The University of the State of New York

The State Education Department
State Review Officer
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No. 24-226

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Payal G. Thakkar, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that the district failed to offer the student a free appropriate public education (FAPE) and ordered it to provide direct funding for respondent's (the parent's) unilaterally-obtained services for the 2023-24 school year. The appeal must be sustained, and, for reasons set forth below, the matter must be remanded for further administrative 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 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

This proceeding, as well as eight proceedings like it, challenging similar decisions by the same IHO, were recently filed with the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 24-231; Application of the Dep't of Educ., Appeal No. 24-225; Application

of the Dep't of Educ., Appeal No. 24-230; Application of the Dep't of Educ., Appeal No. 24-228; Application of the Dep't of Educ., Appeal No. 24-223; Application of the Dep't of Educ., Appeal No. 24-229). Given the limited nature of the appeal and the procedural posture of the matter—namely that no evidence was admitted into the hearing record and there was no evidentiary hearing held on the merits of the parties' claims—a description of the facts and educational history of this student is limited to the allegations in the parent's due process complaint notice and the district's response thereto.

A CSE convened on March 28, 2023 to develop an educational program for the student and recommended that the student receive three periods per week of group special education teacher support services (SETSS) as well as two 30-minute sessions per week of group occupational therapy (OT), one 30 minute session per week of group counseling services, and one 30-minute session per week of individual counseling services (Sept. 11, 2023 Due Proc. Compl. Not. at pp. 1-2; Oct. 5, 2023 Due Proc. Resp. at pp. 1, 2).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a FAPE by failing "to develop and implement a program of services" (Sept. 11, 2023 Due Proc. Compl. Not. at p. 1). The parent asserted that the last program developed for the student was the March 28, 2023 IESP (id.). The parent contended that the district did not assign providers for the services it recommended for the student or inform the parent how services would be implemented (id. at p. 2). The parent also argued that the district had improperly and impermissibly shifted its responsibility to provide the recommended services to the student onto the parent (id.). The parent alleged that, in preparing for the 2023-24 school year, she was unable to locate providers to deliver services to the student at the district's rates and had no choice but to retain the services of a private company to provide the mandated services at an "enhanced rate" (id.). The parent further alleged that she was giving the district notice that, if it did not fulfill its obligations to the student, she would take unilateral action to implement the services necessary for the student and would request funding from the district for such services obtained (id.). The parent then acknowledged that the district had "the right to implement all necessary services directly, through its own providers and support personnel" (id.). Finally, the parent invoked the student's right to receive pendency services (id.). As relief, the parent requested a pendency hearing and order; an award of funding for three periods per week of group SETSS, two 30-minute sessions per week of group OT, one 30-minute session per week of group counseling services, and one 30-minute session per week of individual counseling services for the 2023-24 school year at enhanced rates; and a bank of compensatory education services to make-up for any mandated services not provided by the district (id. at p. 3).

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

B. Impartial Hearing and Impartial Hearing Officer Decisions

An IHO was appointed to the matter and on October 16, 2023, a pendency hearing was held (Tr. pp. 1-11).[2, 3] During the hearing, counsel for the parent notified the IHO that the district had sent over "a signed pendency agreement" and an order on pendency was not necessary (Tr. p. 3). A prehearing conference was held on November 9, 2023 which only the attorney for the district attended (Tr. pp. 12-19). Five status conferences were held thereafter on December 4, 2023, December 20, 2023, January 23, 2024, February 22, 2024, and March 18, 2024 (Tr. pp. 20-57).[4] At the last status conference, on March 18, 2024, the parent's advocate noted that the parent had received a resolution offer and wanted time for the parent to review it (Tr. p. 52). The IHO indicated that the resolution offer was "progress" and it was "certainly reasonable to give some time to consider it" (Tr. p. 52). The IHO then adjourned the matter to May 8, 2024 and granted a request to extend the compliance date for issuing a decision to May 23, 2024 (Tr. pp. 53-55).

In a final decision dated April 29, 2024, the IHO stated "[a] hearing did not go forward as it [wa]s unnecessary due to a lack of any controversy" (IHO Decision at p. 3).

Although it is unclear on what the IHO based his findings, as no evidence was admitted into the hearing record and a hearing did not go forward, the IHO determined that the student was classified as a student with an other health impairment and that the March 2023 IESP consisted of group SETSS in English, three sessions per week for 60 minutes; group OT in English, two sessions per week for 30 minutes; group counseling, one session per week for 30 minutes; and individual counseling, one session per week for 30 minutes (IHO Decision at p. 3). The IHO then noted that the parent alleged the district denied the student a FAPE by failing to implement the student's program and the parent "obtained a provider for [the s]tudent, 'EDOPT' ('SP') to provide [the [s]tudent with SETSS" (id.).[5]

The IHO then determined that "[n]o [j]usticiable [c]ontroversy [e]xist[ed]" finding that the district "had the burden to implement the undisputed IESP it created and it failed to do so" and that

[2] On October 19, 2023, the IHO issued an interim decision, wherein he sua sponte struck paragraphs which he found objectionable from the notice of appearance for the district's attorney (Oct. 19, 2023 Interim IHO Decision at p. 6).

[3] An attorney appeared on the parent's behalf for the pendency hearing; thereafter, a lay advocate appeared for five status conferences. Neither an attorney nor a lay advocate appeared for the parent at the November 9, 2023 prehearing conference (see Tr. pp. 1-57).

[4] The district switched attorneys between the December 20, 2023 hearing date and the January 23, 2023 hearing date (see Tr. pp. 25-41). On December 22, 2023, the IHO issued an interim decision, wherein he sua sponte struck paragraphs which he found objectionable from the notice of appearance for the district's new attorney (Dec. 22, 2023 Interim IHO Decision at p. 6).

[5] The student's classification and the name of the agency appear to have come from counsel for the parent's responses to questions by the IHO during the initial pendency hearing (Tr. pp. 5-6). However, the name "EDOPT" does not appear anywhere in the hearing record other than a statement made by the IHO during the November 9, 2023 status conference—at which neither the parent nor a representative of the parent appeared and the IHO stated "I know that the agency is something called EDopt, E-D-O-P-T" (Tr. p. 15). Counsel for the parent had previously referred to the agency as "Ed Opt, E-D O-P-T" (Tr. p. 5).

the district "has failed in its duties to provide services to [the s]tudent" (id. at p. 4). The IHO further found that there was no evidence in the hearing record that the parent obstructed or was uncooperative with the district's efforts to meet its obligations, and that the district could not delegate its burden to locate a provider onto the parent (id.). Next, the IHO found that because a private school need not employ certified special education teachers, the district was "precluded from raising the issue of the SETSS or other provider's certification as a bar to recovery" (id. at pp. 4-5). The IHO further found that the district was "equitably barred from objecting to the rate of payment for services due to its nonfeasance" and noted that the district had "unclean hands" (id. at p. 5). Next, the IHO determined that the parent was not required to prove her inability to pay and was entitled to direct payment to the student's service providers (id.). The IHO then determined that the June 1 putative bar to recovery was not at issue as the district failed to raise it and was now barred from doing so, without further explanation (id. at p. 6). Then, the IHO addressed the parent's request for compensatory education for services not implemented during the 2023-24 school year (id. at pp. 6-8). The IHO specifically noted that the district "did not introduce any evidence whatsoever to bar such an award," before finding"[t]he [p]arent established that a compensatory education award [was warranted consisting] of the following services that have not yet been implemented for the 2023-2024 10 SY; SETSS, 3 x 60 min per week, group, English, OT 2 x 30 min per week, group, English and Counseling 1x 30 min per week, 1:1 and 1 x 30 min per week in a group based on the quantitative method, to be used over the next two years" (id. at pp. 6, 8).

Finally, the IHO noted the parent was "entitled to the following relief based on the lack of judiciable controversy" (IHO Decision at p. 8). The IHO ordered the district to pay the parent's SETSS provider at their contracted rate upon presentation of the "applicable attendance records invoices, and service contract" (id. at p. 9). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's ten month 2023-2024 school year, the same services set forth above at the same rate of pay and frequency" (id.). The IHO also awarded a bank of compensatory education that would be "good for two calendar years" and that the provider was authorized to be paid at a rate not to exceed $300 dollars per hour for each service (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in failing to allow the parties to develop the hearing record and denied the district its right to due process. The district asserts that due process requires a full hearing before an IHO makes a substantive determination on the parent's claims. The district contends that there was no evidence in the hearing record of the district conceding that it denied the student a FAPE, that the district waived a possible June 1 affirmative defense, or agreed that the parent had satisfied her burden of establishing the appropriateness of her unilaterally-obtained services. The district further asserts that the IHO erred in finding that there was no justiciable case or controversy and that the district was barred from raising any defenses at the impartial hearing. The district argues that there was no evidence that the parent provided a June 1 notice and thus, no basis to conclude that the district failed to provide equitable services for the 2023-24 school year. The district further contends that issues related to the appropriateness of the unilaterally obtained services and equitable considerations under the Burlington/Carter analysis also remain justiciable, as well as what, if any, relief would be

appropriate. As relief, the district requests that both the IHO's decision be vacated and that the matter be remanded for a hearing.

The parent did not file an answer in response to the district's request for review.

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]).[6] "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.).[7] Thus, under State law an eligible New

[6] 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]).

[7] 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.

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

A. Conduct of the Impartial Hearing

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

1. Justiciability Determination

Although not raised at any of the seven hearing dates, the IHO for the first time in his final decision, determined that a "justiciable controversy" was not present in this matter (IHO Decision at p. 4). Justiciability addresses whether a court, or in this instance, an administrative tribunal, should intervene in deciding a question that has come before it and is an umbrella term of art for a number of doctrines such as mootness, ripeness, advisory opinions, adjudication of a political question only, and standing (see Flast v. Cohen, 392 U.S. 83, 94–95 [1968]; Renne v. Geary, 501 U.S. 312, 320–21 [1991]). If one of the doctrines applies and the case is not justiciable because,

for example, the case has been rendered moot, then the appropriate course of action is to dismiss the matter without addressing the question.

In this case, the IHO erred by declaring there was no justiciable controversy and, on that basis, ordering relief on the merits in the absence of any evidentiary hearing at all. The parent's claims are justiciable, because the parent adequately alleged a cognizable injury, including that the district failed to develop and implement appropriate special education programming for the student for the 2023-24 school year, had standing to seek redress due to the alleged failure of the district to provide special education services to the student, and the case neither lacks ripeness nor is moot based on the limited information available in the administrative record (see Parent Ex. A). For all of the foregoing reasons, the IHO's finding as to justiciability was at best misplaced and must be vacated.

2. Remand

As a result of the foregoing errors of the IHO, I find the IHO's process in this matter failed to comport with standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]) and, furthermore, the procedures relied on by the IHO were not consistent with the requirements of due process (34 CFR 300.514[b][2][ii]). In summary, with no evidentiary hearing at all and without providing the district an opportunity to be heard, the IHO made presumptions that facts alleged by the parent in the due process complaint notice and statements made by counsel for the parent during the hearing were true, made assumptions as to factual findings, and precluded the district from asserting a June 1 defense without determining whether such a defense was applicable to the parent's claims. As discussed above, the IHO denied the parties due process by issuing a final decision prior to the commencement of a hearing on the merits of the parties' dispute and in awarding relief after finding that there was no justiciable controversy.

Due to the infirmities in the hearing process, there is no recourse but to vacate the IHO's final decision dated April 29, 2024.

VII. Conclusion

The IHO may have had some valid concerns to raise with the parties during this proceeding. However, as described above, the IHO failed to conduct the impartial hearing in accordance with the requirements of due process. As a result, the matter must be remanded to conduct an evidentiary hearing. Multiple proceedings were recently filed with the Office of State Review with similar conduct by the same IHO, and in my view, it would be ill advised to remand the matter to the same IHO in this instance. Accordingly, I will direct that the matter be remanded to a new IHO.

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

THE APPEAL IS SUSTAINED.

IT IS FURTHER ORDERED that the decision of the IHO dated April 29, 2024 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to a different IHO to conduct an impartial hearing and issue a decision after both parties have been afforded a reasonable opportunity to be heard and upon an evidentiary record that has been adequately developed.

Dated: **Albany, New York**
July 11, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER