The University of the State of New York

The State Education Department
State Review Officer
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No. 17-048

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 SCO Family of Services, Robert J. McMahon Residential Center, and the Tyree Learning Center, the Board of Education of the North Shore Central School District, and the New York City Department of Education

Appearances:
Levanthal, Mullaney & Blinkoff, LLP, attorneys for respondent, SCO Family of Services, Robert J. McMahon Residential Center, and Tyree Learning Center, Jeffrey Blinkoff, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, the Board of Education of the North Shore Central School District, Susan M. Gibson, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, the New York City Department of Education, Theresa Crotty, 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 granted the respondent school districts' motions to dismiss her due process complaint notice. The appeal must be dismissed.[1]

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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 was the subject of two prior administrative appeals; one involving the New York City Department of Education (the district of residence) and another proceeding involving the North Shore Central School District (the district of location) (see Application of a Student with a Disability, Appeal No. 16-055; Application of a Student with a Disability, Appeal No. 15-119). Accordingly, the parties' familiarity with the student's educational history is assumed and will not be repeated here in detail. Briefly, as noted in Application of a Student with a Disability, Appeal No. 16-055, a Family Court placed the student in the care and custody of the New York City Administration for Children's Services (ACS) as of June 20, 2012 and ACS placed the student at an SCO Family of Services Children's Residence, within the district of location, called the Robert J. McMahon Children's Center (SCO/RJMCC) in January 2014. The student began attending the Tyree Learning Center (Tyree) on May 15, 2014 (IHO Ex. 6 at p. 19).[2]

On July 21, 2014, a CSE from Tyree convened to develop the student's IEP for the 2014-15 school year, found the student eligible for special education as a student with multiple disabilities, and recommended a 12-month 6:1+3 special class placement at a State-approved nonpublic school, with related services consisting of individual and group counseling in addition to individual speech-language therapy and occupational therapy (OT) (IHO Ex. 6 at pp. 21-41). The IEP indicated that the student's mother disagreed with the results of the evaluations and the disability classification of multiply disabled; however, the rest of the CSE, including the student's father, were all in agreement (id. at pp. 25-26). On July 21, 2015, the Tyree CSE met for the student's annual review and to develop an IEP for the 2015-16 school year and continued the same recommendations from the July 2014 IEP for a 12-month 6:1+3 special class placement at a State-approved nonpublic school with related services (id. at pp. 42-60). The IEP indicated that both of the student's parents participated in the meeting (id. at p. 60).

On July 18, 2016, the Tyree CSE convened an annual review of the student's program and developed his IEP for the 2016-17 school year (IHO Ex. 6 at pp. 63-81). Having found the student remained eligible for special education and related services as a student with multiple disabilities, the July 2016 CSE continued the same recommendation for a 12-month 6:1+3 special class placement at a State-approved nonpublic school with related services (id. at pp. 63-79). The July 2016 IEP indicated that the student's mother attended the meeting and continued to disagree with the student's classification as a student with multiple disabilities and expressed her belief that the evaluations did not accurately reflect the student's functioning (id. at p. 67). On July 27, 2016, the Tyree CSE sent the student's mother prior written notice informing her of the CSE's recommendations and noting her disagreement with the student's classification and placement in a residential program (id. at pp. 61-62).

In September 2016, the executive director of SCO/RJMCC initiated a proceeding in Supreme Court, pursuant to Article 81 of the Mental Hygiene Law, for the appointment of a personal and financial needs guardian for the student (IHO Ex. 3 at pp. 76-83). On November 22, 2016, the Court determined that the student was an "incapacitated person," in that he could not

[2] Residents of SCO Family of Services Children's Residence called the Robert J. McMahon Children's Center (SCO/RJMCC) typically attend Tyree, a State-approved special education school, affiliated with SCO/RJMCC, that was created to accommodate the needs of SCO/RJMCC's residents (see IHO Ex. 4 at p. 4).

manage his own personal and financial needs (id. at p. 74).[3] The Court designated the student's father as the person to serve as the student's guardian, and dismissed the parent's cross-petition to be appointed the student's sole guardian (id. at pp. 74-75).

A. Due Process Complaint Notice

By due process complaint notice dated December 1, 2016, the parent alleged that SCO/RJMCC failed to offer the student a free appropriate public education (FAPE) for the period from January 15, 2014 to the present (IHO Ex. 3 at p. 69).[4] More specifically, the parent alleged that the student has been "inappropriately classified" and has "no history of mental retardation" (id.). She also asserted that "the evaluations upon which [the student's] classifications and IEPs [we]re based [we]re variously fraudulent, inadequate and misleading" (id.). Additionally, the parent argued that the "IEPs [we]re grossly inadequate," lacked history and parental concerns, and failed to provide appropriate interventions (id.). According to the parent, SCO/RJMCC kept the student without a placement for four months, although he already "had a school request for interview and acceptance" (id.). The parent further alleged that the student was "inappropriately slated for [New York State Office for People with Developmental Disabilities (OPWDD)] adult lifelong placement" (id.).

As a remedy, the parent requested an award of "compensatory education at a NYSED approved school and/or funding (reimbursement) for private tutoring" (id.). Additionally, she requested that the student visit Westchester Exceptional Children's School (WEC) "to determine possible acceptance" (id.). Lastly, the parent requested that the matter be remanded to the IHO who presided over the prior proceedings involving the student (id.).

B. Events Post Dating the Due Process Complaint Notice

In a letter dated December 14, 2016, counsel for SCO/RJMCC and Tyree responded to the parent's due process complaint notice and asserted that she lacked standing to file a due process complaint notice because a guardianship proceeding was pending (IHO Ex. 3 at p. 64). The letter also indicated that SCO/RJMCC and Tyree did not inappropriately classify the student, nor fail to offer the student a FAPE during the period of January 15, 2014 through the present, and that during the four-month period the parent alleged the student was without a placement, the district of location had jurisdiction over the student (id.).

In an email exchange in December 2016, the parent communicated with the New York State Education Department, Office of Special Education, (NYSED) regarding the appointment of an IHO and the parent's request for a specific IHO to preside over the underlying matter (IHO Ex. 6 at pp. 164-69).

On December 23, 2016, the parent amended the due process complaint notice to join the district of location as a party (IHO Ex. 4 at pp. 19-20). In an email also dated December 23, 2016, NYSED acknowledged receipt of the parent's amended due process complaint notice and advised

[3] By order of the New York State Family Court, on January 15, 2014, the student was placed at SCO/RJMCC (IHO Ex. 3 at p. 70).

[4] Residents of SCO/RJMCC typically attend Tyree, a State-approved special education school, affiliated with SCO/RJMCC, that was created to accommodate the needs of SCO/RJMCC's residents (IHO Ex. 4 at p. 4).

the parent that she was required to file her due process complaint notice with the district of location (IHO Ex. 6 at p. 164). According to the email, the district of location was required to initiate the hearing process and appoint an IHO within two business days after receipt of the due process complaint notice (id.).

On January 5, 2017, the parent amended her due process complaint notice to join the district of residence as a party (IHO Ex. 5 at pp. 11-13). According to the parent, pursuant to a prior IHO decision, the student was awarded one year of compensatory education in a proceeding against the district of residence, which had not been implemented (id.). The parent reiterated her request to have the matter remanded to the IHO who presided over the prior impartial hearings (id. at p. 12).

On January 9, 2017, an IHO was appointed to preside over the underlying matter (IHO 1) (IHO Ex. 6 at p. 231).

In a letter dated January 13, 2017, the district of location responded to the parent's due process complaint notices, generally denying her allegations and requesting that the due process complaint notice be dismissed in its entirety because the parent lacked standing to pursue the proceeding and principles of res judicata and collateral estoppel barred her claim against the district (IHO Ex. 6 at pp. 222-26).

In an email dated January 18, 2017, IHO 1 advised the parties of her resignation from serving as the IHO in the underlying matter and directed the district to appoint the next IHO from the rotational list (IHO Ex. 6 at p. 236). Later that day, the parent requested that IHO 1 appoint the IHO who presided over the prior proceedings to hear the matter (id. at p. 235). The parent asked IHO 1 to issue a decision regarding her request for a different IHO, and further noted that the IHO who "ha[d] two related due process complaints," was "familiar with the issues"(id.).

In an email to the district of location, on January 27, 2017, the second IHO (IHO 2) indicated that she was appointed and was attempting to schedule a pre-hearing conference (IHO Ex. 6 at pp. 177). On January 28, 2017, the parent amended her due process complaint notice for the third time and requested that the pre-hearing conference take place in person, because "the issues [we]re extensive for a phone hearing" (id. at p. 175). The parent objected to "further delay of this proceeding via motions regarding standing" (id. at p. 176). She again reiterated her request to have the matter remanded to the IHO who presided over the prior impartial hearings (id.). In addition, the parent amended her request for relief to include an order directing the district of residence or SCO/RJMCC to fund Tibetan tutoring services for the student (id.).

In an email dated February 4, 2017, IHO 2 scheduled a prehearing conference to take place on February 14, 2017 (id.).

By order and judgment dated February 10, 2017, the Nassau County Supreme Court appointed the student's father to serve as the student's guardian (IHO Ex. 3 at pp. 84-95).

On February 14, 2017, the parties convened for a prehearing conference (Tr. p. 3). Each of the respondent districts indicated the intent to move to dismiss the parent's due process complaint notice on the basis that the parent lacked standing and IHO 2 set out a briefing schedule for the motions (see Tr. pp. 25-42).

On March 2, 2017, the district of residence moved to dismiss the parent's due process complaint notice (IHO Ex. 5 at p. 1). The district of residence argued that the parent lacked standing to pursue her claim against it, and that the IHO lacked jurisdiction to enforce a prior IHO decision (id at pp. 2-3). The district further contended that the parent was barred from filing multiple due process complaint notices on the same issue (id. at p. 2).

On March 3, 2017, the district of location moved to dismiss the December 1, 2016 and the December 23, 2016 due process complaint notices (IHO Ex. 4). The district of location raised the following allegations in support of its motion to dismiss the parent's due process complaint notices: (1) the parent lacked standing to bring the underlying action; (2) the parent's claims were precluded by principles of res judicata and collateral estoppel; (3) the parent's claims against the district of location were barred by the statute of limitations; (4) the parent's December 23, 2016 e-mail referenced as an amended due process complaint notice was insufficient and failed to comply with State regulations; and (5) the IHO lacked jurisdiction to enforce the decisions rendered in the prior proceeding between the parent and the district of location (id. at pp. 1-2).

On March 3, 2017, SCO/RJMCC also moved to dismiss the proceeding asserting that the parent lacked standing due to the February 10, 2017 Order and Judgment appointing the student's father as the student's guardian (IHO Ex. 3 at pp. 1-4).

On April 27, 2017, the parent submitted a reply to the motions to dismiss her due process complaint notices (IHO Ex. 6). The parent argued in part, that principles of res judicata and collateral estoppel did nor bar the proceeding, that the district of residence and district of location were necessary parties, and that the IHO should make an interim pendency determination (id. at pp. 5-10). In addition, the parent alleged that she had standing to pursue her claims against the respondent districts as the noncustodial parent, based in part on the findings in prior SRO and IHO decisions (id. at pp. 10-11). She further indicated that the February 10, 2017 Order and Judgment did not alter her rights as a noncustodial parent and further asserted that the November 2016 and February 2017 orders were improperly disclosed during the hearing because they were the subject of a sealing order (id. at pp. 11-14).

C. Impartial Hearing Officer Decision

By decision dated May 19, 2017, IHO 2 granted the respondent districts' motions to dismiss the parent's due process complaint notice based on her finding that the parent did not have standing to request a hearing (IHO Decision at pp. 3-7). More specifically, IHO 2 determined that pursuant to the February 2017 Order and Judgment, the student's father had educational decision-making authority over the student (id. at p. 7). IHO 2 further found that the student's father believed the student was receiving appropriate care at Tyree and he opposed the parent's application for an impartial hearing and objected to the proceedings (id.). Accordingly, IHO 2 concluded that the parent "lack[ed] standing to demand a hearing on behalf of the student under the IDEA" (id. at p. 7). Based on her finding that the parent lacked standing to bring an impartial hearing on the student's behalf, IHO 2 concluded that "there [wa]s no longer a live case or controversy," therefore, the matter was moot (id.). Under the circumstances, IHO 2 declined to address SCO/RJMCC's and the districts' remaining reasons for requesting dismissal and also dismissed the parent's requests to amend her due process complaint notice, for an interim decision on pendency, and for an injunction against the parties for an alleged violation of a sealing order (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals and requests that IHO 2's decision be reversed in its entirety. More specifically, the parent alleges that IHO 2 erred in ruling that she did not have standing to pursue an impartial hearing on behalf of the student. She further alleges that the delay in scheduling the impartial hearing deprived her of her procedural due process rights. Next, she contends that the IHO exhibited bias against her. Regarding the merits, the parent alleges that none of the student's IEPs, namely, the IEPs developed in July 2014, July 2015, or July 2016, have been adjudicated in any impartial hearing. She asserts that a September 2016 IHO decision, in which the IHO directed the respondent to provide the student with one year of compensatory education has not been implemented or enforced. Additionally, the parent alleges that IHO 2 erred in failing to address her request for a decision on pendency, and ultimately dismissing the matter on mootness grounds.

As relief, the parent requests that the matter be remanded to the IHO who presided over earlier proceedings involving the student, the district of residence, and the district of location. Additionally, the parent is requesting a determination on pendency. The parent further requests findings on "any or all of the issues raised by the parent in this due process complaint and the amended complaints, such as educational classification." She also requests an order directing placement of the student at WEC.

SCO/RJMCC, the district of location, and the district of residence all answer the parent's request for review and request that IHO 2's decision be upheld and the request for review be dismissed in its entirety.

V. Discussion

A. Preliminary Matters

1. Delay in Appointment of IHO

The parent asserts that the IHO did not note the "almost two-month delay in her appointment," and that the IHO attributed any delay in the proceeding to the parent.

Numerous courts have rejected the notion that untimeliness in the administrative hearing process, in and of itself, should constitute a reason to reject an administrative decision (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015]; J.W. v. New York City Dep't of Educ., 2015 WL 1399842, at *6 n.3 [S.D.N.Y. Mar. 27, 2015]; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *6 [S.D.N.Y. Aug. 21, 2014]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *7 n.3 [S.D.N.Y. July 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014]).

In this matter, the parent has been through at least two prior proceedings related to the parent's standing to initiate a due process proceeding on behalf of the student and what entity was the appropriate party against whom the parent's requested relief could have been sought (see Application of a Student with a Disability, Appeal No. 16-055; Application of a Student with a Disability, Appeal No. 15-119). The parent's concerns regarding the additional delays in appointing an IHO after the parent initiated a proceeding against SCO/RJMCC are understandable (see IHO Ex. 6 at pp. 164-69); however, upon review of the hearing record IHO 1 was appointed two business days after the parent amended her due process complaint notice to add the district of

residence as a party to the action (id. at p. 231; see IHO Ex. 5 at pp. 11-12). While IHO 1's unforeseen recusal protracted a resolution of the matter, there is no indication that there was any delay in appointing IHO 2 to continue the proceeding, and IHO 2 promptly scheduled a prehearing conference (Tr. p. 3; IHO Ex. 6 at pp. pp. 175-76, 238). Based on the foregoing, although the parent's concerns regarding the hearing process are well taken, any delay in the appointment of an IHO to preside over this matter was minimal and did not deprive the parent or student of their due process rights. Therefore, the parent's allegations do not constitute a basis to set aside IHO 2's decision.

2. Conduct of the Impartial Hearing

The parent alleges that the IHO 2 did not maintain impartiality during the course of the hearing. The parent argues that the IHO 2 has experience representing school districts and that she was unable to check if IHO 2 had previously ruled in favor of parents. She also asserts that IHO 2 performed contractual services for the Office of State Review (OSR) at some point during 2014-15. Additionally, she alleges that IHO 2 refused to consider any of her amended complaints and refused to open the attachments of the third amended complaint.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064).

During the prehearing conference, IHO 2 disclosed that for 17 years, she was employed by a law firm that represented school districts and parents (Tr. pp. 3-4). The IHO also stated that for the past 14 years, she has maintained her own private practice, and over the last 12 years, although she has represented some parents, her practice was devoted to work as an IHO (Tr. p. 4). In addition, the IHO disclosed that she has not represented any of the parties involved in this proceeding, nor was she familiar with any of the parties or the student (id.). Following these disclosures, the IHO gave the parties an opportunity to object; however, none of the parties raised any objection to her presiding over the impartial hearing (Tr. pp. 4-5).

To the extent the parent contends that IHO 2 did not open the attachments to the parent's emails, IHO 2 notified the parent that she would not consider documentation that was not submitted as evidence and informed the parent that evidence will be submitted during the course of the impartial hearing (Req. for Rev. Ex. I). Further, IHO 2 received the parent's answer to the motions to dismiss, including exhibits thereto, and considered it in rendering her decision (IHO Decision at p. 3; see IHO Ex. 6).

Overall, an independent review of the record demonstrates that the parent had the opportunity to present her position in opposition to the motions to dismiss, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]. Accordingly, evidence that IHO 2 worked in different capacities in the field of special education law over the course of many years, without more, does not support a finding of bias or the appearance thereof. Thus, the parent's assertion that IHO 2 was not impartial lacks merit.

3. Standing

Next, the parent alleges that she has standing to bring a claim on behalf of the student under the IDEA, in part because no court has ever terminated her parental rights. She asserts that she has standing to proceed based on Application of a Student with a Disability, Appeal No. 15-119 and a July 27, 2016 IHO Decision, and that principles of collateral estoppel may apply. Conversely, SCO/RJMCC argues that a judicial decree which has identified the student's father as the guardian to make educational decisions on the student's behalf has terminated the parent's right to make educational decisions and thus her standing to proceed. Similarly, the district of location also argues that IHO 2 correctly held that the parent did not have standing to file a due process complaint concerning the student. Although the district of location also acknowledges the July 2016 IHO decision, which determined that the parent had standing to bring the prior action, the district of location contends that the circumstances have since changed, as there is currently a judicial order naming the student's father as his guardian, with educational decision-making authority. Likewise, the district of residence asserts that the student's father, as his guardian, is the only individual clothed with the authority to make educational decisions for the student, and therefore, the student's mother lacks standing to bring the underlying action. As explained more fully below, the IHO properly dismissed the parent's due process complaint notices based on lack of standing.

Under the IDEA and New York State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). In addition to the student's natural parents, the term "parent" can include an adoptive parent, foster parent, guardian, an individual acting in the place of a parent with legal responsibility for the student, and an individual assigned as a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]; see Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]).

In New York, the courts have held that although the IDEA provides for a range of individuals who may be considered a parent, it does not require that all such persons must be granted statutory rights (see Fuentes v. Bd. of Educ. of City of New York, 540 F.3d 145, 149 [2d Cir. 2008]; Taylor v. Vermont Dep't. of Educ., 313 F.3d 768, 777-78 [2d Cir. 2002]). When confronted with situations where multiple individuals may meet the definition of a parent, courts have deferred to state law to determine who retains educational decision-making authority and statutory rights under the IDEA (Fuentes, 540 F.3d at 148; citing Taylor 313 F.3d at 779). Federal regulations have further clarified that when more than one party qualifies as a parent, the biological or adoptive parent is presumed to be the parent for purposes of exercising statutory rights under the IDEA, unless that individual does not have legal authority to make educational decisions for the student, or if a judicial order or decree specifically identifies another specific person as the parent or as having educational decision-making authority (34 CFR 300.30[b]; see also 8 NYCRR 200.1[ii][3]-[4]).

In this instance, the evidence supports a finding that the parent does not have standing to bring an impartial hearing on the student's behalf. The February 2017 order and judgment that appointed the student's father to serve as his guardian granted the student's father the "[p]ower to handle all other matters for the financial security, welfare, and personal needs of the incapacitated

person, inclusive of educational decision-making" (IHO Ex. 3 at p. 89).[5] While the parent asserts that the guardianship order does not change the parties' positions (either in adding authority to the father or taking authority away from the parent), the regulations specifically provide that where a court order identifies a specific person to make educational decisions on the student's behalf, such person shall be the parent (34 CFR 300.30[b][2]; 8 NYCRR 200.1[ii][4]). When a court identifies one person as having educational decision-making authority, it does not follow that another person can also maintain such authority (see Fuentes v. Bd. of Educ. of the City of New York, 12 N.Y.3d 309, 313-14 [2009]).[6]

The parent relies on Application of a Student with a Disability, Appeal No. 15-119, as prior authority determining her capacity to initiate a due process complaint notice on behalf of the student. However, it is worth noting that the decision did not determine the parent had standing to pursue a claim under the IDEA, but noted that there was insufficient evidence to determine the parent did not have standing but "the hearing record d[id] provide a basis for concern regarding the parent's right to control educational decisions on behalf of the student" (Application of a Student with a Disability, Appeal No. 15-119). Additionally, although a July 2016 IHO Decision determined that the parent met the definition of a parent under the IDEA, and determined that the parent had standing (IHO Ex. 6 at pp. 99-100), at the time of that proceeding the guardianship proceeding had not yet been commenced and the court had not yet issued an order conferring educational decision-making authority on the student's father (IHO Ex. 3 at p. 89).[7]

Under the circumstances, in light of the February 2017 judicial order that identifies the student's father as the individual who has educational decision-making authority over the student, the student's father is the "parent," for the purposes of filing a due process complaint on behalf of

[5] The parent requests that the documents from the guardianship proceeding not be used to determine the parent's standing in this proceeding because the record of the guardianship proceeding is under seal and because the parent is challenging the orders in an action in federal district court (Req. for Rev. ¶39; Parent Mem. of Law). While there is an order sealing the record in the guardianship proceeding to protect the confidentiality of the student's medical records and the records from a family court proceeding (IHO Ex. 6 at p. 263), I agree with counsel for the SCO/RJMCC that such an order does not prevent the appointed guardian from producing the February 2017 order appointing him as guardian in order to exercise his rights thereunder. However, to the extent that the court's November 21, 2016 decision was explicitly placed under seal, that order is not relied on in rendering this decision and is only referenced as a part of the factual background leading up to this proceeding.

[6] Additionally, to the extent that the parent asserts she has rights as a noncustodial parent of the student, the parent should not be discouraged from remaining involved in the student's overall education; however, she does not have the right to control educational decision making (Fuentes, 12 N.Y.3d 309, 314 [2009]). Rather, the rights of a noncustodial parent without educational decision-making authority are limited to "participation" in the student's education, such as "requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress" (id.).

[7] The July 2016 IHO Decision was appealed and partially reversed in Application of a Student with a Disability, Appeal No. 16-055).

the student, and the only individual who has standing to pursue an IDEA claim on the student's behalf (see 8 NYCRR 200.1[4]).[8]

In view of the foregoing, the evidence in the record supports the IHO's determination that the parent lacked standing to bring an IDEA claim on the student's behalf.

VII. Conclusion

Having found that the parent does not have standing to bring a claim on behalf of the student pursuant to the IDEA, the IHO's decision is affirmed.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of the determinations above.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 10, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER

[8] In a letter dated July 3, 2017, the attorneys for SCO/RJMCC indicated that because the student turned 21 in September 2016, he will no longer receive special education services, having aged out of the requirement for such services. In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100).