The University of the State of New York

The State Education Department
State Review Officer
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No. 15-104

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Katonah-Lewisboro Union Free School District

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Laura Wong-Pan, Esq., of counsel

DECISION

I. Introduction

Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied the relief sought under section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) and the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101 et seq.). The appeal must be dismissed.

II. Overview—Administrative Procedures under the IDEA

When a student in New York is eligible for special education services, the Individuals with Disabilities Education Act (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 proceeding on jurisdictional grounds, a full recitation of the facts and procedural history is not necessary. On January 9 and January 22, 2015, a team of district employees and the parents convened and found the student was covered under the protections of section 504 related to documentation of an asthmatic/allergic condition (see Joint Ex. 2 at pp. 1-3), which, according to the parents, could be triggered by the student's exposure to a variety of allergens including, among other things, dogs (Joint Ex. 1; Parent Ex. A). A section 504 accommodation plan was put in place by the district, which provided that the district would make "reasonable efforts" to prevent the student's contact with dogs on school premises and implement "[s]pecialized cleaning procedures" in any areas of the school building where a dog had been present (Joint Ex. 2 at p. 3).

A. The Parent's Hearing Request

In a letter requesting a hearing, which was dated April 23, 2015 and amended/supplemented on May 19, 2015, the parents alleged that the district violated section 504 and the ADA (Joint Ex. 1 at p. 1). First, the parents asserted that the district violated the student's section 504 plan by failing to notify the parents of the anticipated presence of a service dog at the school building for a fundraising event scheduled on May 15, 2015 (id.). The parents also stated their disagreement with the district's position that it could not legally bar a service dog from the school building and, in any event, argued that such position was inapplicable under the circumstances, where the event was a fundraiser for an "outside organization," as opposed to "school business" (id. at pp. 2, 3). Finally, the parents asserted that the fundraiser and events that occurred at the fundraiser constituted discrimination against the student, as well as "intimidation and/or retaliation" in response to the parents' complaints (id. at p. 3).

B. Impartial Hearing Officer Decision

On May 8, 2015 the district appointed an impartial hearing officer to hear the parents' claims (IHO Ex. I). An impartial hearing convened on May 28, 2015, and concluded on June 18, 2015, after two days of proceedings (Tr. pp. 1-351).[1] In a written decision dated October 3, 2015, the IHO indicated that, during the impartial hearing, she had granted the district's motion to dismiss the parent's retaliation claim on the ground that she lacked jurisdiction over such matter (IHO Decision at pp. 2, 7). The IHO also determined that the parents had not challenged the appropriateness of the student's section 504 plan (id. at p. 8).

The IHO determined that she had jurisdiction to make a determination on the parents' claim that the district violated the student's section 504 plan (IHO Decision at pp. 7-8). As to the merits of this claim, the IHO found that the district's May 4, 2015 notification to the parents of the expected presence of a service dog at the May 15, 2015 concert, while delayed, was sufficient (id. at p. 9). The IHO noted that, while the section 504 plan required that the parents and student be notified "as soon as practical" of any known visits, it did not tie such notice to—or otherwise provide for—the parent's verification of the cleaning process, which the parents cited as a harm arising from the delayed notice (id.). The IHO also rejected the parents' argument that the district's notice improperly failed to inform them of who would be presenting at the May 15, 2015 concert, noting that the parents did not include this particular claim in their due process complaint notice and, further, that this information was irrelevant, as it was the presence of the dog that triggered the section 504 plan, not the identity or role of the individual with the service dog (id.).

Next, the IHO addressed the district's competing responsibilities to avoid discrimination against individuals who use service animals and to accommodate the student's need by preventing contact between her and a service dog (IHO Decision at pp. 9-12). The IHO reasoned that the presence of the service dog, by itself, did not violate the student's 504 plan so long as the district made every reasonable effort to prevent the contact between the student and a dog (id. at p. 12). As the student did not attend the concert in question, the IHO concluded that no reasonable efforts

[1] During the impartial hearing and in her decision, the IHO indicated that the parties participated in one or more prehearing conference(s) on May 19. 2015 and/or May 21, 2015 (see IHO Decision at p. 1; Tr. pp. 5, 11, 174-75); however, no record of the conference(s) appears in the hearing record.

on the part of the district were necessary and the presence of the service dog, alone, did not result in a violation (id.). The IHO further noted that, while the parents' contended that the student was effectively excluded from the concert due to the dog's presence, the hearing record did not reflect any information as to why the student did not attend the event (id. at p. 13). Based on the foregoing, the IHO dismissed the parent's claims regarding implementation of the student's section 504 plan (id.).

IV. Appeal for State-Level Review

The parents appeal and seek reversal of the IHO's decision to deny their claims, asserting that the IHO erred in her determination that the district did not violate the student's section 504 plan or discriminate against the student. Specifically, the parents assert that the district's May 4, 2015 notice to the parents that a service dog would be present at the school on May 15, 2015 was untimely. The parents also alleged that the district failed to keep track of the whereabouts of service dogs in the school building on two occasions and, therefore, could not ensure that the correct areas were cleaned in a manner consistent with the student's section 504 plan. Additionally, the parents assert that the district does not monitor all entrances to the school building and, therefore, could not know whether or not a dog was in the building.

The parents also challenge the IHO's failure to make a determination about their asserted disagreement with the district's position—set forth in the student's section 504 plan—that the district could not legally bar service dogs from the school building. The parents assert that this allegation constituted a claim that the student's section 504 plan was inappropriate on its face and, therefore, that the IHO erred in finding that the parents did not directly challenge the adequacy of the student's section 504 plan. Next, the parents assert that the district's act of inviting a speaker with a service dog into the school building effectively excluded the student from attending the event and constituted discrimination. Finally, the parents appeal the IHO's dismissal of their retaliation claim.

After a preliminary examination of the administrative hearing record and IHO's decision, the undersigned directed the submission of additional evidence in the form of an affidavit submitted with the answer, which identified facts related to the district's records regarding whether the student either had been or is currently eligible as a child with a disability as defined by the IDEA, and the parents, who were copied on that directive, were notified of their right to oppose any statements made by the district in a reply (see 8 NYCRR 279.6).[2]

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety. The district additionally argues that the parents' petition should be rejected

[2] This case has been captioned as an Application of a Student Suspected of Having a Disability because, at its inception, it was not clear whether the student was IDEA-eligible; however, the matter has since been clarified.

due to failure to conform to the regulatory pleading requirements.[3] Finally, the district asserts that the parents' petition should be dismissed because an SRO lacks subject matter jurisdiction over section 504 and ADA claims. The district submitted an affidavit together with its answer averring to a search of the district's records that resulted in finding no records indicating that the student has been eligible for special education under the IDEA at any time while residing in the district (Nov. 10, 2015 Dist. Aff. ¶ 4).

The parents did not file a reply to the district's answer or otherwise respond to the affidavit attached thereto.

VI. Discussion

At the outset, I note that there is no evidence in the hearing record that the student is a student with a disability under the IDEA, and the parents have rendered no objections to any of the pertinent facts in the affidavit submitted by the district with its answer. This raises the question of which procedural safeguards the parents have a right to exercise.

To be sure, school districts are required to have certain policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure, and districts may elect to satisfy the 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). However, in New York, the review procedure under section 504 does not include state-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of a parents' claims or an IHO's findings regarding section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

In the present case, as noted above, it is undisputed that, at all times relevant, the student was not eligible or suspected of being eligible for special education pursuant to the IDEA (Nov. 10, 2015 Dist. Aff. ¶ 4; see 20 U.S.C. § 1401[3]; Educ. Law § 4401[1]; 34 CFR 300.8; 8 NYCRR 200.1[zz]). The parents' claims, as set forth in the due process complaint notice and as further articulated during the course of the impartial hearing, fell under section 504 and the ADA (see

[3] While the district is correct that the parents' petition fails to set forth all of the allegations in numbered paragraphs, "set forth citations to the record on appeal," or "identify the relevant page number(s) in the hearing decision," a State Review Officer has the "sole discretion" to accept or reject any pleading that does not conform to the form pleading requirements (8 NYCRR 279.8[a], [b]). In this case, although the parents' petition is procedurally defective, it will not be rejected on this basis given the ultimate disposition of this matter and because the parents, proceeding pro se, have raised challenges to the decision of the IHO and sufficiently referenced the evidence in the hearing record.

Joint Ex. 1; IHO Ex. III; see also Tr. pp. 1-364). Further, on May 8, 2015, the IHO was appointed to hear the parents' "504 complaint" and based her decision on section 504 (see IHO Decision; IHO Ex. I).[4] The section 504 review procedure identified in the hearing record in this case is identified as "appeal[ing] the hearing officer's decision within thirty days following the receipt of the hearing officer's decision to the Board of Education" (IHO Ex. II at p. 4). Finally, consistent with the foregoing, the parents' petition sets forth their appeal of the IHO's determinations pursuant to section 504 (see Pet.). Accordingly, I am without jurisdiction to review the IHO's decision.

VII. Conclusion

As I lack the jurisdiction to review claims brought under section 504, the petition must be dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 2, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] The IHO did not provide a statement attached to her decision advising the parties as to any rights of appeal or the mechanism of such. Had the impartial hearing been held pursuant to an IDEA claim such notice would have been required (see 8 NYCRR 200.5[j][5][v]).