



The University of the State of New York

The State Education Department
State Review Officer
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No. 16-042

Application of a STUDENT WITH A DISABILITY, by her 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:

Charity Guerra, Esq., Acting General Counsel, attorneys for respondent, Gail M. Eckstein, 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 the decision of an impartial hearing officer (IHO) which determined that the parent's due process complaint notice was insufficient and dismissed the complaint without prejudice. The appeal must be sustained.

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], 300.508[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

A. Due Process Complaint Notice

A recitation of the student's educational history is not necessary due to the procedural posture of this case. In an undated letter, the parent requested an impartial hearing based upon her disagreement with the recommendations of a January 12, 2016 CSE. Subsequent to the parent's request and the appointment of an IHO, it appears that the district challenged the sufficiency of the due process complaint for failure to include the address of the student's residence as required

by federal law and State regulations (see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b][2]; 8 NYCRR 200.5[i][1][ii]; [i][6]).¹

On January 28, 2016, the parent submitted an amended due process complaint notice which included the address of the student's residence.

B. Impartial Hearing Officer Decision

No hearing was convened in this matter. In a decision dated May 19, 2016, the IHO dismissed the parent's due process complaint notice as insufficient because it failed to state the address of the student's residence (IHO Decision at p. 1). The IHO did not mention or address the amended due process complaint notice (see id.). Accordingly, the IHO dismissed the parent's due process complaint notice without prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, objecting to the IHO's dismissal of her due process complaint notice on sufficiency grounds. The parent asserts that on multiple occasions she provided the district with the student's address in e-mail and written correspondence. The parent attaches to her petition a copy of the amended due process complaint, as well as two emails between herself and district staff notifying the district of the student's street address (see Pet. at Exs. A, B).

The district responds to the parent's petition with a combination of admissions and denials. The district contends that the amended due process complaint notice should be considered legally sufficient and that the IHO incorrectly dismissed this matter. Thus, the district requests that this matter be remanded to the IHO for a hearing.

V. Applicable Standards—Sufficiency of the Due Process Complaint Notice

The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c-d]; 8 NYCRR 200.5[i][2-3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving

¹ The district's request for dismissal was not included in the administrative record provided by the district. The IHO's decision, however, notes that the district challenged the sufficiency of the due process complaint on January 20, 2016 (IHO Decision at p. 1).

party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3] .

VI. Discussion

Before addressing the parties' arguments, it is necessary to address several procedural concerns with the state of the hearing record in this matter. The administrative record does not include a copy of the district's challenge to the sufficiency of the original due process complaint notice (see IHO Decision at p. 1).² Second, according to the IHO's decision, the district's sufficiency challenge was made on January 20, 2016, but the IHO failed to render a decision within five days as required by law and her determination was made approximately four months after the sufficiency challenge (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). Finally, assuming without deciding that it is permissible for a party to seek an extension to the five-day requirement for issuing a sufficiency decision, the hearing record contains no information suggesting that either party requested such an extension.³ The limited information that can be gleaned from the IHO's decision leaves open the distinct possibility that IHO inexplicably left the district's motion to dismiss for insufficiency unresolved for an inordinate amount of time.

Meanwhile, while the district's motion to dismiss was pending, the parent filed an amended due process complaint notice which remedied the defect in the original due process complaint notice. The IHO, however, did not address this in her decision.⁴ In the end, had the IHO timely dismissed the original due process complaint notice due to insufficiency, such a decision might have withstood scrutiny on appeal. However, the IHO's unexplained failure to consider the effect of the parent's amended due process complaint coupled with the delay in rendering a decision weighs against leaving the IHO's dismissal intact.

On appeal, both parties agree that an impartial hearing should proceed with respect to the amended due process complaint notice, and it appears from the parties' papers that no such hearing has been convened. Accordingly I find that the appropriate course of action at this juncture is to vacate the IHO's decision and remand the matter for a hearing for a determination on the merits of the parent's claims.

² Even if the IHO did not enter any evidence into the hearing record, any written submissions related to the motion to dismiss would automatically be considered a part of the administrative hearing record (see 8 NYCRR 200.5[j][5][vi]).

³ Unlike the provisions of State regulations that expressly authorize an IHO to grant a party's request to extend the decision timelines under specified circumstances, the regulations pertaining to sufficiency challenges and the deadlines for deciding them do not explicitly reference such authority (compare 8 NYCRR 200.5[j][5][i], with 8 NYCRR 200.5[i][6]).

⁴ Once again, the IHO did not establish an administrative record showing what was or was not received and/or considered by the IHO. It can be inferred from the district's papers on appeal that the amended due process complaint notice was sent to the IHO (Ans. at ¶¶ 2, 7). Moreover, the amended due process complaint notice bears the same impartial hearing case number as the original due process complaint notice.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 19, 2016 which dismissed the parent's due process complaint notice without prejudice is vacated; and

IT IS FURTHER ORDERED that this matter is remanded to the same IHO to conduct an impartial hearing after the conclusion of the statutorily required resolution period; and

IT IS FURTHER ORDERED that if the IHO who issued the May 19, 2016 decision is not available, another IHO shall be appointed to conduct the impartial hearing in accordance with the district's rotational procedures and State regulations.

Dated: **Albany, New York**
 July 15, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER