



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-065

### **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 Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, 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 an interim decision of an impartial hearing officer (IHO) which ordered the appointment of a guardian ad litem for the student. 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 school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (8 NYCRR 279.10[d]). 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 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student is currently eligible to receive special education and related services as a student with an other health-impairment (Tr. pp. 24, 73; Pet. ¶ 2; Answer ¶ 2).<sup>1</sup> In an e-mail dated January 28, 211, the parents requested that the district authorize an independent functional behavioral assessment (FBA) at private expense (see Parent Ex. C at pp. 1-2; see also 8 NYCRR 200.5[g][1]; 34 CFR 300.502[b][2][1]).

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<sup>1</sup> The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz ][9]).

## **A. Due Process Complaint Notice and Impartial Hearing Officer Decision**

By due process complaint notice dated February 2, 2011, which was amended on or about April 7, 2011, the district, among other things, defended the appropriateness of its FBA and an educational evaluation and requested an impartial hearing (Tr. pp. 5-6, 7-9, 371-72; Answer ¶¶ 4, 16; see 8 NYCRR 200.5[g][1][iv]; 34 CFR 300.502[b][2][i]).<sup>2</sup> At the impartial hearing, the parties agreed that the issue was whether the parents may obtain an independent FBA at public expense (Tr. pp. 7-9, 70). The impartial hearing began on June 1, 2011, continued for additional hearing dates, but has not yet concluded (see Tr. p. 470; see also Answer ¶ 17). In an interim IHO decision dated March 5, 2012, the IHO ordered the appointment of a guardian ad litem (Interim IHO Decision at p. 3; see 8 NYCRR 200.5[j][3][ix]).

## **IV. Appeal for State-Level Review**

The parents appeal the IHO's interim decision and, among other things, state their disagreement and that it should be reversed. The district submitted an answer requesting that the parents' petition be dismissed. The district contends that the petition is premature at the present time because an SRO is without jurisdiction to review an interim IHO decision prior to the issuance of a final determination by the IHO. In a reply, the parents contend that their appeal should not be dismissed.

## **V. Applicable Standards**

State regulations pertaining to practice on review of impartial hearings for students with disabilities state:

(d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(8 NYCRR 279.10[d]).

## **VI. Discussion**

I find that the parents' appeal is premature and must be dismissed. As indicated above, the authority of an SRO in direct appeals from interim decisions of IHOs is limited to pendency placement determinations (8 NYCRR 279.10[d]; Application of a Bd. of Educ., Appeal No. 12-018; Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 09-023; Application of a Child with a Disability, Appeal No. 07-057; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No.

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<sup>2</sup> I note that while referenced in the IHO decision and pleadings, neither the February 2, 2011 due process complaint notice nor the April 7, 2011 amended due process complaint notice has yet been made an exhibit to the hearing record (see IHO Decision at pp. 4-5; Parent Exs. A-O; Dist. Exs. 1-13).

04-064). In this case, the IHO's interim determination is not a pendency determination that may be appealed prior to the IHO's final determination (see Educ. Law 4404[4]; 8 NYCRR 279.10[d]; Application of a Student with a Disability; Appeal No. 10-030; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52). I note that while State-level review of the IHO's interim determination ordering the appointment of a guardian ad litem is premature at this time, as recited above, State regulations provide that the IHO's interim determination may be reviewed by an SRO as a part of an appeal from the IHO's final determination of the claims raised in the April 7, 2011 amended due process complaint notice (see 8 NYCRR 279.10[d]).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of the determinations above.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 17, 2012**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**