The University of the State of New York

The State Education Department
State Review Officer
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No. 23-291

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 failed to timely request equitable services for her daughter pursuant to New York State Education Law § 3602-c for the 2023-24 school year and dismissed the parent's due process complaint notice with prejudice. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

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 Individuals with Disabilities Education Act (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 § 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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.

Briefly, the CSE convened on April 6, 2022, to formulate the student's IESP for the 2022-23 school year (see generally Dist. Ex. 2). The CSE recommended five periods of direct group special education teacher support services (SETSS) per week (Dist. Ex. 2 at p. 5).

In a letter to the district dated September 7, 2023, the parent indicated that the last CSE meeting for the student was held on April 6, 2022 (Parent Ex. C at p. 1). The parent indicated that she consented to the district providing all recommended services from that IESP to the student for the 2023-24 school year; however, she further informed the district that she had been unable to find a provider to implement the services at the district's standard rate (id.). The parent asserted that she would have no choice but to implement the IESP on her own and stated her intent to seek reimbursement and/or direct payment for the costs of those services (id.).

The parent signed a contract with Yes I Can on or about August 16, 2022 for the provision of SETSS to the student (see Parent Ex. D).[1]

In a due process complaint notice, dated September 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to convene an CSE and recommend a proper placement and services (see Parent Ex. A at pp. 1-2). The parent asserted that she was unable to locate a SETSS provider on her own for the 2023-24 school and the district failed to implement its own recommendations (id. at p. 2). The parent contended that, without supports, the mainstream placement the student attended was untenable; as such, the parent asserted that the district's "failure to either implement the services or provide a placement [was] a denial of a FAPE for the 2023-24 school year" (id.).[2] For relief, the parent "reserved" the right to seek compensatory SETSS for any periods not provided during 2023-24 school year (id. at p. 3). The parent requested a finding that the district's failure to convene, recommend a placement or services, or implement its own recommendations for the 2023-24 school year was a denial of FAPE (id.). The parent requested an order that the district "fund the program outlined in" a July 28, 2023 IHO decision for the 2023-24 school year at a reasonable market rate and an order for the district "to fund a bank of compensatory periods of all services which [the student] is entitled to under pendency for the entire 2023-24 school year" or parts of which were not serviced (id.).

An impartial hearing before the Office of Administrative Trials and Hearings (OATH) convened and concluded on October 31, 2023 (see Tr. pp. 1-52). In a final decision dated November 8, 2023, the IHO determined the district was permitted to raise the issue of the June 1 deadline for the first time at the impartial hearing (IHO Decision at p. 6). The IHO held that the parent had an opportunity to present evidence that she complied with the June 1 deadline but did not do so (id.). Since, the parent did not provide the district with timely notice of a request for services, the IHO found that the district not fail to provide the student with a FAPE for the 2023-

[1] The signature for the representative from Yes I Can was dated August 22, 2023 (Parent Ex. D at p. 3). The e-signature verification accompanying the agreement indicated that the parent signed on August 17, 2023 and Yes I Can signed on August 18, 2023 (id. at p. 4).

[2] The parent argued that the student's pendency placement lay in a prior IHO decision dated July 28, 2023 (Parent Ex. A at p. 2).

24 school year by not providing the student with the services (id. at p. 7). The IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the parent should have been able to present evidence of compliance with 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 public school 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]).[3] "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.).[4] Thus, under State law an eligible New

[3] 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]).

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

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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., 694 F.3d at 184-85).

VI. Discussion

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]).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial 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"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Regarding the parent's argument that the district waived the June 1 defense, the IHO cited a decision by the undersigned, which the IHO interpreted to allow a district to raise the June 1 defense at any point during the impartial hearing, even as late as the closing argument (IHO Decision at p. 6 n.2, citing Application of a Student with a Disability, Appeal No. 23-162; see Tr.

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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.).

p. 15). However, in that appeal, although the district did not state its defense until the closing argument, the parent was able to respond and did not allege that a timely letter requesting equitable services existed (Application of a Student with a Disability, Appeal No. 23-162).

Here, best practice would have been for the district to raise the issue of the June 1 defense in an answer to the due process complaint notice or during a prehearing conference. However, the hearing record does not include a response from the district to the due process complaint notice or indicate that a prehearing conference was held by the IHO.[5] The district did raise the defense in its opening statement (Tr. pp. 9-10).

Although, the district could permissibly raise the June 1 defense during the impartial hearing, the parent should have been provided the opportunity to rebut this defense. During the impartial hearing, after the district raised the defense in its opening statement, the parent's attorney indicated an intent to locate and offer a copy of a letter requesting equitable services for the student prior to the June 1 deadline; however, the district objected and the IHO indicated that the letter would not be received into evidence since the parent did not disclose it to the district prior to the impartial hearing as an exhibit she intended to offer (Tr. pp. 13-16). Further, during the impartial hearing, the parent's attorney emailed a copy of the letter to the district and the IHO (Tr. p. 20). The parent's attorney explained that she did not attach the letter with her disclosure because she did not believe it was the parent's burden and expected the district to have a copy (id.). The attorney indicated that, had she known the district did not have a copy of the letter, she would have offered it as evidence (id.). The district objected to the inclusion of the document (Tr. pp. 13, 21-23).

In declining to enter the document offered by the parent into evidence, the IHO relied on the five-day exclusionary rule. Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep.

[5] The parent asserts that a settlement conference was held on October 16, 2023, but there is no evidence in the hearing record regarding what was discussed at that conference or whether the IHO was involved (Req. for Rev. at p. 3). In the future, I would encourage the IHO to use the prehearing conference as an opportunity to discuss, among other things, issues raised and any defenses that may be determinative of the issues raised (see 8 NYCRR 200.5[j][3][xi][a] [identifying one purpose of a prehearing conference as "simplifying and clarifying the issues"]). Further issue clarification and hearing management may be accomplished using tools such as requiring parties to submit prehearing memorandums of law, to present opening statements with specific issue identification instead of broad statements of the parties' positions, and provision of disclosures before the start of the impartial hearing to ensure that parties can identify disputed areas of fact and be on notice of the issues to be addressed during the impartial hearing (see, e.g., Application of a Student with a Disability, Appeal No. 23-121; see also, Application of a Student with a Disability, Appeal No. 23-157), Here, the IHO did not attempt to clarify the disputed issues with any prehearing procedures.

Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Here, the hearing record is not developed regarding the timing of the parties' disclosures.[6] However, it is undisputed that the parent did not disclose the letter requesting equitable services prior to June 1 as part of the exhibits she intended to reply upon. Nevertheless, in refusing to receive the exhibit into evidence, the IHO did not factor the timing of the district's assertion of the June 1 defense, which resulted in the untimely disclosure, or the effect on due process. If the IHO had entered the letter, any prejudice to the district could have been addressed by granting an adjournment as requested by the parent and/or by allowing the district to present evidence (even if not previously disclosed) that it never received the letter that the parent purports to have sent before June 1. Under the circumstances of the present matter, the IHO erred in denying the parent the ability to rebut the district's defense raised for the first time by the district only moments prior.[7]

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Thus, the matter must be remanded for an IHO to render a decision on the merits of the parent's claims, with the June 1 letter included in the hearing record.

As the matter is remanded to the IHO, it is unnecessary to address the remaining issues and arguments raised by the parties on appeal. Thus, for example, it is unnecessary to consider the additional evidence submitted by the parent with her request for review, and the parent may offer the documents to the IHO for consideration on remand. It is left to the sound discretion of the IHO whether to receive additional evidence or testimony, provided that the IHO should give the parent the opportunity to show that she provided the district a timely request for equitable services and give the district the opportunity to present any evidence or argument related to its nonreceipt of a timely notice.[8] On remand, the parent may present her equitable estoppel arguments to the IHO.

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[6] The parent notes that the district did not meet the disclosure deadline, which she agreed to waive (Tr. p. 48; Req. for Rev. at p. 3). The parent makes this assertion to demonstrate that the IHO allowed the district's untimely disclosure, but not the parents. The hearing record does not mention that the district's disclosure was untimely, when the parties moved to enter the exhibits and the parent's attorney made no objection at that time (Tr. pp. 5-6). The parent's attorney did mention the untimely disclosure later in the hearing, when it was made clear to her that she would not be allowed to enter the June 1 letter into the hearing record (Tr. p. 48).

[7] The IHO also failed to factor the fact he issue no prehearing orders that required the district to disclose the defense previously and that the IHO was responsible for the delay in the clarification of this issue for the hearing (see Application of a Student with a Disability, Appeal No. 23-117). Such prehearing orders have been proven to be very effective at avoiding problems like those present in this case.

[8] Regarding testimony, the parent argues that the IHO erred in refusing to adjourn the impartial hearing to allow the parent to testify after the parent did not join the hearing due to reported technical difficulties and then had to

If the IHO finds that the parent requested timely equitable services from the district or was excused on equitable grounds for not timely requesting services, the IHO should address the claims raised in the due process complaint notice and, if necessary, consider whether any relief is warranted. Regarding hearing practices, the IHO should enter into the hearing record any directives, such as prehearing orders.[9]

VII. Conclusion

In summary, the IHO correctly found that the district was able to raise the defense of the June 1 deadline during the impartial hearing but erred in precluding the parent from responding to the defense with evidence. The matter is remanded to the IHO to consider the district's June 1 defense in light of the parent's proffered evidence and, if necessary, address the claims and requests for relief raised in the due process complaint notice.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 8, 2023, is vacated;

IT IS FURTHER ORDERED that the matter is hereby remanded to the IHO to consider the district's June 1 defense in light of the parent's proffered evidence and, if necessary, consider the claims and requests for relief raised by the parent in the due process complaint notice.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

go to work. The hearing record does not demonstrate that the IHO abused his discretion in denying the parent's request for an adjournment to allow the parent to testify. It is left to the IHO's discretion on remand whether the parent should be given an opportunity to testify, provided that, the IHO should make a record regarding any requests to present testimony and the basis for the IHO's rulings to grant or deny.

[9] There was some discussion of the IHO's hearing rules during the impartial hearing, but no prehearing order was included with the hearing record. State regulation provides that "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][c]; 279[a]).