The University of the State of New York

The State Education Department
State Review Officer
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No. 21-195

Application of the BOARD OF EDUCATION OF THE ELMIRA CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
The Law Firm of Frank W. Miller, attorneys for petitioner, by Frank W. Miller, Esq.

Law Office of H. Jeffrey Marcus, P.C., attorneys for respondents, by Lisa M. Gibertoni, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition and related costs at the Blue Sky Learning Center (Blue Sky) for the 2019-20, and 2020-21 school years.[1] The parents cross appeal from adverse determinations by the IHO. The appeal must be dismissed. The cross-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

[1] The outcome of the IHO's decision is drawn from allegations in the district's request for review.

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 disposition of this matter on limited grounds, as discussed in detail below, the parties' familiarity with the facts and procedural history of this case—as well as the student's educational history—is presumed and, as such, will not be repeated herein unless relevant to the disposition of this appeal. Briefly, at the time the parent's filed an amended due process complaint notice on January 29, 2021, the student was 4 years 7 months old and had been classified as a preschool student with a disability in June 2019. The student began receiving special education in

early 2018 through the Early Intervention program and received one hour of speech-language therapy a week and one hour a week of special instruction as well as additional private speech-language services. The student was diagnosed with autism in 2018. In the due process complaint notice, the parents claim that the district failed to offer the student a free appropriate public education for the 2019-20 and 20-21 school years. The gravamen of the parents' complaint was that the district failed to evaluate the student in all areas of disability, impeded the parents' participation in the IEP development process and the CPSEs produced IEPs for the student which were procedurally flawed and substantively inappropriate. As relief, the parents sought reimbursement for one-to-one Applied Behavioral Analysis (ABA) therapy they obtained for the student during the 2019-20 school years, transportation and mileage costs associated with the student's receipt of ABA at the preschool setting chosen by the parents (Blue Sky) and funding for speech-language therapy, occupational therapy and parent training and counseling as compensatory education.

According to the parties' appeal filings, an IHO was appointed to hear the matter and an impartial hearing was conducted over the course of six days between April 14, 2021 and June 14, 2021. The parties indicate that the IHO issued a final decision on August 17, 2021 finding that the district failed to offer the student a FAPE, that Blue Sky was an appropriate unilateral placement and that equitable considerations favored reimbursing the parents for the costs Blue Sky for the 2019-20 and 2020-21 school years.

Given that the disposition of this matter hinges on the district's noncompliance with the practice regulations promulgated by the Office of State Review, the substance of the claims asserted by the district will not considered herein. Briefly, the district argues that the IHO erred by finding that the district failed to offer the student a FAPE for the school years at issue and by awarding reimbursement of the cost of the student's attendance at Blue Sky, as well as transportation costs to and from Blue Sky that were sought by the parents.

IV. Discussion

A. Compliance with Practice Regulations

As a preliminary matter, my initial review of the district's appeal and filing of the record of the impartial hearing with the office of State Review revealed numerous failures to comply with the regulations promulgated in section 279 which govern practice before the Office of State Review. Indeed, the nature and degree of the section 279 violations in this matter present the rare case where the severity of the noncompliance becomes a threshold issue as to whether I am able to consider the district's appeal or dismiss it. Accordingly, a review of the relevant regulations and the district's violations thereof is necessary in order to determine if dismissal of the district's appeal with prejudice is warranted under these particular circumstances.

Regarding the content of a request for review, State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). In addition, section 279.4(a) provides that the request for review "must conform to the

form requirements in section 279.8 of this Part." In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer
>
> (8 NYCRR 279.8[c][1]-[4]).

With respect to the district's pleading, as noted above, State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]).

Here, the district's request for review is not compliant with State regulations as it simply enumerated paragraphs and failed to enumerate the issues for review, most which are not supported by citations to the factual record before the IHO as required by section 279.8 [c][2] and [3].[2] While the memorandum of law cites a bit more to the record, a memorandum of law is not a substitute for a pleading and, therefore, cannot rectify pleading deficiencies in the request for review with respect to determining which claims are properly before an SRO for consideration on appeal (see 8 NYCRR 279[4] and [6]; see also Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of the Dept. of Educ., Appeal No. 12-131. Moreover, the memorandum of law is not compliant as it lacks a table of contents as required by section 279.8[d]. Were these the only issues, I might have been persuaded to excuse them, at least to a degree, but there are more serious noncompliances in the district's filings that I cannot overlook.

Compounding the district's noncompliant pleading, the impartial hearing record filed by the district on the day prior to its filing its request for review was not only noncompliant with the practice regulations but also virtually unusable as a practical matter. The undersigned personally received and opened the sealed box containing the record in this matter. As a descriptive matter, upon opening the box and inspecting its contents, I was confronted by a set of loose documents in

[2] There are approximately three transcript citations in the request for review and no citation to any of the documentary evidence before the IHO.

complete disarray (upside down, backward, out of order) with no discernible organization whatsoever. While some minor shifting of papers can be expected to occur during transit, the condition of the documents here went far beyond the norm. Although the district exbibits and post-hearing brief to the IHO were "comb bound," the many other documents in the box presented substantial difficulty in terms of determining the order or grouping of pages. The chaotic state of the documents was compounded by the lack of a district certification of record as required by section 279.9[a] or an IHO certification of record. The record of the impartial hearing before the IHO must be maintained by the school district (even if certain materials were not marked and entered into the hearing record by the IHO) and the district must then prepare a true copy of said record for submission to the Office of State Review 8 NYCRR 279.9[a]. As a participant in the impartial hearing, the district should have ready access to all hearing record materials. Critically, in violation of section 279.9[a], a copy of the August 2017 IHO decision identified by and appealed by the parties was not filed with the Office of State Review. Moreover, the district failed to file electronic copies of the impartial hearing transcripts as required by Part 279, and the hardcopy transcripts filed were in poor condition, with several pages torn from the back or front of several stapled volumes. There was a notice of intention to appeal from the district and a notice of intention to cross appeal from the parents placed on top of the disheveled documents.

The district did not note in its request for review any irregularities by the IHO in establishing the administrative hearing record, or seek an extension of timelines for filing the hearing record with the Office of State Review due to difficulties with compiling the hearing record.[3] The Office of State Review staff, who are currently assisting SROs with a historic record high filing rate of appeals with the Office of State Review, is not in the position to spend the time to clean up the disarray and then create further opportunities for the district to rectify these noncompliances, especially when the district made little or no effort to work with the record for which it was responsible. Accordingly, I find that the cumulative negative impact of the defects in both the district's pleading and record production on my ability to consider the issues raised on appeal in accordance with the requirements of due process weigh heavily in favor of dismissing the district's request for review for substantial noncompliance with the practice regulations. While one or two relatively minor and easily correctable noncompliant items may be capable of cure via the return of the defective pleading to a party with leave to amend, where multiple issues with both the pleading and record submitted to the Office of State Review are present, an SRO is placed in the unenviable position of expending substantial resources at the outset merely to determine whether noncompliance with the practice regulations renders review of the appeal untenable and attempting to assemble and organize a coherent hearing record from a box of hastily thrown together documents and transcripts. While I am tasked with conducting an independent review of the hearing record on appeal, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st

[3] I granted extensions of the timelines for responsive pleadings, in part to allow for the prospect of settling or withdrawing the appeal, however implausible, since the parents no longer reside in the district.

Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). Similarly, it is not the SRO's role to organize and certify the contents of the impartial hearing record so that they accurately reflect the record created during the impartial hearing or to use limited resources on a tight timeline to pursue elements of the record which should have been filed in the first instance. Accordingly, although an adjudication on the merits is generally preferred, this is one of those few instances where the multiple violations of the practice regulations present in both the district's request for review and the hearing record submitted so impede my ability to review this matter while upholding the integrity and purpose of the practice regulations, that I am constrained to exercise my discretion and dismiss the district's appeal with prejudice.

B. Parents' Cross-Appeal

In a cross-appeal, the parents assert that the IHO failed to address the "remaining allegations as to the [d]istrict's failure to provide a FAPE to [the student] over the period at issue" (Parents' Answer and Cross Appeal at pp). Specifically, the parents allege that the IHO did not address the district's failure to evaluate the student; develop accurate present levels of performance for inclusion in his IEP; convene properly constituted CPSEs; to provide the parents with adequate prior written notices and notices of recommendation; and to include the parents in the development of the student's IEPs.[4]

The IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012]; see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). Here, the IHO's decision resolved the issue of FAPE entirely in the parents' favor awarding all of the relief requested (see Answer and Cross-Appeal ¶¶14-15, 17-18, 22). Therefore, there is no need to proceed to the remainder of the claims that the parents believe the IHO's decision should have addressed (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). As such, the cross-appeal will also be dismissed.

V. Conclusion

As discussed in detail above, having concluded that the request for review and impartial hearing record filed by the district do not comply with the practice regulations of the Office of

[4] In the parents' notice of intent to cross-appeal, dated September 15, 2021, the parents asserted that they intended to raise the issue of whether "the IHO erred in determining amounts owed for mileage reimbursement." However, in an answer served with the cross-appeal, the parents state that the IHO "correctly awarded reimbursement to the [p]arents of monies paid for the services and of transportation costs at the federal mileage rate of $.57/mile" (Parents' Answer and Cross-Appeal ¶21).

State Review and, therefore, IHO's decision will not be disturbed and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 26, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER