The University of the State of New York

The State Education Department
State Review Officer
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No. 16-046

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

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 decision of an Impartial Hearing Officer (IHO) which terminated the proceeding without prejudice based on the parents' withdrawal of their due process complaint notice. 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

Given the disposition of this appeal, a recitation of the student's educational history is unnecessary. In a due process complaint notice dated November 9, 2015, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, 2014-15, and 2015-16 school years (Due Process Complaint Notice at pp. 1-4). The parents also asserted violations regarding accommodations for the student pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [1998]) (id. at p. 2).[1] As relief, the parents

[1] State law does not provide for review of section 504 claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[1][a], [2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]).

requested payment of the costs of the student's tuition at the Winston Preparatory School for the 2015-16 school year, including the summer program; transportation to and from the Winston Preparatory School; compensatory services to remedy the denial of a FAPE for the 2013-14, 2014-15, and 2015-16 school years; reimbursement for privately-obtained tutoring services and counseling services; reimbursement or funding for neuropsychological and speech-language evaluations; and provision of any recommended speech-language therapy (id. at p. 4).

After telephonic prehearing conferences on December 3, 2015 and December 17, 2015, the parties proceeded to an impartial hearing on March 15, 2016, which concluded on May 26, 2016 after four days of proceedings (Tr. pp. 1-72).[2] No documentary or testimonial evidence was entered into the hearing record, as the parties represented to the IHO at each hearing date either that they were discussing the possibility of settlement or that they were not prepared to go forward (Tr. pp. 3-4, 10-11, 19-22, 33-34, 54-59, 65-66). On the last day of the impartial hearing, the student's father requested that the due process complaint notice be withdrawn without prejudice (Tr. pp. 66-67). On May 26, 2016, the IHO issued an "Order of Termination" terminating the proceeding without prejudice based on the withdrawal of the due process complaint notice (IHO Decision at p. 1).

IV. Appeal for State-Level Review

The parents appeal, proceeding pro se, requesting that the order of termination be vacated. Specifically, the parents argue that the IHO demonstrated bias and conducted the impartial hearing in a manner inconsistent with due process. The parents also argue that their due process rights were violated because the IHO and counsel for the district communicated solely with the student's father; the IHO granted the father's request to withdraw the due process complaint notice without consent from the student's mother; and the father's request to withdraw the complaint was made under duress.

In its answer, the district denies the parents' allegations and argues the IHO's decision should be upheld.

V. Discussion

A. Conduct of the Impartial Hearing and IHO Bias

The parents assert that the IHO exhibited bias during the impartial hearing. Based on a careful review of the hearing record, the parents' allegations are without merit. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall

[2] The parents were represented by counsel at the time they filed the due process complaint notice and during the two conferences; counsel for the parents withdrew prior to the March 2016 hearing date (Tr. pp. 19-20).

not, by words or conduct, manifest bias or prejudice (Application of a Student with a Disability, Appeal No. 12-064).

Initially, the parents assert that the IHO exhibited bias by failing to take steps to ensure that the student's father understood the ramifications of withdrawing the due process complaint notice during the impartial hearing. Contrary to the parents' assertions, the IHO explained the consequences of the father withdrawing the due process complaint notice. On March 15, 2016, counsel for the district requested that the IHO dismiss the case without prejudice to give the parents more time to determine whether they wanted to settle the case, proceed pro se, or seek new representation (Tr. pp. 20-21).[3] The student's father asked the IHO the meaning of the term, "dismiss without prejudice" (Tr. p. 21). The IHO explained that dismissing without prejudice would allow the parents to refile (id.).

With respect to the parents' assertion that the student's father was under duress when withdrawing the due process complaint notice, after reviewing the record, there is no support for the contention that he was coerced or solicited by undue pressure from the IHO to withdraw the complaint. On the last day of the impartial hearing, the student's father informed the IHO that he consulted an attorney and "was advised to ask for an extension of time" (Tr. pp. 65-66). After the IHO denied the father's request, the student's father requested that the due process complaint notice be withdrawn without prejudice (Tr. pp. 65-67). When the IHO asked the student's father to confirm whether he "desire[d] to withdraw without prejudice," the student's father answered, "from my knowledge of the legal procedures [withdrawing the case was] what I need to do at this point because [the parents were] not ready to sign the stipulation" (Tr. p. 69). After objection from counsel for the district and further confirmation from the student's father of his request to withdraw the due process complaint notice, the IHO granted the student's father's request to withdraw the due process complaint notice (Tr. pp. 68-71). Therefore, the evidence in the hearing record does not support a finding that the IHO coerced or pressured the student's father to withdraw the due process complaint notice or that the father was under duress when making the request.

Next, the parents contend that the IHO "stretched out the timeline" for the district to the parents' disadvantage. A review of the hearing record demonstrates that the IHO did not demonstrate bias in this respect. In fact, the IHO gave both parties ample time to sign the settlement agreement or put on a case (Tr. pp. 11-12, 24-25, 37). For example, on December 17, 2015, the IHO granted an extension on the record which was requested by both parties (Tr. pp. 11-12). Additionally, on March 15, 2016, the IHO granted a "joint request" for an extension in order for both parties to have more time to "work out the case through settlement or prepare for a hearing" (Tr. pp. 24-25). Further, on April 5, 2016, the student's father stated on the record that he did not want to proceed with the impartial hearing because he was accepting the district's proposed settlement agreement (Tr. pp. 34, 37). The IHO indicated that the "case was filed almost five months ago and [she was] told several times that it was settled or close to settling . . . [but she was] willing to continue th[e] case one more time" and granted an extension (Tr. p. 37). On May 24, 2016, substitute counsel for the district was denied an extension for additional time

[3] On March 15, 2016, counsel for the district indicated during the impartial hearing that the parents' attorney no longer represented the parents (id. at pp. 19-20).

to obtain evidence and witnesses (Tr. pp. 54-59). Also on that hearing date, the IHO informed the parties that the hearing was going forward and that the parents would be required to present their case on May 26 (Tr. pp. 54-55, 59-61). On May 26, 2016, the student's father requested another extension; however, the IHO denied the father's request (Tr. pp. 65-66). Thus, based on the hearing record, the IHO did not exhibit bias but was fair in granting and denying extensions to both parties.

The parents also allege that the IHO failed to make accommodations for the parents to attend the impartial hearing. More specifically, the parents argue that the IHO scheduled the hearings at times which "infringed on parental duties" and excluded the student's mother from attending the impartial hearing. State and federal regulations provide that the impartial hearing shall be conducted at a time and place which is reasonably convenient to the parents (see 34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]). The impartial hearing took place over six days of proceedings (Tr. pp. 1-72). On the first day, the parents were represented by an attorney who did not appear on their behalf (Tr. pp. 1-6). On the second day, neither parent attended (Tr. pp. 7-16). The proceedings on the third day began at 10:47 a.m. and the parents proceeded pro se with only the student's father in attendance (Tr. pp. 17-29). When confirming the time for the next hearing date, the student's father responded, "9:30 is perfect for us" (Tr. p. 28). Although the fourth hearing date was scheduled to begin at 9:30 a.m., the student's father did not arrive until 10:30 a.m. (Tr. p. 32). When scheduling a time for the next hearing date, the IHO noted that the hearings were scheduled for 9:30 a.m. in order "to accommodate the parents because typically [the hearings] begin at 8:30" (Tr. p. 45). The IHO then set the time for the next hearing date for 9:30 a.m. with no objection from the student's father or the district (Tr. pp. 45-46). On the fifth day of proceedings, the impartial hearing began at 10:00 a.m., and when scheduling the next impartial hearing date, the student's father requested that the IHO change the hearing time to the afternoon (Tr. p. 61). The IHO declined the father's request and scheduled the hearing for 9:30 a.m. (id.). Based on the entire hearing record, the student's father only requested that the time for the impartial hearing be changed on one occasion (id.). Additionally, the student's father never expressed to the IHO that the meeting times created hardship for the parents or were inconvenient (Tr. pp. 1-72). Further, the student's father did not request that the meeting times be changed in order to permit the student's mother to attend (id.). In light of the above, there is no basis to find that the IHO acted with bias.

B. Withdrawal

A central focus of the parents' appeal is their assertion that the IHO communicated solely with the student's father and excluded the student's mother from communications. More specifically, the parents argue that the IHO violated the parents' due process rights by accepting the withdrawal of the due process complaint notice from the student's father, without consent from the student's mother. Initially, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "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. 46704 [Aug. 14, 2006]). State regulations provide that the party requesting an impartial hearing may withdraw a

due process complaint notice, but do not specifically address whether one parent may withdraw a due process complaint notice filed on behalf of both parents (8 NYCRR 200.5[j][6]).

In the instant case, both parents signed the due process complaint notice and filed the instant appeal. As stated above, on the last day of the impartial hearing, the student's father requested that the due process complaint notice be withdrawn because the parents were not ready to sign the settlement agreement or to present a case (Tr. p. 69). When the IHO granted the father's request, the IHO had no reason to believe that the student's mother's interests were not represented or that the parents did not have joint-decision making authority (Tr. pp. 70-71). First, a review of the hearing record reveals that the parents shared the same address (Due Process Complaint Notice at p. 1; see Tr. pp. 39-40). In addition, on May 24, 2016, the student's father indicated that he reviewed the settlement agreement with the student's mother, indicating that the student's father was communicating with the student's mother regarding the proceedings (Tr. pp. 60-61). Furthermore, on May 26, 2016, the student's father stated that he was requesting a withdrawal of the due process complaint notice because "we're not ready to sign the stipulation," implying that the parents were joined in interest (Tr. p. 69). Thus, the IHO had no indication that the student's father did not have the authority to withdraw the due process complaint notice on behalf of both parents, especially here, where only the student's father attended the impartial hearings. The hearing record does not indicate that the student's mother, if she desired to proceed with the impartial hearing and put on a case, did not have the opportunity to attend the impartial hearing.[4]

Although the parents cite no case law and offer no statutory or regulatory support for their contention that the IHO must seek the consent of both parents prior to withdrawing a due process complaint notice, at least one district court case has held that only one parent's consent is needed to modify a student's placement for purposes of pendency (Sheils v. Penssbury Sch. Dist., 2015 WL 337234, at *3-*7 [E.D. Pa. Jan. 26, 2015]; see, e.g., Taylor v Vermont Dep't of Educ., 313 F.3d 768, 779 [2d Cir 2002] [acknowledging that it would be contrary to the intent underlying federal regulations defining parent to allow multiple parties, "each of whom may have conflicting ideas with respect to the child's education," to exercise rights under the IDEA]). Although the instant case does not involve the student's pendency placement, the rationale underlying the district court's reasoning in Sheils applies here. In the instant case, where the student's father sought to withdraw the due process complaint notice, no provision of the IDEA or federal or State regulations required the IHO to obtain the consent of the student's mother.[5] Moreover, the petition does not allege that the student’s parents at any time had diverging interests or views with respect to the claims contained in the due process complaint notice or the relief sought, the extensions requested and granted throughout the proceeding or the status of the

[4] For similar reasons, there is no basis to conclude that communications from the IHO and counsel for the district being addressed to the student's father impeded the ability of the student's mother to participate in the impartial hearing.

[5] In particular, while the student's mother asserts that it was improper for the IHO not to ascertain her desires regarding withdrawal of the due process complaint notice because it was filed jointly by the parents, it is precisely the fact that the complaint was filed in both parents' names that permitted the IHO reasonably to assume that the student's father was appearing on behalf of, and was authorized to represent, both parents' interests at the impartial hearing.

settlement as described to the IHO by the student's father. Further, the relative potential for harm to the parents or the student is diminished because either parent is permitted to subsequently re-file a due process complaint notice (8 NYCRR 200.5[j][6][iii], [iv]). Therefore, the IHO's decision to grant the father's request to withdraw the due process complaint notice without prejudice was reasonable and did not violate the parents' due process rights. Additionally, after multiple extensions granted by the IHO, the parents did not sign the settlement agreement and were not prepared to proceed with the hearing and put on a case.[6] On the last day of the impartial hearing, the IHO could have dismissed the case based on the fact that the parents were not prepared to proceed; however, the IHO instead granted the student's father's request to withdraw the due process complaint notice without prejudice. Therefore, the IHO's decision to grant the student's father's request was not improper and the order of termination is upheld.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 10, 2016

CAROL H. HAUGE
STATE REVIEW OFFICER

[6] The hearing record reflects that the parties have for various reasons been unable to finalize a settlement agreement (Tr. pp. 10, 20-22, 33-34, 54).