COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS

In RE: Student v. Ludlow Public Schools **BSEA #** 15-09319

Ruling on Ludlow Public Schools' Partial Motion to Dismiss

On May 21, 2015, Parent requested a Hearing in the above-referenced matter[1] and later amended her Hearing Request on June 12, 2015. Parent's amendment included a compensatory speech language services claim for services not rendered while Student was attending the Verbal Behavior Classroom at the Robinson Park School in Agawam in 2013.

On June 23, 2015, Ludlow Public Schools ("Ludlow") filed a Partial Motion to Dismiss, stating that Parent's compensatory speech services claim dating back to 2013, when Student attended a program at Agawam Public Schools, should be dismissed because it was barred by the two-year statute of limitations applicable appeals pursuant to the Individuals with Disabilities Education Act ("IDEA").

On July 7, 2015, Parent requested an extension of time to file her response to Ludlow's Partial Motion to Dismiss, which was granted on July 14, 2015, extending Parent's deadline through July 31, 2015. Parent requested an additional extension on July 24, 2015, which request was also granted and the deadline for Parent's response was extended through August 14, 2015. Parent's response to Ludlow's Partial Motion to Dismiss was received on August 14, 2015. In her Response, she argued that her request for compensatory speech services was timely and therefore, it should not be dismissed. Upon consideration of the Parties' submissions, the Hearing Request, Amendment and Ludlow's Response to Parent's Hearing Request, Ludlow's Partial Motion to Dismiss is **DENIED** as explained below.

Facts:

The facts delineated below are presumed to be true for the purposes of this Ruling only:

1. Student is a nine year-old whose primary diagnosis is Autism Spectrum Disorder. He attended school in Ludlow starting in August 2011 (pre-kinder) through April 2013 (first grade).

[1] The matter was originally assigned to Hearing Officer Ann Scannell and later administratively reassigned to Hearing Officer Rosa I. Figueroa on July 2, 2015. All of the Orders and Rulings issued by the previous Hearing Officer stand (Ruling on Stay-put and Recusal Motion), and will not be subject to further administrative review.

2. In response to Parent's dissatisfaction with Ludlow, in early 2013[2], Student was enrolled in Agawam Public Schools' Verbal Behavior classroom at Robinson Park School.

3. Student's Team reconvened on June 13, 2013, to consider a speech and language evaluation, teacher reports and occupational therapy recommendations. The Team also discussed compensatory speech and language services. The Team Amended Student's IEP, making changes to his goals and objectives (speech and language) and modifying the Service Delivery Grid to reflect the addition of speech and language services 3x30 minutes/week during the school year and 2x30 minutes/week during the extended school year, among other services. On June 26, 2013, Parent accepted this IEP Amendment in full.

4. Student remained in Agawam through January 2014, the middle of his second grade, when Parent became dissatisfied with Student's placement.

5. In response to Parent's concerns regarding Agawam's program, Student was placed by Ludlow at the May Center (May) where he remained through 2015. While at May, a breakdown in communication between Parent and the May staff triggered reconvening of Student's Team on March 2, 2015. The Parties agreed that Student would remain at May through May 17, 2015, while Ludlow conducted Student's three year reevaluation and while a new placement was identified.[3]

6. Student's Team reconvened on April 13, 2015, to discuss the result of Student's evaluations and since none of the schools to which referral packets were sent was available, Ludlow proposed that Student attend an in-district program.

7. Ludlow forwarded the new IEP to Parents on April 21, 2015.

8. On May 14, 2015, Parent rejected Ludlow's proposed IEP and placement in Ludlow, which program was scheduled to start on May 18, 2015. Soon thereafter, Student stopped attending school.

9. On June 12, 2015, in her Amended Hearing Request, Parent alleged for the first time that Student was owed compensatory speech services from his placement at Agawam in 2013. Parent's original May 21, 2015 Hearing Request did not mention Agawam issues with speech language services, or compensatory education.

10. At the request of the Hearing Officer, on June 12, 2015, Parent[4] and Ludlow submitted their positions on Stay-put and a Ruling was issued on June 23, 2015, finding that Ludlow's IEP fulfilled its obligations under Stay-put.

[2] The parties disagree on the date the Student enrolled in Agawam. The Parent alleges the Student enrolled in Agawam January 2013, while Ludlow alleges the student enrolled in Agawam in March 2013.
[3] It is Ludlow's position that despite Parent's reservations, the May placement was appropriate for Student.
[4] Parent supplemented her Stay-put submission on June 17, 2015.

11. On June 23, 2015, Ludlow filed a Partial Motion to Dismiss, alleging that Parent's 2013 compensatory speech services claim was time-barred by the statute of limitations.

12. With a permissible extension, the Parent filed a Response to the Partial Motion to Dismiss on August 14, 2015. Parent agreed that the applicable statute of limitations was two years, but disagreed with Ludlow's interpretation of the "dispute date" arguing that the actions that form the basis of the complaint fell within the two year statute of limitations. Parent's Response also included several claims unrelated to the Partial Motion to Dismiss not addressed here.

Legal Framework:

I. Standard for Ruling on Motion to Dismiss

The parties do not dispute the jurisdiction of the BSEA over motions to dismiss involving failure to state a claim upon which relief may be granted, pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), and Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*. These provisions are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For a claim to survive a motion to dismiss, the factual allegations must plausibly suggest an entitlement to relief. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 557 (2007)). In evaluating the complaint, the Hearing Officer must take as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor." *Blank v. Chelmsford Ob/GYN, P.C.*, 420 Mass. 404, 407 (1995). These "[f]actual allegations must be enough to raise a right to relief above the speculative level…[based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)…" *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). The Hearing Officer will consider the facts alleged in the pleadings and documents attached or incorporated by reference. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000).

Only if the Hearing Officer cannot grant relief under federal or state special education law (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), may the case be dismissed. See *Calderon-Ortiz v. LaBoy Alverado*, 300 F.3d 60 (1st Cir. 2002); *Witinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005). Conversely, if the opposing party's allegations raise the plausibility of a viable claim that may give rise to some form of relief under special education law (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), the matter may not be dismissed. See *Ashcorft v. Iqubal*, 129 S. Ct. 1937, 1948 (2009).

II. Statute of Limitations

A motion to dismiss is an appropriate instrument for raising a statute of limitations defense. *Epstein v. Seigel*, 396 Mass. 278, 279 (1985). Pursuant to the Individuals with Disabilities Education Act (IDEA), a moving party must request a 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). Thus, under the IDEA, the basis for a party's claim must fall within the two year statute of limitations, or meet one of the exceptions[5]. If a claim fails to meet this standard, it may be dismissed.

Additionally, Rule I(G) of the BSEA *Hearing Rules for Special Education Appeals* provides that "to the extent the amendment merely clarifies issues raised in the initial hearing request, the date of the initial hearing request shall be controlling for statute of limitations purposes. For issues not included in the original hearing request, the date of the amended hearing request shall be controlling for statute of limitations purposes."

Discussion:

I. Controlling Date for Statute of Limitations Purposes

In the original May 21, 2015 Hearing Request, Parent did not raise any claims involving the period in 2013 when Student was in Agawam, and she did not raise claims involving compensatory speech services. She first raised the aforementioned claims in her June 12, 2015 Amended Hearing Request which Amendment did not clarify or address her original claims but rather stated entirely new claims. I note that Parent's Response to Ludlow's Partial Motion to Dismiss did not address which was the controlling date for purposes of the statute of limitations.

The federal statute and the Hearing Rules for Special Education Appeals, however, are clear that the date on which an issue is first raised in the context of an IDEA claim, is the controlling date for purposes of the statute of limitations. As such, pursuant to BSEA Rule I(G), June 12, 2015, the date of Parent's Amended Hearing Request, shall control for statute of limitations purposes regarding Parent's compensatory speech and language services issues.

II. Motion to Dismiss 2013 Claim as Time-Barred by the Statute of Limitations

In her Amended Hearing Request, Parent claimed that Student was owed compensatory speech services from the time he was placed in Agawam in 2013.

Ludlow's Partial Motion to Dismiss, concedes that "during the first few weeks of the [March 2013[6]] placement, Agawam failed to provide Student with all of his speech services". However, Ludlow argued that Parent had failed to raise the claim involving the missing speech services

[5] There are two exceptions to the statute of limitations: 1) the local education agency misrepresented "that it had resolved a problem forming the basis of the complaint"; or, 2) the local educational agency withheld information required to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D).

[6] *See supra* note 1, at 1 (noting the Parent disagrees with Student's enrollment date at Agawam).

within two years of the alleged action. As such, Ludlow argued that the claim should be dismissed as Parent did not raise this misfeasance until June 2015.

Ludlow's submission included a June 13, 2013 IEP Amendment[7] which stated, that Student's Team "also considered recommendations for compensatory services in SL [speech]". Ludlow indicated that the Parent knew or should have known about the alleged action prior to June 2015. Thus, according to Ludlow, Parent's claim in this regard should be dismissed.

In her Response to Ludlow's Partial Motion to Dismiss, Parent disagreed with Ludlow's "dispute date" noting that she believed that the alleged action had taken place within the two year statute of limitations (i.e., after June 13, 2013). A review of Parent's submissions (her Amended Hearing Request and her Response to Ludlow's Partial Motion to Dismiss) show that none of her submissions specify *when* in 2013 she alleges that Agawam failed to provide Student agreed upon speech and language services. Parent simply states that Student is owed compensatory speech and language services.

The June 13, 2013 amended IEP, accepted by Parent on June 26, 2013,[8] indicates the Student should have received 3x30 minutes/week speech and language services during the school year and 2x30 minutes/week during extended school year. If Agawam failed to provide Student the agreed upon speech and language services at any time *after* June 26, 2013, those claims would be viable and not barred by the statute of limitations applicable to IDEA matters as the controlling date for the statute of limitation purposes is June 12, 2013. Drawing all inferences in Parent's favor, regardless of whether she is ultimately able to prove her allegations, I find that Parent has raised the plausibility of a viable claim, pursuant to *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, for which relief can be granted under special education law (20 U.S.C. § 1400 et. seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479). Therefore, Ludlow's Motion for Partial Dismissal is **DENIED**.

ORDER:

1. Ludlow's Partial Motion to Dismiss is **DENIED**.

By the Hearing Officer,

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Rosa I. Figueroa
Dated: September 8, 2015

[7] The IEP was signed by the Parent on June 26, 2013, but makes repeated reference to the actual date of the IEP meeting as June 13, 2013.

[8] The record does not indicate whether the Parties had agreed to implement the speech and language services as of June 13, 2013, the date of the meeting or whether the speech and language services were to be implemented immediately following Parent's acceptance of the IEP Amendment. As such, I use the date of Parent's acceptance of the IEP for purposes of this Ruling.