



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-016

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 Board of Education of the Suffern Central School District

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parent's due process complaint notice on the basis that the relief sought was not available through the impartial hearing process. The matter must be 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 the IHO dismissed the parent's due process complaint notice prior to the parties convening the impartial hearing, no documentary or testimonial evidence was entered into the hearing record. The record on appeal consists of the parties' pleadings and the materials entered into the hearing record by the IHO which include the parent's due process complaint notice, various correspondence between the parties, the IHO's written summary of a prehearing conference, the IHO's interim decisions, the district's motion to dismiss and the parent's response, and the IHO's final decision (IHO Certification of Rec.; see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). Accordingly, the following factual recitation is taken from the statement of facts in the parent's due process complaint notice.

The student attended district schools from September 2010 through December 2012, his kindergarten through second grade school years (Due Process Compl. Notice at p. 3). The parent asserted that she "constantly" requested additional reading support, which was denied, and that the student could not read (id.). The parent thereafter unilaterally placed the student in an out-of-State parochial school, where, according to the parent, he learned to read (id.). The student attended the

parochial school through fourth grade, after which he was placed at a different out-of-State nonpublic school for fifth and sixth grades (id.). On June 13, 2017, a CSE convened to develop the student's IEP for the 2017-18 school year, and recommended the student attend a 12:1+1 special class and receive counseling services in a "Therapeutic Support Center" (id. at pp. 3, 7-16).

A. Due Process Complaint Notice

By due process complaint notice dated September 28, 2017, the parent requested an impartial hearing (Due Process Compl. Notice).¹ The parent contended that the "meeting information" section of the June 2017 IEP was "riddled with errors" (id. at pp. 3-4). The parent further asserted that she requested that the student be placed by the district at the out-of-State nonpublic school he was currently attending and was informed that such a placement was "illegal" (Due Process Compl. Notice at p. 4). The parent also claimed that she had been paying tuition for the student's attendance at nonpublic schools for the past six years "and it is causing a hardship" (id.). For relief, the parent requested a district placement for the student at the nonpublic school (id.).

B. Events Post Dating the Due Process Complaint Notice

A prehearing conference was held on December 18, 2017 (Preh'g Conf. Summ.). As a result of the conference, the IHO noted counsel for the district's contention that while the due process complaint was sufficient, it sought relief that was not within the IHO's authority to grant (id.). The IHO noted that the parents were represented at the time of the conference by counsel who stated that she was considering filing an amended complaint on behalf of the parent, restating the claim as a "case for reimbursement" (id.). The IHO "reminded the parties" that amendment of the due process complaint notice would require the consent of the district or for the IHO to grant permission, and suggested that the parties had several options, including (a) the district move to dismiss the complaint; (b) the parent seek consent of the district to amend her due process complaint notice; or (c) the parent withdraw her due process complaint notice and refile a complaint seeking reimbursement rather than placement (id.). The IHO indicated the parties agreed to discuss how to proceed with their respective clients, and would respond by no later than December 22, 2017 (id.).

In a letter motion dated January 29, 2018, the district moved to dismiss the parent's due process complaint notice (Dist. Mot. to Dismiss). The district asserted that the due process complaint notice failed to request relief that was available under the IDEA (id. at pp. 1-2). Specifically, the district asserted that the parent's request that the IHO order a district placement at a non-approved out-of-State nonpublic school is not available as a matter of law (id. at p. 2). The district also asserted that the request for "any other further relief available" did not meet the specificity requirements of State regulations (id. at p. 1 n.2).

In a response to the district's motion to dismiss, which was also dated January 29, 2018, the parent requested that the IHO deny the district's motion to dismiss (Parent Resp. to Mot. to Dismiss). The parent asserted that the district failed to object to the due process complaint notice

¹ Attached to the due process complaint notice are copies of a June 26, 2017 letter from the parent to the district, an August 23, 2017 letter from the district to the parent, and the June 13, 2017 IEP (Due Process Compl. Notice at pp. 5-16).

within the 15-day period allowed, and therefore the district's motion was untimely (*id.*). The parent asserted that the recommendation for a "TSC 12:1: with counseling" placement was not appropriate (*id.*). The parent also contended that there were further deficiencies with the IEP related to the present levels of performance, annual goals, and the recommended special education and related services (*id.*). Finally, the parent contended that her request for "any other further relief available . . . could certainly be deemed as seeking tuition reimbursement" (*id.*).

C. Impartial Hearing Officer Decision

By decision dated February 3, 2018, the IHO dismissed the parent's due process complaint (IHO Decision). The IHO determined that IHOs and courts lack the authority to order a school district to place a student in a non-approved, nonpublic school, and therefore, the parent could not prove a set of facts in support of her claim that would entitle her to relief in the form of placement at the out-of-State nonpublic school (*id.* at p. 3). The IHO also found that the parent's request for "any other further relief available" could not be considered a request for tuition reimbursement, that the parent had not provided proper notice to the district of her claim for reimbursement, and thus "the issue of reimbursement" was not properly before the IHO (*id.* at pp. 4-5).

Finally, with respect to the parent's claim that the district's motion to dismiss should be denied because the district had failed to make the motion within the required 15-day period, the IHO found that the parent was referring to a sufficiency challenge rather than a motion to dismiss (IHO Decision at p. 5). The IHO determined that the district's motion to dismiss concerned the subject matter of the due process complaint, rather than its sufficiency (*id.* at p. 6). As such, the IHO determined that there was no issue properly before her and dismissed the due process complaint without prejudice (*id.*).

IV. Appeal for State-Level Review

The parent appeals the IHO's dismissal of her due process complaint. As noted by the district, the parent does not clearly challenge the IHO's dismissal of her due process complaint; however, a generous reading of her papers appears to reveal challenges to the CSE process and the student's IEP, as well as the parent's perception that she was "held to legal standards of the law," while the district was not.² The parent submits eight exhibits together with her appeal papers (Parent Exs. A-H).³

² The parent's submission is titled a "Memorandum of Law"; however, for purposes of this decision the document is treated as a request for review. As noted by the district, the parent's submission does not comport with the requirements in State regulations regarding content or form of pleadings filed with the Office of State Review (see 8 NYCRR 279.4[a]; 279.8[c]).

³ One of the exhibits submitted by the parent is a list of free and low-cost legal and other services sent her by the district (Parent Ex. C). The parent contends that the list is out of date and contains erroneous contact information. The district is reminded of its obligation to inform the parent in writing "of any free or low-cost legal and other relevant services available in the area" (34 CFR 300.507[b][2] [emphasis added]; 8 NYCRR 200.5[j][1][iii][a]). While the parent raises no specific claim about the district's actions in this proceeding, if the parent believes that the district is not complying with its obligation in this respect, she may contact her local Quality Assurance regional office (see <http://www.p12.nysed.gov/specialed/quality/regassoc.htm>).

The district answers, asserting that the request for review is "virtually impossible to respond to in any meaningful way" and fails to identify any determinations made by the IHO to which the parent takes exception. The district requests that an SRO dismiss the request for review based on the parent's failure to comport with the practice regulations. The district asserts that the parent attempts to raise issues that were not part of her due process complaint notice. In addition, the district argues that the parent has improperly sought to make counsel for the district and the IHO parties to this matter. The district next contends that the parent has submitted documents that were not part of the hearing record and should not be considered by an SRO. Generally, the district requests that an SRO uphold the IHO's dismissal of the parent's due process complaint notice.

V. Discussion

A. Preliminary Matters

The district correctly asserts that the parent's appeal fails to comply with the regulations governing practice before the Office of State Review.⁴ To the extent the parent seeks to add counsel for the district and the IHO as respondents in this proceeding, I agree with the district that neither the IDEA nor State regulations provide for either to be a party to this appeal. However, in this instance, because the parent is proceeding pro se and, as discussed below, the IHO erred in dismissing her due process complaint notice without a hearing, I exercise my discretion and accept her appeal for review as against the district (8 NYCRR 279.8[a]).⁵

B. Dismissal of Due Process Complaint Notice

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA; however, they should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]). State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies," including the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Sch. Comm. Of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 361 [1985]; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA requires that parents be provided the "opportunity for an impartial due process hearing" relating to complaints they have with regard to their child's educational placement or the provision of a free appropriate public education to their child (20 U.S.C. § 1415[f]; see 20 U.S.C. § 1415[b][6]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to

⁴ The district correctly notes the parent's failure to file a notice of request for review, properly verify her submission, or follow the form and content requirements of the practice regulations (8 NYCRR 279.3; 279.4[a]; 279.7[a], [b]; 279.8[c]).

⁵ While the district correctly argues that the parent did not assert how the IHO's decision was incorrect, the district does not itself assert why the IHO's decision to dismiss the due process complaint notice was correct.

confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]).

In this case, the due process complaint notice stated that the student was attending the out-of-State nonpublic school, and the parent's response to the district's motion to dismiss provided the district and the IHO with notice that the parent was requesting tuition reimbursement as a remedy, rather than a district placement of the student at the nonpublic school (see Due Process Compl. Notice at p. 2; Parent Resp. to Mot. to Dismiss). Further, the parent's response to the motion to dismiss asserted claims concerning the June 2017 CSE meeting and IEP that were not clearly raised in her due process complaint notice (compare Due Process Compl. Notice at pp. 3-4, with Parent Resp. to Mot. to Dismiss).

A party may amend its due process complaint notice either with the written consent of the other party, or by permission granted by the IHO at least five days prior to the impartial hearing (34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]). In addition, State regulations provide that a party may withdraw a due process complaint notice without prejudice at any time prior to the first hearing date, not including the prehearing conference (8 NYCRR 200.5[j][6]). Any refiling within one year of withdrawal that "is based on or includes the same or substantially similar claims" shall be presided over by the IHO appointed to hear the initial complaint (8 NYCRR 200.5[j][6][iv]). As noted above, during the prehearing conference the IHO advised the parties that amendment of a due process complaint notice requires either district consent or permission from the IHO and suggested that if the parent wished to seek tuition reimbursement as a remedy, she could either "seek to amend [her] complaint with the written consent of the District[, or] may withdraw [her] complaint and re-file an impartial hearing complaint based on reimbursement rather than placement" (Preh'g Conf. Summ.). Given that the parties had not yet proceeded to an impartial hearing, the parent was entitled to withdraw her complaint without prejudice and refile at a later date. However, the parent's response could be read to cure any defects in the due process complaint notice without prejudice to the district, as the parties had not yet begun to present evidence. Accordingly, under these circumstances, it would have been the better practice for the IHO to have provided the parent with an opportunity to further articulate and isolate any claims that she wished to raise at the impartial hearing, whether through amendment or withdrawal and refiling.⁶

Finally, with respect to the IHO's finding that she lacked the authority to grant the parent's remedy of a directed placement, the authority of an IHO to order the district to prospectively place the student in a non-approved, nonpublic placement at district expense is limited, even when the district has failed to offer the student a FAPE. In certain circumstances, courts have held that an award directing a district to prospectively pay for the costs of a student's placement in an appropriate but non-approved nonpublic school may be proper (see Connors v. Mills, 34 F. Supp. 2d 795, 802, 805-06 [N.D.N.Y. 1998]). In Connors, the court stated, in dicta, that "once the Burlington prerequisites relative to a non-approved private school are met, and a parent shows that his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school, the public school must pay the cost of private placement immediately" (id. at

⁶ As the IHO dismissed the parent's due process complaint notice "without prejudice," it would appear that there is no bar to the parent refiling a complaint regarding the same events complained of in her September 2017 due process complaint notice. It is understandable, however, that a pro se parent would not be aware of the nuances of legal technicalities, and the better practice would have been for the IHO to hold a conference with the parties to present the parent with the option to either withdraw and refile or amend her due process complaint notice.

805-06). However, the court held that the prospective funding at issue constituted the only available remedy that could have provided the student with an appropriate education, as "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate" (id. at 799, 804). At least one court has noted this distinction, stating that Connors stands for the proposition that a district may be required "to pay tuition directly to [a] private school unilaterally chosen by [the] parent, when the parent and district agreed that the district could not provide a FAPE" (Z.H. v. New York City Dept. of Educ., 107 F. Supp. 3d 369, 376 [S.D.N.Y. 2015]). In any event, a district cannot be directed to effectuate a placement in a non-approved nonpublic school regarding which there has been no finding that the school constitutes an appropriate placement for the student (see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2d Cir. 1988]; Z.H., 107 F. Supp. 3d at 376 [noting the distinction between a district being required to directly fund a unilateral placement and being required to effectuate the placement itself]). However, the Second Circuit has held that "where the equities call for it, direct payment [for the costs of a unilateral placement providing appropriate services to a student with a disability] fits comfortably within the Burlington–Carter framework" and is thus within the scope of remedies permitted by the IDEA (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453-54 [2d Cir. 2014]). Indeed, the Supreme Court explicitly stated in Burlington that "where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, . . . 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school" (471 U.S. at 370). Even without amendment of the due process complaint notice, the parent's complaint could reasonably be read as requesting direct payment of the costs of the student's tuition to a nonpublic school in which the parent had unilaterally placed the student, as opposed to a request for a district placement of the student in the nonpublic school.⁷

VI. Conclusion

Based on the above, the matter is remanded to the IHO, to provide the parent with an opportunity to clarify her claims with regard to the June 2017 CSE meeting and IEP, and to place these claims in a due process complaint notice on which an impartial hearing can be held, whether through withdrawal and refiling or amendment of her due process complaint notice (see 8 NYCRR 200.5[j][3][xi][a] [providing that the purpose of a prehearing conference is to, among other things, simplify or clarify the issues]).

IT IS ORDERED that the decision of the IHO, dated February 3, 2018 is modified, by reversing so much thereof as dismissed the parent's due process complaint notice; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO who issued the February 3, 2018 decision for further proceedings in accordance with this decision; and

⁷ One of the exhibits submitted by the parent on appeal consists of a "Tuition & Payment Summary" from the nonpublic school, indicating that the student's tuition for the 2017-18 school year was fully paid prior to the time the parent submitted her due process complaint notice (Parent Ex. H). Although not necessary to support my determination, this document shows why it is the better practice for an IHO to permit a party to fully present their claims and the evidence in support thereof prior to utilizing summary disposition procedures in the impartial due process hearing context.

IT IS FURTHER ORDERED that if the IHO who issued the February 3, 2018 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**
 March 23, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER