The University of the State of New York

The State Education Department
State Review Officer
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No. 24-419

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:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, 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) that dismissed her due process complaint notice against respondent (the district) without prejudice. The appeal must be dismissed.

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

The student has been the subject of several prior State-level review proceedings that have addressed the claims related to the student's unilateral placement at the International Academy for the Brain (iBrain) (see Application of a Student with a Disability, Appeal No. 23-302; Application

of the Dep't of Educ., Appeal No. 21-012; Application of a Student with a Disability, Appeal No. 19-060). The parties' familiarity with this matter is presumed and, given the disposition of this matter on procedural grounds, as well as the sparse record available on appeal, the facts and procedural history of the case will not be recited in detail.

Briefly, according to the parent, the student was diagnosed with a brain injury with a seizure disorder, optic atrophy, and being G-tube dependent (Due Process Compl. Not. at p. 3; see Application of a Student with a Disability, Appeal No. 23-302). The student was unilaterally placed at a nonpublic school (id. at pp. 3-4).

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 generally Due Process Compl. Not.). As part of the parent's requested remedies, she asked that an immediate resolution meeting be held with appropriate participants (id. at p. 1). She further requested a pendency hearing (id. at p. 2).

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH). A resolution meeting was scheduled for July 12, 2024 and indicated that the parent could request a different time (IHO Ex. III at pp. 18-19). Between July 11, 2024 and July 24, 2024, the parties exchanged emails with the IHO and among themselves regarding the scheduling of a resolution meeting and discussing the parties' disagreement about the degree of decision-making authority that a district participant would be required to possess (IHO Exs. II; III at pp. 11-19, 21-22).

On July 29, 2024, a resolution meeting took place, with an attorney for the parent who was licensed only in New Jersey and Pennsylvania and who attended on behalf of the parent; the parent did not attend the meeting personally (IHO Ex. III at p. 10). According to the district's special education student information system (SESIS) events log, during the resolution meeting, the district attempted to discuss the parent's underlying concerns in the due process complaint notice, such as evaluations, the CSE meeting, and placement considerations (id.). According to the log, the parent's representative "stated that Pendency at iBrain supersedes any/all other claims and while [she] noted there [we]re other concerns[, she] refused to discuss any other concerns until pendency [wa]s addressed" (id.).

The district filed a motion to dismiss dated August 2, 2024 (see generally IHO Ex. III). The district contended that the matter required dismissal because the parent had failed to participate in the resolution process, despite the district's reasonable efforts to hold a resolution meeting on three proposed dates (id.).

On August 2, 2024, the district appeared for the scheduled prehearing conference (Tr. pp. 1-7), but the parent did not (Tr. p. 2). The IHO noted that the parent's representative was included on the IHO's introductory email, that they were included on the IHO's prehearing conference invitation, and that the IHO had sent a reminder email five minutes prior to the proceeding starting (id.). The IHO noted that her introductory email stated that a failure to appear for a scheduled conference could result in the dismissal of the due process complaint notice (Tr. p. 3; see IHO Ex. I at p. 2), and asked the district representative if they had any requests in light of that (Tr. p. 3). The district declined to make a request for dismissal, and instead opted to request an adjournment of 30 days "in fairness, just in case there's a crosswire" (id.). The IHO then scheduled the matter

for a status conference, and to provide the parent the opportunity to respond to the district's motion to dismiss (Tr. pp. 2-4). The IHO provided the parent with two weeks to respond to the motion to dismiss (Tr. p. 6). The IHO further asked for the district's position on pendency, which the district representative indicated that they would oppose the parent's request, and that a hearing date on the issue would likely be necessary (Tr. p. 4). The IHO requested that the district submit any written opposition to the parent's pendency request prior to the status conference (Tr. pp. 5-6).

After the prehearing conference concluded, the IHO sent an email to one of the parent's attorneys, explaining the prehearing conference had proceeding in the parent's absence, and that without their presence, the case was unable to proceed (IHO Ex. V at pp. 1-2). The IHO further informed the parent's representative that the district had submitted a motion to dismiss, with the response being due by August 16, 2024 (id.). The IHO also relayed to the parent's representative that a status conference had been scheduled for August 20, 2024 to discuss the motion to dismiss and any outstanding pendency issues, and/or to set an impartial hearing date (id. at p. 2).

A law clerk from the law firm representing the parent who had previously communicated with the IHO indicated in an email that she was attempting to log into the prehearing conference and stated: "I apologize, my calendar had the PHC listed at 3:00pm" as opposed to 2:30 p.m. (see id. at p. 1). The IHO informed the parent's law clerk that the conference had concluded (id.). Later that afternoon, another staff member from the parent's law firm emailed the IHO alleging that the law clerk did not receive the hearing notice (IHO Ex. VI at pp. 1-2; compare IHO Ex. II; IHO Ex. V at pp. 1-2).

On August 20, 2024, the parties appeared for the status conference before the IHO (Tr. pp. 8-11). The IHO noted that she had not received a response to the district's motion to dismiss from the parent (id. at p. 10). In light of this, the IHO inquired: "At this point, I am going to be granting the District's motion to dismiss . . . Is there anything else that either of you would like to put on the record while we're here today?" to which the parent's attorney responded "No" (id.).

The IHO issued a decision dated August 20, 2024, dismissing the due process complaint notice without prejudice (see generally IHO Decision). The IHO noted that, at no point during the parties' email exchanges with respect to the district's proposed scheduling dates for the resolution meeting, did representatives for the parent request that a specific person be included in the meeting, or that the proposed participants from the district did not have the required factual knowledge of the facts that gave rise to the due process complaint notice (id. at p. 2). The IHO stated that the parent's assumption that the district participants would not have the required authority for a resolution meeting was not supported by the record (id.). Additionally, the IHO noted that the parent did not propose alternative dates and times for a resolution meeting (id.). The IHO noted that, during the only meeting held on July 29, 2024, the parent's representative refused to discuss any matters until pendency was addressed (id.). The IHO found that the district had made reasonable efforts to obtain parent participation for a resolution meeting (id.). The IHO indicated that, while parent's counsel may have had doubts regarding the authority of the district's participants in the resolution process, the IHO credited the district's assertions that the proposed participants had the relevant authority, and that parent's representatives provided no evidence to the contrary (id. at pp. 3-4). The IHO noted that the resolution process is a collaborative effort, and that, if the parent felt that the district was not complying with its obligations for that process, the appropriate response would not have been a refusal to participate, as they did in this matter,

but an argument at the impartial hearing in the context of equitable considerations (id. at p. 4). The IHO stated that the parent's outright refusal to participate violated the spirit of the resolution process (id.). The IHO further noted the lack of a response from the parent to the district's motion to dismiss, and that the parent did not request additional time to submit a response (id. at p. 3). The IHO further noted that parent's counsel did not make any objection to the ruling granting the motion on the record during the August 2, 2024 appearance or make any further record on the issue when given the opportunity (id.).[1]

IV. Appeal for State-Level Review

The parent appeals, alleging, among other things, that the IHO erred by dismissing the due process complaint. The parent further alleges that she filed a motion for reconsideration on the IHO's decision, but this was denied. In addition, the parent contends that the IHO erred by failing to issue an order on pendency.

In an answer the district alleges, among other things, that the IHO did not err in dismissing the due process complaint notice because it was clear the parent and her representatives never intended to engage in any proposed resolution meetings and that the district was unable to secure the participation of the parent in any resolution meeting. The district concedes that the student is entitled to pendency funding as per the pendency implementation form included with the due process complaint notice through the present appeal. The district also alleges that the parent has

[1] The IHO expressed her concerns with the candor of parent's representatives, with respect to two occasions in which the IHO indicated that parent's representatives "presented less than honest information" (IHO Decision at p. 4). The IHO noted that in an July 18, 2024 email to the IHO from one of parent's representatives, in which she alleged that the district was deficient in its resolution obligations, that the parent's representative failed to inform the IHO that the district had made multiple attempts to schedule a meeting, and that the parent had already refused to appear to one such meeting (IHO Decision at p. 4). The second instance discussed by the IHO was regarding the parent's representative's failure to appear for the August 2, 2024 prehearing conference (id.). The IHO noted that one of the parent's representatives had acknowledged receipt of the prehearing notice on two occasions, including when the representative who would be appearing for the matter indicated that she was trying to log into the conference late due to a calendaring error (see IHO Ex. V at pp. 1-2), but then, at a later point, the parent's representatives' office had alleged that no such notice had been received by that same representative (IHO Decision at pp. 3-4; see IHO Ex. VI at pp. 1-2).

since refiled a due process complaint for this same matter and includes a copy of the due process complaint notice filed by the parent as a proposed exhibit.[2, 3]

V. Discussion

The IDEA, as well as State and federal regulations provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). Except where the parties have agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]). Further, a school district may request that an IHO dismiss a due process complaint notice if, at the conclusion of the 30-day resolution period and notwithstanding reasonable efforts having been made and documented, the district was unable to obtain the participation of the parent in the resolution meeting (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). On the other hand, if the district fails to convene the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate

[2] The parent and the district submit additional evidence with their respective pleadings. 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]). One document offered by the parent is a publicly available guidance document issued by the United State Office of Special Education Programs and, therefore, it is not necessary to receive the document as evidence (see "Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)," 61 IDELR 232 [OSEP 2013]). The remaining documents offered by the parent were available at the time of the impartial hearing and are not necessary to render a decision; as such, they will not be considered. The document offered by the district is dated after the IHO's decision, and after the final appearance in this matter, and is necessary to render a decision. It will be cited as SRO Exhibit 1.

[3] The parent submits a reply, largely reiterating the arguments raised in the request for review. A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (NYCRR 279.6 [a]). Accordingly, as the parent's reply reiterates arguments raised in the request for review, it is not a proper reply and will not be considered.

in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]).

As for the district's motion to dismiss, as a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004),[4] but generally regulations do not address the particulars of motion practice.[5] Instead, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in such matters, 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]).

Here, the IHO did not abuse her discretion in dismissing the due process complaint notice without prejudice. The parent failed to make any opposition whatsoever to the district's motion to dismiss, and the parent's arguments on appeal do not set forth a convincing basis for disturbing the IHO's decision. The resolution session requires the attendance of a parent, a term which is specifically defined (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 300.519[a]; 8 NYCRR 200.1[ii]). The parent did not participate with convening the resolution session, since the parent's attorney responded that he would advise if the parent would attend only after conditions imposed by the parent's attorney were met to his satisfaction (IHO Ex. III at pp. 18-19). Furthermore, there is no dispute that the parent did not attend the resolution meeting held on July 29, 2024 or that her attorney cancelled an earlier scheduled meeting (IHO Exs. III at pp. 10, 26-27).[6] Additionally, and of greater importance, the parent failed to oppose the district's motion as noted by the IHO and, thereafter, when provided with an opportunity to make a record regarding the IHO's decision to grant the motion to dismiss, the parent's representative declined to make any such record, objection, or otherwise (see Tr. p. 10).

As a final matter, while the parent alleges that she submitted a motion for reconsideration regarding the IHO's decision dismissing the matter, I note that an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer and an IHO, whose jurisdiction is limited by statute and regulations, has no authority to reopen an impartial hearing, reconsider a

[4] While permissible, summary disposition procedures should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).

[5] The exception is a sufficiency challenge, which addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA (8 NYCRR 200.5[i]; see 20 U.S.C. § 1415[b][7], [c][2]; 34 CFR 300.508); however, there is no allegation in the present matter regarding the sufficient of the parent's due process complaint notice.

[6] The IDEA and implementing regulations do not permit a representative to attend a resolution meeting in a parent's stead, and instead permit a parent to be accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]).

prior decision, or retain jurisdiction to resolve future disputes between the parties (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]), and, therefore, it would have been improper for the IHO to grant a motion for reconsideration, modifying or vacating the IHO's final decision already rendered.[7]

VI. Conclusion

As the IHO did not abuse her discretion in dismissing the due process complaint notice without prejudice, this appeal must be dismissed.

I have considered the parties' remaining contentions and find that the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 3, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] Additionally, the district has asserted that the parent has already refiled a due process complaint notice on this matter, alleging the same or very similar contentions with respect to the 2024-25 school year (see SRO Ex. 1). Thus, even if the parents were to prevail in their appeal, it would not be appropriate to remand this matter and have a second parallel proceeding pending in addition to the impartial hearing that has commenced based on the parent's newly filed due process complaint notice. For that matter, it is unclear what motivates the parent to continue pursuing this matter as the district concedes that the student is entitled to pendency through the date of this decision.