The University of the State of New York

The State Education Department
State Review Officer
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No. 24-087

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:
Brain Injury Rights Group, attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) issued after a remand for clarification regarding her daughter's pendency placement that was so ordered by the United States District Court for the Southern District of New York (see Davis v. Banks, 2023 WL 5917659 [S.D.N.Y. Sept. 11, 2023]). The IHO issued an amended final decision, which ordered the district to fund private transportation services only for each school day that the student used the services. The district cross-appeals from the IHO's decision to the extent that the IHO issued an amended decision. The appeal must be dismissed. The cross-appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

This proceeding initially arose under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law.

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 scope of this appeal and the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary.

In a due process complaint notice dated July 6, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year based

on various procedural and substantive deficiencies (Parent Ex. A). As relief, the parent requested, among other things, direct tuition payment for the student's attendance at the International Academy for the Brain (iBrain) for the 2022-23 school year, as well as the costs for related services, 1:1 nursing services, and a 1:1 paraprofessional, and funding for the costs of private, special transportation to and from the student's home and iBrain (id. at p. 8). The parent also requested an interim order of pendency so the student could remain in her then-current educational placement during the proceedings (id. at pp. 1-2).

An impartial hearing took place over the course of four dates between July 28, 2022 and October 20, 2022 (see Tr. pp. 1-69). The assigned IHO issued an interim decision on pendency dated September 22, 2022, finding that the student's pendency placement lay in an unappealed IHO decision dated May 15, 2022 arising from a prior impartial hearing addressing the district's offer of a FAPE to the student for the 2021-22 school year and consisted of the district funding of the student's tuition at iBrain, as well as "door to door transportation to and from the student's home, and related services including a nurse 1:1 and paraprofessional 1:1" (Interim IHO Decision at p. 5; see Parent Ex. C).[1]

Several months later, the IHO issued a final decision on the merits dated December 10, 2022 and determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of awarding the parent's requested relief (IHO Decision at pp. 4-7). The IHO ordered the district to fund the student's tuition at iBrain for the 2022-23 school year, as well as the costs of a 1:1 private duty nurse, a 1:1 paraprofessional as needed, and "all related services and transportation for the student to and from iBrain" and the costs of an independent neuropsychological evaluation (id. at p. 7).

While the due process proceeding was pending and prior to the IHO's issuance of the final decision, the parent, along with nine other parents who had also obtained pendency orders for the district to pay for all or part of the costs associated with their children attending iBrain, commenced an action in federal district court, seeking enforcement of their respective pendency orders on September 27, 2022 including the interim decision issued in this matter and subsequently filed a motion for summary judgment (see Davis, 2023 WL 5917659). As relevant to this proceeding and the parent's enforcement of the IHO's September 22, 2022 pendency order, the remaining dispute before the Court was whether the district was obligated to pay all transportation costs that were incurred by the parent pursuant to a transportation contract that she had entered into with a private transportation provider or for only the costs of transporting the student on the days that she actually used the services (see id. at *1, *4-*5). The Court determined that the "sole source of the [district's] reimbursement obligations" depended on the language of the applicable administrative order (id. at *4). However, upon examining the IHO's September 22, 2022 pendency order, the Court found that the IHO's language directing the district to fund transportation "to and from" the student's home was insufficiently clear to resolve the parties' dispute because the IHO's language could be interpreted to support both parties' positions (id. at *5). Accordingly, on September 11, 2023, the Court issued an Opinion and Order remanding the matter to the IHO to interpret his own pendency

[1] The IHO's decisions are not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover pages as page one (see Amended IHO Decision at pp. 1-14; IHO Decision at pp. 1-14; Interim IHO Decision at pp. 1-6).

order with respect to the scope of the district's obligation to fund transportation costs and conduct further fact finding if necessary (id. at *5-*6).

Upon remand from the District Court in Davis, the parties and the IHO reconvened for an additional hearing date on October 31, 2023, to discuss the remanded issue (Tr. pp. 70-76), which, as noted above, occurred after the due process proceeding on the merits had already concluded. The parent's attorney stated that the parent was seeking clarification that "the transportation would be as per the contract provided, because that is what the Parent agreed to when they went to the unilateral placement" (Tr. p. 72). The district stated its position that the order for the district to fund "transportation for the student to and from iBrain . . . mean[t] literally on the days the student was actually transported to iBrain and then home, so the dates that the student actually utilized the transportation service" (id.). The IHO stated that the parent's position could not prevail given the language of "the order," seeming to refer to language in the district court's opinion (Tr. pp. 72-73). The district requested "a corrected order" and the IHO agreed that no additional evidence was necessary and that a "corrected order" could be issued to reflect the decision that had already been made (Tr. pp. 74-75).

The IHO issued an "amended" decision dated January 31, 2024 to address the issue remanded to him (see Amended IHO Decision). The IHO reiterated his final determinations on the merits in the matter but stated that the order was "amended pursuant to an Order by Judge Jesse M. Furman of the Southern District of New York" (id. at p. 7). The IHO clarified his final order to provide that the district would be required to "reimburse the parent for transportation, only for the days the student actually used the transportation services to and from iBrain for which they must provide adequate documentation" (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in the amended decision by ordering that the district only had to pay for the costs of transporting the student for each day that the student used transportation services rather than the full amount that the parents incurred pursuant to a third-party transportation contract, and in directing the district to pay paraprofessional and/or nursing services only "as needed." The parent asserts that an SRO has jurisdiction to review the IHO's decision after remand.

In an answer with cross-appeal, the district responds to the parent's arguments and argues that the portion of the IHO's amended decision that addressed the transportation issue should not be disturbed. The district argues that the parent's attempt to appeal language in the IHO's decision regarding district funding of paraprofessional and/or nursing services "as needed" should be dismissed as the language was included in the IHO's December 10, 2022 final decision, which the parent did not timely appeal. Regarding transportation, the district asserts that the District Court retained jurisdiction over the issue and, therefore, an SRO does not have jurisdiction to review the IHO's order, which was issued only as a clarification in response to the District Court's remand.

As for its cross-appeal, the district asserts that the IHO erred in issuing an amended final decision rather than a new decision after remand to address only the issue remanded by the District Court. The district requests that the IHO's decision be vacated with the exception of that portion that addressed the remanded transportation issue.

The parent files a reply and answer to the district's cross-appeal, arguing, among other things, that the IHO had to authority to amend his final decision upon remand from the District Court.

V. Discussion

The IHO's handling of this matter after remand shows that he confused the issues presented or the procedural posture of the matter, and, as a result, he issued an amendment to the December 2022 final decision, which was a Burlington/Carter analysis on the merits of the parties claims, and lacked any mention of the relevant facts or legal standards relevant to the September 2022 interim order, and thus as described further below, the IHO both exceeded his jurisdiction and failed to offer the clarification of the IHO's original pendency determination sought by the District Court.

First, the District Court's decision did not pertain to the order in the IHO's final decision, but instead related exclusively to enforcement of the student's pendency placement (see Davis, 2023 WL 5917659, at *1-*2). Accordingly, the IHO was mandate was to address the September 2022 pendency order and the law is well settled that an IHO lacks the authority to retain jurisdiction and materially alter a final decision on the merits once the due process proceeding has come to a conclusion (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, it is notable that neither party appealed the IHO's December 10, 2022 final decision to a State Review Officer and, accordingly, the IHO's final decision has become final and binding (see 8 NYCRR 279.4[a]). Thus, the IHO exceeded his authority in issuing substantive revisions to December 2022 final decision on the merits after the proceeding had concluded.

Regarding the pendency transportation issue remanded by the District Court, as noted in two prior State-level administrative decisions involving different students but arising from the same order of remand by the District Court, the District Court retains exclusive jurisdiction over the issue of enforcement of the pendency decision and, as such, I would not have the authority to review the IHO's clarifications had they been issued in accordance with the remand (Application of a Student with a Disability, Appeal No. 23-311; Application of a Student with a Disability, Appeal No. 23-310). Here, however, as the IHO exceeded the scope of the remand and amended a final decision in contravention of law, the amended decision must be vacated and the final decision as issued on December 10, 2022 stands. I will remand the matter to the IHO to issue the clarification sought by the District Court and thereafter file the same directly with the District Court.

The order of the District Court appeared clear to the undersigned, but I also note that the discussion that took place on the record during the October 31, 2023 hearing date after remand demonstrates that the IHO misapprehended the language in the Court's order. The IHO stated that "the order of the court is specific in saying that [the transportation funding is] for the days when

the student uses the service" (Tr. p. 73). The IHO then dismissed the parent's position that the language in the IHO's pendency decision could be interpreted to support the parent's request for transportation pursuant to the contract, stating "No, it can't. Have you read the order?" (id.). However, the entire purpose of the District Court's remand was because the IHO's pendency order, which required district funding of transportation "to and from" the student's home was not clear with respect to whether district funding would be required for the entire transportation contract amount or only for services actually delivered (Davis, 2023 WL 5917659, at *5). The court indicated the IHO's September 2022 order was subject to multiple interpretations as the counsel for the parent tried to explain.[2] Specifically, the District Court stated:

> On the one hand, transportation services "to and from iBRAIN" could mean, as Plaintiffs argue, that the [district] is responsible for paying all costs they incurred under the contracts with Sisters. After all, pursuant to the contracts, these costs were associated with transportation to and from iBRAIN — whether it was used or not. Alternatively, the phrase could mean, as the [district] argues, that the [district]'s obligations are limited to days on which the student at issue used the transportation at issue. After all, if a student does not go to and from school, it is hard to say that transportation services — let alone transportation services "to and from" the school — have been provided to that student. The language of the applicable orders alone does not afford a clear answer.

(id. [internal citations omitted]).

The IHO then went on to read from the conclusion set forth in the District Court's decision: "So this is what the order says. It says that -- in the conclusion, it says that the [district] is obligated to reimburse the parents and guardians of the individual students only for days that their children actually use transportation services and for which they provide adequate documentation" (Tr. p. 74). However, the portion of the District Court's conclusion that the IHO quoted related to a subgroup of four other students for which the pendency orders were clear that they only required funding for transportation services used and, therefore, were not remanded (Davis, 2023 WL 5917659, at *4, *6). The entirety of the conclusion reads:

> For the foregoing reasons, the Court holds that the DOE is obligated to implement K.T.'s August 23, 2022 Pendency Order (for the period during which it was in effect); that the DOE is obligated to reimburse the parents and guardians of M.G., A.L., S.H., and O.C.

[2] The parents counsel likely bears some responsibility in the first place. The order stated that "the Court has grave doubts that joinder of Plaintiffs in this case was proper given that their claims turn on the individual circumstances of their cases and the particular language in their respective Pendency Orders" and the Court explained that the attorneys for the parents should be prepared to explain why their cases should not be severed (Davis, 2023 WL 5917659, at *6). The undersigned recently experienced an analogous circumstance in which there was an attempt by an IHO to hold a due process proceeding for 12 or more different students simultaneously, all of whom were represented by the same attorney in a so called "omnibus" fashion and which resulted in confusion and ultimately an unclear, defective hearing process (see, e.g., Application of a Student with a Disability, Appeal No. 24-016).

> only for days that their children actually used transportation services and for which they provide "adequate documentation"; and that the cases of R.P., L.S., R.Z., S.C., W.R., and K.T. (for the period during which K.T.'s August 23, 2022 Pendency Order was in effect) are remanded for further proceedings not inconsistent with this Opinion and Order.

(id. [emphasis added]). The lattermost portion of the District Court's concluding paragraph regarding remand clearly applies to the student in the present matter and describes a different subgroup of five students whose parents received unclear transportation terms in their respective IHO pendency orders, and upon remand the IHO clearly overlooked applicable language in the District Court's order.

While the question is not before me, I encourage that, in addressing the District Court's request for clarification, the IHO should look to the source of the pendency placement, in this case, the May 15, 2022 unappealed IHO decision (see Parent Ex. C). That is because, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist, 386 F.3d 158, 160-61 [2d Cir. 2004]; Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [noting that "pendency placement and appropriate placement are separate and distinct concepts"]) and, instead, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906).

VI. Conclusion

Having found that the IHO exceeded his authority in issuing an amendment to his December 10, 2022 final decision, the IHO's amended decision is vacated and the matter remanded to address the clarification sought by the District Court.

In light of these determinations, I need not address the parents' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's amended decision dated January 31, 2024 is vacated;

IT IS FURTHER ORDERED that the matter is remanded to the IHO to provide the clarification on the issue of pendency transportation services as directed by the District Court in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023).

Dated: **Albany, New York**
April 12, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER