



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-009

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:

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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 determined that the parent had not complied with the reasonable directives of the IHO with respect to the conduct of the impartial hearing and dismissed the due process complaint notice. The appeal must be sustained and the matter remanded.

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

According to the due process complaint notice that initiated this matter, an IEP dated January 10, 2017 was developed for the student, which included "SEIT services in the classroom for [five] hours a week" (Due Process Compl. Notice at p. 2).¹ Also, according to the due process complaint notice, an IESP dated March 13, 2019 was developed for the student, which no longer

¹ There are no exhibits in the impartial hearing record. Additionally, I note that the due process complaint notice was filed by one parent, presumably the student's mother, while the request for review was filed by another parent, the student's father (Due Process Compl. Notice at p. 2; Req. for Rev. ¶1). The parent who initiated the Sept. 22, 2019 due process complaint notice is not a party to the appeal.

contained in-classroom SEIT services but replaced them with "'sep[a]rate location' SETSS services" (id.).²

A. Due Process Complaint Notice

In a due process complaint notice, the parent alleged that the change reflected in the March 13, 2019 IESP was not warranted by the student's needs because the student required a SEIT in the classroom for academic progress, and the IESP goals were "not clear" (Due Process Compl. Notice at p. 2). For relief, the parent requested authorization to continue SEIT services for 5 hours per week for the duration of the 2019-20 school year, that the "IEP meeting" be reconvened to take into account "goals not met in the preschool IEP and goals developed by the providers," and that an "interim order for a bi-lingual neuro-psychological independent evaluation" be issued so that the evaluation may be used to assess the student's academic goals (id.). Lastly, the parent requested a pendency placement based upon the last agreed upon program (id.).

B. Impartial Hearing Officer Interim Order and Decision

According to an interim order on pendency dated October 18, 2019, amended to be entitled "Pendency Agreement," the parties agreed that the basis for the student's pendency was the January 10, 2017 IEP (Pendency Agreement at pp. 1-3).

On November 20, 2019 the parties convened for an impartial hearing (Tr. pp. 1-13). Initially, during a discussion of the matter on the record, the IHO noted that there had been a one-hour delay in beginning the hearing because there was no room available at the scheduled time (Tr. pp. 2-3). The IHO noted that the parent's counsel, who was participating by telephone, stated that he had arrived at the impartial hearing facility on time to begin the impartial hearing, but had to leave to attend another previously scheduled hearing in a different matter at a separate location (Tr. pp. 3-4). The IHO asked if there was "any settlement" between the parties, to which parent's counsel responded "no," and the district representative stated that "[i]t's still under investigation" (Tr. p. 3).

Next, the IHO and parent's counsel discussed two requests made by parent's counsel prior to the date of the hearing regarding the conduct of the hearing. First, parent's counsel noted that the parent could not "participate during the day" because of her work schedule, but "[s]he (indiscernible) participate by phone" (Tr. p. 4). The IHO responded that "you had made that request regarding the parent not being present prior to today's hearing. And you also requested that the hearing be scheduled at 4. And both those requests were denied" (id.). The IHO noted that parent's counsel was aware that the hearing was scheduled to commence that day at the scheduled time, however, counsel "still showed up without the parent. So it would be impossible to conduct a hearing" (Tr. pp. 4-5). Parent's counsel responded that the "two issues [were] completely unrelated ... the parent not appearing due to her schedule" and that the impartial hearing was still scheduled to occur, further commenting that he could not "make the parent appear out of thin air" (Tr. p. 5).

² It is noted that SEIT is Special Education Itinerant Teacher and SETSS is Special Education Teacher Support Services.

There was some additional discussion about the district's responsibility to provide sufficient hearing rooms and hearing officers, whether there was a request to expedite the hearing, and the IHO's requirement that the parent attend in person (Tr. pp. 5-7). Turning to the request to begin the hearing after 4 p.m., the IHO stated that "[n]obody schedules hearings after 4 o'clock . . . the [district] doesn't work that late. Neither do court reporters" (Tr. p. 8). Parent's counsel reiterated his request for the parent to participate by telephone, and the IHO reiterated his denial of the request (*id.*). The IHO asked parent's counsel if he had a request to continue the matter on another day, to which parent's counsel responded, "[n]o, I'm ready to proceed" (Tr. pp. 8-9). Next, the IHO stated "[w]ell, you can't proceed without the parent . . . [y]ou're just an advocate. You're not a witness. You have a right to question the witnesses and question the parent, and to do that in person" (Tr. p. 9). The IHO affirmed the district's right, as well as his own, to cross-examine witnesses in person (Tr. pp. 9-10). With respect to taking testimony by telephone, the IHO stated that "[t]elephonic testimony is only at the discretion of the hearing officer. It has been my rule long before you started appearing at these hearings, that the witnesses testify in person. So I could see them. So I can judge their credibility." (Tr. p. 10).

The IHO further asserted that parent's counsel could not testify on behalf of the parent, and parent's counsel clarified that that he was not requesting to testify on behalf of the parent (Tr. p. 10). Parent's counsel stated that he was not requesting an adjournment because it would not change the fact that the parent was unable to appear in person at the times that the IHO was willing to schedule a hearing (*id.*).

The IHO concluded that he had "no choice" but to dismiss the matter without prejudice, adding that parent's counsel could "reconsider your position" and refile the due process complaint notice (Tr. p. 11). The IHO asked if the district representative had "any ideas," to which the district representative responded in the negative (*id.*). The IHO noted that the fact that the parent "works does not make her any different than the well-over 10,000 cases that are heard in these proceedings on an annual basis. So that is just not a justifiable reason," whereupon the proceeding concluded (Tr. pp. 11-12).

In a decision dated December 5, 2019, the IHO dismissed the matter "for want of prosecution in a timely manner, without prejudice" (IHO Decision at p. 7).³ The IHO cited to caselaw, SRO decisions and State regulations for the propositions that parties to an impartial hearing are obligated to comply with the reasonable directives of the impartial hearing officer regarding the conduct of the impartial hearing; that an IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record; that parents, school authorities, and their respective attorneys or representatives, shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the impartial hearing; that an IHO may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination; and that an IHO may require the parties to be present at the impartial hearing (*id.* at pp. 5-6).

³ The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-8.

The IHO expressed his views that the quality of the adjudication of impartial hearings had deteriorated, that the reliability and integrity of telephonic testimony has become compromised particularly with respect to witnesses reading documents over the telephone rather than testifying so that their credibility cannot be adjudged, and that increasingly attorneys and advocates were appearing at hearings without parents (IHO Decision at p. 6). The IHO stated that in an effort to improve the integrity of the impartial hearings he oversaw, since approximately January 2017, he has "required all parties and their witnesses to appear in person at all stages of the proceedings" and that there had been benefits to the efficiency and quality of the hearing process as a result (id. at pp. 6-7). Lastly, the IHO stated that his rule requiring personal appearance was subject only to an exception for exigent circumstances requiring immediate action and dismissed the matter without prejudice, allowing the parent to refile and request a new hearing (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in dismissing the matter and has denied the parent an opportunity to enter evidence and take testimony, as State regulations require. The parent asserts that the IHO based his denial of the parent's request to appear at the impartial hearing by telephone on his own invented rule to never take testimony by telephone, not on the facts of the particular case. The parent contends that the IHO did not exercise discretion, rather he has applied a blanket policy for attendance in person since January 2017.

The parent contends that although the IHO found that State regulations permit him to require the parent to attend the impartial hearing in person, the cited regulation (8 NYCRR 200.5[j][3][xiii]) says nothing about an IHO's power to require all parties to attend in person, and there is no argument or evidence present in this case that proves that the parent's testimony would be required at all during the impartial hearing.

The parent also asserts that the IHO erred in denying the parent's request to conduct the impartial hearing after 4 p.m. because the IHO did not determine whether the district could hold a hearing after 4 p.m. in this instance, and State regulations require that a hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved.

Lastly, with respect to the IHO's assertion that a parent's attorney or advocate could not or should not attend a hearing without the parent, the parent contends that State regulations allow for parents to be represented by counsel of their choice, and it is a common legal practice for attorneys to represent their clients in State and federal court proceedings without the client being present.

The parent requests that the IHO's decision be reversed, and requests an order allowing the parent to appear by and through an advocate or attorney at hearing dates and further if the parent is required to appear or testify, an order allowing the parent to testify by telephone, absent a fact-specific finding as to why telephonic testimony would be improper in this matter, or at a hearing scheduled at a time the parent can attend, including 4 p.m. or later.

In an answer, the district asserts that the IHO did not err in dismissing the due process complaint notice, because an IHO has broad discretion in the conduct of an impartial hearing, and the parties in an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of an impartial hearing. The district contends that an IHO may require

the parent to be present at an impartial hearing and the IHO explained that his denial of the request to appear by telephone was, specifically, to assess credibility. The district also asserts that the IHO explained the reasoning for his denial of the parent's request to begin the hearing at 4 p.m. or later because district personnel and court reporters are available during the business day prior to 4 p.m. The district contends that neither of these rulings constituted an abuse of discretion and cites SRO decisions for that proposition as well as the proposition that an IHO may dismiss a matter based on the refusal of a parent and advocate to participate in the proceeding.

The district requests that the IHO's decision be affirmed and the parent's appeal be dismissed, and notes that the parent will not be unduly prejudiced because the IHO had dismissed the matter "without prejudice," permitting the parent the option to refile the due process complaint notice and initiate a new impartial hearing.

V. Discussion

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 process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to 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]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). State regulation further provide that parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities, that an IHO may assist an unrepresented party by providing information relating only to the hearing process, and that nothing contained in the cited State regulation shall be construed to impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (see 8 NYCRR 200.5[j][3][vii]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026;

Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Under sufficiently egregious circumstances, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g. Application of a Student with a Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]).

An IHO has the discretionary authority to receive testimony by telephone provided that the testimony is made under oath and subject to cross-examination; however, an IHO is not required to do so (8 NYCRR 200.5[j][3][xii][c]). While I understand the reasons for the IHO's decision to adopt a general policy requiring in-person testimony, this approach can in some cases limit the use of a tool available to the IHO that could potentially ease scheduling difficulties and ensure that parties have the opportunity to present evidence and witnesses while ensuring the timely completion of the hearing (see Application of a Student with a Disability, Appeal No. 18-036; Application of a Student with a Disability, Appeal No. 18-015 [finding no abuse of discretion in a matter wherein the parent did not object to the IHO's directive to have witnesses testify in person, did not request an exception to the IHO's general rule, did not attempt to enter direct testimony by affidavit, and otherwise had a full and fair opportunity to present a case at the impartial hearing]).

In this instance, the IHO categorically refused to allow the matter to proceed without the parent being in attendance in person for the duration of the impartial hearing (Tr. pp. 5, 9). Moreover, the IHO's decision sets out that the IHO has "required all parties and their witnesses to appear in person at all stages of the proceedings" in every matter before him (IHO Decision at p. 6). Except in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]). As the parent argues, given that the district bears the burden of proof, it is possible that the district could have failed to sustain that burden at the impartial hearing such that the IHO could have found that the district's recommended program failed to offer appropriate services without the parent entering any evidence or testimony. The parent also argues that there has been no showing that testimony would be required from the parent, which renders the IHO's concern that credibility cannot be adjudged without the parent being present at the hearing premature. The district did not communicate an intention to call the parent as a witness and the IHO did not communicate any questions he may have had for the parent.

The parent also asserts that the IHO was not exercising discretionary authority to allow or disallow testimony by telephone; rather, he applied an invented rule never to allow telephonic testimony and required a parent's attendance at all stages of a proceeding regardless of the circumstances. It appears that there was no flexibility to the IHO's consideration, in that there was no discussion of testimony by affidavit and cross-examination in person, or video testimony, and no discussion of the potential for the matter to proceed with the district putting on its case, on the

record, while the parent's counsel cross-examined the district's witnesses. I note that the parent's counsel affirmed that he was "ready to proceed" (Tr. p. 9).

Moving on to the dispute with respect to the scheduling of impartial hearings before 4:00 p.m., State regulation requires that the hearing "be conducted at a time and place which is reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]). Furthermore, each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

Additionally, State regulations do not restrict IHOs from scheduling hearings on days and at times when school is not in session. The primary goal of the impartial hearing system under the IDEA is to ensure the timely resolution of disagreements and, while federal and State regulations provide that impartial hearings must be "conducted at a time and place that is reasonably convenient to the parents and child involved" (34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]), the hearing record reflects that the IHO made no effort to determine a time or location that may have been reasonably convenient to the parent; rather, he simply denied the request made by parent's counsel for an impartial hearing to be conducted at or after 4 p.m. (see Tr. pp. 4-9). The IHO should consider whether it is necessary to schedule hearing dates outside of business hours, or on non-school days, or in locations other than those commonly utilized by the district, in order to comply with the regulatory obligation to timely issue a decision. In addition, to ensure the prompt completion of the impartial hearing, it may be necessary for the IHO to issue subpoenas requiring witnesses to be available outside of standard school hours (see 8 NYCRR 200.5[j][3][iv]). Telephone testimony (and presumably video testimony such as Skype) is explicitly authorized by State regulations to ease scheduling difficulties (8 NYCRR 200.5[j][xii][c]). Additionally, the IHO may order that direct testimony be completed by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination (8 NYCRR 200.5[j][xii][g]).

I am sympathetic to the IHO's goals, as stated in his decision, to "raise the level and integrity" of the adjudication of claims, to grant the parties a "greater stake in the litigation" in order to increase the number of cases reasonably settling, to clear the calendar for cases that "truly need to be tried," to foster better preparation and presentation at the hearings, and to discourage frivolous litigation by either party (IHO Decision at pp. 6-7). During the hearing, the IHO eloquently expressed the pressures and difficulties faced by both IHOs, parents and districts in conducting and participating in impartial hearings under the IDEA with limited resources (see, e.g., Tr. pp. 2-6). Nonetheless, concerns with the integrity and proper functioning of the due process system writ large should not overshadow the individual circumstances of any particular case. Based upon the sparse record before me and, as discussed above, the lack of clarity as to what, if any, testimony the parent intended to provide and how the district intended to present its case, there is insufficient support for the IHO's findings that, in effect, the hearing could not be "conducted at a time and place that [was] reasonably convenient to the parents and child involved" (34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]). Accordingly, based on the specific facts of this matter, I must conclude that the IHO did not conduct the impartial hearing in a manner consistent with due process, and that the IHO erred in prematurely dismissing the parent's due process

complaint notice. Accordingly, I will remand the matter to the IHO for further proceedings as set forth below.

VI. Conclusion

Based on the above, I find that the IHO did not conduct the impartial hearing in a manner consistent with due process (34 CFR 300.514[b][ii]). The IHO failed to provide both parties with a sufficient opportunity to present evidence in accordance with their right to due process, and the IHO's dismissal of the parent's due process complaint notice is reversed. The matter is remanded to the IHO for further proceedings and determinations on the merits of the parent's due process complaint notice, in accordance with the body of this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 5, 2019, which dismissed the matter for want of prosecution in a timely manner without prejudice is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that in the event the IHO who issued the December 5, 2019 decision is not available, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: Albany, New York
March 19, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER