



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-475

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Michael Gilberg, Esq., attorney for petitioners

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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. Petitioners (the parents) appeal from the interim decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parents' claims pertaining to the 2021-22 school year as barred by the statute of limitations. 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[a]). 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

Due to the limited nature of the appeal and disposition thereof, a full recitation of the facts and procedural history is not necessary.

The parents initiated the instant administrative proceedings by due process complaint notice dated November 6, 2023, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years and sought, among other things, reimbursement for the costs of the student's tuition at the Rebecca School for the same school years (see Due Proc. Compl. Not. at pp. 1, 5). On November 14, 2023, the parties proceeded to an impartial hearing (see Tr. p. 1). On November 30, 2023, the district executed a "Pendency Implementation Form," indicating that the student's pendency services

included payment of the student's tuition at the Rebecca School (12-month program) and that an unappealed IHO decision, dated January 20, 2022, formed the basis for the student's pendency services (see Pendency Impl. Form at pp. 1-2). In addition, the pendency implementation form noted that the student's pendency services began on the date of the due process complaint notice (id. at p. 1).

The impartial hearing resumed on dates held in December 2023, and in January, February, March, and April 2024 (see Tr. pp. 4, 9, 16, 23, 30). Thereafter, on April 26, 2024, the district filed its motion to dismiss (see Dist. Motion to Dismiss at pp. 1, 8). In the motion to dismiss, the district argued that the parents' allegations pertaining to the 2021-22 school year—as set forth in the November 6, 2023 due process complaint notice—were untimely and barred by the two-year statute of limitations (id. at p. 2). More specifically, the district asserted that the issuance of a previous IHO decision on January 20, 2022 did not toll the statute of limitations as to claims regarding the 2021-22 school year (id. at p. 3). Additionally, the district asserted that the parents knew or should have known of the alleged action that formed the basis of the complaints concerning the 2021-22 school year by February 2021, when the parents attended a CSE meeting to develop the student's IEP for the 2021-22 school year (id. at p. 4). Alternatively, the district argued that the parents knew or should have known of claims related to the 2021-22 school year by September 2021, when the 2021-22 school year began (id.). Next, the district examined the exceptions to the statute of limitations, and concluded that none of them applied to the circumstances herein (id. at pp. 4-5).¹

The impartial hearing continued on dates held in May, June, July, and August 2024 (see Tr. pp. 39, 44, 47, 54). On September 9, 2024, the parents filed their response to the district's motion to dismiss (see Parent Reply to Motion to Dismiss at pp. 1, 4). The parents argued that their prior due process complaint notice, dated September 5, 2020, was not resolved until the IHO issued the decision, dated January 20, 2022 (settling all claims through the 2020-21 school year) (see Parent Reply to Motion to Dismiss at p. 2, fn.1). Relying on the Second Circuit's holding in Murphy v. Arlington Central School District Board of Education, 297 F.3d 195, 200-01 (2d Cir. 2002), the parents asserted that the student therefore had "pendency for this period which included the beginning of the 2021-2022 school year through January 20th until the [district] could recommend a new placement" (Parent Reply to Motion to Dismiss at pp. 2-3). The parents further asserted that, because they prevailed at the previous impartial hearing, the January 2022 IHO decision became pendency for the 2021-22 school year (id. at p. 3). With respect to the development of the February 2021 IEP, the parents stated that the IEP would be implemented on February 22, 2021, which confused them with respect to "when it would begin since it was not being done for the beginning of each school year" (id.). Next, the parents asserted that the IHO's determination in the previous impartial hearing that the district failed to offer the student a FAPE for the 2020-21 school year "invalidat[ed] th[e February 2021 IEP]" (id.). The parents also claimed that the IHO in the previous impartial hearing found the February 2021 IEP was "inappropriate" and therefore, the February 2021 IEP could not form the basis of the student's pendency services (id.). According to the parents, the January 2022 IHO decision formed the basis for pendency until

¹ Similarly, the district argued that the parents' due process complaint notice failed to include any factual allegations giving rise to any claims under Section 504 of the Rehabilitation Act of 1973 (section 504) for the 2021-22 school year; as a result, those claims must also be dismissed (see Dist. Motion to Dismiss at pp. 6-8).

March 1, 2022, when the district developed the student's IEP and "which was well within the two-year filing of th[e November 6, 2023] due process complaint" notice (id.). The parents noted that, at a minimum, the student had pendency "from the start of the 2021-2022 school year through March 1st, 2022, and the balance of the year c[ould] be included with the following two years in this matter" (id.).

As a final point, the parents alleged that by filing a pendency implementation form with the district on July 15, 2022, they invoked the student's right to pendency and put the district on notice of their intentions to place the student at the Rebecca School for the 2021-22 school year (see Parent Reply to Motion to Dismiss at pp. 3-4).²

In a decision dated September 15, 2024, the IHO granted the district's motion to dismiss the parents' allegations pertaining to the 2021-22 school year as barred by the statute of limitations (see IHO Order on Motion to Dismiss at pp. 1, 7).³ Initially, the IHO provided background information in the decision, noting that on November 14, 2023, the parties had fully executed a pendency agreement and consequently, the IHO had not issued an interim order on pendency (id. at p. 2). Next, the IHO set forth the parties' respective arguments and then turned to the legal analysis (id. at pp. 2-6). Here, the IHO concluded that neither of the parents' arguments were "legally founded" (id. at p. 6). The IHO noted, however, that while an unappealed IHO decision may form the basis for a student's pendency services, it did not "excuse the lack of timely filing of a [due process complaint notice] for a specific year" (id.). The IHO indicated that the parents failed to present any evidence of a pendency order, and "merely" alleged that the filing of the pendency implementation form in July 2022 invoked the student's right to pendency (id.).

Next, the IHO explained that pendency was a "legal mechanism triggered by the filing of an impartial hearing request," and as noted, no previous pendency order existed and the parents had "not previously file[d] any complaint for the 2021/22 school year to secure claims for the 2021/22 school year" (IHO Order on Motion to Dismiss at pp. 6-7). In addition, the IHO found that the parents' argument that the January 2022 IHO decision became the student's pendency services until the district offered the student a "new program with a new IEP on March 1, 2022"—and which, according to the parents, became the "date the parent[s] 'knew or should have known' about any FAPE denial"—was "flawed" (id. at p. 7). The IHO also noted that, with respect to the parents' section 504 allegations, there were "no factual allegations in the [due process complaint notice] that g[a]ve rise to Section 504 claims for the 2021/22 school year" (id.).

In light of the foregoing analysis, the IHO dismissed the parents' claims in the due process complaint notice pertaining to the 2021-22 school year with prejudice, but noted that their claims related to the 2022-23 and 2023-24 school years "survive[d]" (IHO Order on Motion to Dismiss at p. 7).

² With respect to the section 504 violations alleged in the due process complaint notice, the parents argued that the three-year statute of limitations applied and the district's contentions therein must be dismissed (see Parent Reply to Motion to Dismiss at p. 4).

³ The IHO's decision is not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Order on Motion to Dismiss at pp. 1-8).

On September 30, 2024, the parties met for an impartial hearing (see Tr. p. 76). The IHO asked the parties for a status update, and the district's representative indicated that she had recommended settlement for the 2022-23 and 2023-24 school years (id. at pp. 77-78). The parents' attorney indicated his intention to appeal the IHO's decision granting the district's motion to dismiss (see Tr. pp. 78-79). Nevertheless, the parents' attorney indicated that they would continue to engage with the district in settlement discussions for the 2022-23 and 2023-24 school years (see Tr. p. 79). Consequently, the IHO indicated that, in moving forward, another status conference would be scheduled (id.). Both parties agreed with the IHO's proposal, and the IHO scheduled a status conference on October 22, 2024 and concluded the impartial hearing for that day (see Tr. pp. 81-84).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by granting the district's motion to dismiss claims alleged in the due process complaint notice related to the 2021-22 school year as barred by the statute of limitations. More specifically, the parents contend that the IHO erred by finding that the student did not have pendency for the 2020-21 school year, the IHO ignored the fact that the January 2022 IHO decision formed the basis for the student's pendency services for the 2021-22 school year, and the IHO ignored the fact that the February 2021 IEP was invalidated by the January 2022 IHO decision. In addition, the parents argue that the student's March 1, 2022 IEP was well within the two-year statute of limitations. Next, the parents assert that the pendency implementation form, dated November 14, 2023, establishes that the Rebecca School was the student's pendency services from September 5, 2020 through March 1, 2022. Therefore, the parents contend that they are entitled to reimbursement for the student's tuition at the Rebecca School from the first day of the 2021-22 school year through March 1, 2022, pursuant to pendency.

Next, the parents contend that the IHO erred by finding that the claims alleged pertaining to the time period from March 15, 2022 through the conclusion of the 2021-22 school year were untimely. The parents note that the March 2022 IEP extended from March 2022 through March 2023, or two separate school years, namely, the remainder of the 2021-22 school year and the beginning of the 2022-23 school year. Therefore, the parent alleges that March 1, 2022 was the earliest they could have known of any challenges to the IEP and the November 2023 due process complaint notice fell within the two-year statute of limitations for that purpose.

In an answer, the district responds to the parents' allegations. The district argues that, regardless of the parents' arguments, their request for review must be dismissed as it is an impermissible interlocutory appeal.⁴

⁴ The district also alleged that the parent failed to verify the request for review in conformity with 8 NYCRR 279.7 because it was verified by their attorney. After the district filed its answer, the parent's attorney attempted to remedy the defect by serving another verification executed by the parent via email. The parent's pleading was deficient, as the district pointed out, but it is not necessary to further address this point as the appeal is otherwise impermissible.

V. Discussion and Conclusion

At the outset, the evidence in the hearing record, which is sparse, shows that although the impartial hearing has occurred with respect to holding status conferences and providing the parties with an opportunity to prepare the motion to dismiss and responsive pleadings, the matter nevertheless was scheduled to continue at the impartial hearing level; thus, as the district asserts, the parents' contentions on appeal are not within the scope of a permissible interlocutory appeal and, at this juncture, is outside the scope of my review. State regulations 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 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's interim decision, dated September 15, 2024, did not resolve a pendency dispute, but instead, addressed the district's motion to dismiss claims in the parents' due process complaint notice based on the statute of limitations (see generally IHO Order on Motion to Dismiss). Therefore, to the extent that the parents appeal from the IHO's interim decision and State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, the parents' appeal must be dismissed as premature (see Application of a Student with a Disability, Appeal No. 24-385; Application of a Student with a Disability, Appeal No. 22-120; Application of a Student with a Disability, Appeal No. 18-075).

Based on the evidence in the hearing record, there does not appear to be a dispute between the parties as to the student's placement during the pendency of this proceeding. Instead, the evidence reflects that both parties executed a pendency implementation form reflecting the Rebecca School, and payment thereto, as the student's agreed-upon placement (see Pendency Impl. Form at pp. 1-2).

While consideration of the parents' allegations on appeal is premature at this juncture, it does not prevent later review of the IHO's interim decision. 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 parents may appeal from the IHO's September 15, 2024 interim decision after the IHO closes the hearing record and issues a final determination on the remaining issues.

THE APPEAL IS DISMISSED.

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

**JUSTYN P. BATES
STATE REVIEW OFFICER**