The University of the State of New York

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

No. 24-263

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq., 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 in part her request for direct funding for the cost of her son's private services delivered by three private companies for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the parent was entitled to relief. 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

Due to the nature of this appeal, a full recitation of the student's educational history is not necessary. Briefly, a CSE convened in September 2020 and determined that the student was eligible for special education and related services as a student with a learning disability (Parent

Ex. B at p. 1).[1] The September 2020 CSE recommended the student receive five periods of direct, group special education teacher support services (SETSS) per week, one 30-minute session of individual speech-language therapy per week, one 30-minute session of group speech-language therapy per week, two 30-minute sessions of individual occupational therapy (OT) per week, and full time 1:1 behavioral support paraprofessional services (Parent Ex. B at p. 13).[2]

The hearing record contains little information regarding what transpired between the time of the September 2020 IESP and May 2023. The hearing record includes a letter, dated May 19, 2023, that contained a conformed signature of the parent; the parent stated that she was parentally placing the student in a nonpublic school for the 2023-24 school year and was requesting special education services from the district for the student under the dual enrollment statute (Parent Ex. D). On August 15, 2023, the parent electronically signed a contract with EDopt LLC (EDopt) for services listed in an appendix to the contract (Parent Ex. E). In a ten-day notice, dated August 23, 2023, the parent, through "Prime Advocacy, LLC, duly Authorized o/b/o Parent," (Prime Advocacy) informed the district that it had failed to assign the student a provider to deliver the student's mandated services for the 2023-24 school year and requested that the district "fulfill the mandate" or the parent would be compelled to unilaterally obtain the services "through a private agency at an enhanced market rate" (Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated September 5, 2023, the parent, through an attorney from Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) (Parent Ex. A). The parent identified the services listed in the September 2020 IESP and indicated that the district had denied the student's right to equitable services under Education Law § 3602-c (id. at p. 2). According to the parent, the district impermissibly shifted its responsibilities to the parent when it failed to "supply providers for the services it recommended for the [s]tudent and failed to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent was unable to procure a provider that would accept the district's standard rates but retained an agency to provide the student with his mandated services for the 2023-24 school year at an enhanced rate (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's SETSS, OT, speech-language therapy, 1:1 paraprofessional support, and an award of compensatory education services for any mandated services not provided by the district (id. at p. 3).

After the due process complaint notice was filed, in a contract dated September 7, 2023, the parent arranged for OT services for the student from Dana's Occupational Therapy Services

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] 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.

PLLC (Parent Ex. J). In a third contract dated September 7, 2023, the parent arranged for speech-language therapy from Well Said Speech Services PLLC (Parent Ex. N).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 26, 2023 and concluded on February 22, 2024, after nine days of proceedings (Tr. pp 1-289). On October 30, 2023, the parent's attorney requested to withdraw the case without prejudice (Tr. p. 15). On December 4, 2023, a lay advocate from Prime Advocacy appeared with the parent present and the parent testified that she wanted the impartial hearing to go forward and the IHO decided to schedule the hearing (Tr. p. 33).[3] During the impartial hearing, the district conceded that it did not provide the student with SETSS, speech-language therapy, or OT during the 2023-24 school year (Tr. p. 49). However, the district argued that the parent was not entitled to relief because the parent failed to show she had transmitted the request for dual enrollment services to the district for the 2023-24 school year prior to the June 1, 2023 deadline (Tr. 264-265).

In a decision dated May 16, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 12). The IHO rejected the district's June 1 defense, finding that it should have been raised at the beginning of the impartial hearing (id.). The IHO found that the parent met her burden to prove the SETSS, speech-language therapy, OT, and paraprofessional services she unilaterally obtained for the student for the 2023-24 school year were appropriate (id. at pp. 14-15). With regard to equitable considerations, the IHO found that the parent failed to show why the parent's requested rates of $195 per hour for SETSS, $95 per hour for paraprofessional services, $300 per hour for speech-language therapy, and $300 per hour for OT were not excessive, inflated, and justified, and that the evidence provided by the parent was not credible (id. at pp. 15-17). As relief, the IHO ordered the district to fund the services privately obtained for the student for the 2023-24 school year, but at reduced hourly rates of $145 per hour for SETSS, $65 per hour for paraprofessional services, $245 per hour for speech-language therapy, and $225 per hour for OT (id. at pp. 16-17). The IHO also found that the student was entitled to makeup services from a provider of the parent's choosing because SETSS was not provided until December 2023, that the student should be reevaluated, and that the CSE must reconvene to develop programming for the student (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in ordering reducing the rate awarded for funding the student's services for the 2023-24 school year and requests that the district be directed to fund the student's privately obtained services at the rates that the parent contracted for with the three companies. The parent asserts that the IHO failed to develop the hearing record and that the IHO's points regarding the excessiveness of rates were "meaningless."

[3] During the hearing, the parent was unable to independently identify that Prime Advocacy was the agency she used to file the due process complaint notice for her but was able to identify the name of the lay advocate who appeared with her on that day (Tr. p. 32). The parent was unsure if she had withdrawn the hearing but indicated that she wanted the impartial hearing to go forward and then stated that she did not withdraw the request for an impartial hearing (id. at pp. 32-33).

In an answer and cross-appeal, the district responds to the parent's material allegations, and asserts that the IHO erred in allowing the parent to submit new evidence near the conclusion of the impartial hearing, but denying the district's defense that the parent failed to timely provide her request for IESP services under the dual enrollment statute. In the alternative, the district asserts that the parent's appeal should be denied and the IHO's decision to reduce the rates for the privately-obtained special education services should be affirmed.

Although the parent sought a specific extension of time to respond to the district's cross-appeal, ultimately the parent did not file a response.

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]).[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 [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

[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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-

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. June First Deadline

An initial threshold issue when determining whether a parent is entitled to reimbursement for privately obtained services under the State dual enrollment statute is whether the parent provided the district with a timely request for IESP services from the district.

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]). 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],

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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.

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 parent offered the May 19, 2023 letter purporting to provide the district with notice of her request for dual enrollment services under Education Law § 3602-c for the 2023-24 school year (Parent Ex. D). However, during the impartial hearing, the district inquired during cross-examination about the parent's communications with the district, and the parent testified that she did not communicate with the district to seek services for her son, but instead makes inquiries though the student's nonpublic school which, in turn, referred her to the companies and/or agencies that she worked with (Tr. p. 92-94). After cross-examination, the IHO provided the parent's advocate opportunity for redirect testimony; however, the advocate declined (Tr. p. 101). A review of the letter purportedly sent on behalf of the parent reveals that it was not addressed to anyone and contained only a two-word generic salutation consisting of "Dear Chairperson" (Parent Ex. D). The district also correctly argues that there is no evidence of how the request was transmitted to the district, thus it cannot be determined from the submitted letter whether it was sent or to whom.

The district noted in its closing argument, among other things, that the parent testified that the evidence showed that the parent did not send the district the request prior to the June 1 deadline and that the district was therefore not obligated to provide IESP services to the student (Tr. p. 265). In her closing argument, the parent's advocate argued that the parent signed and sent the May 19, 2023 request, and asserted that the parent should not have to provide the June 1 deadline notice because the district did not send a "prior written notice" advising the parent that she had to send a June 1 notice (Tr. pp. 279-80).[6] The parent's advocate further argued that an IESP had been developed for the student so the district was aware the student was attending a nonpublic school, and the requirement for the June 1 notice "again and again and again [wa]s unnecessary" (Tr. p. 280).[7]

[6] With respect to a parent's advocate's assertion that the district did not inform the parent of the June 1 deadline, 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 1st 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). Additionally, 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).

[7] To the extent that the parent's advocate asserted during the impartial hearing 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 should instead only require that the district be aware that the student is attending a nonpublic school and had previously received services through an IESP, 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

In this case, I find the district has the better argument. First, while the IHO rejected the district's June 1 defense by finding that it was raised for the first time during closing arguments, that does not bear out in the hearing record and was error. As described above, the district raised it during cross-examination of the parent on the first day of the hearing on the merits in January 2024 and, in contradiction to the advocate's statement during closing arguments that the parent had sent the request, the parent testified she did not communicate with the district regarding the 2023-24 school year and the advocate declined the opportunity to attempt to rehabilitate her testimony during redirect examination (Tr. pp 92-94, 101). Furthermore, the IHO did not issue any prehearing orders or directives regarding management of the impartial hearing, clarification of issues, or timeframes within which to assert defenses, which might have provided a valid basis for precluding the district's defense based on when it was raised.[8] Instead, I find the May 19, 2023 letter requesting dual enrollment services does not show that it was sent or to whom it was sent, and that the testimonial evidence tends to show that the parent did not send the letter at all. Accordingly, I find the district prevails on the basis of its June 1 defense and that the district was not obligated to implement special education services for the student in the nonpublic school during the 2023-24 school year. Consequently, those portions of the IHO's decision that ordered direct funding of the privately obtained services as well as compensatory education for missed SETSS must be reversed.[9]

VII. Conclusion

Based on the foregoing, the evidence shows that the IHO erred in rejecting the district's June 1 defense as it related to the provision equitable services to the student under Education Law § 3602-c for the 2023-24 school year. Accordingly, the parent was not entitled to direct funding for special education services that were privately obtained by the parent for the 2023-24 school year and the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

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must make the request each year for which they seek dual enrollment services. In addition, the district's obligation to annually review a student's IEP and to provide prior written notice under the IDEA is distinct from the district's obligations with the requirements of Education Law § 3602-c, which is the subject of this proceeding.

[8] Further issue clarification and hearing management may be accomplished using tools such as requiring parties to submit prehearing memorandums of law, to present opening statements with specific issue identification instead of broad statements of the parties' positions, and provision of disclosures before the start of the impartial hearing to ensure that parties can identify disputed areas of fact and be on notice of the issues to be addressed during the impartial hearing (see, e.g., Application of a Student with a Disability, Appeal No. 23-121; Application of a Student with a Disability, Appeal No. 23-121; see also, Application of a Student with a Disability, Appeal No. 23-157); however, the IHO did not attempt to clarify the disputed issues with any prehearing procedures.

[9] The district did not challenge those portions of the IHO's decision which ordered the district to reevaluate the student or convene a CSE meeting.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 16, 2024 is modified by reversing those portions which ordered the district to fund special education and related services privately obtained by the parent for the 2023-24 school year and to make up missed SETSS.

Dated: **Albany, New York**
August 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER