see Dist. Ex. 2). A CSE convened on February 28, 2020 and reviewed a November 2019 social history, a January 2020 classroom observation, a December 2019 psychoeducational evaluation, and a December 2019 speech and language evaluation, in addition to reports from the parent and a "review of records," and found the student ineligible for special education as a student with a disability (Dist. Ex. 4).

The parent sent a 10-day letter to the district via facsimile on October 4, 2021 which indicated her disagreement with the February 2020 CSE's determination that the student was ineligible for special education services (Parent Ex. A at p. 2). The parent also requested that the district provide the student with "the proper support he needs and provide him with Special Education Teacher Support Services, as well as Speech Therapy" and the parent indicated her intent to commence a proceeding "to seek funding and/or reimbursement from the district for th[at] program" (id.).

In a due process complaint notice dated June 16, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year, arguing that the February 2020 CSE's determination that the student was ineligible for special education services was insufficient and improper (Dist. Ex. 1). For relief, the parent requested funding by the district for five periods per week of special education teacher support services (SETSS) provided during the 2021-22 school year until January 2022 (id. at p. 2).

On September 14, 2023, the parties convened for a prehearing conference before the IHO, where the IHO indicated that the district was preparing a motion to dismiss the parent's due process complaint notice (Tr. pp. 1-4).

By written motion to dismiss dated October 2, 2023, the district asserted that the parent's claims set forth in the June 16, 2023 due process complaint notice were barred by the IDEA's two-year statute of limitations and that no exceptions to the statute of limitations applied to extend the timelines (Dist. Mot. to Dismiss at pp. 6-10). The district alleged that, even applying the Governor's executive orders that tolled the limitations period during the COVID-19 pandemic, the parent's filing deadline was October 20, 2022 and therefore her claims were time-barred (id. at pp. 10-11).

The parent filed a prehearing brief in opposition to the district's motion to dismiss dated October 23, 2023 (see Prehr'g Br. in Opp'n). The parent argued that her claims were not barred by the statute of limitations because she requested a reevaluation of the student "over a year after the February 28, 2020 [CSE] meeting" by her 10-day letter to the district dated October 4, 2021 and that the district failed to respond to her request which resulted in a denial of FAPE for the 2021-22 school year (id. at pp. 2-3). As such, the parent alleged that she timely filed her June 16, 2023 due process complaint notice within the IDEA's two year statute of limitations because her claims accrued on October 4, 2021 (id.).

The parties reconvened the impartial hearing on November 20, 2023, with the intention of the IHO orally rendering a decision on the district's motion to dismiss; however, the IHO

experienced technical problems and indicated that she would instead issue a written decision on the motion (Tr. pp. 9-10).[2]

By decision dated November 20, 2023, the IHO granted the district's motion to dismiss the parent's June 16, 2023 due process complaint notice with prejudice (IHO Decision at p. 2). The IHO determined that the parent knew or should have known that her claims accrued at the time of the February 28, 2020 CSE meeting and, thus, her claims set forth in her June 2023 due process complaint notice were barred by the statute of limitations (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the IHO erred in determining that the parent's claims year set forth in her June 2023 due process complaint notice were barred by the statute of limitations.

V. Discussion – Statute of Limitations

The IDEA 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]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of the City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "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]).

Exceptions to the timeline to request an impartial hearing apply if a parent was 1) 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; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

The parent argues that the statute of limitations began to run when she sent her 10-day letter to the district on October 4, 2021 because the district failed to respond to her request for

[2] There was also a status conference held on November 6, 2023, but a representative from the district did not appear (Tr. pp. 5-7).

reevaluation and therefore denied the student a FAPE for the 2021-22 school year (Req. for Rev. ¶¶4-6).[3]

As noted above, the parent initially referred the student for special education services in October 2019, and the district responded by conducting initial evaluations and assessments and convening a CSE to discuss the student's educational needs (Dist. Ex. 2; see generally Dist. Ex. 3).[4] The CSE convened on February 28, 2020 and found the student ineligible for special education services (Dist. Ex. 2). According to meeting minutes, during the CSE meeting, the parent and representatives from the nonpublic school the student was attending "strenuously disagree[d] with [the] ineligib[ility] finding" (Dist. Ex. 5). The minutes further reflect that it was determined that the parent would provide the CSE additional documentation, at which time, the CSE would reconvene (id.). The district sent a letter to the parent dated February 23, 2020, advising of the February 2020 CSE's ineligibility determination and that the parent had the right to request mediation or an impartial hearing if she disagreed with the CSE's determination (Dist. Ex. 3). On March 2, 2020, the district sent a prior written notice to the parent, which also summarized the February 2020 CSE's ineligibility determination, the evaluative information relied upon, the reasons for declining to recommend related services, and where the parent could find a copy of the procedural safeguards notice (Dist. Ex. 4). Then, approximately one and a half years later, on October 4, 2021, the parent sent a letter to the district via facsimile entitled "10 Day Notice," stating her disagreement with the February 2020 CSE's determination and her intent to seek district funding for special education services for the student for the 2021-22 school year if the district did not provide them (Parent Ex. A).

As stated above, the date from which the statute of limitations begins to run is the date the party knew or should have known of the alleged action that forms the basis of the due process complaint notice. A review of the parent's June 2023 due process complaint notice demonstrates that the parent alleged that the CSE convened on February 28, 2020 and inappropriately found the student ineligible for special education services (see Dist. Ex. 1). Notably, the parent never mentioned her October 4, 2021 letter in her June 2023 due process complaint notice or otherwise

[3] In support of her argument, the parent cites to a State regulation regarding filing due process complaint notices however, the regulation does not support her calculation of the limitation period (Req. for Rev. ¶ 20). The State regulation the parent cites to states:

> [a] parent or a school district must submit a complete due process complaint notice pursuant to subdivision (i) of this section prior to initiation of an impartial due process hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child.

(8 NYCRR 200.5[j][1]). However, this is a general statement indicating that a parent of a student with a disability who wishes to initiate due process must complete a due process complaint notice; it does not give specifics regarding statute of limitations and when certain issues accrue and thus does not support the parent's argument that the statute of limitations began to accrue on October 4, 2021.

[4] The parent did not raise any allegation regarding the district's initial evaluation of the student in her due process complaint notice (see Dist. Ex. 1).

alleged that the district failed to respond to a referral of student after the February 2020 CSE meeting (see id.).[5]

By focusing her accrual argument on the 10-day notice letter and alleging that the district failed to treat the letter as a referral, the parent attempts to raise allegations that were not included in the due process complaint notice. Generally, a party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). As the parent did not reference her October 4, 2021 10-day letter in her June 2023 due process complaint notice, it would be unfair for the parent to now raise issues about the district's response to her October 4, 2021 letter for the first time on appeal (see Dist. Ex. 1). Moreover, the district did not address the parent's October 4, 2021 10-day letter in its motion to dismiss which leads the undersigned to believe that the district was unaware it would have to defend against a claim regarding its purported inaction in response to such letter (see generally Dist. Mot. to Dismiss).

Thus, the parent's claim that the district denied the student a FAPE for the 2021-22 school year was premised on the parent's disagreement with the district's ineligibility determination and, therefore, accrued at the time of the February 28, 2020 CSE meeting when the student was determined ineligible for special education services, not on October 4, 2021 (see generally Parent Ex. A). The parent was present at the February 2020 CSE meeting and was aware of her procedural rights (Dist. Ex. 3; see generally Dist. Exs. 4; 5).[6] Further, the district sent written notification of the February 2020 CSE's determination to the parent on February 28, 2020 and March 3, 2020 and the parent does not allege she did not receive such notices (Dist. Exs. 3; 4; see Dist. Ex. 1). Moreover, the meeting minutes and the parent's 10-day notice letter, reflect that the parent knew about her disagreement with the CSE's ineligibility determination at the time of the February 2020

[5] A review of the October 4, 2021 10-day notice letter does not support the parent's argument that the letter constituted a written referral of the student for an evaluation (see Parent Ex. A). The parent labeled the letter a "ten day notice," which is defined by statute as the means by which parents notify a district "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). By definition, the letter is meant to state disagreement with actions taken by the district in the past and alert the district to the parent's future intentions. Without clearer language requesting the district to evaluate the student and consider his eligibility for special education in the future, I would not find that the language in the parent's letter would automatically trigger the district's obligation to initiate an initial evaluation of the student under the provision in State regulation for written referral of a student (see 8 NYCRR 200.4[a]; see also D.K. v. Alington Sch. Dist., 696 F.3d 233, 248 n.5 [3d Cir. 2012] [finding that "general expressions of concern" do not amount to "a 'parental request for evaluation' under the plain terms of the statute"], quoting 20 USC 1415[d][1][A][i]).

[6] The parent made no allegations that she was not aware of her procedural rights in her June 2023 due process complaint notice, in her response to the district's motion to dismiss, or on appeal (see generally Dist. Ex. 1; Prehr'g Br. in Opp'n; Req. for Rev.).

CSE meeting and expressed her view to the CSE; this lends further supports a finding that the parent knew at the time of the February 2020 CSE meeting that she was not in agreement with the CSE's ineligibility determination (see Parent Ex. A at p. 2; Dist. Ex. 5 at p. 1). Accordingly, the hearing record demonstrates that the parent's claim accrued on February 28, 2020.

Additionally, as correctly argued by the district, there are no exceptions to the statute of limitations that apply in this matter and the parent has not alleged that any exception applies or that the statute of limitation should have been tolled for COVID-19. As such, I agree with the district that the parent has waived any tolling arguments on appeal, and I do not need to further address this issue. However, I note briefly that the Governor's executive orders on tolling during the COVID-19 pandemic would only have given the parent until November 4, 2022 to file her due process complaint notice.[7] Thus, based on the above, the parent's June 16, 2023 due process complaint notice was time-barred by the statute of limitations and no exceptions or tolling provisions apply that would make the parent's claims timely.

VI. Conclusion

Having determined that the parent's due process complaint notice was not filed within two years from the date of accrual of the parent's claims related to the 2021-22 school year, the parent does not claim any exceptions to the statute of limitations, and application of the COVID-19 tolling period does not render the parent's claims timely, I find that the parent's allegations are barred by the statute of limitations and there is insufficient basis to disturb the IHO's decision on this point.

[7] The Governor of the State of New York issued several executive orders during the COVID-19 pandemic; within one such order, Executive Order 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency)," the Governor "temporarily suspend[ed] or modif[ied] any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency" (9 NYCRR 8.202.8). More specifically, the Governor, via Executive Order 202.8, "temporarily suspend[ed] or modif[ied], . . . the following:"

> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matter during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, or 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 procedural 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

(9 NYCRR 8.202.8). The Governor repeated the same language in subsequent executive orders until the issuance of Executive Order 202.67 on October 4, 2020, which specifically terminated these tolling provisions as of November 3, 2020 (9 NYCRR 8.202.167). The New York State Appellate Division, 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, 585 [2d Dep't 2021]).

I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 2, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER