The University of the State of New York

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

No. 24-243

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 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 determined that the parent failed to timely request equitable services from respondent (the district) pursuant to Education Law § 3602-c for the 2023-24 school year and therefore denied her request that the district fund her son's private special education services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The 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 and the IHO's decision will not be recited here in detail. Briefly, the CSE convened on April 1, 2015, to formulate the student's IESP for the 2015-16 school year (see

generally Parent Ex. B).[1] The April 2015 CSE found the student eligible for special education services as a student with a speech or language impairment and recommended that the student receive ten periods per week of group special education teacher support services (SETSS), three 30-minute sessions per week of individual speech-language therapy, and two 45-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 7).

A. Due Process Complaint Notice

In a due process complaint notice dated January 19, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services by failing to provide adequate special education and related services for the 2023-24 school year (Parent Ex. A). The parent indicated that the last program the district developed for the student was the April 1, 2015 IESP, which mandated ten sessions per week of SETSS and additional related services (id.). According to the parent, the student required the same special education and related services for the 2023-24 school year as those that were set forth in the April 2015 IESP and the district failed to provide them (id.). In addition, the parent asserted that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). Among other relief, the parent requested an award of ten sessions per week of SETSS at enhanced rates for the 2023-24 school year (id. at p. 2).[2]

B. Events Post Dating the Due Process Complaint Notice

On April 16, 2024, the parent electronically signed a contract with Step Ahead to provide related services to the student for the entire 2023-24 school year pursuant to the student's April 2015 IESP (Parent Ex. C).

C. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH) who conducted status conferences on February 21, 2024 and April 3, 2024 (Tr. pp. 1-13). An impartial hearing convened on May 1, 2024 and concluded the same day (Tr. pp. 14-43). During the impartial hearing, the parent clarified that although her due process complaint notice requested relief in the form of funding for SETSS and the related services mandated in the April 2015 IESP, she was now only seeking direct funding for the private speech-language therapy delivered by Step Ahead during the 2023-24 school year (Tr. p. 32; see IHO Decision at p. 3).

[1] The hearing record contains duplicate copies of the April 2015 IESP (compare Parent Ex. B, with Dist. Ex. 2). For purposes of this decision, only the parent's exhibit will be cited when referring to the April 2015 IESP. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] Although the due process complaint notice did not allege any facts related to the 2023-24 school year and it is uncontroverted that no IESP was developed for the 2023-24 school year, the parent also sought "all related services and aides on the IESP for the 2023-2024 school year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard [district] rate for such service" (Parent Ex. A at p. 2).

In a decision dated May 3, 2024, the IHO explained that Education Law § 3602-c requires a parent to file with the district a request for services "on or before the first of June preceding the school year for which the request is made" and that the district bears the burden of proof on such issue (IHO Decision at pp. 6-9). According to the IHO, both parties had an opportunity at the hearing to present evidence regarding the parent's compliance with the June 1 deadline, neither party elected to present any evidence, and the parent's representative "noted that evidence on this issue did not exist" (id. at pp. 8-9). The IHO determined that the student was not eligible for equitable services because the parent failed to timely notify the district pursuant to Education Law § 3602-c (id. at p. 9).[3]

Next, the IHO made alternative findings regarding the parent's request for direct funding for speech-language therapy delivered by Step Ahead using a Burlington/Carter analysis (IHO Decision at pp. 3, 9-12). The IHO alternatively found that the district failed to offer the student a FAPE, and that the parent failed to meet her burden of proving that the unilaterally obtained speech-language therapy met the student's needs (id. at pp. 10-12). The IHO dismissed the parent's complaint with prejudice, but ordered the district to convene a CSE meeting to determine whether the student was eligible for special education and related services (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in holding that Education Law § 3602-c requires parents to notify the district each year of their intent to seek equitable services. The parent further argues that the IHO improperly shifted the burden of proof from the district to the parent. The parent asserts that the IHO also erred in holding that the parent failed to meet her burden under the Burlington-Carter standard that Step Ahead provided the student with an appropriate unilateral program that met the student's unique needs. The district argues that the IHO's decision should be affirmed.

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

[3] The IHO found the student was not eligible for equitable services for the 2022-23 school year (IHO Decision at p. 9). Presumably, the IHO's reference to the 2022-23 school year was a typographical error, as the school year at issue in this case was the 2023-24 school year.

services is made (Educ. Law § 3602-c[2]).[4] "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 [individualized education program (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.).[5] 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 threshold issue to be resolved in this matter is whether the parent complied with the June 1 deadline thus entitling the student to equitable services under New York Education Law § 3602-c. For the reasons that follow, I find no reasonable basis to overturn the IHO's decision which denied funding for privately-obtained speech-language therapy for the 2023-24 school year.

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

[4] 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]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at hhttps://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.

school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

The district raised the June 1 affirmative defense in its April 24, 2024 exhibit list and again in its opening statement on May 1, 2024 (Dist. Ex. List; Tr. p. 21). In response to the district's June 1 affirmative defense, the parent's representative admitted "[w]e don't have any evidence of really what took place between 2015 and [May 2024]" (Tr. p. 22). The parent's representative further asserted "[t]o the extent we are missing evidence of what actions the parents took, [it] is also true that we don't have any evidence of what actions the [district] took to reach out to the parents, which is its obligation" (id.).[6] In his decision, the IHO noted that neither party presented any evidence with respect to the June 1 issue and determined that the parent did not comply with the June 1 deadline under Education Law § 3602-c (IHO Decision at pp. 8-9).

The parent does not allege that the district failed to raise the June 1 affirmative defense; however, the parent contends 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. 38; Req. for Rev. ¶¶ 7-9). However, this argument is in direct contravention of the requirement set forth in Education Law §

[6] With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c (2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

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.

Next, the parent contends that the IHO impermissibly shifted the burden to the parent to prove compliance with the notice requirements under Education Law § 3602-c. While a school district carries the burden of proof at the impartial hearing, here, during the impartial hearing, the district affirmatively asserted that it did not receive a request for services from the parent (see Tr. pp. 21, 34, 35). 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 representative, assert that a request for equitable services was submitted to the district prior to June 1st (see generally Tr. pp. 1-43). Rather, the parent's representative asserted at the impartial hearing that the parent had no evidence to demonstrate that she submitted timely notice (see Tr. p. 22). 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 equitable services by June 1st preceding the 2023-24 school year (see generally Tr. pp. 1-43; Parent Exs. A-H).

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 equitable 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 IHO's alternative findings.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the parent did not provide the district with the required written notice for equitable services prior to June 1, 2023, the student is not entitled to equitable services for the 2023-24 school year, and the parent's requested relief for funding for speech-language therapy must be denied.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 7, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER