

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION

[Student]

v.

**FIFTH
PRE-HEARING ORDER**

Cannon Falls Public Schools (I.S.D. 252)

This matter came before Administrative Law Judge Eric L. Lipman for a Pre-Hearing Conference on August 9, 2013. The conference was undertaken by way of telephone “meet-me” conference call.

Among the purposes of the conference was to receive oral argument as to two motions *in limine*. The School District seeks to fix the date by which claims could have accrued at June 6, 2011 – two years before the date on which the due process complaint was filed. It likewise asserts that reimbursement of expenses is limited to properly-noticed claims for tuition reimbursement.

Andrea L. Jepsen, School Law Center, LLC, made an appearance on behalf of the Student. Nancy E. Blumstein, Ratwik, Rosak & Maloney, P.A., appeared on behalf of the Cannon Falls Public Schools, I.S.D. 252 (the District).

The Administrative Law Judge concludes that claims that accrued more than two years prior to the request for a due process hearing may be cognizable under the Individuals with Disabilities Education Act, as amended (IDEA). For that reason, it is appropriate under Minn. Stat. § 125A.091, subd. 18, for the Administrative Law Judge to require the Student to state his view, in advance of the hearing, as to when these claims accrued. Additionally, the Administrative Law Judge does not agree that IDEA bars claims for reimbursement of privately-paid evaluation services.

Based upon all of the submissions of the parties during the Pre-hearing Conference and all of the files, records and proceedings in this matter,

IT IS HEREBY ORDERED:

1. The District’s motions *in limine* are **DENIED**.

2. As part of its filings on **Wednesday, September 4, 2013**, the Student will file a notice as to the dates that his parents, as next friends, knew or should have known that:

- (a) there were “irregularities,” “flaws,” “false representations” or items “not considered” in the District’s evaluation of the Student (as alleged on page 3, 4, 7, 8 and 9 of the Complaint);
- (b) the educational goal related to Executive Functioning in the Student’s Individual Education Plan was impermissibly vague (as alleged on pages 5 and 6 of the Complaint);
- (c) the District failed to measure progress toward IEP objectives (as alleged on page 6 of the Complaint);
- (d) the District declined to meet the Student’s needs for assistive technology (as alleged on page 8 of the Complaint);
- (e) the Student did not receive occupational therapy services to which he is entitled (as alleged on page 9 of the Complaint);
- (f) the Student did not receive physical therapy services to which he is entitled (as alleged on page 9 of the Complaint);
- (g) the Student did not receive transportation services to which he is entitled (as alleged on page 9 of the Complaint);
- (h) the Student did not receive note-taking services to which he is entitled (as alleged on pages 9 and 10 of the Complaint); and,
- (i) the Student did not receive materials in an electronic format, to which he is entitled (as alleged on page 10 of the Complaint).

Dated: August 19, 2013

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

In its motions *in limine*, the District argues that IDEA bars any claim that accrued more than two years before the Parents' filed their due process complaint. The School District points to a long line of cases that reference a "two year statute of limitations" and count backwards two years from the filing date of the Complaint.¹

Additionally, the District asserts that reimbursement of expenses is limited to claims for tuition reimbursement. It argues that claims for privately-paid evaluations are not recoverable under IDEA. Particularly so in this instance, continues the District, because evaluations for related services are not necessary if it prevails on its claim that the Student is not eligible to receive services under IDEA.²

For his part, the Student asserts that the plain language of 20 U.S.C. § 1415, and the case law directly addressing this question, makes clear that the limitations period is not dependent upon the date of filing the due process hearing request. As the Student argues, the applicable limitations period can include claims that accrued more than two years before the filing of the due process complaint.³

Further, the Student asserts that neither IDEA nor its implementing regulations prohibit the recovery of expenses for privately-paid evaluation services. He asserts that that reimbursement for these services is appropriate because they are costs that would have been borne by the District had it faithfully followed the requirements of IDEA.

Analysis

I. The Statute of Limitations

20 U.S.C. § 1415 provides in pertinent part:

(b) Types of procedures

The procedures required by this section shall include the following:

. . .

(6) An opportunity for any party to present a complaint - . . .

¹ *District's Motion to Limit the Scope of the Hearing*, OAH Docket No. 8-1300-30720 at 6 – 7.

² *Id.* at 2.

³ See, RESPONSE TO DISTRICT'S MEMORANDUM, OAH Docket No. 8-1300-30720, at 8 – 10; see also, *Student v. South Washington County Schools*, ORDER ON MOTION TO DISMISS, OAH Docket No. 61-1300-30492 (2013).

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint

...

(f) Impartial due process hearing

...

(3) Limitations on hearing

...

(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 complaint⁴

Both of these sections were effective on July 1, 2005 and were placed into federal law through the Individuals with Disability Education Improvement Act of 2004 (IDEIA).⁵

While the great weight of precedent, from OAH and in the federal district courts, stands for the proposition that there is a “two-year statute of limitations” in IDEA, in the view of the Administrative Law Judge this summary of the statute is too brusque. The familiar shorthand is not, in fact, a good or a complete recitation of the statute.

In most cases, the shortcomings of this shorthand would not be meaningful or apparent. This is because in most cases the date on which a parent “knew or should have known about the alleged action that forms the basis of the complaint” is quite close in time to the date that the parent files a due process complaint. In such a circumstance, Judges, lawyers and litigants all count backwards from the date of filing by two calendar years, because this is a convenient way to give effect to the “look-back” provisions of 20 U.S.C. § 1415 (b)(6).⁶ And because many times the events that underlie the dispute fall comfortably within this two-year period, describing the limitations period as “two years long” is not controversial at all.

Yet, to say that the practice of counting backwards from the date of filing is often-used, thoroughly sensible and eminently helpful is not to say that it reflects the

⁴ See also, 34 C.F.R. § 300.507 (a) (1) and (2).

⁵ Pub. L. No. 108-446, § 302.

⁶ See, e.g., *Torda v. Fairfax County School Board*, 2012 WESTLAW 2370631 (E.D. Va. 2012) (“[T]he Tordas' administrative complaint is treated as having been filed on October 7, 2009.... Thus, the Tordas may not challenge any conduct by [the School District] made prior to October 7, 2007”).

limitations rule that Congress provided. If Congress has the authority to enact a statute, tribunals are obliged to apply the rules that Congress provides⁷ – even when another understanding is long-standing.⁸

The School District’s argument that both 20 U.S.C. § 1415 (b)(6) and 1415 (f)(3)(C) reflect a single two-year look-back period that ends on the date of filing, is not well taken.⁹ Notwithstanding the very familiar practice in this area, neither 20 U.S.C. § 1415 (b)(6) nor 20 U.S.C. § 1415 (f)(3)(C) reference the date of filing of the due process hearing request. In fact, the limitations period pivots off of a different date entirely – the date on which the parent (or public agency) knew or should have known about the alleged action that forms the basis of the complaint.

In nearly every case, the date when a claim accrues and the filing date of a due process complaint, are not the same. This is because it is rare for parents to file a due process complaint on the very day that they become aware that they have a cognizable claim. Similarly, it is rare for parents to file a complaint on the very last day of the limitations period.

Likewise important, the phrase “2 years before the date the parent knew about the action” is not synonymous with the phrase “within 2 years of the date the parent knew about the action.” These phrases point in different directions. The first provision directs the tribunal to look backward in time from the date of the parent’s awareness of the claim and the second provision directs the tribunal to look forward in time from the date of the parent’s awareness of the claim.

When Congress uses different words in sections of the same act, tribunals do not presume that Congress meant these differently-phrased provisions to operate identically. Instead, they assume that these word choices were deliberate and signify a purposeful distinction in the law.¹⁰

⁷ See, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, ---, 130 S. Ct. 2149, 2156 (2010) (“As in all such cases, we begin by analyzing the statutory language, ‘assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose’”); *United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000) (“If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary. Therefore, if the intent of Congress can be clearly discerned from the statute’s language, the judicial inquiry must end”); *Emerson v. Sch. Bd. of Indep. Sch. Dist. 199*, 809 N.W.2d 679, 682 (Minn. 2012) (When interpreting a statute Minnesota courts give the words and phrases of the statute their plain and ordinary meaning).

⁸ See, *Webber v. St. Paul City Ry. Co.*, 97 F. 140, 144-45 (8th Cir. 1899) (“When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and to confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction”).

⁹ See, *District’s Motion to Limit the Scope of the Hearing*, *supra*, at 5 – 6.

¹⁰ See, *e.g.*, *Abbott v. Abbott*, – U.S. —, 130 S. Ct. 1983, 2003 (2010) (“In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a

When read together, 20 U.S.C. § 1415 (b)(6) and 20 U.S.C. § 1415 (f)(3)(C) contemplate that each one of a parent's claims has a distinct accrual date; conduct that predates the accrual of a claim by two calendar years may be included; and following the accrual of a claim a parent may take up to two years to request a due process hearing.

The implications of reading IDEA this way are not altogether clear. Presumably, a longer and individualized period within which to file claims will benefit parents and follows from Congress's recognition that most parents are not lawyers.¹¹ Yet, it may be true that, in the future, many more parents will need to litigate the particulars of what they knew, and when they knew it, when pursuing due process claims. What used to be a relatively easy calculation is, on closer inspection, not so easy after all – for everyone, including parents and students.

Notwithstanding the Administrative Law Judge's misgivings about the potential impacts of these provisions on parents, the statute is clear. When choosing between alternate constructions of a federal statute, the tribunal's role is not to "assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted."¹²

The right result is to deny the District's motion *in limine* as to the limitations period. Some claims that accrued more than two years prior to the request for a due process hearing may be cognizable under IDEA.

II. Reimbursement Claims for Evaluation Services

In this case, the Parents disagreed with the approaches and results of the triennial evaluation undertaken by the School District¹³ and made its disagreement known. The parties, following the filing of the due process complaint, agreed that an Independent Educational Evaluation (IEE) would be completed at public expense. The parties agreed that Karen E. Wills, Ph.D. L.P., a Board Certified Clinical Neuropsychologist, would undertake this evaluation. By way of an order dated July 5,

different meaning"); *Nken v. Holder*, 556 U.S. 418, —, 129 S. Ct. 1749, 1759 (2009) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship”).

¹¹ See, generally, 20 U.S.C. § 1400(d)(1) (A) and (B) (Among Congress's purposes when enacting IDEA was “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living ... [and] to ensure that the rights of children with disabilities and parents of such children are protected”).

¹² See, *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, ---, 130 S. Ct. 2191, 2200 (2010).

¹³ See generally, 34 C.F.R. § 300.303 (b)(2).

2013, the Administrative Law Judge directed that Dr. Wills conduct an evaluation for this tribunal, pursuant to 34 C.F.R. § 300.502 (d).

Notwithstanding the Parents' willingness to have Dr. Wills make her inquiries, and their assistance in that process, the Parents maintain that a "multi-component evaluation" is required in this case. Citing *Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824 (8th Cir. 1988), they ask that they be permitted to make later reimbursement claims for those features that are not addressed in the evaluation undertaken by Dr. Wills.

The School District objects to such claims and urges excluding any later invoices for privately-paid evaluation services. It asserts that notwithstanding the Parents' stylizing of these claims, they are, in fact, expert witness fees – items that are not reimbursable under IDEA.¹⁴ Moreover, continues the District, the Parents' request for additional evaluative services has been satisfied by the Administrative Law Judge's directive that Dr. Wills complete an IEE. Under 34 C.F.R. § 300.502 (b)(5), a parent is "entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees."

In the view of the Administrative Law Judge, neither party has the applicable rule quite right. The facts of *Evans v. District No. 17 of Douglas County, Neb.*, are distinguishable from those in this case; in ways that reduce its usefulness here. In *Evans*, the evaluation obtained by the parents followed the failure of the District to undertake any evaluation of the student for a period of more than three years. As a result, the privately-obtained evaluation was the only recent assessment available.¹⁵ That is not the case here.

With respect to the District's concern that the privately-paid assessments are merely expert witness fees by another name, this concern can be addressed by disallowing any time spent conferring with lawyers or testifying at the hearing. As the District rightly points out, those are not proper expenses under IDEA.

In order to recover expenses for a privately-obtained evaluation – either before or after the tribunal orders an IEE – the Parents must establish that none of the earlier evaluations at public expense were "appropriate" to identify the Student's educational needs.¹⁶ While such a claim is difficult to prove, it is not outside of the law.

¹⁴ See, *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 298 (2006) ("the text of 20 U.S.C. § 1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause").

¹⁵ *Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824, 829-31 (8th Cir. 1988).

¹⁶ See generally, 34 C.F.R. § 300.502; *Holmes v. Millcreek Twp. School Dist.*, 205 F.3d 583, 591 (3d Cir. 2000); *Hudson by Tyree v. Wilson*, 826 F.2d 1059, 1065-66 (4th Cir. 1987); *Nickerson-Reti v. Lexington Public Schools*, 893 F. Supp.2d 276, 296-97 (D. Mass 2012);

Denial of the District's motion *in limine* is the appropriate result.

E. L. L.