The University of the State of New York

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

No. 24-234

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 Fiona M. Dutta, 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 the decision of an impartial hearing officer (IHO) which found that the district failed to offer respondent's (the parent's) son a free appropriate public education (FAPE) and ordered it to provide direct funding for unilaterally obtained services and a bank of hours of services as compensatory education. 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 similar proceedings like it challenging similar decisions by the same IHO, were recently filed with the Office of State Review (see Application of the New York City Dep't of Educ., Appeal No. 24-223, Application of the New York City Dep't of Educ.,

Appeal No. 24-225, Application of the New York City Dep't of Educ., Appeal No. 24-226, Application of the New York City Dep't of Educ., Appeal No. 24-228, Application of the New York City Dep't of Educ., Appeal No. 24-229, Application of the New York City Dep't of Educ., Appeal No. 24-230, Application of the New York City Dep't of Educ., Appeal No. 24-231, Application of the New York City Dep't of Educ., Appeal No. 24-232). Given the limited nature of the appeal and the procedural posture of the matter—namely that the only evidence admitted was two documents during a pendency hearing and the IHO's interim decision regarding evaluations—and, as there was no evidentiary hearing held on the merits of the parent's claims, there is little evidence to describe the student's needs or educational history. Accordingly, the description of the facts and educational history of this student is limited to the allegations in the parent's due process complaint notice and a December 2018 IESP, upon which a pendency determination was based (Parent Exs. A-B).

A CSE convened on December 20, 2018, to develop an IESP with an implementation date of January 14, 2019 (Parent Ex. B at pp. 1, 6-7). The December 2018 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in English and delivered in a separate location, two 30-minute sessions per week of individual speech-language therapy in English, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 6-7).[1]

A. Due Process Complaint Notice

By 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 for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the last program developed for the student was a December 20, 2018 IESP (id.). The parent contended that the district did not supply providers for the services it recommended for the student in the December 2018 IESP and failed to inform the parent how the services would be implemented for the 2023-24 school year (id. at p. 2). The parent also argued that the district had improperly and impermissibly shifted its responsibility to provide services to the student onto the parent, who was required to locate providers (id.). The parent alleged that in preparing for the 2023-24 school year, she was unable to procure a provider for the school year at the district's rates and had no choice but to retain the services of an agency to provide the mandated services at " an enhanced rate" (id.). The parent further notified the district that if it did not fulfill its obligations to the student, she would take unilateral action to implement the necessary services for the student and would request funding from the district for such services obtained (id.). However, the parent acknowledged that the district had "the right to implement all necessary services directly" (id.). The parent invoked pendency rights and further sought a declaration that the district failed to provide the student with a FAPE as well as with equitable services (id. at p. 3). As additional relief, the parent requested an award of funding for five "sessions" of SETSS, two 30-minute sessions of individual speech-language therapy and two 30-minute sessions of individual OT at enhanced rates for the 2023-24 school year; an allowance of funding for payment to the student's provider/agency for SETSS,

[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.

speech-language therapy and OT at enhanced rates for the 2023-24 school year, an award of all related services set forth on the student's last IESP for the 2023-24 school year, and a bank of compensatory education services to make-up for any mandated services not provided by the district (id.).

B. Impartial Hearing Officer Decisions

On October 16, 2023, the parent's attorney and the IHO convened for a pendency hearing (Tr. pp. 1-17). Two exhibits were admitted into evidence (Parent Exs. A-B). In an interim decision on pendency dated October 16, 2023, the IHO ordered the district to provide the student with "services consistent with" the December 2018 IESP, which consisted of five periods per week of SETSS and related services "for the duration of this pendency agreement" (Oct. 16, 2023 Interim IHO Decision at p. 4).[2] A prehearing conference was held on November 2, 2023, at which the district did not appear (Tr. pp. 18-24). Status conferences were held on November 30, 2023, December 22, 2023, January 26, 2024, March 8, 2024, and April 4, 2024 (Tr. pp. 25-58). During the April 4, 2024 status conference, another status conference was scheduled for May 9, 2024 (Tr. p. 56).

In a decision dated April 29, 2024, the IHO recounted that the final status conference in the matter occurred on April 4, 2024 and "[a] hearing did not go forward as it [wa]s unnecessary due to a lack of any controversy" and that the compliance date had been extended (IHO Decision at p. 3). Next the IHO wrote that "upon information and belief the [district] ha[d] neither conducted an evaluation nor reconvened the CSE to develop a new IESP despite [his] issuing [an] order back in October 2023, which ha[d] added to the already considerable delay in th[e] case" (id. at p. 4). The IHO then determined that "[n]o [j]usticiable [c]ontroversy [e]xist[ed] due to the district having the burden to implement the student's December 2018 IESP and failing to do so (id.). 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 noted that a private school need not employ certified special education teachers and determined that the district was "precluded from raising the issue of the SETSS or other provider's certification as a bar to recovery (id. at p. 5). The IHO further found that the district was "equitably barred from objecting to the rate of payment for services due to its nonfeasance" (id.). The IHO next determined that, because the district failed to evaluate the student and thereafter develop a new IESP as directed pursuant to his October 16, 2023 interim decision, the district was "barred from raising the June 1 putative bar to recovery even if perchance, [the p]arent did not meet her notification requirements" (id. at pp. 5-8). The IHO then found that the parent was entitled to direct payment to the provider, as well as compensatory education (id. at pp. 8-11).

The IHO then ordered relief based on a finding that the district failed to offer the student a FAPE for the 10-month, 2023-24 school year by failing to implement the December 2018 IESP (IHO Decision at p. 11). The IHO ordered the district to pay the parent's providers at their

[2] The IHO also issued an interim decision on October 10, 2023, wherein he sua sponte struck paragraphs from the district representative's notice of appearance, which he had found objectionable (Oct. 10, 2023 Interim IHO Decision at p. 6). The IHO issued another interim decision on October 16, 2023, directing the district to evaluate the student (Oct. 16, 2023 Interim IHO Decision at p. 3; see Tr. pp. 6-7; IHO Ex. I).

contracted rates for "the mandate contained in the 2018 IESP," upon provision of the applicable attendance records and invoices (id. at p. 12). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's twelve [sic] month 2023-2024 school year, the same services set forth above at the same rate of pay and frequency," upon presentation of the applicable invoices and attendance records (id.). Lastly, the IHO awarded the student a bank of compensatory education for unimplemented services for the 10-month, 2023-24 school year, which consisted of five 60-minute sessions per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT to be delivered by the parent's chosen providers at a rate not to exceed $300 per hour for each service (id. at pp. 12-13).

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 therefore 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, waiving any affirmative defenses, or agreeing that the parent had satisfied her burden of demonstrating the appropriateness of her unilaterally obtained services. The district also argues that the IHO improperly failed to provide notice to the parties that he intended to issue a final decision without holding an impartial hearing on the merits. 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 also contends that issues related to the appropriateness of the unilaterally obtained services and equitable considerations under the Burlington/Carter analysis also remain justiciable. The district further alleges that the IHO's erroneous assertions shifted the parent's burden onto the district and improperly barred the district from raising equitable considerations. Lastly the district asserts that the issue of appropriate relief remains a justiciable issue. As relief, the district requests that the IHO's decision be vacated and that the matter be remanded for a full and complete hearing.

The parent has not interposed an answer in this matter.

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 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]).

[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 (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.

VI. Discussion

A. Conduct of the Impartial Hearing

Having reviewed the hearing record and the district's request for review, the district's appeal must be sustained because the impartial hearing was improperly conducted and this matter must be remanded for further proceedings.

Initially, the district argues that the IHO's failure to conduct a full hearing on the merits of the case violated due process. 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 (34 CFR 300.512; 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. June 1 Defense

With regard to the IHO's determination that the district was barred from asserting a June 1 notice defense, 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 November 30, 2023 status conference, to which the district did not appear, the IHO advised the parent's advocate that she "c[ould] tell [her] colleagues, that using that June 1st, 3602-c defense as a blanket for all claims will not fly here" (Tr. p. 28). In his decision, the IHO determined that the district's failure to evaluate the student precluded the district from raising the June 1 defense (IHO Decision at p. 5).

In finding the June 1 deadline "irrelevant," the IHO appears to have determined that that any failure to convene the CSE annually to develop an IESP for the student, necessarily results in a finding that the district denied the student a FAPE (IHO Decision at pp. 5-6). In this matter, although the parent's due process complaint notice requested a finding that the district denied the student a FAPE as well as equitable services for the 2023-24 school year, all of the relief requested by the parent was related to equitable services for a parentally placed student (see Parent Ex. A at pp. 3, 4). Accordingly, rather than barring the district from raising a defense to equitable services, such as the June 1 deadline, the IHO could have conducted a prehearing conference to more accurately identify the issues for the hearing (see 8 NYCRR 200.5[j][3][xi[a]).

Critically, an assessment of whether the parent complied with the June 1 notice deadline would require the IHO to conduct a fact analysis based upon an evidentiary record. But since the IHO failed to hold an evidentiary hearing, there was no opportunity for either party to develop an evidentiary record and the IHO's holding that the district was barred from raising the June 1 deadline must be vacated.

Moreover, to the extent the IHO barred the district from raising a June 1 defense based on noncompliance with his October 2023 interim order directing the district to evaluate the student and thereafter convene a CSE meeting, the IHO's final decision was issued prior to the scheduled May 9, 2024 status conference where the district and parent were directed to report back on the status of the district's compliance with the IHO's interim decision (see Tr. 55-56).

2. Justiciability Determination

For the first time in his final decision, the IHO indicated that the case was not a "justiciable controversy" (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.

However, 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 at p. 1). For all of the foregoing reasons, the IHO's finding as to justiciability was at best misplaced and must be vacated.

3. Remand

As a result of the IHO's foregoing errors, 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 the facts alleged by the parent in the due process complaint notice were true and precluded the district from asserting its June 1 defense without a hearing record to make a fact-based determination. As noted repeatedly above, no evidentiary hearing was conducted and therefore the district was, at a minimum, denied the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. There was no evidentiary basis upon which the IHO could be permitted to make factual findings. Due to the infirmities in the impartial hearing process, there is no other recourse but to vacate the IHO's April 29, 2024 decision in its entirety.[5]

VII. Conclusion

Having determined that the IHO failed to conduct the impartial hearing in a manner consistent with due process, erred in prematurely concluding that the district failed to offer the student a FAPE, erred in awarding relief based on a finding that there was no justiciable controversy and without developing an adequate evidentiary record, the IHO's decision awarding the parent relief must be vacated and this matter must be remanded to allow the parties to present additional evidence and fully develop the hearing record on the merits of the parent's claims. To the extent that the parent continues to seek funding for the costs of the services she unilaterally obtained for the student during the 2023-24 school year, the parent bears the burden of establishing that such services were appropriate.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, 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 10, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

[5] In the interim decision dated October 16, 2023, the IHO provided no legal authority for his decision to order the district to evaluate the student and did so without any relevant evidence (Tr. p. 6). Nevertheless, the district has not appealed from the interim decision and it will not be addressed at this point of the proceeding.