The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-199

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Jesse Cutler, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Siobhan O'Brien, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Windward School (Windward) for the 2020-21 school year. 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The CSE convened on May 13, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Dist. Ex. 5).[1] The parents disagreed with the recommendations contained in the May 2020 IEP, as well as the district's alleged failure to identify a particular public school site for the student to attend for

[1] Although the IEP developed at the May 13, 2020 CSE meeting was admitted into evidence as Exhibit 5 (Tr. pp. 3, 8), the document is labeled as District Exhibit 6 (Dist. Ex. 5). However, a prior written notice dated May 6, 2021 was admitted into evidence as District Exhibit 6 and is also labeled as District Exhibit 6 (Dist. Ex. 6). For the purposes of this decision the May 13, 2020 IEP will be referred to as "District Exhibit 5".

the 2020-21 school year and in a due process complaint notice, dated March 31, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

On May 19, 2023, prior to the first hearing date, the district submitted a written motion to dismiss the due process complaint notice, arguing that it should be dismissed on statute of limitations grounds (Dist. Mot. to Dismiss).

On May 31, 2023, the parents filed opposition to the district's motion to dismiss (Parent Opp'n to Mot. to Dismiss).

An impartial hearing convened before the City of New York Office of Administrative Trails and Hearings (OATH) on June 14, 2023 and concluded on July 10, 2023 after two days of proceedings (June 14, 2023 Tr. pp. 1-14; July 10, 2023 Tr. pp. 1-25).[2] At the June 14, 2023 hearing date the IHO acknowledged the district's motion and the parents' opposition thereto and decided to table the motion and allow the parties to enter evidence on the merits of the parents' claims (June 14, 2023 Tr. pp. 6-7).

In a decision dated August 11, 2023, the IHO dismissed the parents claims related to the 2020-21 school year as being outside the applicable statute of limitations (IHO Decision at pp. 5-8).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also 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 parents' claims related to the 2020-21 school year are 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]).

[2] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "June 14, 2023 Tr. p. 1."

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).

A. Statute of Limitations- March 31, 2023 Due Process Complaint Notice

The parent contends that the IHO identified an incorrect accrual date when applying the two-year statute of limitations and incorrectly calculated the COVID-19 tolling period. The district argues that the IHO correctly found that the parents' claims for the 2020-21 school year were time-barred and that the parents' claims accrued either on May 13, 2020—the date of the relevant CSE meeting—or on September 1, 2020—the first day of the relevant school year.

A review of the parents' due process complaint notice reveals that the parents asserted several procedural claims concerning the educational program recommended for the student during the 2020-21 school year (Parent Ex. A). For example, the parents allege that although a CSE meeting occurred "in the Spring of 2020" no IEP was provided to the parents, and further that no school placement was identified to implement the student's special education program (Parent Ex. A at p. 2).

The IHO found that the parents' claims accrued, at the latest, on September 1, 2020, because the parents were aware that the student was not "receiving an IEP or special education program" at that time (IHO Decision at pp. 5, 7). The IHO then calculated the limitations period using both May 13, 2020, the date of the CSE meeting, and September 1, 2020, a date near the start of the 2020-21 school year, as possible accrual dates (id. at p. 7). The IHO noted that because both dates fell within the tolling period established by executive order running from March 2020 through November 3, 2020, the two-year statute of limitations for claims accruing on either date ran from November 4, 2020 through November 4, 2022 (id.).

On appeal, the parent argues that their claims accrued at "the commencement of the 2020-21 school year" in "early September 2020" (Req. for Rev. at p. 6).[3] In light of the above, it appears the parties are in relative agreement as to the accrual of the parents' claims and there is no reason to disturb the IHO's finding that the parents knew or should have known about any action forming the basis of their claims concerning the 2020-21 school year by September 1, 2020, at the latest, and that that is the accrual date for the claims raised in the parents' March 31, 2023 due process complaint notice.

[3] The parents do not assert that their claims accrued on the date of a prior written notice sent to the parents by the district dated May 6, 2021 (see Req. for Rev. at pp. 5-8; Dist. Ex. 6).

Turning to the parents' claims related to the tolling period created by executive order during the COVID-19 pandemic, the parents argue that the IHO erred by failing to properly apply the tolling.

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).[4]

As noted above, the IHO found that because the parents' claims accrued after the March 20, 2020, executive order that began the tolling period, the two-year limitations period did not begin to run until after the tolling period expired on November 3, 2020 (IHO Decision at p. 7). The IHO thus found that the limitations period began running on November 4, 2020 and that the parents had until November 4, 2022 to file a due process complaint notice (id.). Thus, after applying the tolling period the IHO found that the parents' March 31, 2023 due process complaint notice was untimely (id. at pp. 5-8).

In the parents' view, the IHO should have calculated the limitations period differently. However, the parents appear to confuse what a tolling period is; according to the parents "[a] toll, by contrast, stops the clock in terms of counting days, and then adds the number of days back to the limitations period when the toll is lifted" (Req. for Rev. at p. 6). Thus, the parent contends that "a 228-day tolling period should have been added to the statute of limitations, resulting in the

[4] 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]).

Petitioner's claims being timely interposed" (id.). By the parents' calculation, when considering the accrual date to be September 1, 2020, and a limitations period of two years ending September 1, 2022, plus "a 228-day tolling period," the "expiration date of the statute of limitations would be April 17, 2023," thereby rendering the March 31, 2023 due process complaint notice timely (id. at pp. 6-7). The parents also offer an alternative calculation acknowledging that the tolling period would only run from the date the claim accrued; however, in that instance, the parent requests that the May 13, 2020 CSE meeting be used as the accrual date and that the parent should have 174 days of tolling added onto the limitations period after it is lifted so that the limitations period would run from November 4, 2020 for two years plus an additional 174 days (id. n. 5).

The parents point to two recent cases as support for their argument, however, neither case supports their calculation of the limitations period or the tolling provisions, and I find that the IHO correctly determined that the parents' claims concerning the 2020-21 school year were untimely.

First, the parents contend that the holding in McLaughlin v. Snowlift, Inc. (214 A.D.3d 720 [2d Dep't 2023]) supports their argument. In that case a three-year limitations period was at issue and the relevant claim accrued prior to the beginning of the COVID-19 tolling period, the time to commence the action was tolled for 228 days from March 20, 2020 until November 3, 2020 during the COVID-19 tolling period, and the remainder of the limitations period then ran (McLaughlin, 214 A.D.3d at 720-21). Second, in D.S.R. v. New York City Dep't of Educ. (2023 WL 1993349, at*3-4 [S.D.N.Y. Feb. 14, 2023]) a three-year limitations period for attorney's fees under the IDEA was at issue and the relevant claim accrued prior to the beginning of the COVID-19 tolling period, the time to commence the action was tolled for 228 days from March 20, 2020 until November 3, 2020 during the COVID-19 tolling period, and the remainder of the limitations period then ran (id.).

Here the parents' claims arose during the COVID-19 tolling period, the time to commence the action was tolled from the date of accrual on September 1, 2020 until November 3, 2022, and the remainder of the limitations period—two years—then ran. The limitations period began running on November 4, 2020 and the parents had until November 4, 2022 to file a due process complaint notice. As noted by the IHO, accrual of the parents' claims within the period tolled by executive order between March 2020 and November 3, 2020 would result in the same limitations period (see IHO Decision at p. 7). Additionally, as indicated by the IHO, the parents' interpretation, adding an additional day into the limitations period for each day of tolling would result in double dipping (id.). Finally, as the parents are obviously aware, their interpretation would also result in an absurd situation where the limitations period would end later for a claim that accrued earlier. For example, for a claim that accrued as of the May 13, 2020 CSE meeting, under the parent's interpretation, they would have had until April 27, 2023 to file their claim (Req. for Rev. n. 5); however, under the parents interpretation, a September 1, 2020 accrual date, would resulted in a limitations period that ended earlier, as of January 5, 2023. Accordingly, the parent's interpretation of the limitations period is entirely without merit, and even if it were not, using the parents' interpretation on the accrual date of the parents' claims in this proceeding, of September 1, 2020, would still have resulted in the parents' claims, as raised in the March 31, 2023 due process complaint notice, falling outside the limitations period.

Thus, after applying the tolling period the parents' March 31, 2023 due process complaint notice was untimely and, other than tolling, the parents do not allege that any exceptions to the statute of limitations apply in this matter.

VI. Conclusion

Having determined that the parents' due process complaint notice was not filed within two years from the date of accrual of the parent's claims related to the 2020-21 school year, the parents do not claim any exceptions to the statute of limitations, and application of the COVID-19 tolling period does not render the parents' claims timely, I find that the parents' allegations are barred by the statute of limitations and there is insufficient basis to disturb the IHO's decision on this point.

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**
December 1, 2023

STEVEN KROLAK
STATE REVIEW OFFICER