The University of the State of New York

The State Education Department
State Review Officer
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No. 24-358

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 Board of Education of the Batavia City School District

Appearances:
Kanazawa Day, PLLC, attorneys for petitioner, by John T. Kanazawa, Esq.

Webster Szanyi LLP, attorneys for respondent, by Melanie J. Beardsley, 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 the decision of an impartial hearing officer (IHO) which upheld a manifestation determination review (MDR) team's determination that the student's behavior was not a manifestation of her disability and sustained a school imposed disciplinary suspension during the 2023-24 school year. 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]). In matters involving disciplinary changes in placement of a student having or suspected of having a disability, a parent may request an expedited impartial hearing in which shorter timelines are imposed (see 20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[a][3]-[4]). 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). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (see 8 NYCRR 279.10[d]). 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

Due to the limited nature of the appeal and disposition thereof, a full recitation of the facts and procedural history is not necessary. Briefly, the CSE met on September 21, 2023 and found the student eligible for special education and related services as a student with an other health-

impairment (Joint Ex. III at pp. 1-3).[1] The September 2023 IEP included evaluation results obtained between 2018 and 2021, as well as teacher report and a behavior log from April 2023 (id. at pp. 2-3). A review of the September 2023 IEP showed that the district copied nearly verbatim the information from the student's previous June 2023 IEP created by her previous school district with a few changes to the recommended program (compare Parent Ex. C, with Joint Ex. III).

The September 2023 IEP recommended direct consultant teacher services for math, English language arts (ELA), social studies, and science, along with one 15-minute session per week of counseling (Joint Ex. III at p. 7). In comparison, the June 2023 IEP recommended integrated co-teaching (ICT) services for math, ELA, social studies, and science, along with one 30-minute session per week of counseling (Parent Ex. C at p. 6). The September 2023 IEP included checks for understanding, use of graphic organizers, use of graph paper, directions read, refocusing and redirection, and pre-teaching of material as supplementary aides and services, program modifications, and accommodations for the student (Joint Ex. III at pp. 7-8). The September 2023 IEP included the same modifications and accommodations as the June 2023 IEP, except that the September 2023 IEP eliminated an academic support period to address the student's study skills along with an additional set of books that were kept at home (compare Parent Ex. C at pp. 6-7, with Joint Ex. III at pp. 7-8). Similar to the June 2023 IEP, the September 2023 IEP included a team meeting "within the first [three] weeks of school to discuss [the student's] [behavioral intervention plan] BIP and supports" that was "[i]nclusive of [the] [p]arent" as a support for school personnel (compare Parent Ex. C at p. 7, with Joint Ex. III at p. 8).

The student's September 2023 IEP testing accommodations included extended time, a location with minimal distractions, waiver of spelling requirements, and checks for understanding of directions (Joint Ex. III at p. 9). Three of the testing accommodations in the September 2023 IEP were the same, but the September 2023 IEP replaced directions read to student with a check for understanding of directions (compare Parent Ex. C at p. 8, with Joint Ex. III at p. 9).

Following an incident on January 4, 2024, the student was "charged with disorderly and/or disruptive conduct, conduct endangering the safety, morals, health or welfare of herself and/or others" and the student was suspended from January 5, 2024 through January 11, 2024 (Dist. Ex. 1 at p. 13). The student was recommended to receive a further period of out-of-school suspension and was thereby "entitled to a fair hearing in accordance with Education Law § 3214(3)," and if found "guilty", "the matter m[ight] be referred to the Manifestation Team to determine whether or not [the student]'s conduct [wa]s a manifestation of this disability" (id.). On January 10, 2024, a superintendent's disciplinary hearing was held, during which "[t]he matter was recessed, and [the hearing officer] left the room to allow the Manifestation Team to make a determination" (id. at pp. 4, 6). The MDR resulted in a finding that the student's "conduct in question was not caused by, and did not have a direct and substantial relation to, [the student]'s disability" and that the conduct was not a direct result of the district's failure to implement the IEP (Dist. Ex. 8; see Joint Ex. IV at pp. 1-2; Dist. Ex. 1 at pp. 6). Following the MDR, the student was suspended through the end of the 2023-24 school year (Dist. Ex. 1 at p. 1).

[1] The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

A. Due Process Complaint Notice

In a due process complaint notice dated June 7, 2024, the parent requested an expedited hearing to challenge the findings of the January 10, 2024 MDR that the student's behavior was not a manifestation of her disabilities, the implementation and adequacy of the student's then-current IEP, and the implementation and adequacy of the student's then-current functional behavioral assessment (FBA) and BIP (Joint Ex. I at pp. 1, 3-4). The parent alleged that the district conducted a procedurally and substantively invalid MDR, that the September 2023 IEP was not appropriate and did not offer the student a free appropriate public education (FAPE), that the district failed to develop an FBA and BIP for the 2023-24 school year, that the district engaged in the improper use of aversive techniques consisting of removals from the classroom and suspensions from school, and violated the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973 (section 504) for the 2023-24 school year (id.).[2] As relief, the parent requested that the January 10, 2024 MDR be declared invalid and a determination that the student's conduct was a manifestation of her disabilities, that the student's academic records be expunged, a declaration that the student was denied a FAPE and discriminated against on the basis of disability, funding and/or reimbursement for independent educational evaluations (IEEs), compensatory education, development of an IEP with specific program recommendations and a safety plan (id. at p. 11).

The district submitted a response to the parent's due process complaint notice, dated June 17, 2024 (Joint Ex. II).

B. Impartial Hearing and Impartial Hearing Officer Decisions

A prehearing conference was held on June 19, 2024, which was not recorded (IHO Decision on Bifurcation at p. 1; June 21, 2024 Parent Mem. of Law at p. 1). By motion dated June 21, 2024, the district requested that the IHO separate the expedited and non-expedited claims set forth in the parent's due process complaint notice into two cases with two separate timelines in accordance with State guidance (Dist. Mot. to Bifurcate at p. 1).[3] In a memorandum of law dated June 21, 2024, the parent objected to the district's motion and asserted that the expedited and non-

[2] State law does not make provision for review of ADA or section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding the ADA and section 504 and such claims by the parent's will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[3] The State guidance relied on by the district is no longer available on the New York State Education Department's (NYSED's) website. While it describes entering two types of issues into the impartial hearing reporting system (IHRS) for tracking purposes of those issues subject to expedited and non-expedited time frames, it does not state that IHOs may sever the expedited claims out of the due process complaint notice such that a decision in the expedited matter would constitute a final decision separate from the other issues contained within the due process complaint notice (see Dist. Mot. to Bifurcate, Ex. A).

expedited issues raised in the parent's due process complaint notice be heard together on an expedited basis (Parent Mem. of Law in Opp.).

On June 24, 2024, the IHO ordered that "the due process complaint filed by the Parent dated June 7, 2024 is deemed to be bifurcated with Claim One of the complaint being determined pursuant to 8 NYCRR 201.11 and the remaining claims to be determined pursuant to 8 NYCRR 200.5" and further ordered the district to "take all necessary steps to enter the appropriate data into IHRS to reflect that the two matters are proceeding in accordance with this decision" (IHO Decision on Bifurcation at p. 4).[4]

On July 1, 2024, the parties proceeded to an expedited due process hearing (Tr. pp. 1-178). By decision dated July 16, 2024, the IHO determined that the MDR team correctly found the student's conduct was not a manifestation of her disability and denied the parent's requested relief (IHO Decision at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in separating the claims raised in her due process complaint notice as "all facts and claims were inextricably intwined," the IHO improperly precluded the parent's documentary evidence, and the IHO improperly determined that the student's conduct was not a manifestation of her disability.[5] The parent seeks reversal of the IHO's order and declaratory relief.

In an answer, the district responds with admissions and denials and argues that the IHO's decision should be affirmed.

V. Applicable Standards

The IDEA includes specific protections with regard to the process by which school officials may seek to effectuate a disciplinary change in placement of a student with a disability who violates a code of student conduct (see 20 U.S.C. § 1415[k]; Educ. Law §§ 3214[3][g]; 4404[1]; 34 CFR 300.530-300.537; 8 NYCRR Part 201). State regulations provide that a disciplinary change in placement means a "suspension or removal from a student's current educational

[4] The IHO cited to two IHO exhibits that were never marked as IHO exhibits or admitted into the hearing record (IHO Decision on Bifurcation at p. 2). Notwithstanding, the district has submitted both documents with the certified hearing record.

[5] The parent has annexed to her request for review the documentary evidence excluded by the IHO. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The parent's additional evidence was offered at the time of the impartial hearing and is not necessary to render a decision in this matter. Thus, I decline to accept the parent's documents as additional evidence as part of this appeal.

placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2], [c]).

If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct an MDR "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]). The participants in an MDR must include a district representative, the parents, and the "relevant members" of the CSE, as determined by the parent and the district (20 U.S.C. § 1415[k][1][E][i]; Educ. Law § 3214[3][g][2][ii]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[b]). The manifestation team must "review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]).

If the result of the MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct an FBA and implement a BIP; or if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances" as defined in the IDEA and State and federal regulations, the district must also return the student to the placement from which he or she was removed or suspended (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).[6] If the MDR team determines that the student's conduct was the direct result of the school district's failure to implement the student's IEP, the district must take immediate steps to correct the deficiencies in the implementation of the student's IEP (34 CFR 300.530[e][1][ii], [3]; 8 NYCRR 201.4[e]).

If the parent of a student with a disability disagrees with a school district's decision regarding the student's placement, or a determination of the manifestation team, the parent may request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[a][3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

VI. Discussion and Conclusion

At the outset, the evidence shows that an expedited impartial hearing has occurred with respect to the MDR aspects of the parent's due process complaint notice, but the case continues at the impartial hearing level with respect to the other issues raised by the parent in her due process complaint notice, thus the parent's contention on appeal is not within the scope of a permissible interlocutory appeal and at this juncture is outside the scope of my review. State regulations

[6] A district and parents may agree to a change in the student's placement (20 U.S.C. § 1415[k][1][F][iii], [G]; 34 CFR 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[a], 201.9[c][3]).

governing the practice of appeals from the decisions of IHOs related to matters concerning the provision of a FAPE to a student with a disability or a manifestation determination limit appeals from an IHO's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). Here, the IHO issued multiple decisions, however none of them constitute a final determination as multiple issues raised in the parent's June 7, 2024 due process complaint notice are still pending before the IHO. Further, none of the IHO's decisions issued to date in this matter resolve a pendency dispute. Therefore, the parent has not yet appealed from the IHO's final determination in this matter. As State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, the parent's appeal must be dismissed as premature (see Application of a Student with a Disability; Appeal No. 22-120; Application of a Student with a Disability, Appeal No. 18-075).

Initially, there does not appear to be a stay put dispute between the parties as to the student's placement during the pendency of this proceeding. The student was suspended in January 2024 for the remainder of the 2023-24 school year (Dist. Ex. 1 at p. 1). The district asserts that the superintendent offered the student an early reinstatement option with a return date on or about April 8, 2024 (Answer ¶ 7; see Dist. Ex. 1 at p. 1). Since the suspension period has already elapsed, any reversal in an MDR determination in order to shorten the length of the student's suspension is no longer possible as the time frame for the student's suspension expired at the end of the 2023-24 school year, weeks prior to the IHO issuing his interim decision on July 16, 2024.

While consideration of the parent's allegations on appeal is premature at this juncture, it does not prevent later review of the IHO's decisions related to the expedited issues. State regulation provides that a "party may seek review of any interim ruling, decision, or failure or refusal to decide an issue" in an appeal from an IHO's final determination (8 NYCRR 279.10[d]). Thus, if necessary, the parent may appeal from the IHO's July 16, 2024 decision after the IHO closes the hearing record and issues his final determination on the remaining issues. This approach ensures that the evidentiary record will be further developed with respect to the other aspects of the parent's case (e.g. that the student's 2023-24 IEP was inadequately designed to address alleged behavioral concerns), which if adequately borne out, could be related to the parent's concern that the MDR process was flawed due to misapprehension of the student's disability prior to the events leading to the student's suspension.

It makes sense to conduct one proceeding with issues that are closely related as the parent has alleged. But if speed for certain aspects of the case is paramount (and at the cost of the opportunity for a more developed argument of intertwined issues), there are strategic options to consider prior to filing a due process complaint notice. The IDEA does not preclude a parent from filing two separate due process complaint notices on issues separate from each other (34 CFR 300.513[c]). Therefore, had the parent filed two separate due process complaint notices; one for the claims related to the MDR determinations and one for the claims related to the provision of a FAPE, this office would have been permitted to review the expedited hearing consisting of the MDR claim only because it would have been an appeal from an IHO's final determination. Here, the parent filed one due process complaint notice, thus the IHO's decisions to date do not constitute a final determination in this matter (see Application of a Student with a Disability, Appeal No. 22-120).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 20, 2024

STEVEN KROLAK
STATE REVIEW OFFICER