The University of the State of New York

The State Education Department
State Review Officer
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No. 23-311

Application of a STUDENT WITH A DISABILITY, by his 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) issued after a remand was so ordered by the United States District Court for the Southern District of New York (see Davis v. Banks, 2023 WL 5917659 [S.D.N.Y. Sept. 11, 2023]). The IHO determined, after remand, that the district shall reimburse the parent for the costs related to providing transportation services to the student only for each school day that the student used the transportation services. The appeal must be dismissed.

II. Overview—Administrative Procedures

This proceeding initially arose under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law.

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 limited scope of this appeal and the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary.

By due process complaint notice dated July 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year

based on various procedural and substantive deficiencies (Parent Ex. A).[1] As relief, the parent requested, among other things, direct tuition payment for the student's attendance at the International Academy for the Brain (iBrain) and funding for the costs of private, special transportation to and from the student's home and iBrain (id. at p. 9). The parent also requested an interim order of pendency so the student could remain in his then current educational placement during this proceeding (id. at p. 2).

An impartial hearing convened on August 19, 2022, during which the parent asserted that the student's pendency arose from an unappealed IHO Decision on Pendency, dated August 24, 2021, issued in a prior proceeding (Tr. pp. 1, 6; see Parent Pendency Ex. C).[2] The IHO issued an interim order of pendency dated August 19, 2022, in which she agreed with the parent that the prior August 24, 2021 interim IHO Decision controlled the student's placement during the pendency of this proceeding and directed the district to fund tuition at iBrain, "door-to-door special transportation to and from Student's home and iBRAIN, and related services (including a 1:1 paraprofessional)" (Interim IHO Decision).

On September 15, 2022, the IHO issued a final findings of fact and decision on the merits of the parent's July 2022 due process complaint notice (IHO Decision). The IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement for the student, and that there were no equitable considerations that would preclude or limit an award of tuition reimbursement (id. at pp. 7, 9). Among other relief, the IHO awarded the parent the costs "for transportation for the Student to and from the private school and the Student's home, of limited travel time of no more than 50 miles" (id. at p. 9).

On September 27, 2022, the parent, along with nine other parents who had also obtained pendency orders for the district to pay for all or part of the costs associated with their children attending iBrain, commenced an action in federal district court seeking enforcement of their respective pendency orders and subsequently filed a motion for summary judgment (see Davis v. Banks, 2023 WL 5917659 [S.D.N.Y. Sept. 11, 2023]). As relevant to this proceeding and the parent's enforcement of the IHO's August 19, 2022 pendency order, the remaining dispute before the Court was whether the district was obligated to pay all transportation costs that were incurred by the parent pursuant to a transportation contract that the parent had entered into with a private transportation provider or only for the costs of transporting the student on the days that he actually used the services (see Davis, 2023 WL 5917659 at *1, *4-*5). The Court determined that the "sole source of the [district's] reimbursement obligations" depended on the language of the applicable administrative order (id. at *4). However, in reviewing the IHO's August 19, 2022 pendency order, the Court found that the IHO's language directing the district to fund transportation "to and from Student's home and iBRAIN" was unclear to resolve the parties' dispute because the IHO's

[1] During the impartial hearing, the parent entered certain exhibits into evidence to support her position on pendency, but marked such pendency exhibits with the same lettering that she used to identify other exhibits that she entered into evidence in support of her position on the merits (Tr. pp. 12, 14-15). For clarity, in this decision, the parent's exhibits that were entered during the pendency portion of the hearing will be referenced as "Pendency" exhibits (see Parent Exs. A-H; Parent Pendency Exs. A-F).

[2] The district did not appear at the August 19, 2022 hearing (Tr. pp. 1, 5).

language could be interpreted to support both parties' positions (id. at *5). Accordingly, on September 11, 2023, the Court issued an Opinion and Order remanding the matter to the IHO to interpret her own pendency order with respect to the scope of the district's obligation to fund transportation costs and conduct further fact finding if necessary (id. at *5-*6).

Upon remand from the District Court in Davis, the IHO conducted an administrative hearing on October 19, 2023 to clarify her pendency order with respect to the student's transportation to and from iBrain (Tr. pp. 26-39). Both parties appeared at the October 19, 2023 hearing and were provided an opportunity to present arguments (see Tr. pp. 26, 28-32, 35).

By decision after remand, dated November 15, 2023, the IHO explained that she determined, upon hearing the parties' respective positions at the October 19, 2023 proceeding and reviewing the record, that no further fact finding was necessary to clarify her transportation order (IHO Decision After Remand at p. 3). The IHO reasoned that, although the parent had submitted evidence of a transportation contract, it was the parent's burden to demonstrate the appropriateness of the transportation contract and prove that the district should be responsible for costs on days that the student did not use the transportation services (id. at pp. 3-4). The IHO then determined that the parent failed to meet her burden and therefore equities supported a finding that the district did not have to pay for transportation when the student did not travel to or from iBrain (id. at p. 4). As such, the IHO clarified both her prior transportation orders by ordering the district to reimburse the parent for the student's transportation costs "for each round trip between the Parent's home and the iBRAIN School for each school day that the Student actually utilizes said transportation services" (id.). The IHO also ordered the parent to file a copy of the IHO's decision after remand with the United States District Court for the Southern District of New York within 10 days (id.).

IV. Appeal for State-Level Review

The parent appeals and requests that an SRO affirm the IHO's September 15, 2022 findings of fact and decision that determined that the district failed to offer the student a FAPE for the 2022-23 school year, that the parent's unilateral placement of the student at iBrain was appropriate, and that equities favored the parent. However, the parent asserts that the IHO erred in the September 15, 2022 decision by not awarding direct funding of tuition and related costs including transportation because the hearing record demonstrated that the parent lacked the financial resources to pay.

The parent further requests that an SRO reverse the IHO's November 15, 2023 decision after remand that clarified that the district only had to pay for the costs of transporting the student for each day that the student used transportation services rather than the full amount that the parent incurred pursuant to a third-party transportation contract. The parent asserts that the IHO erroneously reduced the award of the transportation costs notwithstanding the clear terms of the transportation contract and without any evidentiary basis. According to the parent, the IHO improperly shifted the burden to the parent to establish that the transportation contract was appropriate, and the hearing record lacked any evidence showing that the transportation contract was unreasonable or that the parent and third-party transportation provider canceled or amended the contract. The parent also argues that the IHO lacked any statutory authority to alter the terms of the transportation contract and that there is administrative and judicial case law authority for an

IHO to award the full costs of transportation incurred pursuant to a third-party contract even if the services were not provided.

In its answer, the district asserts that direct funding of the unilateral placement is not warranted because the parent failed to demonstrate that she lacked the financial resources to pay for the student's tuition and related expenses. The district further requests that an SRO not disturb the IHO's November 15, 2023 decision after remand, which clarified the transportation award. According to the district, equitable considerations support its argument that the district should not be compelled to pay for services that were not actually rendered. The district also argues that the parent's transportation contract is unreasonable and excessive. Finally, the district argues that the parent was not aggrieved with respect to some of the findings that the parent appealed. The district requests that the parent's appeal be dismissed.[3]

V. Discussion

Initially, it is necessary to determine if this appeal is properly before me.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Bd. of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

As explained in detail above, the United States District Court for the Southern District of New York remanded this matter to the IHO to clarify the scope of her August 19, 2022 pendency order with respect to the district's obligation to pay transportation costs (see Davis v. Banks, 2023 WL 5917659 [S.D.N.Y. Sept. 11, 2023). Pursuant to such remand, the IHO held a hearing on October 19, 2023 where the IHO noted that the Court remanded the pendency order and provided the parties an opportunity to be heard, including the ability to present arguments on how her

[3] The parent filed a reply to the district's answer. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent's reply fails to comply with the practice regulations and will not be considered.

decision on remand may impact her September 15, 2022 final decision on the merits (Tr. pp. 35-36). Both parties discussed that the IHO's August 19, 2022 pendency order and September 15, 2022 final findings of fact and decision contained similar language with respect to the transportation orders (Tr. pp. 36-38). The IHO rendered a decision after remand dated November 15, 2023 where she clarified that her transportation orders directed the district to pay for the transportation costs for only the days the student actually used the transportation services (IHO Decision After Remand).

Any challenge to the September 15, 2022 IHO Decision greatly exceeds the 40-day timeframe for commencing an appeal in State regulations and is therefore not properly before me (see 8 NYCRR 279.4[a]). The parent may not rely on the IHO's November 15, 2023 decision after remand to forgive her untimeliness, especially here when the District Court's narrow remand was limited to the IHO clarifying her pendency order with respect to transportation costs (see Davis, 2023 WL 5917659). Moreover, the Court in Davis only remanded the August 19, 2022 pendency order—there was no direction from the District Court for the IHO to reconsider her prior September 15, 2022 findings of fact and decision or to reopen the hearing record to resolve additional disputes between the parties (see id.). The IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Allowing the parent to initiate an appeal under the circumstances of this case some 15 months after the issuance of the September 15, 2022 final IHO decision would create confusion and throw the due process hearing system envisioned by Congress into disarray.[4]

Also, the parent was not aggrieved by the IHO's September 15, 2022 decision that the district failed to offer a FAPE, that the unilateral placement was appropriate, and that equities favored the parent so those issues are not proper for an appeal. The IDEA and State regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). Consequently, any allegations related to the IHO's September 15, 2022 final decision will not be considered as the parent failed to properly initiate an appeal of such decision and was not aggrieved.

Turning to the remaining issue of whether the IHO erred in her November 15, 2023 decision after remand by clarifying that the district was responsible for only the costs of transportation when the student actually used the services, I find that the parent's appeal of such decision after remand is not appropriately before me.

In September 2022, the parent commenced an action in the United States District Court for the Southern District of New York to compel the school district to reimburse the parent for the student's transportation costs pursuant to the August 19, 2022 pendency order. The parent did not seek to enforce the August 19, 2022 pendency order by an administrative proceeding and instead chose to proceed directly to a judicial forum as it is well-settled that parents need not exhaust their

[4] Additionally, if the parent's appeal of the September 15, 2022 IHO decision is allowed, it would result in an IHO essentially having unilateral authority to grant a party an extension of time to appeal from an IHO decision. Such a result would frustrate the purpose of the timelines in State regulations.

administrative remedies when alleging a violation of pendency (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015] [explaining that "'an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to' the IDEA's exhaustion requirement"], quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2d Cir. 2002]). The District Court in Davis retained jurisdiction over the parent's challenges to pendency and determined that "the existence and extent of the [district's] reimbursement obligations turn on the language of the applicable administrative order" (Davis, 2023 WL 5917659 at *4). Upon reviewing the pendency order, the District Court in Davis issued a limited remand to the IHO to clarify her August 19, 2022 pendency order with respect to transportation costs as it was unclear what she meant by "to and from iBRAIN" (id. at *5). The IHO issued a November 15, 2023 decision after remand in which she clarified that her transportation order only required the district to reimburse transportation costs for days the student actually used the services and the IHO further directed the parents to file the decision with the District Court within 10 days (IHO Decision After Remand at p. 4).

If the parent now wishes to challenge the IHO's November 15, 2023 decision after remand, the parent must do so in district court, which has exclusive jurisdiction of the parent's instant pendency dispute and ordered the remand to the IHO for clarification of her transportation order. The parent was directed to file the IHO's November 15, 2023 decision after remand with the District Court, which reinforces that the District Court is the appropriate forum to hear any further challenges about the IHO decision (IHO Decision After Remand at p. 4). Notably, the IHO's decision after remand did not include any instruction on how to appeal such decision to an SRO (id.). Even the District Court in Davis contemplated the possibility of further judicial review after remand, directing that if the plaintiffs sought judicial review together after remand, they must be prepared to show cause why their cases should not be severed (see Davis, 2023 WL 5917659 at *6 n.8).

An administrative SRO does not have the power to alter a court's pendency decision and here, an SRO lacked any concurrent jurisdiction to hear the parent's pendency challenges as the parent initiated her pendency dispute in District Court (see, e.g., Application of a Student with a Disability, Appeal No. 23-042; Application of a Student with a Disability, Appeal No. 20-178; Application of the Dep't of Educ., Appeal No. 20-033).

Consequently, the parent's challenges to the November 15, 2023 decision after remand must be dismissed as they are not appropriately before me.

VI. Conclusion

Having found that the request for review must be dismissed because the parent failed to timely initiate the appeal of the September 15, 2022 IHO decision and that review of the November 15, 2023 decision after remand is not properly before me, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them

in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 22, 2024

STEVEN KROLAK
STATE REVIEW OFFICER