



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-400

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:

Peter G. Albert, Esq., attorney for petitioner

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 the parent's due process complaint notice regarding the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for his son for the 2024-25 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 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 nature of the appeal and the procedural posture of the matter, namely that the matter was dismissed without prejudice prior to development of an evidentiary record regarding the student, the description of the facts and history herein is limited to a procedural history, including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice without prejudice.

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Due Proc. Compl. Not.). According to the due process complaint notice, the student began attending the International Academy for the Brain (iBrain) in 2020 and as of the time of the due

process complaint notice was attending a 6:1+1 special class with related services, including five 60-minute sessions per week of occupational therapy (OT); five 60-minute sessions per week of physical therapy (PT); five 60-minute sessions per week of speech-language therapy; three 60-minute sessions per week of vision education services; three 60-minute sessions per week of music therapy; and one 60-minute session per week of assistive technology, as well as the support of 1:1 paraprofessional services and special transportation services (id. at pp. 3-4). For the 2024-25 school year, the parent asserted that the district did not provide prior written notice or a school location letter, failed to recommend an appropriate class size, failed to recommend an appropriate school location, would be unable to implement the recommended related services, failed to recommend music therapy as a related service, failed to conduct necessary evaluations, and failed to recommend appropriate transportation services (id. at pp. 5-8). As relief, the parent requested, among other things, direct payment to iBrain for the student's full tuition for the 2024-25 school year, direct payment to Sisters Travel and Transportation Services, LLC for special education transportation services, and direct payment for 1:1 nursing services (id. at pp. 9-10). The parent also requested an interim order of pendency for funding of the costs of the student's tuition at iBrain and transportation services (id. at p. 2).

A. Impartial Hearing Officer Decision

A prehearing conference was held before the Office of Administrative Trials and Hearings (OATH) on July 23, 2024 (Tr. pp. 1-18). At the initial prehearing conference the parent requested that the impartial hearing begin immediately, asserting that the district did not hold a resolution meeting and the district responded that it attempted to schedule one; the IHO then denied the parent's request (Tr. pp. 3-9).¹ Following the initial hearing, the IHO issued an interim order setting forth the IHO's rules for the hearing (IHO Ex. VII). Included as part of the interim order, the IHO directed that all appearances were mandatory and that "failure to timely appear for a conference may result in the appearance continuing without the party, dismissal of the due process request or the striking of defenses" (id. at p. 1). In addition, the IHO sent the parties an email scheduling a prehearing conference for August 12, 2024 at 10:00 a.m. (IHO Exs. II; IV at p. 2).

On August 1, 2024, the district moved to have the due process complaint notice dismissed due to the parent's failure to appear for the scheduled resolution meeting (IHO Ex. V).

On August 12, 2024, the district appeared for the scheduled prehearing conference, and, noting that the parent had not yet appeared, the IHO sent an email to counsel for the parent at 10:03 a.m. indicating that the IHO was "in the hearing room conducting the [prehearing conference] now" further requesting that the parent "[p]lease join" (Tr. p. 20; IHIO Ex. IV at p. 1). The IHO further noted, during the hearing, that she would give the parent five minutes to appear and that she had not received any requests "to reschedule or adjourn the hearing" (Tr. pp. 20-21). In discussing the matter with counsel for the district, the IHO indicated that if the parent failed to appear, she would be "inclined to approve any request to dismiss the complaint without prejudice" (Tr. p. 21). Counsel for the district then made the request, but indicated that the district also filed a motion on August 1, 2024 and had not received a reply from the parent (Tr. p. 21). The IHO

¹ The hearing record includes an email dated July 18, 2024 in which the parent asserted that the district failed to convene a resolution meeting within 15 days of receiving the due process complaint notice (IHO Ex. I).

responded that she did not get a response from the parent on the district's August 1, 2024 motion to dismiss but that she would not address the motion if she dismissed the matter for the parent's failure to appear (Tr. pp. 21-22). As the parent failed to appear for the hearing, the IHO indicated that she would issue a dismissal order by the close of business that day and the prehearing conference concluded at 10:09 a.m. (Tr. p. 22).

In an email, sent at 11:12 a.m. on August 12, 2024, counsel for the parent indicated that the hearing record was scheduled for 10:30 a.m. and that she "logged on at 10:30 and received a message that it was not scheduled for that time" (IHO Ex. IV at p. 1).

In a decision dated August 12, 2024, the IHO dismissed the parent's due process complaint notice without prejudice after finding that the district appeared for the August 12, 2024 prehearing conference, the parent did not appear, and the parent had been given sufficient notice that failure to appear could result in dismissal of the due process complaint notice (IHO Decision).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in not issuing a pendency order in this matter and in dismissing the parent's due process complaint notice due to the parent's failure to appear for the August 12, 2024 prehearing conference.² The parent reviewed a timeline of the procedural history of this matter leading up to the dismissal of the parent's due process complaint notice including the IHO's transmittal of the interim order on July 23, 2024 and the IHO's scheduling of a prehearing conference for August 12, 2024.

The district submits an answer asserting that the IHO acted within her authority in dismissing the parent's due process complaint notice due to the failure to appear at the August 12, 2024 prehearing conference. The district also contends that the parent has refiled the same claim for the 2024-25 school year in a due process complaint notice dated August 28, 2024.³

V. Discussion

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]).

² The parent asserts that, after the IHO's dismissal, the parent made a motion for reconsideration; however, the hearing record in this matter does not include a copy of the motion for reconsideration.

³ Both the parent and the district submit additional evidence on appeal; however, as the additional evidence does not weigh on the IHO's decision to dismiss the due process complaint notice, it is not necessary to render a determination on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

In addition, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Under sufficiently egregious circumstances, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g., Application of a Student with a Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice without prejudice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]).

In this instance, the IHO scheduled a prehearing conference in this matter for August 12, 2024 at 10:00 a.m. (IHO Exs. II; IV). Additionally, the IHO had previously, on July 23, 2024, sent the parties an interim order which notified the parties that "failure to timely appear for a conference may result in the appearance continuing without the party, dismissal of the due process request or the striking of defenses" (IHO Exs. IV at p. 2; VII). After the parent failed to appear for the prehearing conference at 10:00 a.m., and in response to the IHO's email sent at 10:03 a.m. asking the parent to join the hearing, counsel for the parent sent an email at 11:12 a.m. indicating that she believed the hearing was scheduled for 10:30 a.m. (IHO Ex. IV at p. 1). On appeal, instead of addressing the parent's counsel's mistake as to the time of the hearing, counsel for the parent asserts, without further explanation, that parent's counsel did not appear at the scheduled prehearing conference "[d]ue to an inadvertent scheduling conflict" (Req. for Rev. at ¶44).

Accordingly, based on the above, there is not a sufficient basis presented on appeal to overturn the IHO's dismissal of the parent's due process complaint notice without prejudice.

VI. Conclusion

Having found that the hearing record supports the IHO's decision to dismiss the parent's due process complaint notice without prejudice due to the parent's failure to appear at the August 12, 2024 prehearing conference, the necessary inquiry is at an end and, therefore, it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 27, 2024**

**CAROL H. HAUGE
STATE REVIEW OFFICER**