The University of the State of New York

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

No. 24-285

**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 Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Always a Step Ahead (Step Ahead) for the 2023-24 school year. The district cross-appeals from a portion of the IHO's decision, alleging that the IHO should have dismissed the parent's due process complaint notice on the ground that the student was not entitled to equitable services from the district for the 2023-24 school year. The appeal must be dismissed. The cross-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

A CSE convened on August 20, 2021 to develop an IESP for the student with an implementation date of September 13, 2021 (Parent Ex. B at p. 1). The August 2021 CSE found the student eligible for special education as a student with an other health impairment and recommended that the student receive two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 7).[1] The IESP indicated that the student was "Parentally Placed in a Non-Public School" (id. at p. 9).

Turning to the 2023-24 school year at issue, according to session notes entered into evidence, the student began receiving private OT services on September 13, 2023 (Parent Ex. G at p. 1).[2]

### A. Due Process Complaint Notice, Impartial Hearing, and Intervening Events

In a due process complaint notice dated December 20, 2023, the parent alleged that the district failed to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further asserted that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide "services providers" (id.). The parent also claimed 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.). The parent requested an "[a]llowance of funding for payment to the student's providers/agencies" for the provision of OT at the enhanced rates for the 2023-24 school year (id. at p. 2).

A prehearing conference was held on February 14, 2024, at which the district did not appear (Tr. pp. 1-5). The parties reconvened for a status conference on March 14, 2024, at which the district raised the affirmative defense of the parent's failure to request equitable services by June 1 (Tr. p. 9).[3]

On May 9, 2024, the parent electronically signed a document on the letterhead of Step Ahead, stating that she was "aware that the rate of the related services provided to [her] child are $250 an hour, and that if the [district] does not pay for the services, [she] will be liable to pay for

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

[2] An undated document indicated that the student was receiving two 30-minute sessions per week of OT at the nonpublic school during an unspecified time period (Parent Ex. H at p. 1). The two-page document included the name of a different student throughout the description of the student's present levels of performance and did not specify whether or not the student received individual or group services (id.). The document also included two long-term goals, which appeared to be written in two different fonts (id.).

[3] A second status conference was held on April 12, 2024 (Tr. pp. 17-25).

them" (Parent Ex. C at p. 1).[4] The letter reflected that the company was providing services "consistent with those listed in" the August 2021 IESP for the 2023-24 school year (id.).

The parties reconvened for an impartial hearing on May 21, 2024, which concluded on the same day (Tr. pp. 26-83). During her opening statement, the district's attorney reasserted the district's contention that the parent had failed to timely request equitable services for the 2023-24 school year and that, as a result, the parent had forfeited the right to equitable services for the school year (Tr. pp. 31-32). The district's attorney further argued that the district would challenge the appropriateness of the parent's unilaterally obtained OT services, as well as the qualification of the provider and the rate charged (Tr. p. 33). Lastly, the district's attorney stated that the district would "argue equities" and that the scope of the impartial hearing was limited to the issues raised in the parent's due process complaint notice (id.). The parent's attorney argued in her opening statement that the parent's evidence would demonstrate the appropriateness of the OT services and that equitable considerations favored the parent (Tr. p. 34). With regard to the requirement of the June 1 notice, the parent's attorney asserted that "[a]s far as the June 1st letter [wa]s concerned, that [wa]s an affirmative defense and the District ha[d] not brought anything on record to indicate in the negative that they ha[d] not received it or that they ha[d] received it late" (Tr. pp. 34-35). The parent provided a written affirmation from the secretary of Step Ahead, who appeared at the impartial hearing and was cross-examined by the district (Tr. pp. 37-56). In their closing arguments, the attorneys reiterated their previously articulated positions (Tr. pp. 58-77).

**B. Impartial Hearing Officer Decision**

In a decision dated May 22, 2024, the IHO found that the parent did not timely request equitable services from the district by June 1, 2023 under the dual enrollment statute (IHO Decision at p. 5). The IHO then made alternative findings—"assuming arguendo" that the parent was not precluded from seeking her requested relief—the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2023-24 school year (id. at pp. 5-6).[5, 6] Turning to the appropriateness of the parent's unilaterally obtained OT services, the IHO found that the parent did not meet her burden of demonstrating that the OT services she obtained met the individual needs of the student or that they were reasonably calculated to provide educational benefit (id. at p. 6). The IHO further found that the evidence presented did not contain any specific objective evidence to show that the student had made progress in OT during the 2023-24 school year (id.). The evidence showed that the student was receiving OT and working on certain skills (id. at p. 7). The IHO noted that there was no progress report in evidence and the student's provider did not testify "as to how these skills were initiall[]y identified or modified during the school year or about any progress she may or may not have observed" (id.). The IHO also noted that the parent

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

[5] The IHO's decision was not paginated; for the purposes of this decision, the IHO's decision will be cited by reference to its consecutive pagination with the cover page as page one (see generally IHO Decision).

[6] In an agreement signed by the district on January 9, 2024, the parties agreed that student's pendency services were pursuant to a January 31, 2023 IESP, which neither party offered into evidence (Pendency Implementation Form). The IHO noted the discrepancy in her decision (IHO Decision at p. 4).

did not testify about the student's OT skills or the student's progress (id.). With regard to equitable considerations, the IHO determined that the parent did not provide the district with 10-day written notice of her intention to unilaterally obtain private services and seek public funding (id.). The IHO further found that the parent did not exercise due diligence in locating a private provider and that the rate charged by Step Ahead was unreasonable (id.). For all of those reasons, the IHO denied the parent's request for direct funding of her unilaterally obtained OT services (id.).

## IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's request for direct funding for her unilaterally obtained OT services from Step Ahead. The parent argues that the district did not send a notice to the parent indicating that she had to request equitable services prior to June 1, which violated the district's standard operating procedures manual. The parent also asserts that the parent was not required to send a June 1 request for equitable services every year and that it was the district's burden to prove that the parent did not send a request. The parent further contends that a Burlington/Carter analysis should not apply to her claims, and even applying that standard, the services were appropriate and the IHO's decision should be reversed.[7] With regard to equitable considerations, the parent argues that 10-day written notice does not apply, and that the parent established a financial obligation to Step Ahead. As relief, the parent requests direct funding of two-30-minute sessions per week of OT at the rate of $250 per hour for the 2023-24 school year.

In an answer and cross-appeal, the district argues that the IHO properly denied all relief but should have dismissed the parent's due process complaint notice with prejudice for failure to request equitable services by June 1.

## 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

[7] The parent's attorney agreed that a Burlington/Carter analysis should apply to her claims during the impartial hearing (Tr. pp. 34, 64-77).

services is made (Educ. Law § 3602-c[2]).[8] "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.).[9] 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 IHO found that the parent was not entitled to equitable services for the 2023-24 school year under Education Law § 3602-c (IHO Decision at p. 5). The district raised the June 1 deadline as an affirmative defense at the prehearing conference and again in its opening and closing statements (Tr. pp. 9, 31-32, 58-64).[10]

[8] 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]).

[9] 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.

[10] 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

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 parent argues that the district failed to send her notice that she was required to request services by June 1. 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).

The parent also asserts that Education Law § 3602-c does not require that a written request for services be filed "every June 1 prior to a school year" but instead only requires the notice for the first school year in which such services are requested. However, this argument is in direct contravention of the requirement set forth in Education Law § 3602-c, which states that the request be filed "on or before the first of June preceding the school year for which the request is made" (Educ. Law § 3602-c[2][a] [emphasis added]). The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, if a parent seeks an individual right to special education services under an IESP and the due process protections afforded by State law, the parent must satisfy the statutory notice requirement and make the request each year for which they seek dual enrollment services.

The parent also argues that it was the district's burden to establish that the parent did not request equitable services by June 1, 2023. While a school district carries the burden of proof at

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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 impartial hearing, here, during the impartial hearing, it affirmatively asserted that it did not receive a request for services from the parent (see Tr. pp. 9, 31-32, 58-64). If the parent had provided the notice, it was incumbent upon the parent to rebut the district's defense and produce the notice with proof that it was sent to the district. The parent did not appear at the impartial hearing and did not, through her attorney, assert that a request for equitable services was submitted to the district prior to June 1 (see generally Tr. pp. 1-38). Similarly, on appeal, the parent also does not affirmatively assert or argue that she did provide timely notice. Thus, the hearing record contains no evidence satisfying the requirement under Education Law § 3602-c, namely, that the parent made a written request for IESP services by June 1 preceding the 2023-24 school year (see generally Tr. pp. 34-35, 64-77; 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 IESP services from the district for the 2023-24 school year by June 1, 2023. Having found that the parent did not rebut the district's affirmative defense regarding the June 1 deadline, it is unnecessary to further address the parent's appeal of the remainder of the IHO's findings.

With regard to the district's cross-appeal, I decline to disturb the IHO's well-reasoned and well-supported decision. Notably, the district was not aggrieved by the IHO's failure to dismiss the parent's due process complaint notice with prejudice. The IHO found the parent failed to provide a June 1 written request and as a result was not entitled to equitable services for the 2023-24 school year (IHO Decision at p. 5). Out of an abundance of caution, to develop the hearing record and to prevent remand, the IHO made alternative findings and addressed all of the parent's claims in the due process complaint notice. While it is not always necessary for an IHO to make alternative findings, in this matter, it was not error for the IHO to do so.

**VII. Conclusion**

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

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**August 2, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**