The University of the State of New York

The State Education Department
State Review Officer
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No. 24-424

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:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 his due process complaint notice against respondent (the district) without prejudice. 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]). 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 a prior State-level review proceeding that addressed the parent's claims related to the student's unilateral placement during the 2023-24 school year at the International Academy for the Brain (iBrain), privately obtained transportation from Sisters Travel and Transportation Services, LLC (Sister's Travel), and nursing services from B&H Health Care, Inc. (B&H Health Care) (see Application of a Student with a Disability, Appeal No. 23-238). The student in this matter has significant global developmental delays and began attending iBrain in June 2022 (id.). Given the limited nature of the issues on appeal and because the parent's due process complaint notice was dismissed without prejudice before an impartial hearing was conducted, the administrative hearing is sparse in this matter. Accordingly, the parties' familiarity

with this matter is presumed, and, therefore, the facts, including the student's educational history, the procedural history of the case and the IHO's decision will not be recited here in detail.

The parent filed a due process complaint notice on July 2, 2024, which triggered the start of the resolution period for this matter (see Due Process Compl. Not.). In his due process complaint notice, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 extended school year and that the parent had unilaterally obtained the private schooling at iBrain (id. at p. 1). As part of the parent's requested remedies, he asked for an immediate resolution meeting to be held with the appropriate participants (id.). Additionally, the parent requested an interim decision regarding the student's pendency placement, seeking the costs of services from the district for iBrain, Sisters Travel, and B&H Health Care (id. at p. 2).

On July 11, 2024, a district representative sent an email to the parent informing them that a resolution meeting had been scheduled for July 12, 2024 (Dist. Ex. 1 at p. 5). On the same day, the parent's attorney responded to the district's email, confirming that "we will be attending the Resolution Meeting and will notify you of the Parent's attendance as well" (id. at p. 4). In that same email, the parent's attorney asked that the district confirm who would be attending the resolution meeting and what authority the person had to settle the various issues present in the due process complaint notice (id. at pp. 5). On the morning of July 12, 2024, a different attorney from the law firm for the parent responded to the district and asserted that the resolution meeting would not proceed because "1) it was not a mutually agreed date/time with the Parents, and 2) the participants from the [district] do not have decision-making authority to resolve ALL of the issues raised in the Parent's Due Process Complaint . . . " (id. at pp. 3-4).

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH), and the IHO emailed the parties on July 12, 2024 to schedule a prehearing conference on August 5, 2024 (see IHO Ex. I).

Subsequently on July 12, 2024, a third attorney for the parent emailed the IHO, ex parte, stating that the district had failed to schedule a resolution meeting within 15 days of receiving the due process complaint notice (IHO Ex. I). The third attorney requested that due to the alleged failure the timeline for completing the impartial hearing should begin on the 16th day following the filing of the due process complaint notice, which according to the parent would have been July 17, 2024 (id.).

Meanwhile, on July 17, 2024, the district representative emailed the parent and his representatives to attempt to reschedule the resolution meeting (Dist. Ex 1 at p. 3). In the email, the district representative indicated that those in attendance would have appropriate authority in accordance with the IDEA and 8 NYCRR § 200.5(j)(2) and proposed two dates for the resolution meeting (id.). The parent's attorney responded to this email the same day, expressing his doubts about the district representative's authority to resolve all the claims in the parent's due process complaint notice (id. at p. 2).

The next day, on July 18, 2024, an attorney for the parent emailed the IHO, copying the district representative, and asserted that the district failed to convene a resolution meeting within 15 days of receiving the due process complaint notice and requesting, once again, that the impartial

hearing timeline begin (IHO Ex. II). On the evening of July 18, 2024, an attorney for the district sent an email in response, asserting, among other things, that the parent's attorneys had mischaracterized the requirements of the IDEA and 8 NYCRR § 200.5(j)(2) and had thwarted efforts to engage in collaborative discussions with the parent (Dist. Ex. 1 at p. 1).

On August 2, 2024, the district filed a motion to dismiss the parent's due process complaint notice with the IHO asserting the parent's failure to participate in the resolution meeting (IHO Ex. III at pp. 5-6, citing 34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][iv][a]). The district argued, among other things, that it made reasonable efforts to have the parent participate in a resolution meeting as the IDEA and related statutes envisioned but was unable to obtain the parent's participation (id. at p. 5). The district further argued that the parent was required to attend and participate in the resolution meeting, regardless of whether they were represented by counsel (id. at p. 6).

On August 5, 2024, the prehearing conference was conducted by the IHO to discuss the parent's due process complaint notice, as well as the district's motion to dismiss (see Tr. pp. 2-3). The IHO provided the parent with an opportunity to respond to the district's motion to dismiss (Tr. pp. 3-4).

On August 8, 2024, the parent filed a response to the district's motion to dismiss with the IHO, stating that he requested a resolution meeting before 15 days had elapsed, and that he and other parents had commenced a proceeding in federal court, to compel the district to conduct a proper resolution meetings (see IHO Ex. IV). The parent maintained that the hearing timeline commenced on July 17, 2023, because a resolution meeting was not held within the 15-day deadline (id. at p. 11). The parent argued that the district did not schedule an in-person meeting, and argued once again his position that the district representatives who were going to attend the meeting lacked the proper decision-making authority (id. at p. 7-11).

In a decision dated August 23, 2024, the IHO dismissed the parent's due process complaint notice without prejudice (see IHO Decision). The IHO recounted facts as stated in the email threads described above, noting that a resolution meeting had been scheduled for July 12, 2024 and then rescheduled for July 23, 2024 (IHO Decision at pp. 2, 4). The IHO found that the parent was a required participant in the resolution meeting (id. at p. 5). The IHO determined that a resolution meeting was convened on July 23, 2024, and the parent did not attend the meeting (IHO Decision at p. 4; see IHO Ex. III at pp. 4-5).[1] Additionally, the IHO found that the district made reasonable and continuous efforts to hold a resolution meeting and obtain the parent's participation in that meeting (id. at p. 6). Accordingly, the IHO found that the parent did not engage in the process in good faith and, at a minimum, did not attend the resolution meeting.

[1] Both the parent and district only submitted one exhibit into the hearing record, so reliance on IHO exhibits and the parties' motions to create a cohesive timeline of events is necessary. It is not disputed that a resolution meeting occurred, and the parent did not attend, but the date on which the meeting took place is unclear in the hearing record. The parent's response to the district's motion to dismiss states that the parent's attorney attended "the first proposed CSE[] [r]esolution [m]eeting on July 12, 2024 at 9:30 a[.]m[.] via Microsoft Teams" (IHO Ex. IV at p. 13).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the parent's July 2, 2024 due process complaint notice because the district did not have representatives at the resolution meeting who had the authority to address all the claims in the parent's due process complaint.[2] Additionally, the parent argues that the IHO erred in finding that the parent did not participate in the resolution meeting.[3]

The district, in its answer, argues that the IHO's decision should be upheld because the district made reasonable efforts to obtain the parent's participation at the resolution meeting and the parent failed to participate. The district also alleges that the parent has since refiled a due process complaint for the same dispute and includes a copy of the August 28, 2024 due process complaint notice filed by the parent as a proposed exhibit.[4]

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

[2] The proof of service filed with the request for review does not including language conforming to the requirements of an affirmation, which must be subscribed and affirmed by a person to be true under the penalties of perjury which may include a fine or imprisonment (see CPLR 2106). The parent's attorney is cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a party's pleading (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (see, e.g., Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

[3] The parent submits additional evidence with his request for review. 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]; 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]). The documents offered by the parent are not necessary to render a decision, as such, they will not be considered. Similarly, the district has offered additional evidence with its verified answer as proposed SRO Exhibit 1 and proposed SRO Exhibit 2. Both documents are dated after the IHO's decision, and after the final appearance in this matter, and are necessary to render a decision. The due process complaint notice dated August 28, 2024 will be referred to as SRO Exhibit 1 and the transcript of a prehearing conference before a different IHO, dated October 9, 2024, will be referred to as SRO Exhibit 2.

[4] 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.

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 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]). If a parent does not feel that their concerns have been adequately addressed at the resolution meeting, the parent is free to proceed with the due process proceedings and seek what they feel will adequately remedy them (see Polanco v. Porter, 2023 WL 2242764 at *5 [S.D.N.Y. Feb. 27, 2023] [noting that the resolution period is a time where the district may remedy any alleged deficiencies in the IEP without penalty, but if the parent feels their concerns have not been adequately addressed, and a FAPE has still not been provided, then the parent may continue with the due process proceeding and seek reimbursement]).

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),[5] but generally regulations do not address the particulars of motion practice.[6] 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]).

[5] 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]).

[6] 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.

There is no dispute that a resolution meeting was scheduled by the district for July 12, 2024. Next, the administrative record shows that the parent, through his attorney, first made equivocal statements about whether the parent would participate (e.g. "we will be attending" and "we will notify you of the parent's attendance"), then later made unequivocal statements, once again via the parent's attorney, that the parent was cancelling the meeting (Dist. Ex. 1 at pp. 3-5). There is no way to conduct a resolution meeting if the parent refuses to attend, and I find the district was not required to conduct the meeting scheduled on July 12, 2024 in the parents absence.

Next, there is no dispute between the parties that the parent himself did not attend the resolution meeting that was convened by the district on July 23, 2024 and that only the parent's attorney was present on behalf of the parent. 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]). Neither federal nor State regulations list the attorney of the parent among the definitions of "parent" (see 34 CFR 300.30[a]; 8 NYCRR 200.1[ii][1]).

The parent argues that the district representatives present at the resolution meeting lacked the authority to address all the claims contained in the parent's due process complaint (see Dist. Ex. 1 at pp. 2-4).If a parent does not feel that their concerns have been adequately addressed at the resolution meeting, the parent is free to proceed with the due process proceedings and seek what they feel will adequately remedy them (see Polanco v. Porter, 2023 WL 2242764 at *5 [S.D.N.Y. Feb. 27, 2023] [discusses that the resolution period is a time where the district may remedy any alleged deficiencies in the IEP without penalty, but if the parent feels their concerns have not been adequately addressed, and a FAPE has still not been provided, then the parent may continue with the due process proceeding and seek reimbursement].

According to the parent, 34 CFR 300.510 only mandates that the parent participates in the process and does not require the parent to be physically present at the meeting. But the parent nether attended in person or virtually. 34 CFR 300.510(a)(2) states that the purpose of the resolution meeting is "for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 CFR 300.510[a][2]). Similarly, State regulation mandates that "the school district shall . . . convene a meeting with the parents . . ., where the parents of the student discuss their complaint and the facts that form the basis of the complaint, and the school district has the opportunity to resolve the complaint" (8 NYCRR 200.5[j][2][i]). The language of both the federal and State regulations contemplate that the parent of the student will participate at the resolution meeting by discussing the parent's complaint with the district. The parent is permitted to bring an attorney with them to the resolution meeting, but the parent's attorney may not be substituted for the parent at the resolution meeting. Thus, the IHO did not err in concluding that the parent did not participate because the parent, through his attorney, cancelled the first meeting because the district's responses did not satisfy the parent's attorneys, and when the matter was rescheduled, the parent failed to attend. After the first attempt, the district offered to allow the parent to propose dates and times for the meeting that would be more convenient for the parent (Dist. Ex. 1 at p. 3). Thus, the district made reasonable efforts to obtain the parent's participation of the parent in the resolution meeting.

Lastly, there is also no dispute that the parent refiled a due process complaint notice on August 28, 2024, which is identical in content to the due process complaint notice filed for this

matter (SRO Ex. 1). Further, a prehearing conference was held for the matter on October 9, 2024 and a due process hearing was scheduled for October 30, 2024 (SRO Ex. 2 at p. 14). 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 refiled due process complaint notice.[7] Based on the foregoing, I find no reason to disturb the IHO's decision to dismiss the parents' July 2, 2024 due process complaint notice without prejudice.

VI. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determination above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 9, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] The student was entitled to pendency from the July 2, 2024 due process complaint notice through the date of this decision in this appeal, and the parent was pursuing pendency in the refiled proceeding based upon the SRO's favorable findings in Application of a Student with a Disability, Appeal No. 23-238. Duplicative effort is not required. The parties and IHO are free to address the student's pendency placement in that proceeding, as the IHO already contemplated (SRO Ex. 2 at pp. 10-13).