



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-420

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:

Shehebar Law PC, attorneys for petitioner, by Ariel A. Bivas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 educational services to her son for the 2023-24 school year. The appeal must be sustained, and the matter remanded to the IHO for further proceedings.

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 programming 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 limited nature of the issue on appeal and the sparse hearing record underlying the impartial hearing in this matter, a detailed recitation of the student's educational history is not necessary.

Turning to the procedural history and the commencement of this proceeding, the parent filed a due process complaint notice on July 11, 2024, and alleged, among other things, that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Due Process Compl. Not.).¹

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 26, 2024 (see Tr. pp. 1-22).² At the beginning of the proceedings, it became apparent to the parties and the IHO that the student ID number listed in the due process complaint notice was not the ID number of the student who was the subject of the proceeding (Tr. pp. 1-11). Consequently, the IHO had an incorrect student name associated with this case, called that incorrect student name when going on the record for the hearing, and indicated that the hearing was on the record for that incorrect student (Tr. pp. 1-8, 12). Additionally, the district submitted evidence disclosures related to the incorrect student (Tr. p. 7).

The IHO told the parent's representative that it was "too late" to amend the due process complaint notice, because the impartial hearing had already begun (Tr. pp. 11, 13-14). The parent's representative questioned why the parent would need to amend the due process complaint notice for a clerical error, and the IHO stated that it was not a clerical error (id.). The IHO told the parent's representative that she could "either proceed with the hearing and [the IHO could] dismiss the complaint, or [the parent's representative could] withdraw" the due process complaint notice and refile with the proper information (id.).

The parent objected to the IHO's rulings and to the options she presented, which the IHO noted (Tr. p. 20). The IHO further, when faced with protests by the parent's representative, threatened to "exclude [the representative] from the rest of the hearings if [she] continue[d] to be argumentative and impede [the IHO's] ability to conduct the hearing" (id.). The parent elected to proceed (Tr. p. 14). The IHO did not admit any of the proposed exhibits by the parent because "they all reference[d] a student whose name [the parties were] not [there] for" (Tr. pp. 16-18).

¹ As discussed further below, the IHO did not admit any of the parent's proposed exhibits during the impartial hearing. Nevertheless, all of the parent's exhibits were included with the record on appeal. As they were not admitted into evidence, they have not been considered. The district separately filed certain documents with the record on appeal required by State regulation, such as the parent's due process complaint notice (8 NYCRR 200.5[j][5][vi]; 279.9[a]), and, for purposes of this decision, it is those documents that I will reference and cite. The parent may offer the exhibits for consideration to the IHO once again upon remand.

² There is an omnibus docket order, dated July 15, 2024, included in the record on appeal as IHO Exhibit I, issued by a different IHO than the one who presided over this impartial hearing. It is unclear if this order is related to this case, as the IHO's decision in this matter does not reflect that any IHO exhibits were entered into evidence (see IHO Order at p. 4).

The IHO issued an order of dismissal dated August 26, 2024 (see IHO Decision). The IHO stated that she "informed the parties that we could not move forward with the complaint as is . . . and the Parent was no longer entitled to amend the complaint as the hearing had already begun" (id. at p. 1). The IHO further wrote "[b]ased on the foregoing, I was compelled to dismiss this case without prejudice . . . IT IS THEREFORE ORDERED THAT this case is dismissed with prejudice" (id. [emphasis added]).

IV. Appeal for State-Level Review

The parent appeals and alleges, among other things, that the student ID number error was a clerical and immaterial error. The parent further points to the regulations related to due process complaint notices and alleges that a student ID number is not required, and that all the information that is required was listed on the due process complaint notice. The parent notes that the district never made any objections or challenges to the sufficiency of the due process complaint notice. The parent also notes that the IHO order contains a discrepancy with respect to whether the case was dismissed with prejudice, and that the IHO issued a subsequent order the next day clarifying that the dismissal was without prejudice. The parent asks that this matter be remanded to the IHO on the merits.³

In an answer, the district responds to the parent's allegations. The district contends, among other things, that the IHO properly dismissed this matter without prejudice, and that the IHO lacked authority to permit an amendment to the parent's due process complaint notice. The district further contends that the student ID discrepancy was not a mere clerical error because the parties were on the record for the incorrect student. The district agrees however, that the dismissal should be considered to be without prejudice "in line with regulations and the IHO's intent."

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]). 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

³ With her appeal, the parent submits several documents and asks that they be considered. 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]). Here, as noted above, the IHO would not enter evidence into the hearing record, and, the parent had not, prior to the August, 2024 hearing date, known that the correct identity of the student subject to the proceedings would be an issue for which evidence would be required. To the extent deemed necessary, the parent's additional evidence is cited herein.

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.

I further note that the IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). A due process complaint notice is deemed to be sufficient unless the party receiving it timely notifies the impartial hearing officer and other party, in writing, of alleged deficiencies within 15 days of receipt (20 U.S.C. § 1415[c][2][A]; 34 CFR 300.508[d][1]; NYCRR 200.5[i][3], [6]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

Here, as the parent notes, the record is devoid of any timely challenge by the district to the sufficiency of the due process complaint notice. Further, a student ID number is not required to be in the due process complaint notice under the applicable regulations (see 8 NYCRR 200.5[i][1]; see also 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Indeed, the due process complaint notice has everything that is required of it, including the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]). As there was no timely challenge to the sufficiency of the due process complaint notice, and as all the necessary information appears to be included, the due process complaint notice was deemed to be sufficient.

Additionally, the IHO abused her discretion in dismissing this matter based upon the minor clerical error of having an incorrect student ID number listed on the due process complaint notice, when the remaining information on the pleading was correct. As discussed above, there was no challenge to its sufficiency, and so the pleading was deemed to be sufficient. The error on the due process complaint notice was an easily correctible one, which the IHO could have clarified on the record, and an adjournment for the parties to gather evidence and proceed under the proper student's name would have been appropriate under the circumstances.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

The IHO's order of dismissal will be vacated, and this matter will be remanded to the IHO for a determination on the merits, as the IHO abused her discretion in dismissing this matter for the minor clerical error on the due process complaint notice, which was deemed to be sufficient by virtue of the applicable regulations.

One final point of discussion must be explored in this matter. With respect to this case's potential dismissal with prejudice, I note that the IHO, in her order dated August 26, 2024, initially stated that she "was compelled to dismiss this case without prejudice," and then, went on to order "IT IS THEREFORE ORDERED THAT this case is dismissed with prejudice" (IHO Order at p. 1 [emphasis added]). The parent alleges, and submits SRO Exhibit E to support, that the IHO then issued a second order on August 27, 2024, correcting the above discrepancy, and having the dismissal be deemed without prejudice (see SRO Ex. E). I note that an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]), and, therefore, the IHO was not permitted to submit an "amended" or "corrected" order. While this discrepancy is of no significance given that the IHO's order is to be vacated and the case is to be remanded, I note that, even if I were to have found differently, I would have nonetheless found that the matter should be deemed to have been dismissed without prejudice, as there is a clear discrepancy in the IHO's order, the district agrees that the matter should not have been dismissed with prejudice, and the parent's conduct in this matter clearly does not warrant a dismissal with prejudice.⁴

VI. Conclusion

As discussed above, the IHO's Order of Dismissal will be vacated, and this case will be remanded to the IHO to be heard on the merits. I have considered the parties' remaining contentions and find the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

⁴ A dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). In upholding a dismissal with prejudice, SROs have considered whether there was adequate notice to the party at risk for dismissal and whether the party engaged in a pattern of conduct or in conduct so egregious as to warrant the maximum sanction of dismissal of the due process complaint notice with prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 20-137; Application of a Student with a Disability, Appeal No. 20-009; Application of a Student with a Disability, Appeal No. 20-008; Application of a Student with a Disability, Appeal No. 18-111).⁴

IT IS ORDERED that the IHO's August 26, 2024 order of dismissal, dismissing this case, is vacated;

IT IS FURTHER ORDERED the matter is remanded to the IHO to be heard on the merits, under the proper student's name, and with a clarification of the record made addressing the due process complaint notice's discrepancy with respect to the student ID number, and the IHO shall ensure that the proper student ID number is associated with this matter.

Dated: **Albany, New York**
 November 1, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER