The University of the State of New York

The State Education Department

State Review Officer

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No. 17-077

Application of a STUDENT WITH A DISABILITY, 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:

Barger & Gaines, attorneys for petitioner, by Giulia Frasca, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Mary H. Park, Esq.

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 student) appeals from a decision of an impartial hearing officer (IHO) which dismissed the matter on the basis that the student did not have standing to file a due process complaint on his own behalf. The appeal must be sustained and the matter remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Because of the procedural posture of this matter, it is unnecessary to provide a detailed factual history. Briefly, the student attended a 12-month program in a 12:1+1 special class at a State-approved nonpublic high school pursuant to the recommendation of a district CSE for the 2012-13 and 2013-14 school years (Dist. Exs. 1-2; 5; see Tr. p. 29).

In March 2014, an attorney representing the student requested that the district reevaluate the student "to determine his abilities and his current level of functioning[, as well as] whether [the

student] is prepared to graduate, or if he needs additional services" (Student Ex. N). The district thereafter conducted a psychoeducational evaluation of the student in May 2014 (Student Ex. K). A CSE convened on June 24, 2014; the meeting minutes from the June 2014 CSE meeting reflect that the student, his brother, and the attorney who requested the reevaluation participated in the meeting, along with staff from the nonpublic school, and indicated that the student would continue to attend the nonpublic school until June 30, 2014, and that an "exit summary w[ould] be developed and sent to the student" (Dist. Ex. 6; see Dist. Exs. 3; 11). The hearing record reflects that the student graduated with a high school diploma at the conclusion of the 2013-14 school year (Tr. p. 36; Dist. Ex. 12; see Dist. Ex. 6 at p. 2).

A. Due Process Complaint Notice

The student filed a due process complaint on his own behalf on May 29, 2015, which was amended on June 1, 2015 (Student Exs. O; P). The student claimed that he was not prepared to graduate and that the district failed to provide him with an appropriate educational program by issuing him a diploma in June 2014 (Student Ex. P at pp. 1-2). The student asserted that he "had not acquired the requisite skills to transition successfully into a post-secondary school setting" and required additional services from the district (id. at pp. 4-5). The student claimed that the IEPs developed for him by the district for the 2012-13 and 2013-14 school years "were inadequate and not reasonably calculated to provide a meaningful education benefit" (id. at pp. 6-7). The student claimed that the district's failure to develop appropriate IEPs during the 2012-13 and 2013-14 school years, in addition to its determination to graduate the student in June 2014, denied the student a free appropriate public education (FAPE) (Student Ex. P at p. 7). For relief, the student requested compensatory education for the 2012-13 and 2013-14 school years, consisting of 971 hours of 1:1 instruction, "additional tutoring hours" for the district's failure to provide an appropriate program during the pendency of this matter, reimbursement for the cost of privately-obtained evaluations, and a "full reevaluation" at district expense (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on April 26, 2017, which concluded on June 20, 2017, after two days of proceedings (see Tr. pp. 1-264).[1] In a decision dated August 1, 2017, the IHO determined that the student could not file a due process complaint notice on his own behalf and dismissed the student's complaint (IHO Decision). The IHO indicated that on reviewing the exhibits after the first hearing date, he realized that the proceeding was "commenced by [the s]tudent and not by a [p]arent" (id. at p. 2). The IHO then permitted the parties to submit briefs on the issue of "whether Student was permitted to commence a Due Process proceeding" under the IDEA and New York law (id. at p. 3; see IHO Ex. I). The IHO found that the IDEA and federal regulations "are replete with references to the rights of parents," and that neither the IDEA nor federal or New York State regulations permit anyone other than a parent to commence a due

[1] There is no adequate explanation in the hearing record for why the parties did not proceed to hearing for almost two years after the filing of the due process complaint notice. The IHO noted that he scheduled a number of hearing dates that "were adjourned at the request of one or the other of the parties . . . for various reasons" (IHO Decision at p. 2; Tr. pp. 7-8). However, the reasons for the extensions are not documented in the hearing record in written orders as required by State regulation, and there is no indication that the IHO considered the factors set forth in the regulation (8 NYCRR 200.5[j][5][i], [ii], [vi][c]).

process proceeding (id. at pp. 3-5). The IHO further found that while federal regulations provide that states may allow for the transfer of parental rights at the age of majority, New York has not done so (id. at pp. 5-6). Thus, the IHO determined that the student could not file a due process complaint notice on his own behalf, and that the IHO did not have jurisdiction to rule on this matter (id. at p. 7).

IV. Appeal for State-Level Review

The student appeals, asserting that, as an "emancipated adult," he was entitled to file a due process complaint notice on his own behalf. The student further contends that dismissal constitutes an inequitable outcome contrary to the purpose and intent of the IDEA. For relief, the student requests that the matter be remanded to the IHO for a determination on the merits.

In an answer, the district responds to the student's allegations and generally argues to uphold the IHO's decision in its entirety. The district asserts that the student does not have standing under the IDEA to file a due process complaint notice on his own behalf because he does not meet the definition of a parent under the IDEA or federal and State regulations and State law does not transfer parental rights to students who have reached the age of majority.

In a reply, the student largely reiterates the positions articulated in the request for review.

V. Discussion

The student claims he was entitled to file a due process complaint notice on his own behalf as an "emancipated adult," that is, as a person who has reached the age of majority and does not have a legal guardian. In particular, the student contends that "all educational rights transfer to [an] emancipated adult student" upon reaching the age of majority.

Initially, the student contends that the IHO improperly raised the issue of standing sua sponte "on the eve of the last day of [the] hearing". However, an IHO is not barred from addressing standing sua sponte nor is standing subject to waiver (see U.S. v. Hays, 515 U.S. 737, 742 [1995] [noting that standing may be addressed "even if the parties fail to raise the issue"]; Cent. States Se. and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, 433 F.3d 181, 198 [2d. Cir 2005]; see also A.M. v. New York City Dep't. of Educ. 840 F. Supp. 2d 660, 674 [E.D.N.Y. 2012]). Accordingly, to the extent the student asserts that the IHO erred in raising the issue of standing, he is incorrect.

Next, the student offers no authority to support his proposition that all educational rights under the IDEA transfer to a student upon reaching the age of majority such that the student may file a due process complaint notice on his own behalf (see 8 NYCRR 200.5[i][1] [providing that "[a] parent or school district may file a due process complaint"]; see also Educ. Law § 4404[1][a]; 34 CFR 300.507[a][1]). While the IDEA and federal regulations provide that a State may provide for the transfer of all rights accorded to parents under the IDEA to a student with a disability who has reached the age of majority under State law (20 U.S.C. § 1415[m]; 34 CFR 300.520), New York State law "does not grant a child who has reached the age of majority all rights previously granted to parents under IDEA" ("Individuals with Disabilities Education Act (IDEA) Part B Final Supplemental Regulations Issued December 1, 2008 and Effective December 31, 2008 – Non-Regulatory Guidance" [VESID May 2009] [emphasis in original], available at

http://www.p12.nysed.gov/specialed/idea/nonregulatoryguidancememo.htm; see Application of a Student with a Disability, Appeal No. 11-121; Application of a Student with a Disability, Appeal No. 05-131).

However, despite finding that the student does not have standing to proceed on his own behalf based on the transfer of parental rights upon his attaining the age of majority under State law, it is necessary to examine whether he may have standing under another theory. In addition to a student's birth 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, or an individual assigned as a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]).[2] Pursuant to State regulation, the definition of a parent includes a person in a parental relationship to the child as defined in Education Law § 3212, as well as an individual designated as a person in parental relation pursuant to article 5, title 15-a of the General Obligations Law (8 NYCRR 200.1[ii]).[3]

A person in a parental relation to a student is defined as including birth parents, adoptive parents, stepparents, "his legally appointed guardian, or his custodian" (Educ. Law § 3212[1]). It does not appear that any person other than the student's birth parents has been appointed to act as the student's parent for purposes of educational decision making (see 34 CFR 300.30[b][2]; 8 NYCRR 200.1[ii][4]). As discussed further below, it is unclear whether anyone has become the student's custodian. A custodian is defined as someone who "has assumed the charge and care of [the student] because the parents or legally appointed guardian of [the student] have died, are imprisoned, are mentally ill, or have been committed to an institution, or because, they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown (Educ. Law § 3212[1]).

In this case, it is unclear to what extent the student's parents were or continue to be involved in educational decision making related to the student. Unfortunately, only a limited amount of evidence regarding the parents' relationship with the student is contained in the hearing record. Related to the 2013-14 school year, the June 2013 IEP identified that the CSE attempted to contact the student's mother by phone but was unsuccessful (see Dist. Ex. 1 at p. 15). There are no indications that she was involved with the student's educational planning during that school year or thereafter. Conversely, testimony from the student's brother and his partner suggest that their roles in the student's education increased significantly over time. The student's brother testified that the student's mother was previously involved with the student's education and had previously attended CSE meetings (Tr. p. 162). While it is unclear whether or when the student's mother's involvement with his education ceased, testimony from the student's brother and the brother's partner indicated that she encountered communication difficulties with the district. The student's brother testified that his mother's primary language was Spanish and that while she understood English, she was not a fluent English speaker (Tr. p. 166). The brother's partner testified that he

[2] While the definition of a "parent" is broad, there is no indication that those who may act in the capacity of "parent" include a student with a disability who has reached the age of 21 (8 NYRCC 200.1 [ii]).

[3] While parents may designate another as a person in parental relation pursuant to the General Obligations Law (8 NYCRR 200.1[ii][1]; see Educ. Law § 2[10]), the hearing record includes no evidence of any such designation (General Obligations Law § 5-1551 et seq.).

attended parent-teacher conferences with the student's mother to help her understand what was happening and to "put it in layman's terms," that the student's mother had difficulty understanding what was happening at CSE meetings, and only attended two CSE meetings because she believed "it was just better to avoid the situation" (Tr. pp. 249-50). The student's brother further testified that he had taken the "place of [the student's] mother" during parent-teacher conferences during the 2013-14 school year (Tr. pp. 180-81). Notably, the brother testified that he was involved with the student's education during his senior year and attended school meetings; he also testified that he attended the June 2014 CSE meeting and asked that the student's graduation be delayed as the student was "not ready to make a transition . . . to college or a vocational program"(Tr. p. 156; see Dist. Ex. 6). The brother's partner also testified that he and the student's brother "handle[d] [the student's] affairs" (Tr. pp. 251-52). As a result of the lack of evidence in the hearing record, it is not clear whether the student's brother met the definition of a parent as a custodian under the Education Law.

Adding to the confusion, the student's attorney elicited testimony from the student's brother and the brother's partner tending to establish that they were not his guardians and that the student had no legal guardians at the time of hearing. The student's brother and his partner testified that they were not the student's legal guardians, and as far as they were aware, the student did not have a legal guardian (Tr. pp. 153, 210-11; see Tr. pp. 245-46).

Despite this testimony, it is nonetheless necessary to remand this matter to the IHO. Although the student's brother and his partner testified that they were not the student's guardians, the hearing record does not establish whether either of them or another person had become the student's custodian by assuming "the charge and care of [the student] because the parents . . . have died, are imprisoned, are mentally ill, or have been committed to an institution, or because, they have abandoned or deserted [the student] or are living outside the state or their whereabouts are unknown" (Educ. Law § 3212[1]; see Tr. pp. 210-11, 245-46).[4] In particular, the reason the parents did not participate in the decision-making process regarding the student's educational program during the time period at issue was never fully addressed, even though the student's brother had testified that the parent was previously involved in the student's education, and that the parent incurred difficulties interacting with the district as a result of a language barrier. Finally, the student argues that the purpose of the IDEA is to ensure that students with disabilities have available to them a FAPE and to ensure that the rights of both students with disabilities and parents of such students are protected, and thus, dismissal of an adult student's claim "who lacks . . . a relationship with his parents" on standing grounds is contrary to the purpose of the IDEA and "against the interest of justice." I sympathize with the student on this point; nevertheless, at this juncture, there is no evidence in the hearing record suggesting that his parents had "abandoned" him or that another individual was acting as his custodian pursuant to State law (see Educ. Law § 3212[1]). In any case, the law clearly identifies parents and school districts, not students, as the parties who may commence an action under the IDEA. Therefore, on remand the IHO is directed

[4] The student's brother testified that at the time of the impartial hearing, the parents were alive and living in New York State (the father within the district and the mother without), the student was not a homeless youth, and the student lived with his aunt (see Tr. pp. 211, 251-52). There is insufficient evidence in the hearing record to determine whether the student's parents had abandoned or deserted the student within the meaning of the Education Law.

to further develop the record as it relates to the issue of standing, specifically, whether there are any individuals who meet the definition of a "parent" as identified in the IDEA and federal and State regulations.[5] If the IHO determines that someone other than the student's birth parents met the definition of a parent at the time the due process complaint notice was filed, it is left to the IHO's sound discretion to determine whether the due process complaint notice may be amended or refiled in order to reflect this. As a result of this determination, it is unnecessary to review the merits of the student's claims at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, in the event that the IHO issues findings on the merits of the claims, those claims contested on appeal will be addressed at that time.

In addition, I note that State regulations provide for a "surrogate parent" to be appointed to act in place of a parent when no parent can be identified; after reasonable efforts, the district cannot locate a parent; the student is an unaccompanied homeless youth; the student is a ward of the State; or the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law (34 CFR 300.519[a]; 8 NYCRR 200.1[ccc]; 200.5[n][1]). It is the duty of a school district to determine whether a student requires a surrogate parent and to assign a surrogate parent (34 CFR 300.519[b]; 8 NYCRR 200.5[n][1], [3]). The factual circumstances related to the district's inability to obtain the participation of the student's parents at the July 2013 or May 2014 CSE meetings are undeveloped in the record and the student has not claimed that the district failed to appoint a surrogate parent. However, the parties may wish to explore this issue on remand to the extent it is relevant to record development for a determination as to standing.[6]

Next, the student asserts that the IHO should have appointed a guardian ad litem rather than dismissing his due process complaint notice on standing grounds. An impartial hearing officer is empowered to appoint a guardian ad litem; "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student . . . the [IHO] shall appoint a guardian ad litem to protect the interests of such student" (8 NYCRR 200.5[j][3][ix]). State regulation defines a guardian ad litem as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" and, where appropriate, join in an appeal to the SRO initiated by the parent or district (8 NYCRR 200.1[s]). This provision supports the objective of ensuring that a student's rights are adequately represented during an administrative due process proceeding. The appointment of a guardian ad litem; however, contemplates that a due process complaint notice was filed by a parent whose interests were opposed to or were inconsistent with the student's interests. The request to appoint a guardian ad litem by the student in the instant matter is distinct from the appointment of a guardian authorized to act as a parent, as discussed above. A guardian ad litem does not act as the student's parent; rather, a guardian ad

[5] Federal and State regulations clarify that when more than one person qualifies as a parent, the biological 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 person to act as the parent or as having educational decision-making authority (34 CFR 300.30[b]; 8 NYCRR 200.1[ii][3]-[4]).

[6] As previously stated, counsel has represented the student since at least March 2014 and was present at the July 2014 CSE meeting (Student Ex. N; Dist. Ex. 6).

litem is appointed to ensure that the student's interests are properly represented during a hearing. In this case, the student was represented by counsel and his interests were adequately represented.

Finally, the student asserts that the IHO was biased and that the matter should be remanded to another IHO. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., 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, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). Here, there is no evidence in the hearing record to support the student's claim that the IHO ruled on standing solely to avoid grappling with the fact that the record established that the district denied the student a FAPE, "has a long history of exhibiting bias toward" parents, and that his "decisions are overwhelmingly in favor of" school districts.[7] Rather, the IHO conducted the hearing and rendered his decision within the bounds of standard legal practice and the hearing record does not support a finding of bias. Overall, an independent review of the hearing record demonstrates that the student had a full and fair opportunity to present his case at the impartial hearing, 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]). Thus, the student's assertions of IHO bias are rejected.

VI. Conclusion

For the reasons stated above, the IHO's dismissal of the student's claims for lack of standing is reversed and the matter remanded to the IHO to develop the hearing record on the issue of standing and to decide whether a determination on the merits is warranted. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

[7] Nevertheless, I sympathize with the student for the length of time it took to conduct the hearing. The IHO commented on the protracted nature of this case at the hearing and questioned the reason for the delay (Tr. pp. 7-8, 18-19). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). The student filed the initial due process complaint notice on May 29, 2015, but the IHO's decision was not issued until August 1, 2017—more than two years from the initial filing date (IHO Decision at p. 7; Student Ex. O at p. 1). This is an unacceptable delay, and the IHO should take care to abide by the timelines set forth in regulation going forward, and ensure that the reasons for all extensions granted to the decision timeline are documented and comport with State regulations (8 NYCRR 200.5[j][5][i], [ii], [vi][c]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 1, 2017, is modified, by reversing so much thereof as determined that the student lacked standing to filed a due process complaint notice, and the matter is remanded to the IHO who issued the August 1, 2017 decision for further proceedings in accordance with the body of this decision; and

IT IS FURTHER ORDERED that if the IHO who issued the August 1, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
November 15, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER