The University of the State of New York

The State Education Department
State Review Officer
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No. 13-019

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:
Dalit Paradis, Esq., Partnership for Children's Rights, for petitioner

Jessica C. Darpino, Esq., for Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, for respondent

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 parents) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Cooke Center Middle School (Cooke) for the 2011-12 school year. 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

Because of the procedural posture of this case, it is not necessary to provide a detailed factual history. Briefly, the student has received diagnoses with a persistent developmental disorder, not otherwise specified, a learning disorder, not otherwise specified, and an attention deficit hyperactivity disorder (Dist. Ex. 6 at p. 6). On April 8, 2011, a CSE was convened to develop an IEP for the student for the 2011-12 school year (Dist. Ex. 2). By letter dated June 13, 2011, the parent informed the district that she was rejecting the April 2011 IEP, expressing her concerns and her intention to place the student at Cooke for summer 2011 and seek public funding (Parent Ex. B). On August 22, 2011, the parent reiterated her concerns with the April 2011 IEP and the assigned public school site and notified the district of her intention to place the student at Cooke for the 2011-12 academic school year and seek public funding (Parent Ex. C). By due

process complaint notice dated September 5, 2012, the parent requested an impartial hearing, asserting that the district did not offer the student a free appropriate public education (FAPE) (Parent Ex. A).[1]

By prehearing order dated October 23, 2012, the IHO directed the parties to submit direct testimony by affidavit pursuant to 8 NYCRR 200.5(j)(3)(xii)(f) (IHO Ex. I at p. 1).[2] Both parties objected to this procedure and submitted objections to the IHO (Dist. Ex. 14; Parent Ex. V). By order dated November 14, 2012, the IHO adhered to her determination, directed the parties to comply with the October prehearing order, and set dates by which affidavits were to be submitted to the opposing party and the IHO (IHO Ex. II). However, the IHO also indicated that the parties would be permitted to submit written argument regarding the need to provide live testimony for particular witnesses (id. at p. 2). An impartial hearing was convened on December 20, 2012; however, the IHO excluded affidavits from five of the parent's seven witnesses on various grounds (Tr. pp. 1-287). By decision dated January 4, 2013, the IHO found that the district offered the student a FAPE and denied the parent's request for relief (IHO Decision).

IV. Appeal for State-Level Review

The parent appeals, asserting that the manner in which the IHO conducted the impartial hearing impeded her right to due process. Initially, the parent asserts that the IHO's direction that the parties submit all direct testimony by affidavit violated due process, the IDEA, and State regulations. In addition, to the extent otherwise permissible the parent asserts that a fact-administrative hearing is not an appropriate context for requiring direct testimony by affidavit. Further, the parent contends that the IHO's October 2012 prehearing order was inconsistent and confusing, and did not provide notice to the parties that sanctions would be imposed for noncompliance. The parent asserts that the IHO abused her discretion in excluding the affidavits because the parent complied with the November 2012 prehearing order. The parent also contends that the IHO abused her discretion by not providing an additional hearing date on which the parent could present her witnesses.

Along with her petition, the parent submits four proposed exhibits (Parent Proposed Exhibits Y-BB), consisting of e-mails between the parties and the IHO that the parent wishes considered as additional evidence with regard to the conduct of the impartial hearing. The district objects to consideration of these exhibits on the ground that they were available at the time of the impartial hearing and are unnecessary to resolution of the issues presented on appeal.

[1] The district responded to the due process complaint notice (Dist. Ex. 1). The parent thereafter moved for a more definite statement (which was not included in the hearing record submitted to the Office of State Review), which the district opposed (Dist. Ex. 17). The IHO denied the parent's motion by order dated December 4, 2012 (IHO Ex. III).

[2] Although not entirely clear, it appears from the hearing record that the IHO entered an October 23, 2012 prehearing order into evidence as IHO Exhibit I, a November 14, 2012 interim decision into evidence as IHO Exhibit II, and a December 4, 2012 interim decision into evidence as IHO Exhibit III (IHO Decision at p. 17; Tr. pp. 28-30), and they shall be referenced as such herein. The hearing record submitted to the Office of State Review also includes a prehearing order dated August 31, 2012, which will be referred to herein as IHO Prehearing Order, that is substantially similar to IHO Exhibit I.

In an answer, the district denies the parent's material allegations, affirmatively asserts that it offered the student a FAPE, and requests that the IHO's determination be upheld. The district contends that the use of affidavits for direct testimony is permitted by State regulation and exclusion was a permissible sanction for the parent's failure to comply with the IHO's order. In the alternative, the district asserts that Cooke was not an appropriate unilateral placement and equitable considerations do not support the parent's request for relief.

V. Applicable Standards and Discussion—Conduct of Impartial Hearing

Parties to an impartial hearing have the right "to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing" (8 NYCRR 200.5[j][3][xii]). State regulations explicitly mention a limited number of circumstances under which an IHO may exclude evidence, including when the evidence was not submitted to the opposing party in accordance with State regulations (8 NYCRR 200.5[j][3][xii], [xii][a], [c]-[e]).

Initially, to the extent the parent argues that it was not appropriate for the IHO to take testimony by affidavit on issues of disputed fact, she provides no relevant support for this assertion. State regulations permit an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]). Furthermore, the October prehearing order indicated that the parties would be permitted to conduct "[a]dditional direct examination that is not repetitive or irrelevant" (IHO Ex. I at p. 1), and the November prehearing order directed the parties to comply with the October order (IHO Ex. II at p. 2). For the reasons stated by other SROs in similar circumstances, the requirement to submit testimony by affidavit, by itself, did not infringe on the parent's due process rights (Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 13-157).[3]

The manner in which the IHO implemented her orders, however, was inconsistent. The initial order was sent to the parties on October 19, 2012 (Parent Proposed Ex. Y),[4] and specified that the district was required to submit affidavits to counsel for the parents eight days prior to the impartial hearing, while the parent was required to submit affidavits to counsel for the district three days prior to the impartial hearing (IHO Prehearing Order at p. 1). After the impartial hearing was adjourned, the IHO issued the October 2012 prehearing order, which specified that "the party with the burden of proof" was required to submit affidavits to the opposing party seven days prior to the impartial hearing, while the other party was required to submit affidavits to the opposing party four days prior to the impartial hearing (IHO Ex. I at p. 1). After receiving the parties' objections to this procedure, the IHO issued a third prehearing order in November 2012 indicating that the impartial hearing had been scheduled for December 21, 2012 and directing the district to submit affidavits by December 17 and the parent by December 19 (IHO Ex. II at p. 2). The next day,

[3] While I agree with the parent that the IHO's prehearing order should have provided notice to the parties of potential sanctions for noncompliance, I decline to disturb her determination on that basis, as the inherent powers of a tribunal extend to exclusion of testimony in an appropriate situation. I express no opinion with regard to whether exclusion was an appropriate sanction within the IHO's discretion in this case, as I find that the IHO erred in excluding the testimony on other grounds.

[4] The proposed exhibits are cited to only to the extent they inform the factual circumstances surrounding the events at issue.

counsel for the parent informed the IHO that the parent was unavailable on that date and, after discussion among the parties, the hearing date was rescheduled for December 20, 2012 (Dist. Ex. 18 at pp. 7-8; Parent Proposed Ex. AA). Several weeks later, counsel for the district requested "clarification" regarding the timelines set forth in the November 2012 prehearing order, opining that because the hearing date had been moved up, the schedule for exchanging affidavits "must be modified" (Dist. Ex. 18 at pp. 6-7). Counsel for the parent objected, asserting that it would be overly burdensome to comply given the late date of the request (id. at p. 5). An attempt to conference the matter among the parties was unsuccessful, with the final resolution prior to the impartial hearing an e-mail from the IHO to the parties requesting that counsel for the parent provide the affidavits to counsel for the district "so that she can prepare her cross-examination in a timely fashion. I know that both parties will cooperate and act in the most professional manner" (id. at pp. 1-4).

The parent sought to introduce the testimony of seven witnesses through affidavit: the student's speech-language therapist at Cooke for the 2011-12 school year; the student's classroom teacher at Cooke for the 2011-12 school year; the director of the Cooke summer program; the Cooke school psychologist; a private psychologist; the assistant director of the Cooke lower school; and the parent (Pet. ¶ 12). Draft affidavits for the speech therapist, the classroom teacher, and the summer program director were provided to counsel for the district on December 18 and 19, 2012 (Tr. pp. 151-52). Final affidavits for each of the seven witnesses were provided to counsel for the district on or around the close of business on December 19, 2012 (Dist. Exs. 19; 20).[5] At the impartial hearing, the IHO admitted the affidavit of the summer program director into evidence, rejected the affidavit of the speech therapist on the basis that it had been modified since its initial submission to counsel for the district, and indicated that she would have accepted the affidavit of the classroom teacher except for her unavailability for cross-examination (Tr. pp. 121-22, 134-37, 193, 208-10, 217-18). The district objected to the remainder of the affidavits on the basis that they were untimely provided to counsel for the district, and the IHO declined to admit the affidavits into evidence (Tr. pp. 144, 151-52, 208-09, 213-14, 216-17, 220-23, 227, 251-53, 261-62, 284).[6]

However, the parent argues that she complied with the final prehearing order issued by the IHO with regard to the exchange of affidavits, and the district conceded during the impartial hearing that it received the parent's affidavits on December 19, 2012 (Tr. pp. 259-61; Dist. Exs. 19-20). Inasmuch as the November 2012 prehearing order specified no time on that date by which the affidavits were to be submitted to counsel (IHO Ex. II at p. 2), I agree with the parent that the IHO improperly imposed sanctions for a failure to comply with her directives regarding the exchange of affidavits. While the IHO expressed her displeasure with counsel for the parent during the impartial hearing for not providing counsel for the district with adequate time for preparation (Tr. pp. 136-50, 217, 227-33, 256-57, 280-81), and her displeasure with counsel for failing to

[5] Although none of the "affidavits" was notarized other than the parent's, the IHO excused this defect in form, indicating that the witnesses could swear to their affidavit testimony on the record, and the district does not challenge this determination (Tr. p. 136; Dist. Exs. 19-20).

[6] Counsel for the parent was unwilling to provide affidavits to the district earlier than December 19 for a hearing held on December 20, but objected during the impartial hearing at being requested to "move it along" by the IHO, asserting that he had only "had [the] testimony since Friday," six days prior (Tr. pp. 79, 85, 92; Dist. Ex. 18 at p. 5).

extend basic professional courtesy to opposing counsel is entirely understandable, it was ultimately the IHO's obligation to establish the parties' respective obligations with regard to the exchange of affidavits, and she failed to do so when the district requested clarification of the prehearing order. Accordingly, I find that the IHO erred in excluding the parent's affidavits from the impartial hearing. Any hardship to the district as a result of its late receipt of the affidavits was occasioned by the district's failure to request a modification of the November 2012 prehearing order in a timely fashion and the IHO's failure to amend her order upon the district's request.

Nonetheless, it is necessary to determine whether the improper exclusion of evidence caused any harm to the parent. As a general rule, "the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted'" (Shinseki v. Sanders, 556 U.S. 396, 409-10 [2009], quoting Palmer v. Hoffman, 318 U.S. 109, 116 [1943]; see Snyder v. New York State Educ. Dep't, 486 Fed. App'x 176, 180 [2d Cir. 2012] [noting that "[t]he moving party has the burden of showing that 'it is likely that in some material respect the factfinder's judgment was swayed by the error'"], quoting Tesser v. Bd. of Educ., 370 F.3d 314, 319 [2d Cir. 2004]; see also Fed. Rules Civ. Pro. 61; Fed. Rules Evid. 103).[7]

The parent argues that the exclusion of her witnesses' testimony is relevant to the issue of whether the district offered the student a FAPE, in that the affidavits "would have spoken to and supported the numerous allegations made by the Parent in the [due process complaint notice], including the inadequacy of the evaluations on which [the student's] evaluations were based and the inappropriateness of [the student's] IEP," as well as "the manner in which the [CSE] meeting was conducted and to the inappropriateness of the [district's] recommended school placement." However, because the district bears the burden of establishing that it offered an appropriate program to the student, it is not immediately clear why the parent's inability to present direct testimony with regard to an issue on which she bore no burden of proof was harmful. To the extent the parent objects to the exclusion of the affidavit of the private psychologist, the hearing transcript indicates that the purpose of this affidavit would have been to challenge the district school psychologist's interpretation of the results of the January 2011 psychoeducational evaluation (Tr. pp. 233-38). However, as noted by the IHO, counsel for the parent was able to cross-examine the district school psychologist at length (Tr. pp. 33-117, 120-21), and it is unclear why counsel for the parent could not challenge the district psychologist's interpretation of the psychoeducational evaluation using information obtained from the affidavits. Similarly with regard to the affidavits prepared by the parent or the student's classroom teacher at Cooke, despite noting that the IHO did not inquire into the nature of the proposed testimony, the parent has made no offer of proof with regard to the contents of the affidavits nor any affirmative representations that the affidavits contained any statements tending to undermine the evidence presented by the district or that they contained evidence that could not have been introduced through cross-examination of the district witnesses. Although noting that the exclusion of her witnesses caused the testimony of district witnesses regarding the appropriateness of the recommended program to stand unrebutted, at no point does the parent assert any particular rebuttal that was or would have been included in the direct testimony of her witnesses, or that she could not rebut the testimony of the witnesses through a comprehensive cross-examination. Moreover, the parent has not submitted any of the excluded

[7] The Court in Shinseki explained that this rule does not constitute burden shifting; rather, it requires the appealing party to "explain why the erroneous ruling caused harm" (556 U.S. at 410).

affidavits as additional evidence and requested that I consider them in my review of the IHO's decision.[8] Accordingly, there exists no basis in the record or in the parent's submissions here to find this error was other than harmless.[9]

Although the parent did not present evidence in the form of direct testimony from a number of her witnesses, she was able to confront and cross-examine witnesses as guaranteed under the IDEA and State and federal regulations (see 20 U.S.C. § 1415[h][2]; 34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). The United States Department of Education's Office of Special Education Programs (OSEP) has opined that "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the hearing officer. These decisions, however, are subject to review under [the federal regulations] if a party to the hearing believes that the hearing officer has compromised the party's [due process] rights" (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]). In this case, the parent was afforded the opportunity to participate in the impartial hearing. With regard to the classroom teacher who was unavailable due to illness, and to whose affidavit the district did not object, the IHO inquired why the witness could not be made available by telephone, and counsel for the parent was unable to provide an answer (Tr. pp. 121, 134-36, 218).[10] While it would have been better practice to permit a brief adjournment for the illness of a witness, the IHO offered to conduct a hearing on the following date and I do not find the refusal to schedule another hearing date constituted an abuse of the IHO's discretion.

Despite the parent providing no basis to reverse the IHO's determination, I have examined the entire hearing record and find that the testimony provided by district witnesses was consistent with the documentary evidence included in the hearing record, including the district school psychologist's interpretation of the results of the January 2011 psychoeducational evaluation as reflected in the April 2011 IEP. Furthermore, despite certain deficiencies in the evaluation alleged by the parent, the hearing record reflects the CSE was in possession of information provided by Cooke and that the student's then-current teacher and a Cooke supervisor also participated in the April 2011 CSE meeting (Dist. Ex. 16 at pp. 2-7). Accordingly, the hearing record supports the IHO's determination that the district offered the student a FAPE.

[8] The parent submitted four proposed exhibits for consideration as additional evidence, each relating to scheduling matters; none of the excluded affidavits was submitted.

[9] Nothing in this ruling constrains the parent from attempting to introduce this evidence on appeal (20 U.S.C. § 1415[i][2][C][ii]; 34 CFR 300.516[c][2]).

[10] The IHO also excluded the testimony of the classroom teacher on the basis that her affidavit was provided to the speech therapist for review (Tr. pp. 218-20; see Tr. pp. 160-61, 177). However, as noted above the district did not object to the admission of the classroom teacher's affidavit (Tr. p. 193).

VII. Conclusion

As described above the hearing record adequately supports the IHO's determination that the district offered the student a FAPE for the 2011-12 school year, and none of the arguments now advanced by the parent provide a basis for reversing that determination. I have considered the parties' remaining contentions and find that I need not address them in light of the findings made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 31, 2014

NICHOLAS A. STEINBOCK-PRATT
STATE REVIEW OFFICER