The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-217

**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:**
Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 denied her request that respondent (the district) fund the costs of her daughter's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision asserting that equitable considerations provide an alternative basis for denying relief. The appeal must be dismissed. The cross-appeal must be dismissed.

## 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 § 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, 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 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 facts and procedural history of the case will not be recited here in detail.

A CSE convened on October 27, 2021 and found the student eligible for special education services as a student with a speech or language impairment (see Parent Ex. B).[1] As a result, the CSE developed an IESP in which it recommended that the student receive eight periods of direct group special education teacher support services (SETSS) per week, three 30-minute sessions of group speech-language therapy per week, two 30-minute sessions of individual occupational therapy (OT) per week, and one 30-minute session of individual counseling services per week (id. at p. 10). The IESP reflected that the student was parentally placed in a non-public school (id. at p. 13).

Turning to the 2023-24 school year at issue, in a letter with the salutation "Dear Chairperson," dated May 17, 2023, the parent indicated that she intended to place the student at a non-public school for the 2023-24 school year at her own expense and requested that the district provide the student with special educational services (Parent Ex. D at p. 1). The letter was signed by conformed signature and attached to an email that was sent to several email addresses with the school district email domain, including "CSE5," "CSE6," "CSE7" and "CSE8" and four individuals and copied to a private email address (id. at p. 2).[2]

The parent electronically signed a contract with EdZone on July 6, 2023 (see Parent Ex. E). The contract addendum indicated that EdZone would provide the student with 10-month services for the 2023-24 school year pursuant to the last agreed upon "IEP/IESP/FOFD/Pendency Order/Pendency Agreement/Court Order" (id. at p. 3).

In an unsigned letter to the district dated August 23, 2023, Prime Advocacy, LLC (Prime Advocacy) indicated that the district had failed to assign a provider to deliver the student mandated services for the 2023-24 school year (Parent Ex. C).[3] In the letter, Prime Advocacy requested that the district fulfill the student's mandate and asserted that, if the district failed to assign a provider, the parent would unilaterally obtain the mandated services through a private agency at an "enhanced market rate" (id.).

**A. Due Process Complaint Notice**

In a due process complaint notice dated September 11, 2023, the parent, through an attorney with Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 1-2).[4, 5] The parent contended

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The email thread indicates that the email was not received by CSE5 (see Parent Ex. D at p. 2).

[3] The letter was not signed by the parent or by a particular representative from Prime Advocacy; instead, the signature line listed "Prime Advocacy, LLC, duly Authorized o/b/o Parent" (Parent Ex. C).

[4] The due process complaint notice indicated that the student's community district was district 25 (Parent Ex. A at p. 1).

[5] The parent requested pendency services based on the last agreed upon IESP dated October 2021 (Parent Ex. A at p. 2). In particular, the parent asserted pendency consisted of eight periods of group SETSS per week, three

that, in contravention of federal and State law, the district failed to develop an appropriate program of services for the student for the 2023-24 school year (id. at p. 1). In addition, the parent asserted that the district failed to supply providers to implement services under the student's prior IESP and failed to inform the parent how services would be implemented (id. at p. 2). The parent asserted that the district put the burden on her to find providers, that she was unable to procure a provider for the 2023-24 school year at the district rates, and that, consequently, she had no choice but to arrange for the services from private providers at enhanced rates (id.). For relief, the parent requested direct payment to the student's provider/agency for eight periods of group SETSS per week, three 30-minute sessions of group speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute session of individual counseling per week, at enhanced rates for the 2023-24 school year (id. at p. 3). The parent also requested a bank of compensatory education services as to make-up for any mandated services not provided by the district (id.).

**B. Impartial Hearing Officer Decision**

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 25, 2024 and concluded on March 12, 2024 after three days of proceedings inclusive of a prehearing conference (Tr. pp. 1-146).[6][7] In a decision dated April 22, 2024, the IHO found that the parent failed to provide the district with notice of her request for equitable services by the June 1 deadline under Education Law § 3602-c and, therefore, was not entitled to any of the relief proposed in her due process complaint notice for the 2023-24 school year (IHO Decision at p. 6).

Regarding the June 1 deadline, the IHO noted that the district raised the defense at the January 2024 prehearing conference but that, prior to the February 29, 2024 hearing, the parent did not offer proof the June 1 letter was sent and, instead, offered just a copy of the letter itself (IHO Decision at pp. 11-12).[8] The IHO held that the parent's failure to disclose the second page with documentation of email transmittal deprived the district of an opportunity to address it as part of its case (id. at p. 12). The IHO held that, when the parent's advocate cross-examined the district's

30-minute sessions of group speech-language therapy per week, two 30-minute sessions of individual occupational therapy (OT) per week, and one 30-minute session of individual counseling per week (id. at p. 2). The parties agreed to this pendency program via a pendency implementation form which was signed by the district on December 27, 2023 (IHO Ex. I).

[6] During the impartial hearing, two different advocates from Prime Advocacy appeared and a third engaged in some email communication with the IHO (see Tr. pp. 1, 12, 67; IHO Exs. VI; VII). For purposes of this decision, references to the parent's "advocate" will not differentiate which individual advocate.

[7] The district subpoenaed the parent to testify and there was discussion during the impartial hearing regarding the parent's unavailability for the February 29, 2024 hearing date, the advocate's misunderstanding of the need for the parent's appearance, and the district's request for adverse inferences due to her failure to appear (See Tr. pp. 28-30, 33, 51-63; Dist. Exs. 1; 2; IHO Exs. VI at p. 1; VII at pp. 1-2). The parent testified at the March 23, 2024 hearing date (see Tr. pp. 102-25).

[8] As to the parent's May 2023 letter itself, the IHO did not find the letter lacking due to the fact that the letter was signed electronically or sent by the parent's advocate (IHO Decision at pp. 10-11).

witness during the February 29, 2024 impartial hearing, it was clear that the advocate had knowledge of where the June 1 letter had been sent (id.). The IHO found that the advocate had "no legitimate excuse (and none was proffered) as to why the 'proof of sending' . . . was not included in Parent's disclosure" (id. at p. 13). An "updated disclosure" was sent on March 5, 2024 (Parent Ex. D; IHO Exs. III, IV).[9] The IHO compared both versions of the email and called into the question the parent's proof that the email was properly sent, noting that it was rejected by CSE 5 and that it was "curious" that another version of the email was resent at the same time as the original message (id.). Specifically, the IHO stated:

> Even if I were to afford Parent the benefit of the doubt and accept that Parent's representative's Firm was able to determine that the original email was blocked to CSES's email address and then resent the message immediately again to the same recipients within the same 60 second window, so that the same time would reflect on both emails, which although improbable is not impossible, it would still not avail Parent

(id.).

On April 12, 2024, the IHO asked the parties to inform him of the particular community district for the student and, in response, the district informed him that the student fell under CSE region three with "District 25" being the student's particular "service district" based on the location of the student's school (IHO Decision at p. 14; see IHO Ex. V).[10] The IHO then determined that the parent failed to notify the correct community district of her request for equitable services as the student's educational planning fell under the auspices of CSE region 3 (IHO Decision at pp. 13-14, 18). The IHO held that CSE region 3 did not receive the parent's May 17, 2023 letter (id. at pp. 14, 20-21).[11] The IHO indicated that whoever sent the letter on behalf of the parent knew it had to be sent to the correct CSE as they sent it to four CSEs (id. at p. 18). Moreover, the IHO noted that the parent's advocates were aware, by the time the due process complaint notice was filed, what the correct community district was as it was written on the complaint (id. at pp. 14, 19).

[9] A one-page version of the email in Parent Exhibit D had been disclosed in advance of the impartial hearing on February 29, 2024, which was later replaced by a two-page version of the document on March 12, 2024 (Tr. pp. 41, 81).

[10] Although SROs typically refer to respondent in their decisions as "the district," similar to other school districts within the State, pursuant to Education Law Article 52-a, the City School District of the City of New York is made up of 32 geographic regions known as geographic districts or community districts as well as two special purpose districts that span the geographic area of New York City. Each community district has similarities such as its own superintendent similar to other public schools across the State, and there are regional CSEs that conduct special education planning for community districts that fall with a CSE's region. The Mayor of the City of New York appoints the Chancellor of the city district, which is comprised of all of the community districts. This structure, in addition to other statutory components not described in this decision, is revisited from time to time by the Legislature and is the approach used to address the immense size and number of families and students that live within New York City.

[11] In his decision, the IHO referenced May 17, 2023 letter as a "June 1 letter" due to the statutory deadline that it purported to address.

The IHO held that there was no question of the advocate's knowledge of the June 1 requirement (id. at p. 19). Further, the IHO noted that the parent's advocate did not take advantage of his offer to allow the advocate to recall the district's witness to inquire about the proof of email transmittal (id. at pp. 15, 21).

Based on the foregoing, the IHO determined that the parent, through her advocate, failed to send the June 1 notice to the correct recipient and ha[d] not "complied with the peremptory formality that would have entitled to the Student to receive services from the District for the 2023-2024" school year under the dual enrollment statute (IHO Decision at p. 23). The IHO found that there was no basis or evidence in the hearing record for any relief and denied the parent's request for relief (id.).

**IV. Appeal for State-Level Review**

The parent appeals, arguing that the IHO erred in finding that she did not comply with the June 1 deadline under 3602-c. The parent contends that she submitted a letter to the district prior to June 1, even though she did not submit the letter to the correct CSE office. The parent asserts that the City of New York is one school district and the fact that the letter was not sent to "specific intra-city [community] district of residence is immaterial." The parent argues she complied with the mandate by providing timely notice to appropriate educational authority, regardless of whether the specific intra-city community district received the notice. The parent asserts that she should not be prejudiced by "miscommunications among specific intra-city [community] districts," and that it is inequitable to disallow her claim on a mere technicality. For relief, the parent requests that the district be ordered to fund the privately obtained SETSS at the contracted rate and that the district issues related service authorizations (RSAs) for all related services.

In an answer with cross appeal, the district argues that the IHO's decision should be upheld in its entirety, but, in the event the parent is found to have complied with the June 1 deadline, the district asserts that the parent's relief should be denied on equitable grounds as the parent's action obstructed the district from providing an IESP.

**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]).[12] "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.).[13] Thus, under State law an eligible New 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

**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]).

Here, there is no question that the district raised the June 1 defense during the impartial hearing. Further, there is no dispute that the parent knew of the requirement that she provide the

[12] 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]).

[13] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

district notice of her request for equitable services prior to June 1 and that a letter was prepared for this purpose and dated May 17, 2023 (Parent Ex. D). The entirety of the dispute between the parties surrounds the transmittal of the May 2023 letter.

On this issue, my independent review of the hearing record leads me to find that the IHO properly requested additional information from the parties to understand the issue at hand, weighed the evidence presented, and properly questioned what could be viewed as an attempt by the parent's advocate to obfuscate potentially unfavorable evidence. Reviewing the IHO's conclusions and the parent's allegations on appeal, I find insufficient basis to disturb the IHO's finding that the parent did not properly submit notice of her request for equitable services for the student for the 2023-24 school year and that, therefore, the district did not deny the student equitable services under State law.

With respect to the transmittal of the parent's May 2023 letter, as noted above, the one-page letter originally entered into evidence was replaced by a two-page version of the exhibit on March 12, 2024 (Tr. pp. 41, 81; see Parent Ex. D; IHO Exs. III, IV). The second page of the exhibit shows that the May 2023 letter was sent to several email addresses with the school district email domain, including "CSE5," "CSE6," "CSE7" and "CSE8" and four individuals (Parent Ex. D at p. 2). After inquiry from the IHO, it was determined that the student's educational planning fell under the auspices of CSE 3, which was not included on the email (see Parent Ex. D at p. 2; IHO Ex. V).

The parent testified that she had the May 2023 letter written on her behalf and she was aware of it, but did not email it herself (Tr. pp. 113, 115-16; see also Parent Ex. D at p. 1). The parent testified that she did not send any emails or documents to the district for the 2023-24 school year (Tr. p. 119). After the parent's testimony, parent's advocate stated that the email from which the May 2023 letter was sent was a Prime Advocacy email address and that the email was sent by Prime Advocacy (Tr. p. 127).

The district offered into evidence its special education student information system (SESIS) events log for the student, which contained entries beginning December 7, 2016 through January 25, 2024 (see Dist. Ex. 3). A district school social worker for CSE 3 testified to explain the SESIS log (Tr. pp. 37-38). The witness testified that there were no entries in the SESIS log from 2022 to October 2023 (Tr. p. 40; see also Dist. Ex. 3 at p. 2). The social worker testified that, had the parent sent the May 2023 letter, it would have been logged into SESIS (Tr. p. 41). The social worker also testified that he had never seen the May 2023 letter before (Tr. p. 42). The social worker testified that he did not have access to any other CSE emails other than CSE 3, but that he communicated with the other CSEs on a daily basis via email (Tr. p. 44). He was questioned by the IHO as to whether there was a way to determine if an entry was deleted or if it was possible to delete an entry (Tr. p. 48). The witness responded that it was possible to hide entries from view but that the student's SESIS log entered into evidence was a "complete events log" for the student (Tr. p. 49).

Here, the hearing record supports the IHO's finding that the parent failed to demonstrate that she properly notified the district of her request for equitable services for the 2023-24 school year. The district social worker testified that CSE 3 never received the parent's May 2023 letter, and that testimony was supported by the documentary evidence—namely, the district's event log—

that was not challenged. The parent did not rebut the district's evidence that it did not receive notice of the parent's intent to seek equitable services by June 1, 2023. The parent has not denied that she knew which CSE or district the student fell under, and instead argues broadly that the district should be found to be a singular entity. However, given that there are approximately 1 million students inclusive of over 200,000 students eligible for special education services residing within New York City, the parent's position that it is sufficient to transmit a request for dual enrollment services under Education Law § 3602-c to the wrong community district or CSE region is unreasonable and is therefore rejected. As detailed above, the hearing record supports all of the IHO's factual determinations, and the parent has not presented any convincing reason why the IHO's rationale and interpretation of the facts should be overturned.

Therefore, I decline to overturn the IHO's finding that the parent failed to comply with the June 1 deadline as she did not properly transmit the letter to the student's community district or CSE region.

## VII. Conclusion

Having found the parent failed to comply with the notice requirements of Educ. Law § 3602-c(2), the necessary inquiry is at an end.[14]

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**August 19, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**

[14] As I decline to reach the merits of this case, I will not address the district's arguments on cross appeal regarding equitable considerations.