The University of the State of New York

The State Education Department
State Review Officer
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No. 24-599

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 his request that respondent (the district) fund the costs of his daughter's unilaterally obtained services 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Based on the limited information available in the hearing record, a CSE convened on May 24, 2021 and found the student eligible for special education services as a student with an

emotional disability (see Parent Ex. B).[1] The May 2021 IESP recommended six periods per week of direct group special education teacher support services (SETSS) to be provided in a separate location, together with two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (Parent Ex. B at p. 11).[2, 3] According to the May 2021 IESP, the student was "[p]arentally [p]laced in a [n]on-[p]ublic [s]chool" (id. at p. 13).

In May 2022, the parent requested summer services for the student and the district sent the parent prior written notice refusing the parent's request (Dist. Exs. 2; 3).

On or about September 1, 2023, the parent entered into an agreement for an individual to provide the student with six sessions per week of SETSS at a rate of $175 per hour for the 2023-24 school year (Parent Ex. C).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated June 16, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). The parent claimed that the May 2021 IESP was the last IESP developed for the student (Parent Ex. A at p. 1). The parent agreed with the program and related services recommended in the May 2021 IESP and stated that for the 2023-24 school year, the student required the same special education and related services as recommended in the May 2021 IESP (id.).

The parent further asserted that because the district failed to provide and implement a program for the student for the 2023-24 school year and failed to implement the student's program pursuant to the last agreed upon IESP dated May 24, 2021, he secured a SETSS provider for the

[1] The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]). The May 2021 IESP uses the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]; see also "Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance," Office of Special Educ. Mem. [July 2022], available at https://www.nysed.gov/sites/default/files/ special-education/memo/emotional-disability-replacement-term-for-emotional-disturbance.pdf). The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[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.

[3] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[4] During the hearing, the provider testified that he worked for an agency – Keep Children Moving; however, the agreement for services was not with the agency but directly with the provider (Tr. p. 87; see Parent Ex. C).

student for the 2023-24 school year at an enhanced rate (Parent Ex. A at pp. 1-2). As relief, the parent requested an order on pendency and an order directing the district to directly fund the six periods of SETSS per week delivered to the student during the 2023-24 school year by the parent's chosen provider at an enhanced rate (id. at p. 2). The parent also requested an order awarding all related services for the 2023-24 school year as recommended in the student's May 2021 IESP (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference on July 23, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 30, 2024 and concluded on October 1, 2024 (Tr. pp. 1-118).[5] In a decision dated October 24, 2024, the IHO found that she had subject matter jurisdiction over the parent's claims but that the parent failed to file a timely notice by June 1, 2023 for services for the 2023-24 school year and, therefore, the IHO dismissed the due process complaint notice with prejudice (IHO Decision at pp. 5, 8).

In determining whether the parent complied with the June 1 deadline, the IHO stated that the district first asserted the affirmative defense at the July 23, 2024 prehearing conference and then the IHO requested evidence from the parties regarding the June 1 affirmative defense (IHO Decision at p. 6). The IHO also acknowledged that the district raised the affirmative defense during its opening and closing statements and noted once the defense was raised the parent was required to present evidence that a notice was sent (id.). The IHO found that the parent's testimony that he mailed the June 1 notice was not credible or reliable as to whether the June 1 notice was sent to the district (id. at pp. 6-7). The IHO relied on a prior request that the parent made for services and the district's written response thereto, but noted that, in this instance, the parent did not provide evidence of any notice to the district (id. at p. 7). The IHO specifically found that if the parent had emailed a June 1 notice there would have been evidence of the communication, but it was not produced in this matter (id.). Further, the IHO was not persuaded by the parent's argument that the district waived the affirmative defense since the district neither developed an IESP or implemented services after June 1, 2023 (id.). Accordingly, the IHO found that the parent failed to file a request for services on or before June 1, 2023 , which was a "condition precedent" to the district's obligation to provide the student with equitable services for the 2023-24 school year (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding a lack of evidence that the parent requested services on or before June 1, 2023. The parent asserted that it was the district's burden to prove that the parent did not send the June 1 notice and not the burden of the parent. The parent argues that the events log submitted by the district was not reliable and the district did not record all communications or notices received by the parent.

Additionally, the parent asserts that the requirement that a June 1 notice be sent every school year, even when the student previously received services, is inconsistent with the IDEA.

[5] The district made a motion to dismiss the parent's due process complaint notice based on a lack of subject matter jurisdiction on September 18, 2024 (IHO Ex. I).

Further, the parent contends that there is no annual requirement to provide notice to the district, but notice is only required when equitable services are first requested.

Next, the parent claims that if the case was not dismissed, it should have been decided on the merits with both the "burden and proof and persuasion" on the district as a Burlington/Carter analysis is not required. However, even under a Burlington/Carter standard, the parent contends that he offered sufficient evidence that the SETSS were appropriate for the student to receive an educational benefit. With respect to equitable considerations, the parent argues that he cooperated with the district and demonstrated a financial obligation for the SETSS. As relief, the parent seeks direct funding of the six periods per week of SETSS for the 2023-24 school year at an enhanced rate.

In an answer, the district generally denies the material allegations contained in the request for review. The district asserts that the IHO was correct in finding that the student was not entitled to equitable services for the 2023-24 school year because the parent did not comply with the mandatory notice requirement. Moreover, the district argues that the parent failed to offer sufficient evidence that the unilaterally obtained SETSS were appropriate for the student and also that equitable considerations did not favor the parent.

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 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

[6] 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]).

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

A threshold determination must be made as to whether the student was entitled to equitable services for the 2023-24 school year under Education Law § 3602-c.

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]). 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).

[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.

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., 2011 WL 4375694, at *6, 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]).

Initially, in this case, the district raised the June 1 deadline as an affirmative defense at the prehearing conference and again in its opening statement before the parties delved into the merits of the impartial hearing and later in its closing statement (Tr. pp. 3, 7, 34, 46-47, 100-03). The IHO found that the district timely raised the defense of the June 1 deadline (see IHO Decision at p. 6). Notably, the parent does not challenge the timeliness of the assertion of the defense in his request for review, and instead argues that the district was required to prove that it did not receive the parent's notice.

Contrary to the parent's argument, once the district has raised the defense, although the district would generally have the burden of proof on an affirmative defense, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] ["it is unclear how the school district could have proved such a negative"). Here, the parent offered nothing in writing to demonstrate that he provided the district with the June 1 notice (see Parent Exs. A-F). On the other hand, the district offered its special education student information system (SESIS) events log for the student into evidence to show that there was no communication between the district and the parent between June 29, 2022 and May 17, 2024 (Dist. Ex. 4 at p. 1).

Although the parent testified that he sent the June 1 notice, the IHO found that his testimony was not credible or reliable (IHO Decision at pp. 6-7).[8] The father of the student testified that the

[8] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

June 1 letter was sent for the 2024-25 school year but the testimony was unclear whether a notice was sent for the 2023-24 school year (Tr. pp. 55-56). He testified that a June 1 letter was mailed in connection with the 2023-24 school year, then stated he was unclear as to what was being discussed (Tr. p. 66). The parent testified that he mailed the notice because the district did not read the emails (id.). Then, the parent testified that he mails the June notice every year (Tr. p. 67). Further, he testified about requesting summer services but, based on the testimony and the documentary evidence produced by the district it appears that was in reference to the summer of the 2022-23 school year (Tr. pp. 55-59, 61-62; see Dist. Exs. 2-3). Here, the hearing record lacks a compelling reason to disturb the IHO's credibility findings as the IHO was in the best position to assess the testimony and neither the documentary evidence nor the hearing record in its entirety justifies a contrary conclusion.

Next, the parent argues that Education Law § 3602-c does not require that a written request for services be filed each June 1 prior to a school year (Req. for Rev. ¶¶ 15-16). He claims, instead, that "the legislature intended that the school districts of private schools be put on notice" and that a parent must file the request prior to June 1 of the school year in which the services are first requested but that, thereafter, the CSE is required to annually review the student's IESP (id. ¶ 15). 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 1 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.

Based on the foregoing, 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. 1-118; see Parent Exs. A-F). Thus, the IHO's determination that the parent failed to establish either through testimony or documentation that the June 1 letter was actually sent to the district will not be disturbed.

VII. Conclusion

Having found that the student was not entitled to equitable services 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 during the 2023-24 school year.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determination.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 23, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER