The University of the State of New York

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

No. 16-071

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:[1]

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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for transportation costs. 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

[1] As further detailed below, the parent appeared pro se and the district did not appear in this appeal.

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

A. Due Process Complaint Notice

By due process complaint notice dated June 16, 2016, the parent indicated that although the student received counseling services pursuant to the issuance of a "Nickerson letter," the parent did not receive any reimbursement for the costs she expended to provide roundtrip transportation

so the student could attend the counseling services (see Parent Ex. A at p. 2).[2] The parent further indicated that after contacting respondent (the district), she "was told . . . to send" in a Related Services Authorization (RSA), which she had "already handed [] in" (id.). In addition, the parent indicated that she was also told that her "application would be resubmitted" and that she should "wait to hear from them," but the parent alleged that she did not receive any further contact from the district (id.). As relief, the parent requested reimbursement for the costs of the roundtrip transportation that she provided to the student so he could attend the counseling services pursuant to the Nickerson letter (id.).

B. Impartial Hearing Officer Decision

An IHO was appointed to hear the matter and on August 16, 2016, she conducted a prehearing conference (see Tr. pp. 1-2). Although the parent did not attend the prehearing conference, the IHO continued without the parent to schedule a date for the impartial hearing (id. at p. 2). At that time, the IHO indicated that she would "check to see" if the parent received the "notification," and further noted that "if there [was] a problem with the date for the Parents, [the parties would] change it" (id.). On August 31, 2016, the parties proceeded with the impartial hearing, which concluded on the same date (see Tr. pp. 5-20).[3] In a decision dated September 15, 2016, the IHO denied the parent's request for reimbursement of the transportation costs and dismissed the due process complaint notice "with prejudice" (see IHO Decision at pp. 2-3). Initially, the IHO found that the student—who was currently 29 years old—previously received special education and related services from the district (id. at p. 2). The IHO further noted that the student graduated and received a "diploma" in 2006, and thereafter, the student was referred to a "work program" (id.). In addition, the IHO indicated that at the time of the impartial hearing, the student currently attended "school" to earn a "two year degree" (id.). Relying on the parent's unsworn statements at the impartial hearing, the IHO noted that the parent received a Nickerson letter based upon an IHO decision "rendered in 2001," and as a result, the student received counseling services "outside of the school" (id.). The IHO concluded that even if the student continued to receive counseling services in "2005 and 2006," the parent's due process complaint notice and request to be reimbursed for the transportation costs incurred "ten years ago" was "well beyond any statute of limitations" and "may not be granted" (id.). As such, the IHO dismissed the parent's request for reimbursement "with prejudice" (id.).

[2] Although the due process complaint notice referred to a "nicholson letter," the context suggests the parent, who is proceeding pro se, was describing a "Nickerson letter." A "Nickerson letter" is a remedy for a systemic denial of a free appropriate public education (FAPE) that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

[3] At the impartial hearing held on August 31, 2016, the parent stated that she could not attend the prehearing conference because she was in the hospital (see Tr. p. 7).

IV. Appeal for State-Level Review

The parent appeals, and argues that she was not "given the opportunity" to present evidence at the impartial hearing. In addition, the parent asserts that the impartial hearing failed to address that the student was no longer "in the system anymore" and that she did not receive any notification regarding reimbursement for transportation costs, which she previously "applied for." Finally, the parent contends that the impartial hearing did not focus on the issue presented, but rather, focused on the statute of limitations.[4]

V. Discussion

A. Preliminary Matters—Initiation of Appeal and Improper Service

To comply with practice regulations in an appeal from an IHO's decision to an SRO, a petitioner must timely and personally serve a verified petition and other supporting documents, if any, upon respondent (8 NYCRR 279.2[b], [c]).[5] Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006).[6]

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability,

[4] Although the district provided the Office of State Review with the hearing record in this matter, the district did not file an answer responding to the allegations in the parent's petition.

[5] Generally, a petition and supporting documents must be personally served upon a respondent within 35 days from the date of the IHO's decision to be reviewed (see 8 NYCRR 279.2[b], [c]; 8 NYCRR 279.11).

[6] Pursuant to State regulation, "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (8 NYCRR 279.1[a]).

Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]).

In this case, the parent filed the following documents with the Office of State Review: a "Notice with Petition" and an "Affidavit of Verification," both dated October 11, 2016; an e-mail between the parent and an individual at the district, dated October 11, 2016; and two documents captioned as a "Notice of Intention to Seek Review" together with two "Affidavit[s] of Service by Mail," all of which were also dated October 11, 2016 (Pet.; Parent Affs. of Service).[7] According to the Affidavits of Service by Mail, the parent served "District 75/District 29"—presumably, the district in this case—at a location that the parent designated as the address for the Office of State Review in Albany, New York (Parent Affs. of Service). Based upon these documents, it appears that the parent attempted to initiate the instant appeal by serving the petition upon the district by mail at the Office of State Review instead of personally serving the petition upon the district, as required by State regulation (compare Parent Affs. of Service, with 8 NYCRR 279.2[b], [c]).

In addition, the exceptions to the general rule requiring personal service of the petition do not apply in this case. For example, the parent did not allege any facts or circumstances indicating that the parties agreed to waive personal service, or that the parent sought and received permission for alternate service of the petition from the Office of State Review.[8] Moreover, even if the parent requested and received permission to serve the district through alternate service (i.e., by mail), the Affidavits of Service by Mail reveal that the parent mailed the petition to the Office of State Review in Albany to effectuate service upon the district and therefore, she did not mail the petition to the correct address to serve the district (see Parent Affs. of Service). Therefore, because the parent did not personally serve the petition upon the district, the appeal must be dismissed.

B. Jurisdiction

Assuming for the sake of argument that the parent had properly initiated the appeal, the parent would nevertheless fail, but on different grounds than those articulated by the IHO. As indicated above, a parent may file a due process complaint notice with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such student (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.507[a][1]). Similarly, in an appeal from an IHO's decision to an SRO, State regulation authorizes an SRO to conduct an impartial review of an IHO's decision related to the "identification, evaluation, program or placement of a student with a disability" (8 NYCRR 279.1[b]; see 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"]; 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

[7] Both of the Affidavits of Service by Mail filed by the parent note the following in bold typeface at the bottom of the forms: "Do not use Form E for proof of service of the petition and other supporting papers. The petition must be personally served (See Form D). Form E may be used for proof of service for all pleadings and papers served subsequent to the petition" (Parent Affs. of Service). Notably, "Form E" appears at the top of both Affidavits of Service by Mail (id.).

[8] It seems implausible that a parent would ever be in the position of being incapable of locating the district; however, the other exceptions, if alleged, may apply in some circumstances.

York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]). In this case, there is no information in the administrative record that suggests that there would be any jurisdiction of an IHO or an SRO in this matter. First, a student may have a right to special education transportation if there has been an individualized determination by the CSE that the student required such specialized transportation services; however, it does not follow that all students with disabilities must be provided with specialized transportation.[9] However, there is no indication in the evidence or the parent's allegations that the student in this matter had any special education transportation needs at all. The allegation in this case is that the special education related service of counseling was provided though a Nickerson letter, but neither the parent's due process complaint notice nor the instant petition for review in this appeal further allege any matter relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such student, and instead only indicates generally that transportation was not paid for by the district (see generally Parent Ex. A; Pet.).[10] If the student was entitled to transportation under the State law provisions and district policies that are applicable to all students (disabled or not), then a dispute under those general polices applicable to all students is not a special education-related dispute redressable in the IDEA due process system. Here, the parent's due process complaint notice sought reimbursement for the costs of transportation that she provided to the student to attend counseling services that occurred, at a minimum, nearly 10 years ago (see Tr. pp. 9-10, 13-15; Parent Ex. A at p. 2). Absent any indication that the necessary jurisdiction is present in this case, the parent's arguments on appeal that she was not "given the opportunity" to present evidence at the impartial hearing, the impartial hearing did not address the issue of reimbursement, and the impartial hearing improperly focused on the statute of limitations, all fail because no triable issue that is redressable by an IHO was asserted by the parent. Thus, even if the parent had properly initiated this appeal, I would nevertheless find no need to remand the matter for further administrative proceedings or a further evidentiary hearing.[11]

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[9] The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, New York State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment, such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the least restrictive environment (LRE) (34 CFR 300.107; 300.305). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]).

[10] Given the student's age—now approximately 29 years old—it is questionable, and the IHO did not address, whether the parent retained standing to pursue any claims on the student's behalf related to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such student.

[11] To the extent that the parent alleges in the petition that she was told at the impartial hearing that she could present evidence but was not afforded the opportunity to do so, the transcription of the proceedings does not

Next, to the extent that the parent's request for reimbursement for the transportation costs she expended in conjunction with the student's ability to access the counseling services he received pursuant to the issuance of a Nickerson letter, I find that that this is perhaps the closest the parent's allegations relate to the "provision of a FAPE" to the student (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.507[a][1]), insofar as Jose P. involved a systemic denial of a FAPE to class members. However, disputes over relief provided pursuant to Nickerson letters cannot be resolve through the IDEA due process mechanism because neither an IHO, nor an SRO, has jurisdiction over matters related to the stipulation reached in the Jose P. class action suit. The remedy provided by the Jose P. decision was intended to address those situations in which a student had not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192, n.5; M.S., 734 F. Supp. 2d at 279; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).[12] Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 12-039 [indicating that "[n]o provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal"]), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]).

Consequently, neither the IHO nor SRO have the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d at 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct.

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support this allegation (see Tr. pp. 5-20). However, the transcription does show that the IHO noted at the beginning of the proceedings held on August 31, 2016 that the parties engaged in a "slight off-the-record discussion" before the IHO, who wanted to "make sure [the parent] underst[oo]d because she's representing herself" (Tr. pp. 5, 7). While it is possible that the parent may have been told that she could present evidence during this "slight off-the-record discussion," it must be noted that the parent did enter the due process complaint notice into evidence, and a review of the remainder of the transcript of the proceedings does not indicate that the parent attempted to enter any other evidence into the hearing record or was not otherwise provided with the opportunity to do so (see generally Tr. pp. 7-20). Notwithstanding, as already indicated, the absence of jurisdiction obviates the need for any additional evidence in this matter.

[12] It is also questionable, and the IHO did not address, whether the two-year statute of limitations adopted in the IDEA and State law—and as applied by the IHO in this case as a basis for dismissing the parent's due process complaint notice with prejudice—is applicable to matters related to the stipulation and consent order reached in the Jose P. class action suit.

16, 2012]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability of and parents' rights to enforce the Jose P. consent order]).

VI. Conclusion

In summary, the parent's appeal must be dismissed for the failure to properly initiate the appeal and for lack of jurisdiction over the issues raised in the parent's due process complaint notice.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 8, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER