The University of the State of New York

The State Education Department
State Review Officer
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No. 24-336

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:
Law Offices of Neal H. Rosenberg, attorneys for petitioner, by Karen Newman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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) appeals from a decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice regarding respondent's (the district's) provision of special education services to her daughter for the 2023-24 school year with prejudice. The appeal must be sustained.

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 programing for students with disabilities under the 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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 the matter—namely that it was dismissed with prejudice prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the

facts and educational history of the student in this matter is limited to the procedural history including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

According to the parent, the student's "last agreed upon" individualized education program (IEP) was developed by a committee on preschool special education (CPSE) on April 25, 2017, and provided that the student would receive 10 hours per week of special education itinerant teacher (SEIT) services and related services (Due Process Compl. Not. at p. 2). The parent indicated that the student received the recommended services and "ha[d] been making progress with this support" (id.).

For the 2023-24 school year in question, the parent indicated that a CSE did not convene to develop an IESP (Due Process Compl. Not. at p. 2).

In a due process complaint notice dated March 27, 2024, the parent alleged that the district failed to provide the student with equitable services for the 2023-24 school year (Due Process Compl. Not. at p. 2). In particular, the parent contended that the district failed to create an IESP for the student for the 2023-24 school year and that the student continued to require those special education services found in the April 2017 CPSE IEP, including 10 hours per week of SEIT services and related services of speech-language therapy and occupational therapy (OT) (id.). The parent further asserted that she had been "unable to find a bilingual Yiddish provider" to deliver such services to the student for the 2023-24 school year at the district rate (id.). As relief the parent sought district funding of the services set forth in the April 2027 CPSE IEP delivered by Yeled V'Yalda, a private provider chosen by the parent, at an enhanced rate (id. at pp. 1-2).[1]

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). According to the IHO, the same dispute was the subject of a previous due process complaint notice brought under a different impartial hearing number (original filing) (see IHO Decision at pp. 1-2; June 24, 2024 Tr. pp. 3-4). The hearing record underlying the original filing is not part of the hearing record on appeal in the present matter; however, the IHO summarized the procedural history underlying the original filing and the parties do not dispute the IHO's summary (see IHO Decision at pp. 1-2; June 24, 2024 Tr. pp. 3-4; Req. for Rev. at pp. 2-3; Answer at pp. 3-4). The IHO recounted that the parent filed a due process complaint notice on September 7, 2023 alleging that the district failed to provide the student with a "free appropriate public education or equitable services" for the 2023-24 school year (IHO Decision at p. 1). The IHO described that the September 2023 due process complaint notice was treated as "part of omnibus group of 25 cases" before an IHO with OATH who conducted prehearing and status conferences and scheduled the impartial hearing on the merits, granting one adjournment of such date after the parties appeared (id. at pp. 1-2). Prior to the adjourned hearing date, the parent withdrew the original filing by email dated January 19, 2024 (id. at p. 2).

[1] On April 16, 2024, the district executed a pendency implementation form agreeing that the student's pendency placement was based on the April 2017 CPSE IEP and consisted of 10 hours per week of group SEIT services two 30-minute sessions per week of group speech language services per week, one 30-minute individual session of speech-language services per week, and two 30-minute sessions of OT per week, with the SEIT and speech-language therapy sessions being provided in Yiddish (Pendency Impl. Form).

The parent's March 2024 due process complaint notice was assigned to the same IHO who presided over the previous proceeding. According to the IHO and the parties, the March 2024 due process complaint notice was again treated with other cases in an "omnibus" fashion with seven other cases (IHO Decision at p. 2; Req. for Rev. at p. 3). On May 1, 2024, the parties appeared for a prehearing conference, and they discussed the number of anticipated witnesses for the impartial hearing and how long the hearing on the merits should take (May 1, 2024 Tr. pp. 1-8). According to the IHO, on June 18, 2024, the parent's attorney sent an email stating she wanted to withdraw the matter and the IHO responded, stating that the parties would be required to appear, and the parent's attorney would be expected to explain why the withdrawal should not be deemed to be with prejudice (IHO Decision at pp. 2-3).

On June 24, 2024, the parties appeared before the IHO and discussed the parent's withdrawal of the March 2024 due process complaint notice (June 24, 2024 Tr. pp. 1-8). As to the reasons for the withdrawal, the parent's attorney noted it had been difficult in light of a directive issued that affidavits would not be accepted by OATH unless signed and notarized and that she did not want to appear for the impartial hearing unprepared (June 24, 2024 Tr. pp. 4-6). The parent's attorney argued that, if the IHO were to grant a brief adjournment, all of the [omnibus] cases could be done, as she had "all the documentation" (Tr. p. 5). The district's representative argued that, because it was "the third time" the matter was on the calendar for a hearing—referring to two scheduled dates arising from the prior proceeding in addition to the June 24, 2024 date in the present matter—and that "nothing has been done on this matter," they were in the "territory of failure to prosecute" (June 24, 2024 Tr. p. 6). To the extent the parent sought an adjournment, the district representative noted that his availability would require that the adjournment "be a little longer than a brief [one]" (June 24, 2024 Tr. p. 7).

In an order dated July 1, 2024, the IHO dismissed the parent's March 2024 due process complaint notice with prejudice (IHO Order). Regarding State regulation that permits withdrawals, the IHO acknowledged the regulation but found that it did not allow parents "to do so at the expense of judicial economy," noting that she had "allotted almost 30 hours on her calendar over three hearing dates within an almost 10-month time span for parent's representative to have hearings on this batch of omnibus cases" (id. at pp. 4-5). The IHO was also not persuaded by the parent's attorney's argument that it was difficult to arrange affidavits for omnibus cases noting that the parent's attorney had 10 months to prepare and "did not have to refile the case when [she] did" if she was not prepared (id. at p. 5). Thus, the IHO dismissed the matter with prejudice based on the parent's failure to prosecute (id.). The IHO also denied the parent's request for an adjournment (id.).[2]

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the parent's March 2024 due process complaint notice with prejudice. The parent argues that the IHO failed to give sufficient notice that a dismissal with prejudice was likely to result from a request to withdraw. In addition, the parent notes that the IHO sua sponte raised the possibility that the parent's attempt to withdraw

[2] A request for an adjournment of the proceeding until after the June 24, 2024 hearing date does not appear in the hearing record.

could be treated with prejudice in contravention of State regulation which provides that a withdrawal should be presumed to be without prejudice unless the other party requests otherwise and the parties have an opportunity to be heard. The parent also argues that the conduct was not so egregious to require dismissal with prejudice. The parent requests that the matter be remanded or that the dismissal of the matter be deemed without prejudice.

In an answer, the district responds to the parent's material allegations. The district asserts that it submitted disclosure on June 14, 2024, it had been the third time that a hearing date had been scheduled, and the parent withdrew the case on June 18, 2024 in advance of the June 24, 2024 impartial hearing. The district argues that the IHO had broad discretion to require the parent to follow reasonable directives, the parent had an opportunity to be heard with respect to whether dismissal with prejudice was justified, and the parent's conduct was sufficiently egregious to warrant dismissal with prejudice. Accordingly, the district requests the parent's request for review be dismissed.

V. Discussion

In this case several areas of concern arise as a result of the underlying proceedings. First, the administrative record itself is lacking. The factual basis of the IHO's decision is the parent's prior conduct in both this proceeding and the prior proceeding; however, the materials related to the prior due process proceeding and the parent's communication seeking to withdraw in that proceeding as well as this proceeding are unavailable because the IHO did not make them part of the administrative record in this proceeding. On appeal, the parties, in their verified pleadings, agree that the parent withdrew the due process complaint notice in an email dated June 18, 2024, thus I will accept the parties' representations in this appeal.

Here, the IHO's order of dismissal is in contravention of State regulations regarding withdrawals of due process complaint notices. Specifically, pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). If a party withdraws the due process complaint notice prior to the first date of an impartial hearing—meaning the first date the evidentiary hearing is held after the initial prehearing conference if one is conducted—the withdrawal shall be without prejudice unless the parties otherwise agree (8 NYCRR 200.5[j][6][i]). After the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]). Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding" (8 NYCRR 200.5[j][6][iv]).

Here, on June 18, 2024, after the May 1, 2024 prehearing conference but before June 24, 2024, the first date scheduled for the impartial hearing, the parent's attorney withdrew the due process complaint notice (see IHO Decision at pp. 2-3). Because the parent's withdrawal occurred

prior to the first date of the impartial hearing, pursuant to State regulation, the IHO did not have discretion with respect to whether or not the withdrawal would be deemed with or without prejudice (8 NYCRR 200.5[j][6][i]). Accordingly, the IHO erred in dismissing the due process complaint notice with prejudice based on the parent's failure to prosecute. As the parent withdrew the matter, remand is not appropriate and, instead, the appropriate recourse is to hold that the matter was withdrawn without prejudice as contemplated by State regulations.

As a final note, the IHO's expressed valid concerns regarding judicial economy and amount of effort expended in two separate proceedings to move the disputed issues toward an impartial hearing.[3] It is not appropriate conduct to commence the same case time and time again only to withdraw it prior to the impartial hearing. However, under current limitations imposed by State regulation, the option available to an IHO is consideration of a party's conduct during a due process proceeding as a factor to be weighed when fashioning equitable relief. If a party has engaged in a pattern or practice that results in unfair manipulation of the due process procedures, there is nothing that precludes the IHO from considering such facts when weighing equitable factors at the conclusion of the impartial hearing, so long as they based upon an adequate record and after providing the parties a reasonable opportunity to be heard.[4]

VI. Conclusion

Based on the foregoing, the IHO erred by dismissing the parent's due process complaint notice with prejudice.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the order of the IHO, dated July 1, 2024, is vacated; and

[3] When current regulatory language governing withdrawal of a due process complaint notice was promulgated by the Board of Regents, the provisions were designed to prevent "IHO shopping" with the withdrawal and resubmission of due process complaint notices for the purpose of obtaining a different IHO in the rotational selection requirement (see "Proposed Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education Relating Special Education Impartial Hearings" https://www.regents.nysed.gov/sites/regents/files/114p12a2%5B1%5D_0.pdf). That is not a factor in this proceeding. There is no indication that the IHO's current concern regarding judicial economy and the vast increase in the number of due process proceedings within the district was a factor in 2014 or that the text of the regulation that allows withdrawal prior to a hearing with reassignment to the same IHO effectuates the stated objectives at this point in time. However, it would be up to State policymakers to determine whether further amendments to the plain text of the Section 200.5 are necessary to address the concerns raised by the IHO.

[4] The activity of both parties must be considered. For example, in the prior proceeding the IHO found that both parties had failed to meet disclosure deadlines in the past (IHO Decision at p. 2), not just the parent, but once again the record in this proceeding is inadequate to review such findings.

IT IS FURTHER ORDERED that the parent's March 27, 2024 due process complaint notice is deemed withdrawn without prejudice.

Dated: **Albany, New York**
October 7, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER