PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER
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Re: K.R.. Due Process Hearing
No. 00495-0910 AS

RULING ON MOTIONS AND ASSERTED LEGAL DEFENSES

Kentall Rosario (Student) is a ten year old resident of the Lower Merion School District (District). Mr. and Mrs. Rosario (Parents) brought this request for due process, claiming, among other things, compensatory education from the beginning of the 2006-2007 school year. They filed their Complaint Notice (complaint) on November 23, 2009, relying upon, among other things, the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504). The complaint included both retrospective and prospective claims against the District for educational services that allegedly were denied to the Student by the Agora Cyber Charter School (Charter School), in which the Parents had enrolled the Student after withdrawing him from the District's school in mid-September 2009.

The District filed a motion to dismiss, asserting the IDEA limitations period. And also seeking dismissal of any allegations pertaining to a time when the Student was in a charter school by Parents' choice. Parents responded to the District's motion, asserting that the limitations period set forth in the 2004 amendments to the IDEA, 20 U.S.C.§1415(f)(3)(C), does not limit the Parents' claims. Parents asserted that they had preserved their original filing date when they filed a previous due process complaint, raising the same allegations, on August 21, 2007; this previous complaint had been dismissed "without prejudice" by order of Special Education Hearing Officer Dr. Linda Valentini on November 26, 2007.

Parents also argued that the IDEA limitations period is subject to equitable tolling due to inequitable circumstances, or when a party has preserved its rights by filing a defective pleading. Here, Parents alleged that Hearing Officer Valentini had led them to delay filing a new complaint until the Student was sufficiently recovered from a critical, life-threatening surgery that had drawn their attention away from the educational issues that they had begun to litigate.

Finally, the Parents argued that the explicit exceptions to the IDEA limitation period should be applied, because the District had withheld information from them. They argued specifically that the District did not inform them of the two year limitation period for IDEA claims and its application to their claims. They also argued that the District triggered the exceptions by failing to provide Procedural Safeguards in Spanish, the Father's native language.

Finally, the Parents argued that they should be permitted to seek compensatory education and other relief from the District, their school district of residence, even for educational actions or inactions by the Agora Cyber Charter School (Charter School), in which they had enrolled the Student after withdrawing him from the District's school in mid-September 2009.

Upon review of the Parents' arguments and citations, as well as those of the District, I rule that the Parents are not barred by the IDEA limitations period from pursuing their claims against the District from the beginning of the 2006-2007 school year. I find that the previous order of the hearing officer intended to and did preserve the claims asserted in their initial filing. As this finding resolves the issues raised by the District with regard to the time prior to two years before the filing of the latest Complaint Notice, I do not reach the many other arguments raised by the parties with regard to this time period.

I also find that the District is not responsible for claims made with regard to the period during which the Student was enrolled in the Charter School. Under the Pennsylvania regulations governing charter schools, a charter school is a Local Education Agency (LEA) for purposes of the IDEA. 22 Pa. Code §711 et seq. Therefore, for the period of enrollment in the Charter School, the Parents' remedy is against that school, and not against the District.

PROCEDURAL HISTORY

The parties submitted a binder of stipulated exhibits, which is marked as HO-3. (NT 16-5 to 17-20; HO-3 pp. 1 to 20.)[1] These documents reveal that the Parents filed a due process Complaint Notice on or about August 21, 2007. (HO-3 p. 4, 5.) The Complaint Notice covered in summary form issues including the Student's medical needs, placement in the current school, need for placement near home, need for nursing care, physical therapy, speech therapy, occupational therapy, life skills training, and transition into academic programming. Ibid. On September 4, 2007, the District challenged the sufficiency of this complaint; on

[1] For purposes of this ruling, "NT" will refer only to the transcript of hearing on January 20, 2010.

September 8, 2007, Hearing Officer Dr. Linda Valentini found the complaint insufficient, (HO-3 pp. 12 to 14), and allowed the Parents to amend their complaint. At this time, the Parents were unrepresented. (NT 75-23 to 76-25, 106-6 to 109-5; HO-3 pp. 9, 11.)

The Parents sent a letter to Hearing Officer Valentini dated September 17, 2007, reiterating and somewhat amplifying their concerns with medical care and placement. (HO-3 p. 16.) A hearing scheduled for October 19, 2007 was continued on October 2 without date; Hearing Officer Valentini requested a status report on November 19, in which the Parents were directed to state whether or not they intended to proceed with their due process complaint. (HO-3 p. 18.)

In her October 2, 2007 letter to Parents, Hearing Officer Valentini noted that the Student was scheduled for an important medical procedure on the date of the hearing, with likely lung surgery to follow. She noted that the District was reviewing medical records to consider whether or not to assign greater one-to-one attendance. She "offered two alternatives – either a parental withdrawal of the complaint with the option of refiling if the District's review of Kantell's medical records did not lead to a resolution satisfactory to the parents, or a continuance … ." (HO-3 p. 18.)

The Parents did not provide the status report expected of them on November 19. Hearing Officer Valentini called them twice, leaving recorded messages. She then wrote a letter on November 26, 2007, (HO-3 p. 20), noting that she had offered the opportunity to Parents to "withdraw and file later." Receiving no response to her telephone calls, Hearing Officer Valentini wrote:

> Therefore I am dismissing the matter without prejudice, which means that you may re-file for a hearing when you are in a position to do so. Please be aware, however that there is a time limitation on filing for a hearing; I would advise [seeking legal advice] so that you know the "window" you have for re-filing if you choose to so so. [HO-3 p. 20.]

In mid-September 2009, the Parents withdrew the Student from the District and enrolled him in the Charter School. Subsequently, on November 23, 2009, the Parents filed their second Complaint Notice. (NT 29-12 to 13.)

FINDINGS AND DISCUSSION – IDEA LIMITATIONS

The IDEA provides:

> (C) Timeline for requesting hearing
> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint … .
> [20 U.S.C. 1415(f)(3)(C).]

20 U.S.C. 1415(f)(3)(C) is subject to only two explicit exceptions:

> (D) Exceptions to the timeline
> The timeline described in subparagraph (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).]

Hearing Officer Valentini was well aware that she was dealing with a pro se party, unschooled in the law. In addition, in the span of three documents and several telephone conversations, she clearly conveyed that she was holding the Parents harmless for any dismissal at that juncture, because she was cognizant that the Parents were preoccupied with the Student's medical care. (NT 82-15 to 84-2, 110-7 to 11-7.) Nothing in her letters or orders suggests that she intended her dismissal of the previous matter to preclude the Parents from filing to pursue the claims they had identified – albeit in a flawed manner - in their original complaint.

Hearing Officer Valentini's letter of November 26, 2007 did refer to a "time limitation on filing for a hearing." The Parents were warned that the clock was running, but were not explicitly told what the time limit was. Instead they were enjoined to seek legal counsel.

The District argues that this put the parents on notice that the IDEA two year limitation period commenced on the date of their original claims, whether they arose in 2005, 2006 or on the original date of filing, August 2007. (NT 151-16 to 153-5.) However, the Father's testimony,

which I find credible on this point, makes clear that he did not even think about a two year limitation period – much less whether it started to run before the dismissal letter on November 26, 2007. (NT 82-22 to 84-20, 110-7 to 111-7.) The very suggestion that the letter could have intended to preserve some unspecified prior date as the starting point for limitations runs contrary to the explicit message of the dismissal letter. I conclude that it cannot reasonably be interpreted to convey such a convoluted, arcane time line to these unrepresented individuals.

Such a limitation period would have set a trap for the Parents: they would have seen a two year period and assumed that they had two years, when they only had about a year from the time of dismissal. (NT 154-13 to 155-18.) I conclude that, if Hearing Officer Valentini intended this nuanced application of the concept of dismissal without prejudice, she would have made it clear to the Parents. Her purpose in dismissing in this way was clearly to protect them; setting a procedural trap would contradict such a purpose. It is clear also, that the letter did not convey that the limitation period would start to run at any time before the filing of the dismissal letter itself. (NT 126-22 to 128-19.)

In my view, it is much more likely that the hearing officer intended to restart the limitations period of the IDEA from the time of dismissal without prejudice. This result is more in keeping with her obvious intention to hold the Parents harmless for the dismissal, a dismissal that was not due to their fault, but to the frightening and unexpected events that necessitated surgery on the Student's lungs. I find that this was the effect of the letter in any event, since it is not plausible to expect any of the persons who read this to conclude otherwise.

This result is also more in keeping with the custom and practice in special education administrative hearings. In this forum – unlike the custom in the courts – it is common even for attorneys to agree that a matter will be dismissed "without prejudice" – frankly intending to preserve the original filing date of the dismissed complaint for purposes of the IDEA limitation period. Usually, such dismissal is requested without elaboration of the meaning of the phrase, "without prejudice." It is simply understood in this forum that such dismissal is intended to preserve the original filing date. While such a use of the phrase may not be universal, it is so common that the phrase has acquired that meaning.

The Parents acted in a way that was consistent with their understanding of Hearing Officer Valentini's instructions to them – to deal with the surgery and then attend to the due process matter. The Student's surgery and recovery lasted several months, and within a year, the Parents again tried to obtain educational services for him. (NT 84-21 to 86-21.) Moreover, they re-filed within two years of the dismissal, consistent with

the Hearing Officer's warning in her last letter that they would need to re-file within the legal timeline. (NT 154-18 to 154-25.)

The District cites Brennan v. Kulick, 407 F.3d 603 (3d Cir. 2005), for the proposition that a dismissal "without prejudice" is treated as a nullity and does not have a tolling effect in federal court. This case delineating federal appellate jurisdiction is not binding in the instant matter, which deals with the factual meaning of a specific administrative decision to dismiss without prejudice. I will not interpret the meaning of the hearing officer's letter by reference to federal appellate jurisdiction law. Rather, the order of dismissal must be given its common meaning in administrative due process proceedings.

Moreover, Brennan supports the Parents' argument that the instant determination must be made by taking into consideration the circumstances of the particular dismissal. This is emphasized by the Third Circuit decision upon which Brennan is based, Cardio-Medical Associates, LTD. v. Crozer-Chester Medical Center, 721 F.2d 68, 77 (3d Cir. 1983), in which the Court emphasized that it is the circumstances of the dismissal that ultimately determine its finality for appellate jurisdictional purposes. Similarly, here, I find that the circumstances gave the order the effect of permitting the Parents to re-file within two years for the issues encompassed in their original filing.

In the present matter, the District argues that a finding for the Parents in effect puts a duty on districts and hearing officers to offer legal advice to parents about how to interpret the IDEA limitations period. I disagree. First, my finding puts no duty whatsoever on the District; it is based solely upon the effect of Hearing Officer Valentini's order dismissing the instant matter "without prejudice." This finding is fact-specific and limited to the facts of this matter. Moreover, it is based upon my conclusion as to the effect of the order in relation to the limitations period, not upon any interpretation of the duties established by law with regard to such orders.

FINDINGS AND DISCUSSION – ENROLLMENT AT CHARTER SCHOOL

The Parents argue that the District should be held responsible for any claims they have against the Charter School, both retrospective and prospective. This argument runs contrary to statutory and regulatory law. A cyber charter school is an independent public school. 24 PS 17-1703-A. As such, it alone is responsible for providing a FAPE to its enrolled students under the IDEA. 22 Pa. Code §711.3(a). The Parents rely upon 24 PS 17-1744-A(3), which requires districts to provide assistance to cyber charter schools in delivering services to eligible students, and

permits them to charge for those services. They also rely upon 24 PS 17-1725-A(a)(4), which permits intermediate units to provide services to charter schools on a contract basis, and charge for the cost of such services. These provisions for assisting charter schools do not alter the plain language of 24 PS 17-1703-A, cited above, nor the even plainer mandate of 22 Pa. Code §711.3(a) that charter schools bear the responsibility for providing FAPE to their eligible students.

The Parents cite York Suburban School District v. S.P., 872 A.2d 1298 (Pa. Cmwlth Ct. 2005), which suggested that a local school district is responsible for FAPE in a charter school. The latter was based upon a provision of the 1949 Public School Code that is since amended, and thus offers no guidance here.

CONCLUSION

The Parents will be allowed to present their requests for relief for the period from the beginning of the 2006-2007 school year until the date on which they withdrew the Student from the District in mid-September 2009. This includes all retrospective claims with regard to the Student's medical needs, placement in the current school, placement near home, nursing care, physical therapy, speech therapy, occupational therapy, life skills training, and transition into academic programming.

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February 18, 2010