The University of the State of New York

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

No. 16-065

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, 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 district) appeals from a "corrected" decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2015-16 school year was not appropriate and ordered, among other things, a remedy in the form of compensatory education. The appeal must be sustained.

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

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, however, the student suffers from a rare medical condition that affects the mobility of his joints for which he requires physical therapy (PT) in various forms to ameliorate the progressive reduction in joint mobility caused by the condition (Tr. pp. 89-91, 134-41, 287-90, 365; Parent Ex. S at pp. 1-2). Beginning some time in 2012, the student received PT several sessions per week in the home pursuant to related services authorizations (RSAs) issued by the district (Tr. pp. 287-92, 330, 452-53, 466-67, 469, 499-503). The central issue in this matter concerns the parents' efforts to prevent the district from discontinuing home-based PT as part of the student's special education program (see Dist. Exs. 2 at pp. 7-8; 3 at p. 2). The home-based PT took the form of "manual therapy", which is a specific modality the parents were advised the

student required and would not be performed in a school setting (see Tr. pp. 110-11, 138, 334-35, 337-38, 343-44, 362-63, 367-68, 477-480). The parent's pursuit of home-based PT has taken them on a long administrative and legal trek consisting of no fewer than seven IEPs over a two year period, and three separate filings for due process, including the one leading to this proceeding (Parent Exs. A-B; D-I; K; Dist. Exs. 1-4).[1]

As relevant to the matter at hand, a CSE convened on November 10, 2015 to develop an IEP for the 2015-16 school year (Parent Ex. B at pp. 1, 14). Finding the student remained eligible for special education and related services as a student with an other health impairment, the November 2015 CSE recommended a 10-month program of integrated co-teaching services in a general education classroom (id. at pp. 14-15).[2] The November 2015 CSE also recommended related services of two 45-minute sessions per week of individual occupational therapy (OT) in a separate location, two 45-minute sessions per week of individual PT in a separate location, and two 45-minute sessions per week of individual PT in the student's general education classroom (id. at p. 14).

A. Due Process Complaint Notice

By amended due process complaint notice dated December 21, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year (Dist. Ex. 2 at pp. 7-8).[3] In particular, the parents asserted that the November 2015 IEP contained inadequate OT and PT services because the student required more sessions per week and extended school year services (id. at p. 7). The parents also alleged that the student required home-based "manipulative" PT and a full-time health paraprofessional during the school day (id. at pp. 7-8). The parents further asserted that the November 2015 IEP did not recommend a direct service to meet some of the goals, and that the district had repeatedly failed to respond to the parents' inquiries and attempts to obtain RSAs for home-based PT services (id. at pp. 6-7).

As a proposed resolution, the parents requested that the IHO modify the student's program to provide the student with related services of three 45-minute sessions per week of individual PT in school, two sessions in the gym and one in the therapy room, and three 60-minute sessions per week of individual PT in the home utilizing manipulative therapy (Dist. Ex. 2 at p. 8). Further, the parents requested that the IHO order related services of three 45-minute sessions of individual OT per week in the student's classroom and two 45-minutes sessions of individual OT per week in the therapy room (id.). The parents also requested that the services of the full-time 1:1 health

[1] The first filing for due process was settled by a resolution agreement, the second went to impartial hearing and resulted in an IHO decision in favor of the parents dated August 4, 2015 (Tr. pp. 387; Dist. Exs. 3-4).

[2] The student's continuing eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] The parents initially submitted a due process complaint notice dated November 23, 2015 (Dist. Ex. 1). The district challenged the sufficiency of the initial due process complaint notice, resulting in the parents obtaining the services of an advocate and filing the amended due process complaint notice on December 21, 2015 (Nov. 3, 2015 IHO Decision; see Dist. Ex. 2 at pp. 6-8). Two copies of the amended due process complaint notice are included in the hearing record; one is dated December 17, 2015, and is otherwise identical to the other, which is dated December 21, 2015 (compare Parent Ex. A at p. 8, with Dist. Ex. 2 at p. 8).

paraprofessional be reinstated and that the student be provided with extended school year services for OT and PT (id.).

B. Partial Resolution Agreement and Impartial Hearing Officer Decisions

After the filing of the amended due process complaint notice, the parties executed a partial resolution agreement, dated January 15, 2016, which addressed several of the parents' requests regarding the 2015-16 school year (Dist. Ex. 3 at pp. 1-2). Pursuant to the partial resolution agreement, the district agreed to reconvene the CSE to recommend reinstatement of the full-time health paraprofessional and consider the student's need for PT and OT as extended school year services (id.). A CSE reconvened on January 21, 2016 to modify the student's IEP to reflect the partial resolution agreement (Dist. Ex. 18).

A prehearing conference was held, by telephone, on February 1, 2016 (Tr. pp. 1-32). During the prehearing conference, the parents' advocate explained that the parties were discussing a possible resolution of the amount of OT services to be provided to the student, but that the in-school and home-based PT services remained in dispute (see Tr. pp. 8-9, 37).

The impartial hearing convened on March 3, 2016, and concluded on May 18, 2016, after five hearing dates (Tr. pp. 1-625).[4] By decision dated August 22, 2016, the IHO determined that the district failed to offer the student a FAPE for the 2015-16 school year (August 22, 2016 IHO Decision at pp. 20-21).[5] The IHO found, among other things, that the parents were denied meaningful participation in the development of the student's educational program, that the November 2015 IEP failed to provide sufficient school-based PT, and that the student required home-based manipulative PT (id.). The IHO granted the parents' requested remedy "in full" and ordered the district to provide the student with two 45-minute sessions per week of individual PT in the student's physical education class and two 45-minute sessions per week of individual PT in the school-based provider's office or other related environments (id. at p. 21). The IHO also ordered the district to provide three 60-minute sessions per week of individual PT "utilizing Manual (Manipulative) Therapy Approach" to the student at a location and by a provider of the parents' choice (id. at pp. 21-22). The IHO also ordered the district to "complete all administrative/bookkeeping procedures required to immediately implement" the remedies ordered in the decision (id. at p. 22). The decision noted that the order is a final decision and order, that the matter "is resolved and is to be closed", and included a notice of the right to appeal the decision with instructions on how to do so (id. at pp. 2, 22-23).

After the IHO issued the August 22, 2016 decision, the parents' advocate emailed the IHO asking the IHO to clarify the decision "with specific regard to the relief granted and what I will call 'owed' PT services. My question is this, does the student receive a bank of services you have ordered from the date you determined FAPE was denied (November 2015) until now?" (Pet. Ex.

[4] The hearing record contains two versions of the transcript and word index for the hearing conducted on May 18, 2016, an original and a corrected copy. The certification of the hearing record submitted by the district indicates that the district obtained an amended transcript to fix an error with the date of "Exhibit O" on the exhibit list (see Tr. p. 435).

[5] The IHO decision is dated both "this 16th day of August 2016," and "August 22, 2016" (IHO Decision at p. 22).

3 at pp. 4-5). A discussion via email ensued during which the IHO suggested that she did not know "whether or not a party can seek compensatory damages where, as here, neither the issue of, nor a request for, compensatory services was included in the Due Process Compliant that was filed and adjudicated" (id. at pp. 2-3). During the exchange of emails, the parents requested that the IHO amend her decision to "reflect the start date of these services to the date the parents' due process complaint was first filed" (id. at pp. 1-2). Thereafter, the district's counsel objected to the parents' request for the IHO to amend her decision and award additional relief and stated that "[i]f the parent is unhappy with the order than the appropriate course of action is to appeal the decision" (id. at p. 1).

In a "corrected" decision dated September 8, 2016, the IHO maintained all the findings and orders from the August 22, 2016 decision and added the following order:

> d. Compensatory sessions of the services set forth in sections a-c in paragraph 1 immediately above, to give [the student] the opportunity to achieve the benefit he would have gained had the services been furnished from the beginning of his second grade school year (2015/16). The number of sessions is to be equal to the number of sessions missed during the 2015/16 school year.[] The scheduling of these services is to be within the sole discretion of [the student's] parent. Parent control includes, but is not limited to, frequency, spacing and length of each session. There is to be no time limit within which the compensatory education or counselling sessions must be used.
>
> (September 8, 2016 IHO Decision at p. 22).[6]

In addition to the compensatory education award, two footnotes were added to the September 8, 2016 decision that discussed the legal and factual reasoning behind the IHO's inclusion of the compensatory education remedy (id. at pp. 21-22). The paragraph numbering scheme was also modified, in that the original decision used numbered paragraphs per section and the "corrected" decision's paragraphs are consecutively numbered throughout (compare August 22, 2016 IHO Decision, with September 8, 2016 IHO Decision).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in issuing a "corrected" decision which changed the substance of the original decision and further erred in awarding compensatory educational services because it was not requested in the amended due process complaint notice or during the impartial hearing.[7] The district explicitly declines to appeal the August 22, 2016 IHO decision, and does not assert that the relief awarded to the parents therein was inappropriate.

---

[6] The corrected decision, in addition to being labeled as "Dated: August 22, 2016", and "Corrected Date: September 8, 2016," is also identified as being "dated this 6th day of September 2016" (see September 8, 2016 IHO Decision at p. 23).

[7] In its petition, the district suggested that some of the parents' emails to the IHO were ex parte (inappropriate communication with a judge without all parties present); however, the district withdrew that claim by letter dated November 30, 2016 after the parents' answer identified it as being without merit (see Pet. ¶ 9; Answer ¶¶ 9, 24).

In an answer, the parents assert that the IHO acted within her authority to address the denial of FAPE during the 2015-16 school year, that the IHO's "corrected" decision did not constitute a substantive change to the result, that the parents and their untrained advocate had been under the impression that any relief ordered by the IHO would have been "retroactive," that substantively the hearing record demonstrated the student's regression without the required home-based PT, and that the parents could not have requested a specific amount of compensatory services because they could not have predicted how long the proceeding would take.

V. Discussion

A. Corrected Decision — Retaining Jurisdiction

With regard to the parties dispute, an IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 121391 at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Conversely, the IDEA and state regulation provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In this case, the district is correct in its contention that the IHO did not have authority to issue the September 8, 2016 decision in this matter, especially since the decision was, in essence, a material amendment to the August 22, 2016 decision which contained substantive changes that altered the outcome of the case by imposing additional obligations on the district as opposed to a clarification of a minor error that was merely typographical or clerical in nature. The IHO was appointed, presided at an impartial hearing, and issued a final written decision on August 22, 2016, which ended her jurisdiction over the matter. The IHO erred when she rendered a second decision adding relief in the form of compensatory educational services. Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions. Accordingly, because the IHO lacked authority to issue the second decision, the September 8, 2016 "corrected" decision is vacated (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024).

The determination to vacate the September 8, 2016 decision leaves the IHO's August 22, 2016 decision undisturbed and fully in effect. The August 22, 2016 IHO decision has not been appealed by either party at this juncture, and the district has explicitly disavowed appeal of that order in this proceeding and is accordingly bound by the orders therein. The district is therefore

required to provide, among other things, the additional school-based PT sessions and 60-minute sessions of manipulative PT at a location chosen by the parent (albeit on a going-forward basis).

However, the parents have not disavowed appeal of that order, and should they decide that they wish to pursue the compensatory education remedy they had received in the amended September 8, 2016 decision, the proper avenue is for the parents to serve and file an appeal of the original August 22, 2016 decision. As the parents appeared in this matter pro se, a brief description of the requirements for appealing from an IHO decision, should the parents choose to do so, is provided below.

Initially, it should be noted that Part 279 of State regulations governing the process for appealing an IHO's decision to an SRO was amended in September 2016 and will become effective January 1, 2017 and, consequently, any further appeal served and filed by the parent at this point would almost certainly fall under the revised regulations and procedures. Accordingly, the regulatory citations below refer to the regulations as revised. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a], [b]). In most cases, a request for review must be personally served within 40 days from the date of the IHO's decision to be reviewed in order to be considered timely (8 NYCRR 279.4[a]). "The request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 200.4[a]). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service of the petition in a timely manner]).

However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to serve the request for review must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]["attorney error or computer difficulties do not comprise good cause"]). The parents in this case would not be able to serve an appeal of the August 22, 2016 within the 40-day timeline, so any request for review of that order should seek excusal and explain the reasons that they did not serve an appeal from the IHO's August 22, 2016 order on or before October 3, 2016.[8]

VI. Conclusion

In light of the determination to vacate the IHO's September 8, 2016 decision, I need not address the district's contention that the IHO erred in ordering compensatory education services for the alternative reason that such relief was not requested in the amended due process complaint

[8] The October 3, 2016 date presumes that the IHO's order was mailed.

notice or at the impartial hearing. In the event that the parents elect to serve a request for review appealing from the IHO's original August 22, 2016 decision, it would behoove the parents to be prepared to address the district's alternative argument.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's corrected decision dated September 8, 2016 is vacated.

Dated: **Albany, New York**
December 29, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER