



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-204

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:

Law Office of Andrew Weisfeld, PLLC, attorney for petitioner, by Andrew Weisfeld, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian J. Reimels, 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 the interim decision of an impartial hearing officer (IHO) which granted the parent's request for independent educational evaluations (IEEs) but at maximum rates lower than requested. 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 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). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (see 8 NYCRR 279.10[d]). 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 in this case has been the subject of one prior State-level administrative appeal concerning his pendency placement during these proceedings (see Application of the Dep't of Educ., Appeal No. 20-163). Accordingly, and in light of the limited scope of this appeal, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented herein.

Briefly, the parent filed three due process complaint notices—the first two dated June 8, 2020 and the third dated September 30, 2020—alleging procedural and substantive violations upon which to conclude that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-29, 2019-20, and 2020-21 school years, as well as requesting various forms of relief (see generally Parent Exs. B; F; IHO Ex. I). Relevant to this appeal, the parent indicated in all three due process complaint notices that, in a letter to the district dated May 8, 2020, she requested IEEs "in order to finally understand" the student's needs due to the district's failure to appropriately evaluate the student (Parent Exs. B at p. 10; F at pp. 11; IHO Ex. I at p. 10).¹ The parent further indicated in all three due process complaint notices that, after sending the letter via facsimile and email, the district did not respond to the letter, nor did it seek an impartial hearing to "defend its evaluation" or otherwise agree to "publicly fund" the requested IEEs in violation of the IDEA and State regulation (Parent Exs. B at p. 10; F at p. 11; IHO Ex. I at pp. 10-11). In all three due process complaint notices, the parent indicated that she had requested that the district fund IEEs including speech-language, assistive technology, physical therapy (PT), and occupational therapy (OT) evaluations, an applied behavior analysis (ABA) skills assessment, a functional behavioral assessment (FBA), and a behavioral intervention plan (BIP) (see Parent Exs. B at pp. 10-12; F at pp. 11-12; IHO Ex. I at pp. 10-12). In the first June 8, 2020 due process complaint notice, the parent sought as the primary relief an order requiring the district to fund the IEEs at the parent's requested rates and through the parent's requested evaluators (Parent Ex. I at p. 12).

When the parties met for an impartial hearing on November 4, 2020, the IHO initially noted that, although "this case primarily relate[d] to the request for independent evaluations," a consolidation issue existed "regarding two other cases" (see Tr. pp. 1-2). The IHO then probed the parties for their respective positions, and the district representative stated that the district did not object to a consolidation of the three cases—noting that two cases were "seemingly . . . identical"—but had no position regarding the IEEs (see Tr. p. 3). The parent's attorney explained that the "second" and "third" due process complaint notices requested differing forms of compensatory educational services as relief, as well as reimbursement claims (Tr. p. 4). The parent's attorney stated that "it would be in everybody's best interest to consolidate the second and the third hearing request[s]," but the "first hearing request, because it relate[d] only to IEEs and less substantive matters, d[id] not need to be consolidated with the other two" cases (Tr. pp. 4-5). In addition, he indicated that the parties could have a "separate hearing for the first hearing request" (Tr. p. 5).

According to the IHO, however, the parent's attorney had changed his position from an earlier email, wherein he had requested "consolidation of all three cases" (Tr. p. 5). The parent's attorney confirmed that, having reexamined the issue further, "it just seemed to make more sense to move forward with the first request" so the IEE relief would not be delayed by litigating the second and third due process complaint notices (id.). The district representative pressed the need to consolidate the three due process complaint notices because all three pertained to the same

¹ To be clear, the allegations in one due process complaint notice dated June 8, 2020 primarily focused on the IEEs requested by the parent, as compared to the second June 8, 2020 due process complaint notice and the September 30, 2020 due process complaint notice (compare IHO Ex. I, with Parent Ex. B, and Parent Ex. F).

school years and similar allegations—noting additionally that any differences, as explained by the parent's attorney, were related to the relief sought (see Tr. pp. 5-6).

After the IHO and the parties continued to discuss whether to consolidate all three of the parent's due process complaint notices, the IHO asked the parties' opinions about having her consolidate all three cases, issue an interim order for the IEEs, and then proceed with the remaining issues separately (see Tr. pp. 6-11). The district representative agreed to proceed in this manner, and the parent's attorney stated he "would have no objection if an interim order [was] acceptable to all parties" and the IHO (Tr. pp. 11-12). The IHO confirmed the parties' agreement to consolidate and turned to scheduling an impartial hearing date for the IEE issue (see Tr. pp. 12-23).

In two separate orders both dated November 4, 2020, the IHO consolidated all three of the parent's due process complaint notices (see generally IHO Orders on Consol.). Thereafter, on November 20, 2020, the parties resumed the impartial hearing, which continued on December 3, 2020 (see Tr. pp. 25, 94-132).

In an interim order dated December 5, 2020, the IHO granted the parent's request for IEEs, including speech-language, OT, and PT evaluations, and an FBA, each not to exceed a rate of \$1,500.00; a BIP, not to exceed the parent's requested rate of \$1,125.00; an assistive technology evaluation, not to exceed the parent's requested rate of \$2,100.00; and an ABA skills assessment, not to exceed the rate of \$1,000.00 (see Interim IHO Decision at p. 3). The IHO noted that the "record remain[ed] open on these issues until the record [was] closed on the entire case" and that, therefore, she would "entertain any further submissions of evidence" relating to the maximum rates ordered for the evaluations (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO improperly reduced the rates to be paid for several of the IEEs, specifically the speech-language, OT, and PT evaluations, the FBA, and the ABA skills assessment. The parent does not appeal the IHO's award or rates for the assistive technology IEE or the BIP. In support of her assertion, the parent argues that the IHO improperly sought additional evidence from the parties, failed to consider all of the evidence in the hearing record, improperly reduced the IEE rates, and conducted the impartial hearing in a manner inconsistent with the plan agreed upon during the impartial hearing and referenced in the IHO's consolidation orders. The parent seeks to reverse the IHO's decision and for an order directing the district to fund the contested IEEs at the parent's requested rates.

In an answer, the district responds to the parent's allegations, and generally argues to dismiss the parent's appeal on the grounds that it is an impermissible interlocutory appeal. Alternatively, the district contends that the IHO had sufficient evidence upon which to order the IEE rates, the parent agreed to consolidating all three due process complaint notices, and the fact that the IHO did not order all of the IEEs at rates proposed by the parent alone does not support a finding that the "IHO somehow diverged from the agreed-upon course of action concerning consolidation." The district also contends that the IHO did not err by seeking additional evidence or information. Next, the district asserts that, while not cross-appealing the interim order, the parent did not actually disagree with any district evaluations in her May 8, 2020 letter seeking

IEEs, and the district offered to conduct many of the requested IEEs at district expense. Finally, the district asserts that the parent's witnesses both testified to their respective willingness to conduct evaluations at a "lower rate than their 'customary' rates."

V. Discussion and Conclusion

The parent's contention on appeal is not within the scope of a permissible interlocutory appeal and is therefore outside the scope of my review. As noted above, State regulations governing the practice of appeals for students with disabilities limit appeals from an IHO's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). Here, the IHO's interim decision, dated December 5, 2020, did not address a pendency dispute, but instead, resolved the parent's request for IEEs in several areas (see Interim IHO Decision at p. 3; see generally IHO Ex. I). Therefore, to the extent that the parent appeals from the IHO's interim decision and State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, the parent's appeal must be dismissed as premature (see Application of a Student with a Disability, Appeal No. 18-075). However, while consideration of the parent's allegations on appeal is premature at this juncture, State regulation provides that a "party may seek review of any interim ruling, decision, or failure or refusal to decide an issue" in an appeal from an IHO's final determination (8 NYCRR 279.10[d]). Thus, if necessary, the parent may appeal from the IHO's December 5, 2020 interim decision after the IHO closes the hearing record and issues her final determination on the remaining issues in the proceeding.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
January 29, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER