The University of the State of New York

The State Education Department
State Review Officer
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No. 13-225

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, of counsel

Friedman & Moses, LLP, attorneys for respondents, Elisa Hyman, 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 district) appeals from the interim decision of an impartial hearing officer (IHO) that directed the district to provide interpreter and translation services to respondents (the parents) with respect to all educational records and communications related to the special education of the student during the 2012-13 and 2013-14 school years, as well as with respect to the instant impartial due process proceeding. 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). 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

Given the limited nature of the district's appeal and the disposition thereto, a full recitation of the facts and procedural history is not necessary and will not be included.

A. Due Process Complaint Notice

By due process complaint notice dated July 3, 2013, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-

14 school years based upon numerous procedural and substantive allegations (see Parent Ex. A at pp. 1-25). Relevant to the instant appeal, the parents averred that during the 2012-13 and 2013-14 school years, the district failed to provide them with educational records or notices translated into their native language (id. at p. 3). The parents also asserted that the district failed to provide them with adequate interpreter services, which included the failure to provide an interpreter at the student's CSE meetings or during telephone conversations prior to CSE meetings (id. at pp. 3, 7-8, 14, 21). Moreover, the parents contended that the district failed to provide legally sufficient notices and safeguards to them and only provided limited education-related documents translated into their native language (id. at p. 6). In addition, the parents alleged that the district failed to provide them with information concerning the student's evaluations in their native language, and failed to provide them with prior written notice in their native language both before and after the evaluations or with respect to CSE meetings (id. at pp. 3, 6, 15, 17). The parents also asserted that the district violated their due process rights by systemically failing to provide language access to parents whose primary language was not English (id. at p. 4).

More generally, the parents alleged that the district failed to offer the student a FAPE during the 2012-13 and 2013-14 school years because it did not provide them with documents—including CSE meeting notices, IEPs, evaluations and reports, waivers, and notices of their rights—in their native language (see Parent Ex. A at p. 14). The parents also averred that the district failed to properly explain the special education process to them in their native language, and by failing to translate key records, rendered the parents' participation in the process impossible (id.).

As a remedy, the parents requested, among other things, that an IHO order the district to provide the following: (1) interpreter services at all district meetings regarding the student's educational services and needs, including but not limited to CSE meetings and meetings related to the revaluation process; (2) translation of any and all notices, meeting invitations, evaluations, safeguards, parent guides, IEPs, progress notes, report cards, and other documents concerning the student's educational services into the parents' native language on a "going-forward basis;" and (3) translation of all other district documents into the parents' native language as otherwise required by law to ensure the parents' due process rights (Parent Ex. A at p. 24). In addition, the parents requested that an IHO order the district to provide translations of all IEPs, evaluations, notices, and other documents prepared by the district comprising the student's educational records created during the 2012-13 and 2013-14 school years into the parents' native language (see id. at pp. 24-25).

B. Impartial Hearing Officer Decision

In this case, the IHO conducted prehearing conferences to clarify issues and to discuss preliminary matters and interim decisions on September 13, October 3, October 17, and October 25, 2013 (see Tr. pp. 1-192). Pursuant to the IHO's directives, the parties submitted briefs related to the particular interim decisions sought, and the IHO issued an interim decision dated October 29, 2012 (sic), and a second interim decision dated November 1, 2013 (see IHO Interim Decision

at pp. 1-2; IHO Second Interim Decision at pp. 1-3); see also Dist. Ex. 13 at pp. 1-16; Pet. Exs. 1 at pp. 1-25; 2 at pp. 1-13; Answer Exs. A at pp. 1-14).[1]

In the November 1, 2013 interim decision, the IHO directed the district to translate the following into the parents' native language: (1) any of the evaluations, report cards, IEPs and progress reports "in evidence" or that would be submitted "into evidence" at the impartial hearing that had not already been translated into the parents' native language; (2) two IEPs created for the 2012-13 school year submitted into evidence at the impartial hearing; (3) any special education meeting notices, consent forms, prior written notices, final notices of recommendation (FNRs), new evaluations, report cards, IEP progress reports or reports or IEPs created by the district during the 2013-14 school years; and (4) all IHO orders (see IHO Second Interim Decision at p. 2).

With respect to interpreter services, the IHO directed the district to provide the parents with the services of an interpreter for all verbal communications (either in person or over the telephone) between the parents and district staff on an "as-needed basis" (see IHO Second Interim Decision at p. 2). In addition, the IHO directed that the interpreter must be available to "orally translate" (1) any notices, notes or letters sent by the district to the parents during the 2013-14 school year, and (2) any documents relevant to the impartial hearing, such as transcripts, exhibits, and notices, that were not already translated into the parents' native language (id.). The IHO directed the district to arrange for the interpreter's access to email so that any "letters or other written communication" given to the parents could be sent to the interpreter by email (id. at pp. 1-2). In addition, the IHO directed the district to make an interpreter available "on the line" if the district initiated telephone communications with the parents (id. at p. 2). Finally, the IHO directed the district to provide the services of an interpreter at all IEP meetings, placement meetings, evaluation meetings, or other meetings required under the IDEA or State laws, and to provide the parents with copies of documents discussed at any meeting translated into their native language (id.).

IV. Appeal for State-Level Review

The district appeals. Initially, the district asserts that regardless of the "label," the IHO's interim decision constitutes a final determination, and thus, is subject to review at this time. The district argues that the IHO erred as a matter of law in ordering the district to provide both translation and interpreter services since it is not required under either federal or State laws to provide the requested translation of all educational records, all correspondence between the district and parents, or IHO orders into the parents' native language. Moreover, the district asserts that the IHO lacked jurisdiction to order such interim relief. Finally, the district asserts that the IHO deprived the parties of due process when he issued the interim decision prior to the completion of a full impartial hearing and completed hearing record. The district seeks to overturn the IHO's interim decision in its entirety.

In an answer, the parents argue that contrary to the district's assertion, the IHO's interim decision is not subject to review because the relief granted does not constitute "ultimate relief," as the interim decision was time-limited in its effect and did not address the full range of issues asserted in the parents' due process complaint notice. The parents also assert that an SRO lacks jurisdiction under federal and State laws or regulations to review the IHO's interim decision.

[1] Neither party appealed the IHO Interim Decision dated October 29, 2012 (sic).

Finally, the parents argue that the IHO's interim decision was correct and within his jurisdiction to issue such order because the IDEA mandates the translation and interpretation services ordered by the IHO. Consequently, the parents seek to uphold the IHO's interim decision in its entirety.

V. Applicable Standards

State regulations pertaining to practice on review of impartial hearings for students with disabilities state:

> (d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(8 NYCRR 279.10[d]).

VI. Discussion

As indicated above, State statutes and 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 November 1, 2013, did not address a pendency dispute, but instead, resolved issues raised in the parents' motion for partial summary judgment (see IHO Second Interim Decision at pp. 1-3; Dist. Ex. 13 at pp. 1-16; Pet. Exs. 1 at pp. 1-25; 2 at pp. 1-13; Answer Exs. A at pp. 1-14). Such order cannot be construed as relating to pendency, and the district does not argue that the IHO's interim decision constitutes a pendency determination. The plain language of the governing regulatory framework forecloses the appeal of any order issued prior to or during the due process hearing, except for pendency determinations, and does not provide for any other exceptions (Does v. Mills, 2005 WL 900620, at *11 [S.D.N.Y. Apr. 18, 2005] [interpreting regulations according to "plain-language meanings"]). Therefore, given that the IHO's interim decision at issue here is not a pendency determination that may be appealed prior to the IHO's final determination, the district's appeal must be dismissed as premature (see Educ. Law 4404[4]; 8 NYCRR 279.10[d]; Application of a Student with a Disability; Appeal No. 10-030; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52]).[2]

Although no action with respect to the IHO's second interim decision is appropriate at this time, I note without comment as to the merits, that the interim decision appealed from does not contain any findings of fact, cite to any legal authority or even reference the parties' briefs on the

[2] Indeed, the IHO issued the second interim decision in the midst of prehearing conferences and prior to the taking of any testimony during the impartial due process hearing (see Tr. pp. 1-192; IHO Second Interim Decision at pp. 1-3). In any event, even if the IHO's interim decision could be construed to provide for some measure of "ultimate relief," albeit in piecemeal fashion, it would still qualify as interim or interlocutory in nature, and any appeal therefrom would be expressly prohibited until the IHO issued a final determination at the conclusion of the impartial due process hearing (8 NYCRR 279.10[d]).

translation/interpretation issue, leaving the IHO's reasoning somewhat mysterious (see IHO Second Interim Decision), and therefore before the conclusion of the proceeding, the IHO may consider offering the parties and any administrative or judicial reviewer some further understanding of the factual basis for his findings at that time the second interim decision was issued and the legal rationale upon which the interim decision was predicated.

Finally, I note that since the State regulations allow a party to seek review of any interim decisions issued by an IHO upon that party's appeal of the IHO's final determination (8 NYCRR 279.10[d]), the matter remains subject to review and district's appeal of the interim decision discussed herein is dismissed without prejudice.

VII. Conclusion

Having considered all of the parties' contentions and concluded that the district's appeal must be dismissed as premature, the necessary inquiry is at an end and no further determinations are warranted at this time.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 22, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER