The University of the State of New York

The State Education Department
State Review Officer
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No. 24-291

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Gil Auslander, Esq.

Law Office of Noelle Boostani, attorneys for respondent, by Noelle Boostani, Esq.

DECISION

I. Introduction

Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) issued after a remand that was so ordered by the United States District Court for the Southern District of New York (see V.B. v. New York City Dep't of Educ., 2024 WL 1120033 [S.D.N.Y. Mar. 14, 2024]). The IHO determined after remand that the district shall directly fund and/or reimburse the parent for transportation services from February 9, 2021 through the end of the 2020-21 school year. 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 June 30, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year

based on various procedural and substantive deficiencies (Parent Ex. A).[1] As relief, the parent requested, among other things, direct funding of the student's tuition fees and related costs for the student's attendance at the Titus School (Titus) and an order for appropriate transportation services (id. at p. 9).

An impartial hearing convened on October 7, 2020 and concluded December 15, 2020 after three days of proceedings inclusive of a prehearing conference (Tr. I pp. 1-105).[2] The IHO at the initial impartial hearing (IHO I) issued an interim order on pendency on October 16, 2020 and a final findings of fact and decision on February 9, 2021 (IHO I Decision; Interim IHO I Decision). IHO I found that the district had conceded that it denied the student a FAPE for the 2020-21 school year, that the parent met her burden of demonstrating the appropriateness of Titus, and that equitable considerations favored reimbursement (IHO I Decision at pp. 4-8).[3] As relief, IHO I ordered that the district "shall pay/reimburse tuition for [Titus] for [the 2020-21] school year (id. at p. 9). Neither party appealed IHO I's decision to a State Review Officer.

On November 9, 2022, the parent commenced an action in federal district court alleging that the district failed to comply with orders issued by IHOs in three administrative proceedings (see V.B., 2024 WL 1120033, at *1). By decision dated March 14, 2024, the United States District Court for the Southern District of New York initially determined that it did not have subject matter jurisdiction over the parent's IDEA claims but did have subject matter jurisdiction over the parent's 42 U.S.C. § 1983 claims (id. at *4). The District Court further noted that the parent could seek enforcement of her IDEA claim under § 1983 (id.). The District Court acknowledged, however, that there was a dispute between the parties regarding whether IHO I's final decision obligated the district to fund the student's transportation services (id. at *5). IHO I submitted a declaration to the District Court wherein she stated that her order to pay or reimburse tuition "comprised all aspects" of the student's program from classroom instruction to "specialized transportation" (id. [internal quotations omitted]). The District Court, however, noted the possibility of different interpretations of the language in IHO I's order and that it was unclear "whether [the IHO's] declaration was made in her personal or professional capacity" (id.). Therefore, the District Court remanded the issue of funding for transportation services during the 2020-21 school year to IHO I for further clarification (id. at *6).

Upon remand from the District Court in V.B., an IHO (IHO II) from the Office of Administrative Trials and Hearings (OATH) was appointed to address the issue remanded (IHO II

[1] During the initial impartial hearing, the parent entered exhibits A-P into evidence to support their position. Following remand, the parent entered exhibits A-E into evidence. Parent exhibits B through E admitted after remand are different from those exhibits identified by the same lettering and admitted at the initial impartial hearing (Tr. pp. 80-81).

[2] The transcripts of proceedings that occurred after remand are not paginated consecutively with the transcripts of proceedings before remand. Transcripts from the initial impartial hearing will be cited as "Tr. I" and transcripts from the proceedings after remand will be cites as "Tr. II" (see Tr. I pp. 1-105; Tr. II pp. 1-133).

[3] IHO I's decision is not paginated; for the purposes of this decision, IHO I's decision will be cited by reference to its consecutive pagination with the cover page as page one (see generally IHO I Decision).

Decision at p. 3).[4] Both parties appeared for a prehearing conference on April 8, 2024 and proceeded to an impartial hearing on April 22, 2024, which concluded on May 28, 2024 (Tr. II pp. 1-133).[5] IHO I and an attorney for the district testified during the remand proceedings before IHO II (see Tr. II pp. 85-97, 110-23).

By decision after remand dated May 28, 2024, IHO II found that the parent was entitled to direct funding and/or reimbursement of the student's transportation services from February 9, 2021 through the end of the 2020-21 school year (IHO II Decision at p. 5).

IV. Appeal for State-Level Review

The district appeals and argues that IHO II erred in finding that the parent was entitled to direct funding and/or reimbursement for the student's transportation services. The district asserts that IHO II erred in permitting IHO I to revise her unappealed February 9, 2021 decision and erred in crediting IHO I's testimony. The district also contends that the parent did not demonstrate a contractual obligation for transportation services and IHO II erred in awarding the parent funding. The district further alleges that State regulation prohibits the entire proceeding as neither party appealed from IHO I's February 9, 2021 decision. As relief, the district requests that IHO II's decision be reversed and vacated.

In an answer the parent asserts that the District Court "remanded a question of law, the interpretation of an Order . . . to the ordering party, the lower court, here, the Impartial Hearing Office, to issue a determination on the correct interpretation of" the February 9, 2021 decision.[6] In response to the district's arguments, the parent alleges that the district's claims should be denied and that IHO II's evidentiary rulings and determinations should be affirmed. The parent further

[4] In response to a significant increase in the number of due process complaint notices filed in the district, an agreement between the New York State Education Department (NYSED), the New York City Department of Education, and OATH, dated December 1, 2021, explained a transition of the handling of special education impartial due process hearings in the district to OATH and provided for a separate special education unit to be staffed by IHOs employed by OATH (see Memorandum of Agreement [Dec. 1, 2021], available at http://www.nysed.gov/common/nysed/files/office-of-administrative-trials-and-hearings-memorandum-of-agreement.pdf). The Mayor of the City of New York issued Executive Order No. 91 on December 27, 2021 to further implement the transfer (Executive Order [de Blasio] No. 91 [Dec. 27, 2021], available at https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-91.pdf).

[5] IHO II issued a prehearing conference and order dated April 8, 2024 (IHO II Pre-Hr'g Conf. Order) and, by email dated April 11, 2024, the parent's attorney submitted various objections to the contents and directives contained within the order, including her assertion that "the SDNY cannot remand an enforcement action of an order to the IHO to retry a final decision that wasn't appealed to the SRO or SDNY directly" (see April 11, 2024 Email Exchange re Pre-Hr'g Conf. Order). The parent's attorney reiterated her objections during the impartial hearing (Tr. p. 16).

[6] The parent has annexed a copy of the District Court's order to her answer as proposed SRO Exhibit A in the event the district did not include the order as part of the hearing record on appeal. The proposed exhibit was already admitted into evidence as IHO Exhibit I and further it is also available as a published decision. Thus, the parent's proposed exhibit is unnecessary.

argues that district cannot appeal IHO II's decision as the underlying decision of IHO I was not appealed. As relief, the parent requests that the district's appeal be denied review and dismissed.

V. Discussion

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

It is well settled that an IHO lacks the authority to retain jurisdiction and materially alter a final decision on the merits once the due process proceeding has come to a conclusion (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Rather, 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]). As noted, neither party appealed IHO I's February 9, 2021 decision to argue that it erroneously did or did not include an order for transportation funding, as the case may be, or that it otherwise was unclear.

Instead, in November 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 fund the student's programming, including the cost of the student's transportation from February 9, 2021 through June 30, 2021 pursuant to IHO I's decision. The parent proceeded to federal district court to seek enforcement as neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

As explained in detail above, the District Court remanded this matter to IHO I to clarify whether her February 9, 2021 decision requiring the district to "pay/reimburse tuition" included the costs of the student's transportation (V.B., 2024 WL 1120033 at *5; see Feb. 9, 2021 IHO I Decision at p. 9). Pursuant to such remand, IHO II held a hearing on three dates with the purpose of ascertaining IHO I's intent (see IHO II Decision at p. 2; Tr. II pp. 6-7, 84-85; see also April 11, 2024 Email Exchange re Pre-Hr'g Conf. Order at pp. 1-2 [stating IHO II's view that his role was "to determine the previous IHO's intent and provider greater clarification"]). The hearing included testimony from IHO I (Tr. II pp. 85-97). IHO II rendered a decision after remand dated May 28, 2024 in which he determined that IHO I intended that her order require the district to fund or reimburse the costs of the student's transportation from February 9, 2021 through June 30, 2021 (IHO II Decision at pp. 3-4, 5).

Several of the district's arguments on appeal are law of the case already addressed by the District's Court's remand decision. For example, to the extent that the district argues that the clarification provided by IHO II was not supported by the plain language of IHO I's order, the

District Court already ruled that the interpretation of IHO I's order to include transportation was "plausible" (V.B., 2024 WL 1120033, at *6).

The District Court's remand sought clarification but did not re-open the finality of IHO I's decision. Thus, if the district now wishes to challenge IHO II's May 28, 2024 clarification issued after remand, the district must do so in District Court, which has exclusive jurisdiction over the instant dispute and narrowly ordered the remand to IHO I to clarify the relief she ordered with regard to transportation. Beyond the input of the IHO's clarification, this is not an instance where the educational expertise of the State-level of administrative review would aid in the review of the issue (see, e.g., E.H. v. New York City Dep't of Educ., 611 F. App'x 728, 731 [2d Cir. 2015] [discussing the benefit of the educational expertise of SROs on certain issues]; see also SJB v. New York City Dept. of Educ., 2004 WL 1586500 [S.D.N.Y. July 14, 2004] [noting exhaustion requirement does not apply to enforcement of an IHO order]). The District Court in V.B. also directed the parties to "promptly inform the Court once the IHO ha[d] clarified [the district]'s financial obligations and the administrative proceeding [wa]s otherwise complete" (see 2024 WL 1120033 at *9), and did not provide that the IHO's clarification could or should be reviewable in a State-level administrative appeal rather than being addressed directly to District Court.

Here, the parties' time to appeal IHO I's decision had lapsed and an SRO lacks subject matter jurisdiction to hear the parent's enforcement claims, which the parent correctly initiated in District Court, or to review IHO II's limited clarification, which was provided in response to the District Court's specific remand. Consequently, the district's challenges to the May 28, 2024 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 district failed to timely initiate the appeal of the February 9, 2021 decision issued by IHO I and that review of the May 28, 2024 decision issued by IHO II 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**
August 7, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER