



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-168

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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent,
Cynthia Sheps, 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 Order of Dismissal issued by an Impartial Hearing Officer (IHO) which made the parents' withdrawal of their due process complaint notice "with prejudice." The appeal must be sustained in part.

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]; 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). 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

This matter was commenced by the filing of a due process complaint notice on or about July 9, 2014 (Answer at ¶18; Tr. at p. 130). On August 26, 2014, an impartial hearing convened and, on August 29, 2014, an "Order on Pendency" was issued (Tr. pp. 1 – 96; IHO Order on Pendency at pp. 1-3). In addition, on September 19, 2014, a second day of hearings was held, at which time the merits of the claims raised in the parents' due process complaint notice were scheduled to be addressed (Tr. pp. 36-37, 57, 87-88, 101-159). However, the record reflects that after an opening statement by the district (which rested its case without presenting any witnesses [*id.* pp. 127-132, 139]), and unsuccessful attempts by the parents to contact people identified as witnesses by telephone, the parents indicated that they wished to withdraw their claims from consideration (*id.* at p 147). Thereafter, the following exchange ensued:

HEARING OFFICER: No, if you
withdraw, you withdraw with prejudice, and then
you're not going to be able to come back.

PARENT: How is it withdrawing with prejudice? We're withdrawing--

HEARING OFFICER: We're here at the hearing. You withdraw with prejudice, which means you will not be able to bring the action again on this matter.

(*id.*). Despite this warning, the parents elected to withdraw their claims (*id.* at p. 158), and on September 24, 2014, the IHO issued an "Order of Dismissal" (IHO Order) noting that the parent's "complaint" was withdrawn "with prejudice" (IHO Order at p. 2).

IV. Appeal for State-Level Review

The parents appeal the IHO's Order, contending that they were forced to withdraw their claims because they were "bullied" by the IHO, and that she (the IHO) demonstrated a bias against them. As relief, the parents request that the student's "situation . . . be given consideration," and that the IHO's order "be overturned and for [their due process complaint notice] to be decided as being withdrawn without prejudice." In addition, the parents request that the IHO "be un-appointed as the presiding IHO" for all claims pertaining to the student for the 2014-15 school year.

The district, in an answer, denies the parents' claims and argues both that the IHO acted in a "fair and impartial manner," and that she properly dismissed the parent's claims "with prejudice." In addition, the district contends that the parents' claims are moot.

V. Discussion

A. Preliminary Matters

Before addressing the merits of the parents' appeal, I must address a couple of preliminary matters, namely whether additional evidence submitted by both parties along with their respective pleadings is properly before me, and whether the parents' claims in this matter are moot as the district contends.

1. Additional Evidence

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Here, the district offers eleven exhibits with its answer for my consideration. Many of these exhibits, however, are things that could have been offered at the impartial hearing, including

proposed district exhibits 1, 4, 5, 6, 7, 8, 9 and 10. Moreover, the record reflects that a number of these exhibits (proposed exhibits 4, 6, 7, 8 and 10) were offered as exhibits at the impartial hearing (Tr. pp 90, 102, 104-5, 112), and thus should have been transmitted to the New York State Education Department's Office of State Review pursuant to 8 NYCRR 279.9(a), but were not.¹ Accordingly, acceptance of these documents into the record at this juncture would be improper, and I decline to accept and/or consider them herein. I will, however, accept into the record proposed exhibits 2, 3 and 11 which relate to proceedings occurring subsequent to the instant matter, and which are necessary to render a decision on issues raised on appeal.²

In addition, the parents submit seven "disclosures" with their petition for my consideration. The district generally does not object to my consideration of most of these "disclosures," but does object to my consideration of "disclosure 4," which it claims was available at the time of the impartial hearing and does not relate to the 2014-15 school year which this matter pertains to. In this regard I note that the issue before me is essentially whether the IHO properly made the withdrawal of the parents' due process complaint notice "with prejudice." To that extent, consideration of "disclosure 4," which is a letter from the United States Department of Education's Office for Civil Rights acknowledging a complaint filed by the parents and advising them that an investigation will be opened, is not necessary for me to render a determination in this matter. Accordingly, I will sustain the district's objection and not accept that document into the record. The parents' other "disclosures," however, will be accepted for consideration.³

2. Mootness

The district contends that the parents' appeal should be dismissed as moot. Specifically, the district maintains that the parents have already filed a fifth due process complaint notice and that hearings are ongoing in that matter, so that their "request to withdraw [this] matter 'without prejudice' to permit [them] to refile a new [due process complaint notice]" is not 'live.'"⁴ I disagree.

Generally, a dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). Here, the district's argument that this matter is moot must fail because, in addition to a reversal of the IHO's dismissal of this matter "with prejudice," the parents also seek to have the IHO "be un-appointed as the

¹ In fact, none of the exhibits entered into evidence at the impartial hearing have been provided for my consideration. Rather, and despite the hearing record indicating that 37 such exhibits were entered into evidence (Tr. pp. 73, 90, 104-14, 124-25), the district initially submitted a certification indicating that no exhibits existed (see District Certification dated October 14, 2014). While the district later explained, in response to an inquiry by the Office of State Review, that it was not in possession of these exhibits because the IHO had given them to the parents (see District Letter dated November 24, 2014), and further while these exhibits are not necessary for a determination of the issues raised herein, I remind the district of its obligations both to ensure that a complete copy of the hearing record before the IHO is provided to the Office of State Review, and to properly certify such record (8 NYCRR 279.9[a]).

² References to these exhibits are cited as "Dist. Ex. ____."

³ References to these "disclosures" are cited as "Parent Ex. ____."

presiding IHO" for all claims pertaining to the student for the 2014-15 school year. In addition, and more importantly, the district's argument must also fail because while the record before me does reflect that the parents have already commenced a subsequent proceeding related to the 2014-15 school year (Dist. Ex. 2), and further while the record reflects that this proceeding is currently pending (Dist. Ex. 3), the record also shows that the district is seeking to have that matter dismissed on the basis that the parents' claims in this matter were withdrawn "with prejudice," and is arguing that the doctrine of res judicata bars the parents from "litigating the same facts in a new action" (Dist. Ex. 11 at pp. 3-4). Accordingly, the suggestion that this matter is without consequence is incorrect, and I decline to dismiss the parents' appeal as moot.

B. The IHO's Decision

As noted above, the parents suggest that the IHO should not have made the withdrawal of their claims "with prejudice" and assert, as a basis for this claim (as well as the other relief that they seek), that the IHO was essentially biased. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). 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, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (see, e.g., Application of a Student with a Disability, Appeal No. 12-064; Application of a Child with a Disability, Appeal No. 07-090).

Upon careful review and consideration of the record before me, I am unable to find that the IHO in this matter was unfair or demonstrated a bias against the parents. Rather, the hearing record as a whole reflects that the IHO generally attempted to work with the parents and gave them an opportunity to be heard on various issues as they arose. While I understand that the parents may not have been happy with the IHO, and further while they may have disagreed with her in a number of respects, that disagreement alone does not provide a basis for finding actual or apparent bias by the IHO (see Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). Nor do I find that the specific instances of conduct cited to by the parents in their answer show that the IHO demonstrated a bias against them. In fact, some of the parents' allegations – for example, that the IHO "disregarded" the disability of the student's father and would not provide him with a 10 minute recess while he was having "manifestations" – are explicitly contradicted by the record which reflects that the IHO did, in fact, offer to take a break while these "manifestations" were occurring (Tr. pp. 155-56). In addition, the parents point to several other alleged instances of bias to support their claims, but a review of these reflect that most are simply decisions to overrule objections raised by the parents or to allow certain statements to be made. Again, these alone do not establish or suggest a bias by the IHO. Moreover, in at least one of these alleged instances the IHO made a decision that favored the parents in that documents offered by the district as evidence, but which the parents objected

to, were only marked for identification purposes and were not entered into evidence (*id.* at pp. 105-107). Accordingly, I decline to award the parents relief on the basis that the IHO was biased.

Though I find that the record in this matter does not support a finding of bias by the IHO, this does not end the inquiry. Rather, recently enacted regulations provide that withdrawals of a due process complaint notice in situations like the one presented here "*shall be presumed to be without prejudice* except that the impartial hearing officer may, *at the request of the other party and upon notice and an opportunity for the parties to be heard*, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]) (emphasis added). As noted above, the record reflects that upon being advised by the parents that they wished to withdraw their claims, the IHO – without much explanation, discussion or a request by the district - immediately advised the parents that their withdrawal would result in a dismissal "with prejudice" (Tr. p. 147). As such, I am unable to find on the record before me that the parents were provided with the requisite due process that is required prior to determining that their claims should be withdrawn "with prejudice." Nor is there a sufficient record upon which to review the IHO's decision. Accordingly, and for these reasons, I find that the IHO's decision must be reversed.⁴

VI. Conclusion

For the reasons discussed above, the IHO's decision is reversed to the extent that it made the parents' withdrawal of their due process complaint notice "with prejudice." However, and since the record before me does not support a finding of bias by the IHO, the parents' request that the IHO be precluded from presiding over any future claims related to the 2014-15 school year is denied.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's Order of Dismissal dated September 24, 2014 is modified to provide that the parents' due process complaint notice is withdrawn without prejudice as to the 2014-15 school year.

Dated: **Albany, New York**
December 10, 2014

HOWARD BEYER
STATE REVIEW OFFICER

⁴ I am, however, compelled to note that this decision should not be construed as a finding that a dismissal "with prejudice" would not have been justified. This is especially true in light of information in the record suggesting that three prior proceedings related to matters relevant to this case were commenced – and then subsequently withdrawn - by the parents (Tr. pp. 127-132), and that despite being advised by the IHO that this matter was scheduled to be heard at a date and time certain (*id.* at pp. 36-37, 57, 87-88), the parents showed up to that hearing unprepared to proceed (*id.* at 148).