



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-107

Application of a STUDENT WITH A DISABILITY, by her 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:

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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) appeal from a decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice against respondent (the district) regarding the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 limited nature of the appeal and the procedural posture of the matter, a recitation of the student's educational history is not necessary. Briefly, however, the evidence in the hearing record indicates that, during the 2020-21 school year, the student was parentally placed in a nonpublic school (Dist. Ex. 1 at p. 13). A CSE convened on January 7, 2021 and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student with a projected implementation date of January 22, 2021 (id. at pp. 1, 10). The CSE recommended that the student receive the following related services on a weekly basis:

three 30-minute sessions of individual speech-language therapy in Yiddish; two 30-minute sessions of occupational therapy (OT); and two 30-minute sessions of physical therapy (PT) (id. at p. 10).

According to the parent, a CSE next met in May 2022 and developed an IESP that recommended related services only (Parent Ex. A at p. 2; see also Tr. pp. 11-12, 77).

A. Due Process Complaint Notice

In a due process complaint notice dated September 28, 2022, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). The parent asserted that the district failed to conduct updated evaluations or consider updated data about the student, impeded the parent's opportunity to participate in the CSE process, convened a CSE without the requisite "team of representatives and teachers," failed to consider the full continuum of services, and failed to provide the parent with a procedural safeguards notice or a prior written notice (id. at pp. 1-4). The parent argued that the May 2022 CSE inappropriately recommended a program consisting of only related services, "despite the fact that such services were recommended in past years but never implemented by [the district]" (id. at p. 3 [emphasis omitted]). In addition, the parent contended that the district failed "to implement the student's agreed upon services" (id. at p. 2).

The parent invoked pendency, alleging that an October 2015 IESP developed by a Committee on Preschool Special Education (CPSE) formed the basis for the student's stay put placement during the pendency of the proceedings (Parent Ex. A at p. 5). For relief the parent sought declaratory findings and an order requiring a specified program be put in place for the student for the 2022-23 school years and that any of such services not delivered be ordered as compensatory education (id.). In particular, the parent alleged that, for the 2022-23 school year, the district "should have provided the student" with the following services "at market rate": six hours per week of special education itinerant teacher (SEIT) services, three 30-minute sessions of speech-language therapy, two 30-minute sessions of occupational therapy OT, and two 30-minute sessions of PT (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

After a prehearing conference on January 26, 2023, the parties appeared before the Office of Administrative Trials and Hearings (OATH) on five more dates between February 7, 2023 and April 17, 2023 (Tr. pp. 1-154). At the close of proceedings held on March 21, 2023, the IHO summarized an off-the-record discussion where it was agreed that the parent's advocate would assess whether the parent wanted to amend the due process complaint notice and that such determination would be made by April 3, 2023 (Tr. p. 136).¹ The parties jointly requested an

¹ The parties disagreed on the student's pendency placement and it became a disputed issue during the impartial hearing. In an interim decision dated March 31, 2023, the IHO found that the January 2021 IESP formed the basis of the student's pendency placement, which provided for three 30-minute sessions of individual speech-language therapy in Yiddish, two 30-minute sessions per week of individual OT, and two 30-minute sessions of individual PT (Interim IHO Decision at p. 6). The IHO rejected the parent's position that the October 2015 preschool IEP should be relied upon to find that the student's pendency placement included SEIT services (id. at pp. 5-6).

extension of the decision timeline, which the IHO granted, indicating that the "new compliance date" would be May 2, 2023 (Tr. pp. 140-41). On April 17, 2023, an attorney appeared on the parent's behalf and stated the parent's intent to "amend the complaint" (Tr. p. 148). The IHO indicated that the "compliance date" was May 2, 2023 and that she would "leave that in place" since, if the parent amended the due process complaint notice, it would "restart the clock" (Tr. p. 150). Alternatively, the IHO indicated that, if the parent did not file an amendment, the matter would "expire" (*id.*). Accordingly, the IHO warned the parent's attorney that, if no amendment was filed, the matter would be dismissed, or the parent would have to "come back with a request for an extension that [she] c[ould] justify" (*id.*). The parent's attorney agreed (*id.*). The parent's attorney stated that the amendment would likely be done "by the end of th[at] week" (Tr. p. 151). The IHO requested that the parent's attorney provide a copy of the proposed amended due process complaint to her and the district's counsel and stated that the district would be provided "two business days from receipt" to state whether it accepted the complaint (Tr. pp. 151-52).

In an email dated April 28, 2023, the IHO "reminded [the parties] of the May 2, 2023 compliance date" and indicated that if an amended due process complaint notice had not been "fully submitted and approved in accordance with the procedures discussed on April 17, [she] w[ould] issue an Order of Termination without prejudice" (IHO Ex. II). On May 1, 2023, the parent's attorney sent the IHO and the district an email with an attached amended due process complaint notice (IHO Ex. III; *see* IHO Ex. IV).² Thereafter, by email on the same date, the IHO requested that the district state whether it accepted the amended due process complaint notice (IHO Ex. V); however, the district did not respond.

In a final decision dated May 2, 2023, the IHO "terminated" the impartial hearing "without prejudice" (IHO Decision at p. 5). The IHO cited State regulations concerning a party's withdrawal of a due process complaint notice and stated that an "IHO must issue an Order of Termination" when a hearing has commenced (*id.* at p. 4).

The IHO indicated that the parent failed to comply with the agreed-upon schedule for the submission of the proposed amended due process complaint notice and did not offer explanation for the delay (IHO Decision at p. 5). Further, the IHO noted that the district had not accepted the amendment (*id.*). The IHO also declined to grant the parent permission for the amendment, reasoning that the proposed amendments did not add new factual information or request new relief and improperly stated a new position on pendency notwithstanding that the IHO had already issued an interim decision on the issue (*id.* at p. 4).

IV. Appeal for State-Level Review

The parent appeals through her advocate, arguing that the IHO erred in dismissing the due process complaint notice. The parent asserts that nothing in the hearing record supported the IHO's reasoning for terminating the case without prejudice. The parent's advocate alleges that, while she hoped to file the proposed amended due process complaint notice earlier, she did not owe the IHO an explanation for the delay and that there was "ample time" for the district and IHO to review it. The parent also asserts that the IHO did not give the district the two business days to review the

² In an apparent typographical error, the proposed amended due process complaint notice was dated April 1, 2023 (IHO Ex. IV at p. 1).

proposed amendment. The parent's advocate contends that, if the district chose not to accept the proposed amendment, she would have pursued the allegations in the original due process complaint notice.

The parent also argues that the IHO erred in not accepting the amended due process complaint notice. In particular, the parent asserts that the proposed amended due process complaint notice did include changes insofar as the original September 2022 due process complaint notice challenged the May 2022 IESP and requested a finding that the student "should have received a different constellation of services," whereas the proposed amended due process complaint notice agreed with the May 2022 IESP but challenged the district's failure to implement the recommended program. Thus, the parent asserts that the proposed amendment narrowed the issues. Regarding pendency, the parent opines that, if the parent's request for pendency was duplicative of the interim decision already issued, the IHO could have disregarded that request.

The parent requests that the matter be remanded to the IHO for an impartial hearing on the merits of the parent's claims.

In an answer, the district responds to the parent's material allegations and requests that the IHO's dismissal without prejudice be upheld. In the alternative, the district states that it "does not oppose a remand for the purpose of a hearing on the merits" of the parent's claims pertaining to the 2022-23 school year.

V. Discussion

A. Dismissal of the Due Process Complaint Notice without Prejudice

The central issue in this case is whether the IHO erred in dismissing the parent's due process complaint notice without prejudice, based on the expiration of the "compliance date."

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

At the same time, the IHO is required to reach a final disposition of the proceeding within the decision timelines. When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (*id.*). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

Here, the hearing record reflects that the IHO issued documented extensions to the 45-day timeline on several occasions (see Mar. 22, 2023 Order of Extension; Feb. 27, 2023 Order of Extension; Jan. 26, 2023 Order of Extension). According to the last extension granted, the IHO's decision due date was May 2, 2023 (Mar. 22, 2023 Order of Extension). In addition to the order of extension, the IHO also communicated the final decision due date to the parties during the impartial hearing and by email (Tr. pp. 140-41, 150; IHO Ex. II). The IHO warned the parent that, if the parent did not file an amended due process complaint notice, the parent would have to request an extension to the timeline that she "c[ould] justify" or the matter would be dismissed (Tr. p. 150). The IHO also gave the parent notice that the proposed amendment would have to be submitted in time for the district to have two business days to review it and ascertain its position (Tr. pp. 151-52). Thus, the parent's allegation IHO did not give the district the two business days is untrue.

The parent's advocate indicated a decision would be made about whether to amend the due process complaint notice by April 3, 2023, and after that date passed, on April 17, 2023, the parent's attorney represented that the proposed amended complaint would likely be done by the end of that week (i.e., April 21, 2023) (Tr. pp. 136, 151). On April 28, 2023, the IHO reminded the parties about the decision due date and reiterated that the matter would be dismissed if an amended due process complaint notice was not filed (IHO Ex. II). The parent submitted the proposed amended due process complaint notice on May 1, 2023, leaving only one day for the district to review before the decision timeline expired, rather than the two days required by the IHO (IHO Ex. III). The parent made no application to the IHO for an extension of the decision timeline to allow for the two business days for the district to review the proposed amended complaint or, in the event that the district did not accept the amendment, so that the parent could pursue the original due process complaint notice. The IHO is prohibited by State regulation from soliciting extensions to the decision timeline because they are required to be requested by a party (8 NYCRR 200.5[j][5][i]). The IHO promptly requested that the district respond with its position about the proposed amendment but, hearing no response, the parent's conduct, via her representatives, created the

circumstances in which the IHO was left without an evidentiary record upon which to base a decision or any viable options. Accordingly, the IHO did not abuse her discretion in issuing a decision on the decision due date dismissing the matter without prejudice.

B. Amended Due Process Complaint Notice

Had the IHO granted the parent permission to amend the due process complaint notice, "the applicable timelines for an impartial due process hearing, including the timelines for the resolution process" would have recommenced upon the filing of the amended due process complaint notice (8 NYCRR 200.5[i][7][ii]). Accordingly, the parent also argues that the IHO erred in not accepting the amendment.

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]; [i][7][i][a]), 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][i][b]).

As of May 1, 2023, when the parent submitted the proposed amended due process complaint notice, a prehearing conference followed by four hearing dates had already occurred (Tr. pp. 1-154). While the parties had not yet begun the phase of proceedings specific to the merits of the parent's claims related to the evaluation and CSE meeting processes, prior written notice, and the IESP, the hearing had been pending for several months at that time and documentary evidence had already been admitted at the impartial hearing. Accordingly, it is not at all clear that the IHO even retained the discretionary authority to allow the amendment to the due process complaint notice, as the "impartial hearing" had already begun (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see Application of a Student with a Disability, Appeal No. 22-121). Moreover, the IHO did not abuse her discretion in declining to allow the proposed amended due process complaint notice for the reasons stated in her decision. If the parent wished to narrow the issues before the IHO, there would have been no impediment to doing so in the course of the impartial hearing.

VI. Conclusion

The evidence shows that the actions taken by the IHO were the result of the parent's noncompliance with the IHO's reasonable directives in managing the hearing process. Despite the numerous warnings, the IHO exercised restraint in dismissing the case without prejudice, thus allowing the case to be refiled. Having found that the IHO did not abuse her discretion in dismissing the parent's due process complaint notice without prejudice, the inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 10, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**