The University of the State of New York

The State Education Department
State Review Officer
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No. 23-212

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:
Thrive Advocacy, LLC, attorneys for petitioner, by David Kahane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 the decision of an impartial hearing officer (IHO) which denied her request for reimbursement for special education teacher support services (SETSS) along with compensatory education for her daughter for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that the student was entitled to equitable services for the 2022-23 school year, arguing that the parent failed to timely notify the district of her intent to obtain equitable services for the student in her nonpublic school. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20

U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

A review of the student's educational history shows that following a hospitalization at seven months of age due to a febrile seizure, the student began receiving Early Intervention (EI) services, which she received until she aged out and was recommended to receive special education services as a preschool student with a disability (Tr. pp. 21-22; Dist. Ex. 1 at pp. 2-3). The student received special education itinerant teacher (SEIT) services in preschool (Dist. Ex. 1 at p. 1).

On May 20, 2021, a CSE convened to develop an IESP for the student and finding the student eligible for special education as a student with a learning disability, the CSE recommended that the student receive 10 periods per week of direct, group SETSS, along with two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of group speech-language therapy with an implementation date of September 13, 2021 (Parent Ex. C at pp. 1, 11).

On August 23, 2022, the parent sent the district a letter indicating that the district failed to "assign a provider for the services mandated in the [student's] CSE/IESP for the 2022-2023 school year" (Parent Ex. A). The parent further indicated that if the district did not assign a provider, the parent would unilaterally obtain services through a nonpublic agency at "market rate" (id.).

On September 16, 2022, the parent entered into an agreement with Absolute-ED for the provision of "1:1 Special Services" to the student for the 2022-23 school year (Parent Ex. D).[1]

On November 3, 2022, the CSE reconvened and developed an IESP for the student with a projected implementation date of November 10, 2022, recommending that the student receive ten periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of group speech-language therapy (Dist. Ex. 2 at pp. 1, 8-9).

In a due process complaint notice dated May 23, 2023, the parent alleged that the May 2021 IESP was the last educational program developed for the student and that the district failed to supply providers for the services it recommended (Parent Ex. B at p. 1). According to the parent, she "exerted extensive efforts to find a SETSS provider" to provide the student with SETSS, but was unable to locate a provider at the district rate and had to obtain SETSS for the student at an enhanced rate (id.). The parent requested, in part, an award of 10 hours per week of SETSS for the 2022-23 school year and direct funding to the agency provided SETSS for 10 hours per week of SETSS for the 2022-23 school year (id. at p. 2).

An impartial hearing convened on August 9, 2023 and concluded on August 23, 2023 after three days of proceedings (Tr. pp. 1-158). In a decision dated August 30, 2023, the IHO determined that the district failed to implement the student's IESP for the 2022-23 school year, but the parent failed to meet her burden of proving that the unilaterally obtained services were appropriate and equitable considerations weighed against the parent's request for relief (IHO

[1] The Absolute-ED contract names Absolute-ED as "Absolute-ED Inc.," but the affidavits of Absolute-ED's clinical supervisor and financial officer affirm that the name of Absolute-ED is "Absolute-ED LLC" (see Parent Exs. D; E; F).

Decision at pp. 11-13, 15). Therefore, the IHO denied the parent's requested relief (IHO Decision at p. 16).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parties' dispute on appeal is whether the IHO erred in determining: (1) that the parent did not meet her burden of proving that the services provided by the private SETSS agency were appropriate for the student; (2) that equitable considerations failed to support an award of SETSS; and (3) that the district failed to meet its burden of proving that the parent did not file a request for equitable services before the June 1 deadline.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[2] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[3]

[2] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[3] State guidance explains that providing services on an "equitable basis" means that "special education services

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (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]).

VI. Discussion

At the outset, I will address the district's threshold argument pertaining to whether the student was entitled to equitable services for the 2022-23 school year under Education Law § 3602-c.

In the May 2023 due process complaint notice, the parent alleged that the district failed to implement the student's May 2021 IESP for the 2022-23 school year and requested an order directing the district to fund ten hours of SETSS per week at an enhanced rate for the 2022-23 school year (Parent Ex. B).[4][5]

The district did not present any evidence that it offered the student a SETSS provider or a speech-language provider for the 2022-23 school year (Tr. p. 17).[6] During the impartial hearing, the district argued before the IHO that "the [p]arent did not request equitable services on or before June 1st, 2022, for the 2022/2023 school year. As such, the [p]arent should be precluded from seeking equitable services for the 2022/2023 school year" (Tr. p. 14). The district represented, as part of its opening statement, that it did not receive a notice from the parent by June 1, 2022 asking for the district to provide services in the student's private school (Tr. pp. 13-14). The district then

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are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

[4] The parent did not raise any allegations related to the November 2022 IESP in her due process complaint notice (see Parent Ex. B). Additionally, although the district mentioned in its closing statement that the parent might raise a potential waiver claim related to the November 2022 IESP (Tr. p. 133), the parent did not raise waiver as an issue in response to the district's closing statement or in its request for review. Accordingly, the November 2022 IESP, including any potential claim that the district waived the June 1 deadline by developing an IESP for the student, will not be addressed in this decision (see NB & CB v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016] [referring to the "classic waiver of waiver"] [internal quotation marks omitted], aff'd, 711 Fed. App'x 29 [2d Cir. 2017]).

[5] The speech-language therapy is not at issue in this case as it was not requested in the parent's due process complaint notice (see Parent Ex. B). Additionally, the parent testified that the student received speech services for the 2022-23 school year from a source other than Absolute-ED, the agency at issue in this proceeding, and that she was happy with the student's speech-language services (Tr. pp. 24-25).

[6] The district presented evidence that it developed an IESP for the student on November 3, 2022, during the 2022-23 school year (Dist. Ex. 2).

had the opportunity to question the parent as to when she first contacted the district to seek services for the 2022-23 school year, and, in responding, the parent only testified that she discussed services with the school that the student had attended in kindergarten—which was a nonpublic school, as the student was recommended for services through an IESP for that school year (Tr. pp. 25-26; see Parent Ex. C). The parent then explained in her testimony that she "didn't receive a call or an email from the [district], so [she] d[id]n't really know who to contact" (Tr. pp. 13-14, 25-26).

The IHO acknowledged the district's argument that the parent "failed to timely request IESP services as required by Section 3602-c(2)(a)(1)" but determined that because the district "presented no evidence (e.g. witness testimony that the [district] received no request letter from [p]arent) that [p]arent did not make the appropriate request [and the district had] therefore failed to meet its burden of proving the affirmative defense" (IHO Decision at pp. 11-12).

The district cross-appeals and argues that the IHO should have applied the Education Law "§ 3602-c June 1st deadline strictly" and that the IHO erred in determining that the district failed to present evidence establishing that the parent failed to "make the appropriate request" (Answer ¶¶ 21-22). The district noted that "the [p]arent did not assert at hearing that she submitted the June 1st request for services" and that instead "parent's counsel argued that the [district] failed to notify the [p]arent that such a request was required" (Answer ¶ 22; see also Tr. p. 145). Additionally, the parent had the opportunity to respond to these allegations on appeal but has not submitted an answer to the district's cross-appeal.

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). In this case, there is no evidence in the hearing record showing that the parent complied with the notice requirement on or before June 1, 2022. The Commissioner of Education has previously addressed this issue and determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin).

The IHO was correct to note that the June 1 deadline is an affirmative defense (IHO Decision at p. 11). As noted in prior SRO decisions, the issue of the June 1 deadline fits with other defenses, such as the defense of the statute of limitations, which are required to be raised at the hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district

had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). As further noted in prior SRO decisions, the June 1 deadline may be waived; however, the response to the due process complaint notice is not a waiver, especially where the parties discussed the issue prior to the commencement of the merits portion of the impartial hearing (see e.g., Application of a Student with a Disability, Appeal No. 23-032).

In this case, the district raised the June 1 deadline affirmative defense in its opening statement before the parties delved into the merits of the impartial hearing (Tr. pp. 13-14). The parent admitted that she did not provide the district with a request for services pursuant to her daughter's IESP before the June 1 deadline (Tr. pp. 25-26, 145). Parent's counsel argued that the district failed to inform the parent of the June 1 deadline (Tr. p. 145), but pursuant to decisions of the Commissioner of Education, as set forth in further detail above, the parent's lack of awareness of the June 1 deadline did not relieve her of her obligation to submit a request for dual enrollment by June 1, 2022. It is clear from the hearing record that the district did not waive its June 1 deadline affirmative defense and equally clear that the parent did not rebut the district's assertion that she failed to notify them of her intent to seek IESP services from the district at the student's unilateral placement for the 2022-23 school year by June 1, 2022. Having found that the district properly raised the June 1 deadline as an affirmative defense, which was unrebutted by the parent, it is unnecessary to further address the parent's appeal of the remainder of the IHO's findings.

VII. Conclusion

Having found that the parent was not entitled to equitable services in accordance with an IESP because she did not comply with the June 1 deadline under Education Law § 3602-c, the district did not fail to provide equitable services under Education Law § 3602-c to the student during the 2022-23 school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated August 30, 2023 is modified by reversing that portion which found that the district was obligated to offer the student equitable services during the 2022-23 school year.

Dated: **Albany, New York**
November 30, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER