The University of the State of New York

The State Education Department
State Review Officer
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No. 24-533

Application of a STUDENT WITH A DISABILITY, by her 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 Toni L. Mincieli, 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 daughter's private services delivered by EdZone, LLC (EdZone) 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

A CSE convened on March 16, 2021 and developed an IESP for the student, which recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) and one 30-minute session per week of individual counseling (Parent Ex. B at pp. 1, 6).

The hearing record does not include any evidence regarding the student's educational history after the March 2021 IESP through the 2022-23 school year.[1]

On August 30, 2023, the parent signed a contract with EdZone for the 2023-24 school year, for the provision of special education services to the student (see Parent Ex. C). In a letter, dated September 4, 2023, the parent's representative submitted a ten day notice to the district on the parent's behalf, advising a "Chairperson" that the district had failed to assign a provider to delivered the student's mandated services for the 2023-24 school year, requesting that the district provide the student with the services, and, in the event the district failed to do so, stating the parent's intent to secure said services from a private agency at an enhanced rate (see Parent Ex. D). EdZone provided the student with SETSS for the period of September 7, 2023 through June 19, 2024 (Parent Exs. E ¶ 2; H at pp. 1-21).

A. Due Process Complaint Notice

In a due process complaint notice dated July 14, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (see Parent Ex. A). The parent asserted that the district failed to ensure that the student had special education service providers for the 2023-24 school year and requested an order of pendency based on a November 8, 2023 IESP consisting of seven hours per week of SETSS, funding for seven hours per week of private SETSS provided to the student for the 2023-24 school year at "an enhanced rate set by the provider," and an award of compensatory education for any mandated services that were not provided (id. at p. 3).

B. Impartial Hearing and Impartial Hearing Officer Decision

On July 15, 2024, an IHO from the Office of Administrative Trials and Hearings (OATH) who was originally assigned to the matter (IHO I) issued a prehearing order to the parties setting forth "firm expectations" for the impartial hearing (see SRO Ex. A).[2] On September 5, 2024, the district submitted a motion to dismiss for lack of subject matter jurisdiction and ripeness (see Dist. Mot. to Dismiss). The parent's representative submitted a response to the district's motion to

[1] The parent's due process complaint notice references a November 11, 2023 IESP that allegedly recommended that the student receive seven sessions of SETSS per week (Parent Exs. A at pp. 1-2); however, neither party offered the November 2023 IESP as evidence during the hearing impartial.

[2] The July 15, 2024 prehearing order and an October 1, 2024 letter regarding reassignment of the matter to a different IHO were attached as proposed additional evidence with the parent's appeal (see Req. for Rev. p. 2). The district does not deny that the prehearing order and letter of IHO reassignment relate to the present matter or object to the documents being considered; rather the district references the documents in its answer (Answer ¶ 13). Here, the district should have included IHO 1's prehearing order and the IHO reassignment letter as part of the hearing record filed on appeal, as State regulation requires that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Because the prehearing order and IHO reassignment letter should have been included in the hearing record, the documents have been considered and will be cited as SRO exhibits "A" and "B," respectively. The district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]).

dismiss, also dated September 5, 2024 (see Parent Response to District's Mot. to Dismiss). On September 25, 2024, the district provided a response to the parent's due process complaint notice (see Due Process Response). The district's due process response stated, among other things, that the district intended to pursue the June 1 affirmative defense (id. at p. 1).[3] On October 1, 2024, the case was reassigned from IHO 1 to another IHO from OATH who ultimately presided over the impartial hearing and issued the final decision (the IHO) (SRO Ex. B).

An impartial hearing convened and concluded on October 7, 2024 (see Tr. pp. 1-28). During the impartial hearing, the parties discussed the district's September 5, 2024 motion to dismiss for lack of subject matter jurisdiction (Tr. pp. 4-8). After hearing the parties' arguments on the matter, the IHO denied the district's motion to dismiss and stated that IHOs have jurisdiction to hearing claims regarding implementation of equitable services and that the matter was ripe (Tr. p. 8). The parent's attorney confirmed that pendency and compensatory education were no longer at issue (Tr. p. 10). During the impartial hearing, the district brought up the June 1 affirmative defense and the parent stated that the district did not timely raise the defense and that the letter was mailed to the district; the IHO directed the parties to provide evidence regarding the June 1 letter by October 11, 2024 (Tr. pp. 20, 25-26).

Neither party submitted additional evidence by the October 11, 2024 deadline (IHO Decision at p. 5). In a decision dated October 16, 2024, the IHO found that the hearing record lacked evidence of the June 1 letter having been submitted by the parent to the district (id.). The IHO held that it was more difficult for the district to prove that it had not received the June 1 letter than it would be for the parent to prove that she had sent the June 1 letter (id.). Therefore, the IHO found that the parent failed to prove that she had timely submitted a June 1 letter and denied the parent's requested relief (id.).

IV. Appeal for State-Level Review

The parent appeals through a lay advocate, alleging that the IHO erred by not barring the district from raising the June 1 affirmative defense and asserting that the district failed to prove that it did not receive a request from the parent for equitable services prior to June 1, 2023.[4] The parent argues that the prehearing order issued by IHO 1 reflects that the district should have disclosed any affirmative defenses within 10 days of the impartial hearing. The parent also argues that the parent's delayed service of her notice of intention to seek review should be excused.

[3] Attached to the district's response to the due process complaint notice was a prior written notice, which indicated that a CSE meeting took place on February 12, 2024 and developed an IESP for the student (Due Process Response at pp. 3-4).

[4] The request for review does not conform to practice regulations governing appeals before the Office of State Review. The lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

In an answer, the district argues that it notified the parent of its intention to raise the June 1 affirmative defense in its September 25, 2024 due process response and that the IHO's dismissal of the parent's case for failure to prove that a June 1 letter was sent should be affirmed. The district asserts that it complied with IHO 1's October 2024 prehearing orders. The district further asserts that it is the duty of the Office of State Review to strictly enforce the timelines delineated in 8 NYCRR 279(b) and that the parent failed to timely serve a notice of intention to seek review.

The parent served and filed a reply; however, the reply is rejected as it was not timely served. The parent's lay advocate requested an extension to serve the reply until January 4, 2025, which was granted; however, the reply was not served until January 6, 2025 (Parent Reply Aff. of Serv.).[5] In addition, the reply suffers from other deficiencies. As with the request for review, the reply does not comply with the 8 NYCRR 279.8(a)(4), which states that "all pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney." The reply was neither signed by an attorney nor the parent as required by State regulations. For that matter, the reply was not signed at all as it sets forth only a signature line, below which the lay advocate's name and address are typed. Furthermore, I note that it appears that the parent's advocate served the district by email with consent; however, the affidavits of service filed by the lay advocate are likely inaccurate in that they state that the lay advocate served the district's attorney by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or consenting to service by an alternate delivery method, both the method of service used as well as the identification of what papers were served must be accurately set forth in the affidavit of service. It appears that the lay advocate did not understand how to properly draft the affidavits of service, and they are defective.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state

[5] The parent's advocate did not request an additional extension of time or set forth any reason for the late service of the pleading.

[6] State law provides that "services" includes "education for students with disabilities," which means "special

shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New 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 hearing record reflects that this student was parentally placed in a private school, but that the parent was seeking to obtain special education and related services from the district (Parent Ex. D). 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

educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

York 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]).

Here, IHO 1's July 15, 2024 prehearing order directed the parties to "articulate[] and communicate[] in writing (via D[ue]P[rocess]R[esponse], motion, email, etc.) within ten (10) business days of the scheduled hearing date" to the other party "[a]ny known or knowable affirmative defense" (SRO Ex. A ¶ 3). The hearing record reflects that the district disclosed its intent to assert the June 1 affirmative defense in its September 25, 2024 due process response (Due Process Response at p. 1). I find that the district complied with the affirmative defense disclosure directives contained in IHO 1's July 2024 prehearing order by announcing its intent to raise the June 1 affirmative defense in writing in its due process response, dated within 10 days of the impartial hearing. The district then proceeded to argue the June 1 defense at the impartial hearing, and the parent was provided the opportunity to be heard (Tr. pp. 20, 25).

At the impartial hearing, the IHO permitted the parties "until close of business" on October 11, 2024, four days after the impartial hearing, "to provide evidence" regarding the June 1 notice; i.e., for the parent, that the June 1 notice "was sent" and, for the district, "that it was not sent" (Tr. pp. 25-26). The IHO informed the parties that "if [she] d[id] not hear from the parties by that date, [she] w[ould] issue a ruling based on the information presented" (Tr. p. 26). Thus, the IHO gave both parties the opportunity to present evidence regarding the June 1 notice. Further, although the district would generally have the burden of proof on an affirmative defense, as the IHO observed, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] [noting that "it is unclear how the school district could have proved such a negative"). Ultimately, although the parent generally alleges on appeal that the district did not submit any proof that it did not receive a June 1 notice, she does not challenge the IHO's findings that the parent was in the best position to prove the letter was sent; that she did not, in fact, prove that she sent the notice; and that the parent failed to timely request special education services by the June 1 deadline (IHO Decision at p. 5). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Based on the foregoing, there is insufficient basis to disturb the IHO's determination that the parent did not submit a written request for equitable services for the student

by June 1, 2023 for the 2023-24 school year and that, therefore, the district was not obligated to provide the student with equitable services for that school year.

VII. Conclusion

Having found that the hearing record contains no evidence that the parent made a written request for equitable services by June 1st preceding the 2023-24 school year as required under Education Law § 3602-c, and that the district timely disclosed its intent to raise its June 1 affirmative defense according to IHO 1's July 15, 2024 prehearing order, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 31, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER