



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-292

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:

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Edward Lent, 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 2) issued after a remand that 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]). IHO 2 determined after remand that respondent (the district) shall only fund the costs of the door-to-door transportation services that were actually provided to the student. 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

This appeal arises from IHO 2's decision issued after a remand by an SRO for an IHO to address a clarification sought by the District Court (see Application of a Student with a Disability, Appeal No. 24-087). 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.

In a due process complaint notice dated July 6, 2022, the parent alleged that the district denied 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) for the 2022-23 school year, as well as the costs for related services, 1:1 nursing services, and a 1:1 paraprofessional, and funding for the costs of private, special transportation to and from the student's home and iBrain (id. at p. 8). The parent also requested an interim order of pendency so the student could remain in her then-current educational placement during the proceedings (id. at pp. 1-2).

An impartial hearing took place over the course of four dates between July 28, 2022 and October 20, 2022 (see Tr. pp. 1-69). The assigned IHO (IHO 1) issued an interim decision on pendency dated September 22, 2022, finding that the student's pendency placement lay in an unappealed IHO decision dated May 15, 2022 arising from a prior impartial hearing addressing the district's offer of a FAPE to the student for the 2021-22 school year and consisted of district funding of the student's tuition at iBrain, as well as "door to door transportation to and from the student's home, and related services including a nurse 1:1 and paraprofessional 1:1" (IHO Ex. IV at p. 5; see Parent Ex. C).²

Several months later, IHO 1 issued a final decision on the merits, dated December 10, 2022, and determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of awarding the parent's requested relief (IHO Decision at pp. 4-7). IHO 1 ordered the district to fund the student's tuition at iBrain for the 2022-23 school year, as well as the costs of a 1:1 private duty nurse, a 1:1 paraprofessional as needed, and "all related services and transportation for the student to and from iBrain" and the costs of an independent neuropsychological evaluation (id. at p. 7).

While the due process proceeding was pending and prior to IHO 1's issuance of the final decision, 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 on September 27, 2022, including the interim decision issued in this matter, and subsequently filed a motion for summary judgment (see IHO Ex. VI). As relevant to this proceeding and the parent's enforcement of IHO 1's September 22, 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 she had entered into with a private transportation provider or for only the costs of transporting the student on the days that she actually used the services (see id. at pp. 1-2, 8-13). The Court determined that the "sole source of the [district's] reimbursement obligations" depended on the language of the applicable administrative order (id. at p. 9). However, upon examining IHO 1's September 22, 2022 pendency order, the

¹ Upon remand, IHO 2 entered into the hearing record several IHO exhibits, including prior IHO, SRO, and district court decisions in this matter (see IHO Exs. IV-VI). For these decisions, the IHO's exhibits will be cited. Some of the IHO's other exhibits were duplicative of parent exhibits already in evidence (compare IHO Exs. I, with Parent Ex. A, and IHO Ex. III, with Parent Ex. C). For purposes of this decision, where there are duplicative exhibits, only the parent's exhibits are cited.

² The district did not contest the basis for pendency (Tr. p. 4).

Court found that IHO 1's language directing the district to fund transportation "to and from" the student's home was insufficiently clear to resolve the parties' dispute because IHO 1's language could be interpreted to support both parties' positions (id. at pp. 11-12). Accordingly, on September 11, 2023, the Court issued an Opinion and Order remanding the matter to the IHO to interpret his 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 pp. 12-13).

Upon remand from the District Court in Davis, the parties and IHO 1 reconvened for an additional hearing date on October 31, 2023, to discuss the remanded issue (Tr. pp. 70-76), which, as noted above, occurred after the due process proceeding on the merits had already concluded. IHO 1 issued an "amended" decision dated January 31, 2024 to address the issue remanded to him (see Amended IHO Decision).³ IHO 1 reiterated his final determinations on the merits in the matter but stated that the order was "amended pursuant to an Order by Judge Jesse M. Furman of the Southern District of New York" (id. at p. 7). IHO 1 clarified his final order to provide that the district would be required to "reimburse the parent for transportation, only for the days the student actually used the transportation services to and from iBrain for which they must provide adequate documentation" (id.).

In Application of a Student with a Disability, Appeal No. 24-087, an SRO held that the December 10, 2022 final decision was final and binding as neither party had timely appealed its findings and that IHO 1 "exceeded his authority in issuing substantive revisions to December 2022 final decision on the merits after the proceeding had concluded" (IHO Ex. V at p. 5). As the IHO had not provided the clarification sought by the District Court regarding the terms of the May 15, 2022 pendency decision, the SRO remanded the matter to the IHO (id. at p. 7).

Upon remand from the SRO, the matter was assigned to IHO 2 and the parties reconvened for an additional hearing date on May 20, 2024 (Tr. pp. 77-89). IHO 2 indicated that it was his understanding that the matter was remanded back for clarification on what was intended by IHO 1's pendency order (Tr. p. 78). IHO 2 indicated he understood the district's position to be that the order for funding was only meant for the days in which transportation was actually used, while the parent maintained that the district's funding obligation was pursuant to the transportation contract (see Tr. p. 80).

IHO 2 issued an "Order of Clarification," dated May 29, 2024, which held that the unappealed May 2022 IHO decision that formed the basis for pendency "[wa]s quite clear" in "[f]inding unreasonable the [p]arent's request that the [district] be responsible for funding the transportation costs as reflected in the transportation contract," therefore, IHO 2 found that IHO 1's 2022 decision ordered the district to directly fund the costs of the student's transportation services "'to and from the private program that were actually provided'" (IHO Order of Clarification at p. 4; see Parent Ex. C at p. 22; IHO Ex. IV at p. 5). Therefore, IHO 2 clarified the order on pendency to indicate that the district was required to fund the "costs of the door-to-door transportation services to and from iBrain that are actually provided to the [s]tudent" during the pendency of the proceedings (IHO Order of Clarification at p. 5).

³ The amended decision was not submitted with the hearing record in this appeal, however, it was reviewed as part of the hearing record in Application of a Student with a Disability, Appeal No. 24-087.

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the SRO has jurisdiction to review IHO 2's order of clarification asserting that there is a difference between enforcement of a pendency order and clarification of a pendency order. The parent argues that the SRO has jurisdiction because of the actions of the SRO in Application of Student with a Disability, Appeal No. 24-087, as the SRO assigned to that appeal remanded the case and IHO 2 directed the parties to file an appeal with the SRO, not with the district court.

Regarding the order, the parent contends that IHO 2 erred in not awarding direct funding for the cost of transportation services pursuant to the terms of the contract between the parent and the transportation provider. The parent asserts that the transportation contract was appropriate and the district failed to present any evidence to refute this. The parent argues that an IHO does not have the authority to rewrite the terms of the contract and the district offered no evidence that those terms were unreasonable or excessive.

In an answer, the district asserts that the SRO does not have authority to resolve this appeal. First, the district notes that this appeal is outside the 40-day requirement for appealing from an IHO decision. Further, the district contends that, the parent appealed the issue of pendency to federal court before exhausting administrative remedies and cannot now reverse course and seek review by an SRO, as the district court retains jurisdiction over the issue of pendency. Should the SRO determine that it does have the authority to review this appeal, the district contends that the finding by IHO 2 should not be disturbed.

In a reply, the parent reiterates her argument that an SRO has jurisdiction over this matter and that IHO 2 erred by not granting direct funding for transportation pursuant to the terms of the transportation contract.

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 above, neither party appealed IHO 1's September 2022 interim decision on pendency or IHO 1's December 2022 final decision on the merits to argue that it erroneously did or did not limit the award of transportation funding, as the case may be, or that it was otherwise unclear (see generally IHO Decision; IHO Ex. IV).⁴

⁴ Any challenge to IHO 1's September 2022 interim decision on pendency or December 2022 final decision greatly exceeds the 40-day timeframe for commencing an appeal in State regulations and is therefore not properly before

Instead, in September 2022, the parent, along with other parents, commenced an action in the United States District Court of the Southern District of New York to enforce IHO 1's September 2022 interim decision on pendency (see generally IHO Ex. VI). The parents did not seek to enforce the November 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 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 parents' 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" (IHO Ex. VI at p. 9).

As explained in detail above, upon reviewing the pendency order, the District Court issued a limited remand of this matter to IHO 1 to clarify the September 2022 pendency order with respect to the district's obligation to pay the student's transportation costs as it was unclear what IHO 1 meant by "to and from iBRAIN" (see IHO Ex. IV at p. 11). Following that remand, IHO 1 issued an amended decision, which exceeded the scope of his authority and of the remand from the District Court and, therefore, an SRO remanded the matter back to an IHO (see IHO Ex. V at pp. 5-6). Upon remand, IHO 2 followed the instructions of the District Court and rendered the order of clarification, in which he determined that the September 2022 pendency decision based the student's pendency on an unappealed May 2022 IHO decision from a former proceeding; the IHO further found that the May 2022 IHO decision required the district to fund transportation services "to and from the private program that were actually provided" (see Tr. pp. 77-89; IHO Order of Clarification at pp. 4-5; see also Parent Ex. C; IHO Ex. IV).

The District Court's remand sought clarification but did not re-open the finality of IHO 1's pendency decision. Thus, if the parent now wishes to challenge IHO 2's order of clarification issued after remand, the parent must do so in District Court, which has exclusive jurisdiction over the instant dispute and narrowly ordered the remand to clarify the transportation aspect of pendency. 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 IHO Ex. IV at p. 13 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

me (see 8 NYCRR 279.4[a]). The parent may not rely on IHO 2's May 29, 2024 order of clarification after remand to forgive her untimeliness, especially here when the District Court's narrow remand was limited to the IHO clarifying his pendency order with respect to transportation costs (see IHO Ex. III). Moreover, the Court in Davis only remanded the September 22, 2022 pendency order—there was no direction from the District Court for the IHO to reconsider the prior December 10, 2022 findings of fact and decision or 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 regarding the September 2022 pendency decision or the December 2022 final decision, some 17 months after issuance of the final decision in this proceeding, would create confusion and throw the due process hearing system envisioned by Congress into disarray.

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 IHO 2's May 2024 order of clarification after remand must be dismissed as it is 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 IHO 1's September 2022 interim decision on pendency or December 2022 final decision and that review of IHO 2's May 2024 order of clarification 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 28, 2024

STEVEN KROLAK
STATE REVIEW OFFICER