The University of the State of New York

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

No. 24-220

Application of a STUDENT WITH A DISABILITY, by his 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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Always a Step Ahead (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the student was entitled to equitable services from the district for the 2023-24 school year. 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 § 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

A CSE convened on July 29, 2022, found the student eligible for special education as a student with an other health impairment, and developed an IESP for the student with a projected implementation date of September 8, 2022 (Parent Ex. B; see Parent Ex. F at p. 1).[1] The CSE recommended that the student receive three 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session per week of group counseling (Parent Ex. B at p. 8). The IESP indicated that the student was "Parentally Placed in a Non-Public School" (id. at p. 10).

In a due process complaint notice, dated December 14, 2023, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (Parent Ex. A at p. 1). The parent indicated that the July 2022 IESP was the last agreed-upon educational program developed for the student and that "the student require[d] the same services" for the 2023-24 school year (id.). The parent asserted she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and that the district failed to provide the student with services in accordance with his IESP (id.). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). The parent sought an order requiring the district to continue the student's services under pendency and an award of funding for OT and counseling delivered by a private company during the 2023-24 school year at "enhanced rates" (id. at p. 2).[2]

On January 1, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware" of the rate charged for services provided to the student consistent with the July 2022 IESP and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. C).[3]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 18, 2024 and concluded on April 18, 2024 after four days of proceedings including three prehearing and/or status conferences (Tr. pp. 1-38).[4]

In a decision dated April 23, 2024, the IHO found that the district did not meet its burden to prove that it provided the student with a FAPE but that the parent was not entitled to the relief sought (IHO Decision at p. 4). Initially, the IHO indicated that the district "timely asserted an

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] In an agreement signed by the district on December 15, 2023, the parties agreed that student's pendency placement lay in the July 2022 IESP (Pendency Implementation Form).

[3] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] After a status conference on March 19, 2024 (see Tr. pp. 15-24), the IHO issued a "Prehearing Conferences Summary and Order," dated March 19, 2024, setting forth the IHO's expectations for the impartial hearing (see Pre-Hr'g Order).

affirmative defense" at the impartial hearing that the parent had failed to provide the district with notice of her request for equitable services by June 1 preceding the 2023-24 school year (id. at p. 7). However, the IHO found that the district did not support its defense with "evidence or testimony" to prove that it did not receive such a notice from the parent (id). Upon dismissing the district's defense, the IHO also found that the district failed to meet its burden to prove that it provided the student a FAPE for the 2023-24 school year (id. at p. 8).

Regarding the unilaterally-obtained services, the IHO found that the parent did not present sufficient evidence of how services from Step Ahead were specially designed to meet the student's needs, noting the lack of testimonial evidence and unexplained omissions and gaps in the session log and finding the session notes were insufficient to explain what occurred during sessions and that the progress reports failed to provide an explanation of the student's functioning at the beginning of the 2023-24 school year or at the time of the impartial hearing and failed to describe how the services addressed the student's unique needs (IHO Decision at pp. 10-14). Next, the IHO found that, had the parent met her burden to prove the related services delivered by Step Ahead were appropriate, she would have found that equitable considerations did not support an award of district funding for the costs of the unilaterally-obtained services, noting that the hearing record did not include evidence that the parent provided the district with a ten-day notice of her intent to unilaterally obtain private services for the student and seek funding for such services from the district (id. at p. 15).

Finally, the IHO ordered the district to identify an OT provider and a counselor to deliver the student's services for the remainder of the 2023-24 school year and until a new IESP is formulated so as "to prevent any regression" (IHO Decision at pp. 16-18). The IHO ordered the district to reevaluate the student if needed and convene the CSE to develop an IESP for the student within 30 days of her decision (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply in this matter and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent asserts that the IHO erred in considering the appropriateness of the unilaterally obtained services in the absence of an argument from the district that the services were inappropriate. In addition, the parent argues that she utilized the services of Step Ahead, which used an appropriately credentialed/licensed provider for the counseling and OT services for which funding was requested and that the providers followed the detailed discussions, goals, and frequency of services the district itself created and recommended in the IESP. Regarding equitable considerations, the parent argues that the contract established the parent's legal obligation to pay for the OT and counseling services. In addition, the parent asserts that the 10-day notice rule does not apply to matters arising under Education Law § 3602-c or in instances where the district did not offer a placement, but, even if it did apply, reduction or denial of reimbursement is not authorized when, as here, the parent did not receive a procedural safeguards notice from the district. The parent also argues that in balancing equitable considerations, the IHO failed to take into account the district's conduct. The parent argues that the evidence in the hearing record fully supports an award of direct funding to Step Ahead for OT and counseling services delivered to the student during the 2023-24 school year at the rate set by Step Ahead.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the parent did not meet her burden to prove the appropriateness of OT and counseling services from Step Ahead for the 2023-24 school year and that equitable considerations did not weigh in the parent's favor. The district argues that equitable considerations weigh against an award of funding given the parent's failure to submit a request for equitable services to the district by June 1 or provide the district with proper notice of her intent to obtain private services and given the lack of evidence of the parent's legal obligation to pay the costs of the private services as of the date the services commenced. As for a cross-appeal, the district asserts that the IHO erred in determining the student was entitled to equitable services. The district argues that the parent failed to present evidence that she complied with the June 1 deadline for requesting equitable services from the district. Given this, the district contends that the IHO also erred in ordering the district to convene the CSE to develop 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]).[5] "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.).[6] Thus, under State law an eligible New

[5] 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]).

[6] 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

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

At the outset, I will address the district's threshold argument as to whether the student was entitled to equitable services for the 2023-24 school year under Education Law § 3602-c.

Initially, in this case, the district raised the June 1 deadline as an affirmative defense at the prehearing conference and again in its opening statement before the parties delved into the merits of the impartial hearing (Tr. pp. 4, 30-32). The IHO found that the district timely raised the defense of the June 1 deadline (see IHO Decision at p. 7), and the parent did not appeal the IHO's finding in this regard.[7]

---

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.

[7] 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]).

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]).

During the impartial hearing and again on appeal, the parent, through her representatives, asserts that Education Law § 3602-c does not require that a written request for services be filed "every June 1 prior to a school year" but instead only requires the notice for the first school year in which such services are requested (see Tr. p. 33; Req. for Rev. ¶¶ 6-7). However, this argument is in direct contravention of the requirement set forth in Education Law § 3602-c, which states that the request be filed "on or before the first of June preceding the school year for which the request is made" (Educ. Law § 3602-c[2][a] [emphasis added]). The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services. In addition, the parent's argument about the district's obligation to annually review the student's IEP and to provide prior written notice conflates the district's obligations under the IDEA with the requirements of Education Law § 3602-c in an effort to excuse the parent's failure to comply with Education Law § 3602-c.

As noted above, however, the IHO determined that the district did not meet its burden to prove that it did not receive a request for equitable services prior to June 1, 2023 (IHO Decision at p. 7). While a school district carries the burden of proof at the impartial hearing, here, during the impartial hearing, it affirmatively asserted that it did not receive a request for services from the parent (see Tr. pp. 4, 30-32). If the parent had provided the notice, it was incumbent upon the parent to rebut the district's defense and produce the notice with proof that it was sent to the district. The parent did not appear at the impartial hearing and did not, through her attorney, assert that a request for equitable services was submitted to the district prior to June 1st (see generally Tr. pp. 1-38). Similarly, on appeal, the parent also does not affirmatively assert or argue that she did provide timely notice. Thus, the hearing record contains no evidence satisfying the requirement under Education Law § 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding the 2023-24 school year (see generally Tr. pp. 1-38; Parent Exs. A-I).

Based on the foregoing, it is clear from the hearing record that the parent did not rebut the assertion that she failed to notify the district of her intent to seek IESP services from the district for the 2023-24 school year by June 1, 2023. Having found that the parent did not rebut the district's affirmative defense regarding the June 1 deadline, it is unnecessary to further address the parent's appeal of the remainder of the IHO's findings.

VII. Conclusion

Having found that the student was not entitled to equitable services in accordance with an IESP because the parent did not comply with the June 1 deadline under Education Law § 3602-c, the district was not required to provide equitable services to the student under Education Law § 3602-c during the 2023-24 school year.

In light of this determination, I need not address the parent's allegations that the IHO erred in finding that she did not meet her burden to prove that services delivered by Step Ahead were appropriate and that equitable considerations did not support the parent's requested relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO's decision, dated April 23, 2024, is modified by reversing those portions which found that the district was obligated to offer the student equitable services during the 2023-24 school year and which ordered the district to convene a CSE to develop an IESP for the student and ordered the district to provide the student with OT and counseling during the 2023-24 school year.

Dated: **Albany, New York**
July 5, 2024

STEVEN KROLAK
STATE REVIEW OFFICER