The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 15-065

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 Board of Education of the Cazenovia Central School District

Appearances:
The Law Office of William J. Porta, attorneys for petitioner, William J. Porta, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for respondent, Susan T. Johns, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which found that the parent's claims regarding the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2014-15 school year were without merit, had been addressed in a prior decision involving the student, or were outside the scope of the IHO's jurisdiction and dismissed her due process complaint notice. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

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

The student has been the subject of prior administrative appeals related to the school years 2009-10 through 2014-15, and as a result, the parties' familiarity with the student's educational history and the prior due process proceedings is assumed and they will only be repeated herein to

the extent relevant to this matter (see Application of a Student with a Disability, Appeal No. 15-053; Application of the Bd. of Educ., Appeal No. 14-109).[1]

As relevant to the instant appeal, a CSE convened on May 8, 2014, to develop the student's IEP for the 2014-15 school year (District Ex. 8 at p. 1).[2] The May 2014 CSE recommended that the student attend a BOCES 12:1+4 special class identified in the IEP as the "SKATE program" and receive speech-language therapy, occupational therapy (OT), a sensory diet, physical therapy (PT), adapted physical education, and the services of a 1:1 teaching assistant (id. at pp. 9, 11).[3] The May 2014 CSE further recommended a 12-month school year program substantially similar to that recommended for the 10-month 2014-15 school year (id. at pp. 9-10). The hearing record reflects that the student attended the SKATE program during summer 2014 (Tr. pp. 237-38; see Dist. Ex. 17).

A. Due Process Complaint Notice

By due process complaint notice dated September 2, 2014, the parent requested an impartial hearing (Dist. Ex. 1).[4] During the course of the impartial hearing, the parent filed a subsequent due process complaint notice dated December 22, 2014 (IHO Ex. 1b; see Tr. pp. 624-26).[5] In the December 2014 due process complaint notice, the parent contended that she was entitled to the relief ordered by an IHO in a June 2014 decision regarding the impartial hearing underlying Appeal No. 14-109 (the June 2014 IHO decision) and that the district was required to implement the IHO's decision because the district allegedly initially informed the parent that it would not appeal the decision (IHO Ex. 1b at pp. 5-6, 8-9, 16, 17-18).[6] The parent further alleged that the district failed to implement the May 2014 IEP (id. at pp. 6, 10-12). The parent additionally contended that the district failed to implement the student's pendency (stay put) placement subsequent to the filing of her September 2014 due process complaint notice (id. at pp. 9, 11). Finally, the parent also alleged that the district failed to offer a FAPE to the student for the 2014-

[1] Additionally, because the parties stipulated to use the hearing record created with respect to the impartial hearing underlying Appeal No. 15-053, this decision does not distinguish between citations to the record developed in that case and the additional materials entered into the hearing record in connection with this matter (see IHO Decision at pp. 3, 20-23).

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The hearing record reflects that SKATE stands for Scaffolding Kids' Abilities Through Education (Tr. p. 383).

[4] The IHO rendered an interim decision regarding the student's pendency placement on February 23, 2015 (IHO Ex. 9) and a final decision on April 13, 2015 (the April 2015 IHO decision). The parent's appeal from the April 2015 IHO decision was the subject of Appeal No. 15-053.

[5] The IHO initially indicated that he would consolidate the two complaints, as requested by both parties (Tr. pp. 653, 763-64, 767-70; IHO Decision at p. 3 n.1), but eventually did not consolidate the matters and issued separate decisions for each complaint.

[6] At the time the parent filed her December 2014 due process complaint notice, the district's appeal of the prior hearing was pending before the Office of State Review (see Application of the Bd. of Educ., Appeal No. 14-109).

15 school year and that the May 2014 IEP was not appropriate (id. at pp. 7-9, 10, 12-13, 15-18).[7] For relief, the parent requested, among other things, declaratory relief and compensatory education services (id. at pp. 21-24).

B. Impartial Hearing Officer Decision

By letter motion to dismiss dated January 2, 2015, the district asserted that the parent's December 2014 due process complaint notice was duplicative of her September 2014 due process complaint notice; asserted matters beyond the jurisdiction of an IHO; and was improperly interposed in an attempt to untimely amend the September 2014 due process complaint notice (IHO Ex. 1c at pp. 1-4). By letter opposition dated January 9, 2015, the parent contended that to the extent her claims were duplicative, the December 2014 due process complaint notice addressed new and continuing violations of the student's rights; a number of the complaints raised in the due process complaint notice were raised solely to satisfy the exhaustion requirement of the IDEA; and the parent appropriately filed a second complaint to address her new claims (IHO Ex. 1d at pp. 1-2).

In a decision dated May 13, 2015, the IHO dismissed all of the parent's claims (IHO Decision at p. 18). The IHO found that a number of the parent's claims accrued before she filed the September 2014 due process complaint notice, had been addressed by his April 2015 decision, and were barred by the principles of res judicata and collateral estoppel (id. at pp. 11, 12-13, 14, 15-16, 17). With respect to the parent's claims that had not been previously addressed, the IHO found that the majority were without merit or outside the scope of his jurisdiction (id. at pp. 11-12, 13-15, 16-17). The IHO further found that the only viable claim contained in the December 2014 due process complaint notice was the district's alleged failure to implement the May 2014 IEP (id. at pp. 12, 17-18). The IHO determined that the parent had rejected the program recommended by the May 2014 CSE and that the district implemented the student's pendency placement (id. at pp. 12, 18). The IHO agreed with the district that the student's pendency program was the BOCES SKATE program; however, this was superseded by an agreement between the parties that the student would remain in the local elementary school during the pendency of the proceedings (id.).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in dismissing her December 2014 due process complaint notice without taking additional evidence. Specifically, the parent claims that the IHO erred by dismissing her claims that the district was obligated to implement the June 2014 IHO decision, that the district failed to implement the May 2014 IEP, and that the district failed to implement the student's pendency placement. The parent asserts that while she stipulated to use of the existing record created with regard to the impartial hearing held on her September 2014 due process complaint notice, she did not waive her right to a hearing on the December 2014 due process complaint notice. The parent also reiterates a number of claims which were raised in her September 2014 due process complaint notice and addressed in a prior appeal (see Application of

[7] The parent raised a number of claims outside the scope of my jurisdiction or which were adjudicated in the prior impartial hearings and appeals involving this student. For reasons set forth below, none of these claims need be addressed in this appeal.

a Student with a Disability, Appeal No. 15-053). The parent attaches a number of exhibits for consideration as additional evidence (Pet. Exs. A-J). Furthermore, the parent purports to appeal from the IHO's February 2015 interim decision on pendency.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. The district objects to the parent's offer of additional evidence and alleges that the parent's appeal from the IHO's February 2015 interim decision on pendency is untimely.

In a reply, the parent argues that the IHO did not consolidate the parent's due process complaint notices and the parent did not have an opportunity to present evidence relative to her December 2014 complaint. The parent further argues that her appeal from the IHO's February 2015 interim decision on pendency is timely and, if not timely, the district has not been prejudiced.

V. Discussion

A. Preliminary Matters

1. Timeliness of the Appeal from the Interim Decision on Pendency

In this appeal, the parent challenges the findings set forth in the IHO's February 2015 interim decision on pendency. A petition for review must be personally served within 35 days from the date of the IHO's decision to be reviewed, except that if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto are excluded in computing the period within which the petition may be timely served (8 NYCRR 279.2[b], [c]). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause set forth in the petition (id.).

In this case, the parent failed to initiate the appeal from the interim decision on pendency in accordance with the timelines prescribed in Part 279 of State regulations (8 NYCRR 279.10[d]). The IHO addressed the parent's pendency claims in the impartial hearing relating to the parent's September 2014 due process complaint notice in his February 2015 interim decision on pendency and issued the April 2015 IHO decision disposing finally of the issues raised in that due process complaint notice. The parent did not initiate this appeal until after the time in which to timely appeal both the February 2015 interim decision on pendency and the April 2015 IHO decision had passed (8 NYCRR 279.2[b]). Furthermore, in her appeal from the April 2015 IHO decision, the parent did not appeal from the February 2015 interim decision on pendency (see Application of a Student with a Disability, Appeal No. 15-053). Accordingly, the parent's appeal of the IHO's February 2015 interim decision on pendency is untimely and not properly raised in this proceeding. Additionally, the parent has failed to assert good cause—or any reason whatsoever—in her petition for the failure to timely initiate the appeal from the February 2015 interim decision on pendency, and instead argues in a reply that the district was not prejudiced by the untimeliness of the appeal. Accordingly, there is no basis on which to excuse the parent's failure to timely appeal the February 2015 IHO's interim decision on pendency (8 NYCRR 279.13).

Accordingly, the IHO's determination regarding the student's pendency placement has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see

also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2. Additional Evidence

The parent has submitted additional documentary evidence together with her petition for consideration on appeal. Generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if the additional evidence could not have been offered at the time of the impartial hearing and is necessary to render a decision (8 NYCRR 279.10[b]; see, e.g., L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 468-69 [S.D.N.Y. 2013]). Upon review of this evidence, I decline to accept the additional evidence proffered by the parent because it is not necessary to the disposition of this matter.

3. Scope of Review

Before reaching the merits of this case, a determination must be made regarding which claims are properly before me on appeal. The IHO dismissed a number of the parent's claims on the basis that they were addressed in his April 2015 decision, and therefore barred by the doctrines of res judicata and collateral estoppel (IHO Decision at pp. 11-17).

A party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). The parent did not allege in her December 2014 due process complaint notice that the district failed to properly implement the student's pendency placement during the 2013-14 school year, nor can her due process complaint notice reasonably be read to include this claim (see IHO Ex. 1b). A review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include this issue, nor did the parent attempt to amend the due process complaint notice to include this issue. Therefore, this allegation is outside the scope of my review and will not be considered.[8]

Parties are also limited by the doctrine of collateral estoppel, which "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006] [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and

[8] Additionally, the district did not open the door to consideration of this claim by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to the issue (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217 250-51 [2d Cir. 2012]).

> (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

A review of the due process complaint notices and the hearing record reveal that the IHO correctly dismissed the parent's claims that were addressed in the April 2015 IHO decision, including her ability to participate in the May 2014 CSE meeting, the location of the student's recommended program, the parent's access to educational records, the district's failure to provide the parent with notice of procedural safeguards, whether the recommended program was in the least restrictive environment, and the failure to include parent counseling and training on the May 2014 IEP (IHO Decision at pp. 12-15). On appeal, the parent also claims that the length of the bus ride to the SKATE program was unreasonable. This claim was also addressed in the April 2015 IHO decision and a prior appeal involving this student and may not be raised again with respect to the adequacy of the program developed for the student for the 2014-15 school year (see Application of a Student with a Disability, Appeal No. 15-053).

Also outside the scope of my review are claims that do not involve the identification, evaluation, or educational placement of a student with a disability. As in the prior administrative proceedings, the parent alleges a series of discriminatory and retaliatory claims arising from violations of federal statutes upon which no relief can be granted pursuant to the IDEA or the Education Law (Application of a Student with a Disability, Appeal No. 15-053; Application of the Bd. of Educ., Appeal No. 14-109). The IHO declined to consider these claims, noting that the parent provided no authority that an IHO appointed pursuant to the IDEA could adjudicate such matters. Likewise, the parent's alleged violations of various federal civil rights statutes, as well as section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 794[a]), the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), and the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g), exceed the jurisdiction of an SRO.[9] Thus, I am without jurisdiction to address the IHO's rulings on the parent's section 504 claims or his refusal to rule on the parent's claims arising under the ADA, FERPA, or federal civil rights statutes.

B. Implementation of the May 2014 IEP and Pendency Placements

With respect to the district's implementation of the May 2014 IEP, the IHO held that the parent rejected the program recommended by the May 2014 CSE and that the district had properly implemented the student's pendency program. Nevertheless, the IHO's determination does not resolve the time period from July 1, 2014 through the filing of the parent's due process complaint notice on September 2, 2014. The hearing record reflects that the student attended the BOCES SKATE program for part of summer 2014 pursuant to the May 2014 IEP and that the parent did not reject the IEP in writing until her September 2014 due process complaint notice (Tr. 237-39; see Dist. Exs. 1; 17). The parent also argues that she is entitled to the relief ordered by the IHO in the June 2014 IHO decision, while simultaneously alleging that the district failed to implement the May 2014 IEP. Although the IHO erred by not determining whether or not the district properly

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

implemented the May 2014 IEP while the student attended the BOCES SKATE program during the 2014 summer, the district timely appealed the June 2014 IHO decision (see Application of the Bd. of Educ., Appeal No. 14-109) and, therefore, the district was not obligated to provide the parent with any part of the relief ordered therein until such time as the award was affirmed by an SRO or a court.

Moreover, it is unclear from the hearing record precisely what services were included in the student's pendency placement. Apart from holding that the September 2014 pendency agreement was implemented by the district, the IHO made no findings regarding the terms of the agreement. Also relative to pendency, the parent alleges that the pendency placement is not appropriate and that the district failed to provide the student with the agreed-upon level of related services. To the extent the parent asserts that the pendency placement deprived the student of a FAPE, the determination of a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ., 386 F.3d 158, 160 [2d Cir. 2004]). The pendency provision operates as "an automatic preliminary injunction," without regard to the merits of the parent's claims (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Mackey, 386 F.3d at 160-61, quoting Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d Cir. 1996]). However, to the extent the IHO found that the parent's claim regarding implementation of the student's pendency placement pursuant to the September 2014 pendency agreement was without merit, he erred in holding that the student would not be entitled to some measure of relief in the event that the district did not provide the student with the agreed-upon level of related services. In particular, the Second Circuit has held that "when an educational agency has violated the stay-put provision, compensatory education may—and generally should—be awarded to make up for any appreciable difference between the full value of stay-put services owed" and the services the student actually received (Doe v. E. Lyme Bd. of Educ., 2015 WL 3916265, at *12 [2d Cir. June 26, 2015]). The hearing record provides some indication that the student may not have received all of the services to which he was entitled under the May 2014 IEP during summer 2014 and the September 2014 pendency agreement during the period between the agreement and the filing of the parent's December 2014 due process complaint notice (Tr. pp. 806, 808). The matter is therefore remanded to the IHO, to reconvene the impartial hearing for the limited purpose of permitting the parties to present evidence regarding the contours of the September 2014 pendency agreement and the extent to which the student did not receive services in accordance with the May 2014 IEP and the pendency agreement.[10]

VI. Conclusion

A review of the evidence in the hearing record supports the IHO's dismissal of the majority of the parent's claims. The IHO erred, however, by not determining whether the district implemented the May 2014 IEP during summer 2014 until the parent's filing of a due process complaint notice on September 2, 2014. Additionally, the hearing record does not fully establish

[10] As noted above, the IHO's determination on pendency has become final and binding on the parties. Accordingly, the parent cannot challenge the IHO's determination that prior to the September 2014 pendency agreement, the student's pendency placement was that described in the student's August 2012 IEP, which could only be implemented by the district in the SKATE program (IHO Ex. 9 at pp. 5-7). Accordingly, the parent has no claim for the district's alleged failure to implement the student's pendency placement between September 2, 2014, and September 16, 2014, during which time she chose not to send the student to the SKATE program.

the terms of the September 2014 pendency agreement and does not contain evidence establishing whether the agreement was implemented from the date of the agreement through the filing of the December 2014 due process complaint notice. Accordingly, this matter is remanded to the IHO to determine whether or not the district implemented the May 2014 IEP during summer 2014 and the September 2014 pendency agreement and, if not, what compensatory services are warranted to remedy the district's failure to do so.[11]

I have considered the parent's remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 13, 2015, is modified, by reversing those portions which dismissed the parent's claims regarding the implementation of the May 2014 IEP and the September 2014 pendency agreement, and the matter is remanded to the IHO; and

IT IS FURTHER ORDERED that the IHO shall determine whether the district implemented the May 2014 IEP during the period the student attended the BOCES SKATE – program; and

IT IS FURTHER ORDERED that the IHO shall determine the terms of the September 2014 pendency agreement and whether the district implemented the September 2014 pendency agreement during the period prior to the filing of the December 2014 due process complaint notice; and

IT IS FURTHER ORDERED that if the IHO determines that the district failed to implement either the May 2014 IEP or the September 2014 pendency agreement during the relevant time frames, the IHO shall determine a compensatory remedy.

Dated: **Albany, New York**
July 24, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

[11] The hearing record contains some indication that the district may have attempted to make up the missed services (Tr. p. 759). Furthermore, the IHO may weigh the parent's cooperation—or lack thereof—with the district's attempts to implement the student's services in developing an appropriate equitable award (see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 472 [2d Cir. Nov. 3, 2011]).