



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-194

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Sherburne-Earlville Central School District

Appearances:

Ferrara Fiorenza, PC, attorneys for respondent, by Susan T. Johns, 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 regarding the impartial hearing process, including the recusal of an impartial hearing officer (IHO), in a proceeding challenging respondent's (the district's) educational program for the student for the 2023-24 school year and seeking district funding for an independent educational evaluation (IEE). 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

Given the procedural posture of this matter, a full recitation of the facts and procedural history is not possible and, in any event, is unnecessary given the disposition of this appeal.

By due process complaint notice dated July 7, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) (Answer Ex. 3 at p. 14).¹ The

¹ With its answer, the district submitted five exhibits, which constitute the entirety of the hearing record on appeal. These exhibits include: the parents' letter to the CSE requesting district funding of an IEE of the student dated June 21, 2023 (Answer Ex. 1), the district's response to the parents' request for district funding of an IEE (Answer Ex. 2), the parents' July 7, 2023 due process complaint notice (Answer Ex. 3), communications and board of

parents contended that, although they agreed with the recommendations in the student's IEP for the 2023-24 school year, the district failed to evaluate the student for and identify that the student was "suffering from [post-traumatic stress disorder (PTSD)] due to months of bull[y]ing" and needed counseling services and that the district failed to provide the student with "a safe environment in school" (*id.* at pp. 2-9, 14). As relief, the parents requested reimbursement for tutoring services they unilaterally obtained for the student beginning May 31, 2023 (*id.* at pp. 9-10). The parents further requested district funding of "an independent neuropsychological evaluation and a QEEG brain mapping" of the student to be completed by a specified psychologist (*id.* at p. 10). The parents also requested "an auditory processing evaluation" and "an evaluation for auditory integration training" (*id.*). If deemed necessary, based on such evaluations, the parents requested for the student to receive speech-language therapy and "the two-week auditory integration training therapy" (*id.*).

On July 12, 2023, the district appointed an IHO (IHO I) to hear the parents' due process complaint notice; however, "due to an unforeseen medical issue and circumstance," IHO I recused herself on September 11, 2023, prior to a scheduled September 13, 2023 prehearing conference (*see* Answer Ex. 4 at p. 1).²

IV. Appeal for State-Level Review

The parents appeal, alleging that they filed a due process complaint notice on July 7, 2023 but the district failed to timely schedule an impartial hearing pursuant to Part 200 of State regulations.³ The parents assert that, as of the date of their appeal, 69 days had elapsed since they filed their due process complaint notice and, due to the recusal of IHO I, there was no IHO assigned to the matter, and the parents would not have a "due process hearing decision within 75 days." The parents contend that the practice whereby school district attorneys contact the IHO assigned "must end" and that the State Education Department should be responsible for contacting the assigned IHO. The parents request the same relief as indicated in their due process complaint notice and additionally request reimbursement for lost wages for both parents for "taking the day off for the hearing." The parents also request a change to State regulations regarding IHO appointments.

education meeting minutes regarding the appointment and recusal of IHOs (Answer Ex. 4), and the parties' partial resolution agreement signed August 4, 2023 (Answer Ex. 5). For ease of reference, the documents will be cited as exhibits to the district's answer using the exhibit designations assigned by the district.

² As of September 18, 2023, the district had approved appointment of another IHO (IHO II) to preside over this matter (Answer Ex. 4 at p. 3).

³ The pro se parents' notice of intention to seek review and request for review, as filed with the Office of State Review, were not accompanied by proof of service as required by State regulation (8 NYCRR 279.4[e]). However, the district has answered and does not dispute that the parents' appeal documents were properly served. Though a failure to comply with practice requirements of Part 279 of the State regulations may result in rejection of a request for review, given that the parents' appeal is premature and being dismissed on other grounds and the district does not dispute service, I decline to exercise my discretion to reject the parents' appeal due to their failure to comply with the practice requirements of Part 279 (8 NYCRR 279.8[a]).

In an answer, the district generally denies the parents' material allegations. In addition, the district alleges that the IHO has yet to issue a decision in this matter that is capable of review and that the parents have not exhausted their administrative remedies. The district requests that the parents' appeal be dismissed.⁴

V. Discussion

As noted above, a party aggrieved by the decision of an IHO may subsequently appeal to an SRO (Educ. Law § 4404[2]; *see* 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). However, State regulation provides that "[a]ppeals from an impartial hearing officer's ruling, decision, or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to . . . Education Law [§ 4404]" (8 NYCRR 279.10[d]). Instead, "in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision, or refusal to decide an issue" (*id.*).

Here, when the parents brought this appeal, an IHO had not issued an interim pendency determination or a final determination in this matter. Instead, the parents' appeal raises concerns about the timing of the impartial hearing process. The plain language of the governing regulatory framework forecloses the appeal of any action or inaction or order issued prior to or during the due process hearing, except for pendency determinations, and does not provide for any other exceptions (*Does v. Mills*, 2005 WL 900620, at *11 [S.D.N.Y. Apr. 18, 2005] [interpreting regulations according to "plain-language meanings"]). Therefore, given that an IHO has not issued an interim decision regarding pendency or a final determination that may be appealed, the parents' appeal must be dismissed as premature (*see* 8 NYCRR 279.10[d]; Application of a Student with a Disability; Appeal No. 10-030; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52)).⁵

The district in its answer indicates that a new IHO has been appointed to determine the merits of the parents' July 2023 due process complaint notice (Answer ¶ 3). The parents' concern

⁴ After the district filed its answer, the parents filed documents purporting to consist of an amended request for review with accompanying documents. In addition to reiterating allegations from the original request for review, the proposed amended request for review also includes allegations pertaining to actions purportedly taken at a prehearing conference held by IHO II on September 21, 2023 after the parents served and filed their original request for review in this matter. State regulation provides that: "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by a State Review Officer, except [under certain circumstances,] a reply" (8 NYCRR 279.6[a]). Here, the parents did not request leave to serve and file an amended request for review and the proposed amended request for review is not otherwise a pleading permitted by right under State regulation (*see* 8 NYCRR 279.6[a]). Furthermore, the proposed amended request for review attempts to raise issues regarding proceedings that took place after the original request for review but prior to an appealable decision by the IHO, and, therefore, even if it was a permitted pleading, the claims therein would be dismissed on the same grounds discussed below. As the proposed amended request for review is not considered, neither is the district's answer thereto.

⁵ Indeed, the parents' attempt to raise additional issues in the proposed amended request for review regarding IHO II's purported rulings at a prehearing conference that postdates the parent's original request for review lends support to the policy of disallowing multiple appeals from every interim adverse ruling, action, or inaction that occurs during the impartial hearing process.

about the timeliness of the impartial hearing process is a subject that may be addressed as part of the pending impartial hearing. Generally, courts have found that, as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if . . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alternations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). In this matter, as there is no hearing record upon which to conclude that a substantive right to a FAPE has been compromised due to the delays alleged, it would be premature to rule as such. Further, to the extent the parents seek a default judgement due to the delays in the process, authority on the issue tends to lean against entry of a default judgment in the absence of a substantive violation and instead indicates that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. Dec. 25, 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). Accordingly, the remedy for the parents' concerns is for the proceeding to continue, which is already occurring, and the parents are free to raise any requests pertaining to the delay during the impartial hearing and in an appeal from the final decision of an IHO.

Once an impartial hearing is held and a decision is issued, a party aggrieved by the decision may appeal to an SRO, including the issue of whether the impartial hearing process was delayed under State regulations (8 NYCRR 279.10[d]).

VI. Conclusion

As the alleged delay in the impartial hearing process does not finally determine the issues in this proceeding, the appeal must be dismissed as premature. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
October 6, 2023

STEVEN KROLAK
STATE REVIEW OFFICER