



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 18-075

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 Westhampton Beach Union Free School District

Appearances:

Kevin A. Seaman, Esq., attorney for respondent

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, in part, respondent's (the district's) amended motion to dismiss the parent's due process complaint notices concerning the educational placements, programs, and related services recommended by the Committee on Special Education (CSE) for a portion of the 2017-18 school year and for the entire 2018-19 school year. 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 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[a]). 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

In this case, the student has been the subject of four prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 18-064 [resolving the pendency (stay-put) dispute for this student in the same, ongoing impartial hearing]; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and will not be repeated in detail.

The parent initiated the instant administrative proceedings with a due process complaint notice dated March 7, 2018 (March 2018 due process complaint notice), following a CSE meeting convened on March 5, 2018 (see IHO Ex. I at pp. 1-2; see generally IHO Ex. VIII). In the March

2018 due process complaint notice, the parent listed approximately 16 allegations to describe the "Nature of the Problem" (IHO Ex. I at pp. 1-2).¹ In a response to the parent's March 2018 due process complaint notice dated March 19, 2018, the district argued, among other things, that the principles of estoppel barred the parent from relitigating issues allegedly resolved through previous administrative proceedings (see IHO Ex. V at pp. 2-5, 14; see generally IHO Exs. VI-VII).

Shortly thereafter on March 28, 2018, the IHO held a prehearing conference (see Mar. 28, 2018 Tr. pp. 1-3). Near the conclusion of that impartial hearing date, the IHO set a briefing schedule to allow the district to make a "formal" motion to dismiss and to allow the parent to file responsive papers (Mar. 28, 2018 Tr. pp. 49-54).² In its motion to dismiss dated April 20, 2018, the district argued that principles of res judicata and/or collateral estoppel barred the issues raised in the parent's March 2018 due process complaint notice concerning the 2017-18 school year because those issues had been decided in a previous IHO decision, which was subsequently affirmed in an SRO decision (see IHO Ex. X at p. 1; see generally IHO Exs. VI-VII). The parent simultaneously filed a "Pre-Hearing Brief" to address the issues of res judicata, collateral estoppel, and pendency (IHO Ex. XI at p. 1; see generally IHO Exs. XII-XVII).

On or about June 6, 2018, the parent filed a second due process complaint notice (June 2018 due process complaint notice) following a CSE meeting convened on May 22, 2018 (see IHO Exs. II at pp. 1-2; XXIV at pp. 3-4; see generally IHO Exs. XXI-XXIII). In the June 2018 due process complaint notice, the parent listed approximately 17 allegations describing the "reasons" for filing the due process complaint notice (IHO Ex. II at pp. 1-3).³ On June 7, 2018, the IHO held a prehearing conference, and on the same date, issued an order consolidating the parent's March 2018 and June 2018 due process complaint notices (see IHO Ex. XXIV at p. 4; see IHO Ex. III at p. 4).⁴

Following the IHO's consolidation order, on or about June 14, 2018 the district submitted an "Amended/Renewal Motion" (amended motion to dismiss) seeking dismissal of both the March 2018 and the June 2018 due process complaint notices (IHO Ex. XX at p. 1). Overall, the district continued to argue that the parent's due process complaint notices should be dismissed based upon principles of estoppel (see generally IHO Ex. XX). On or about June 17, 2018, the parent

¹ Although the March 2018 due process complaint notice included approximately 16 allegations to describe the "Nature of the Problem," the parent did not otherwise identify—with any specificity—either the CSE meeting, the IEP, or the school year that formed the basis for those allegations (see generally IHO Ex. I).

² On April 11, 2018, the IHO held a "conference call" to address the parent's request for pendency (stay-put) services (Apr. 11, 2018 Tr. pp. 1-3).

³ Similar to the March 2018 due process complaint notice, the parent did not otherwise identify—with any specificity—in the June 2018 due process complaint notice either the CSE meeting or the IEP that formed the basis for the allegations, except noting that the parent sought relief for the "academic year commencing in September 2018" (compare IHO Ex. II at pp. 1-3, with IHO Ex. I at pp. 1-2).

⁴ According to the IHO's consolidation order, the parent's March 2018 due process complaint notice challenged the district's recommendations for the student for the 2017-18 school year and the parent's June 2018 due process complaint notice challenged the district's recommendations for the 2018-19 school year (see IHO Ex. III at p. 1).

submitted a response to the district's amended motion to dismiss and cross-moved for summary judgment (see generally IHO Ex. XXV).

A. Impartial Hearing Officer Decision

In a decision dated June 28, 2018, the IHO granted, in part, the district's amended motion to dismiss the parent's March 2018 and June 2018 due process complaint notices (see IHO Ex. IV at pp. 6-14, 16). With regard to the March 2018 due process complaint notice, the IHO dismissed 15 of the 16 allegations because the specific issue or claim had "already been determined" by a previous IHO and SRO (id. at pp. 6-10). The IHO did, however, find that the parent raised one issue that was not "determined in prior litigation" pertaining to the 2017-18 school year, and the IHO specifically allowed it to remain a subject for resolution at the impartial hearing (id. at pp. 9, 14). With respect to the June 2018 due process complaint notice, the IHO similarly dismissed several issues raised by the parent (id. at pp. 10-14). The IHO specifically limited the impartial hearing to reviewing the "procedural obligations" of the district—approximately five issues—but otherwise precluded review of the "substantive recommendations" of the CSE with respect to the 2018-19 school year as part of the impartial hearing (id. at pp. 14-15). Finally, the IHO listed parameters of the impartial hearing, including the evidence to be presented (id. at pp. 15-16).

IV. Appeal for State-Level Review

The parent appeals, arguing initially that the IHO's dismissal of all of the parent's substantive complaints rendered the IHO's decision a "final" order—and not interlocutory—and thus, the IHO's decision is ripe for appeal. Next, the parent argues that the IHO erred in dismissing the parent's "substantive complaints" on the grounds of collateral estoppel and/or res judicata. The parent also argues that, contrary to the IHO's finding, his view of the district's alleged predetermination of the student's placement was based upon the district's "continued failure to conduct a 'meaningful analysis' of its capacity to educate" the student within the district. Next, the parent contends that the IHO erroneously interpreted an SRO's decision with respect to the conduct of any subsequently convened CSE meetings. The parent also contends that the IHO erred in finding that a previous IHO decision and related SRO decision determined that a special class located in another school district was appropriate and constituted the student's least restrictive environment. As relief, the parent requests that an SRO "reinstate" the substantive complaints dismissed by the IHO and order the IHO to conduct an impartial hearing upon the merits.

In an answer, the district responds to the parent's allegations and argues that, as an interlocutory appeal not permitted by State regulation, the parent's appeal must be dismissed. The district also contends, among other things, that because the IHO did not dismiss all of the parent's claims and allowed some issues to proceed to impartial hearing, the IHO's decision must be considered non-final and thus, renders the parent's appeal interlocutory in nature.⁵

⁵ On August 20, 2018, the parent personally served the district with a reply to the district's answer in this matter; however, State regulations required the parent to serve the reply upon the district no later than August 16, 2018—six calendar days from the completed service by mail of the district's answer, which occurred on August 10, 2018 (see 8 NYCRR 279.6[a], 279.11[a]-[b]). Consequently, the parent's reply was not timely served upon the district and it will not be considered on appeal.

V. Discussion and Conclusion

As explained herein, 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 June 28, 2018, did not address a pendency dispute, but instead, resolved issues raised in the district's amended motion to dismiss (see IHO Ex. IV at pp. 6-14, 16). Therefore, to the extent that the parent appeals from the IHO's interim decision on the district's amended motion to dismiss 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. 11-138). 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 June 28, 2018 interim decision after the IHO closes the hearing record and issues her final determination on all of the remaining issues in the proceeding.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 22, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER