The University of the State of New York

The State Education Department
State Review Officer
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No. 24-638

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's private services delivered by a private tutor for the 2024-25 school year. The 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

According to the hearing record, the student was parentally placed in a nonpublic school and received services pursuant to IESPs developed on March 7, 2018 and March 12, 2020 (Parent Exs. D; E). In correspondence dated May 4, 2022, the district advised the parents that they must

sign and return an attached form by June 1, 2022 to receive special education services for the student for the 2022-23 school year (Parent Exs. F; G).

A CSE convened on September 22, 2022, to develop an IESP for the student with an implementation date of October 6, 2022 (Parent Ex. C at pp. 1, 12). The September 2022 CSE found the student eligible for special education and related services as a student with a learning disability (id. at p. 1).[1] The September 2022 CSE recommended that the student receive three periods per week of direct group special education teacher support services (SETSS) in a separate location, two 45-minute sessions per week of individual occupational therapy (OT) in a separate location, two 45-minute sessions per week of group physical therapy (PT) in a separate location, and one 30-minute session per week of individual PT in a separate location (id. at p. 12).[2] The September 2022 IESP indicated that the student was parentally placed in a nonpublic school (id. at p. 15).

A CSE convened on January 11, 2024, to develop an IESP for the student with an implementation date of January 25, 2024 (Parent Ex. A at pp. 1, 9-10).[3] The January 2024 CSE continued to find the student eligible for special education and related services as a student with a learning disability and recommended that the student receive three periods per week of direct group SETSS in a separate location, two 60-minute sessions per week of individual speech-language therapy in a separate location, and two 45-minute sessions per week of individual OT in a separate location (id.). The January 2024 IESP indicated that the student was parentally placed in a nonpublic school (id. at p. 12).

By prior written notice dated January 11, 2024, the district summarized the recommendations of the January 2024 CSE and indicated that the recommended services would be put into effect on January 26, 2024 (Dist. Ex. 2 at pp. 1, 2). The January 11, 2024 prior written notice also stated that the parents could download a copy of the procedural safeguards notice from the district's website or request a copy by phoning an individual specifically named on the prior written notice (id. at p. 1).

By email dated September 3, 2024, the student's then-current speech-language pathologist contacted the district to state that she was continuing speech-language therapy services for the student for the 2024-25 school year and asked if a new related services authorization (RSA) was needed (Dist. Ex. 7 at p. 24). The district responded on September 4, 2024, by stating that the family should contact the district (id.). On September 4, 2024, the parent emailed the district

[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.

[3] The hearing record contains 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 district's attorney objected to some of the parents' exhibits as duplicative, in response, the IHO specifically declined to exclude duplicative exhibits from evidence (Tr. pp. 33-34). 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]).

requesting a "P3/P4" for the student's "SETSS" provider (id. at p. 23). On September 6, the district replied stating that the parents had not completed a parental notice of intent informing the district that the student was parentally placed and that "[a]t this time [the district was] not able to arrange services" (id.).

On September 6, 2024, the parents emailed the parental notice of intent to the district and requested RSAs for the student's providers (Dist. Ex. 7 at p. 22). The district replied on September 6, 2024, advising the parents that the deadline for submission of the parental notice of intent form was June 1, 2024 (id.).

In a notice dated September 9, 2024, the district advised the parents that they must sign and return an attached form by June 1, 2025 to receive special education services for the student for the 2025-26 school year (Dist. Ex. 3).

By email dated September 10, 2024, the parents wrote to the district stating that they never received a form to request equitable services from the district, and that they did not know it was a requirement for the district to approve services for the 2024-25 school year (Dist. Ex. 7 at p. 20). The parents further stated that "[i]f [th]e[y] needed to sign a consent form to receive services, then [the district] should've sent [them] one as they did back in 2022 for the 2022-23 school year" (id.). The parents also wrote that the district "did not send it to [them] in May 2024 nor were [they] told [they] needed this as a precursor to services being approved for this school year. Further, [the district] did not send it to [them] in May 2023, yet [they] were still able to receive services for the 2023-24 school year" (id.). The parents also stated that "[a]s soon as [they] were alerted [that they] needed to sign [the form] in order to receive consent for services for the 2024-25 school year, [they] went ahead and signed the form and returned it" (id.).

The district responded on September 10, 2024, stating that the parents had submitted a notice of intent after the June 1, 2024 deadline and that they were awaiting guidance regarding students with late notices of intent (Dist. Ex. 7 at p. 20).

A. Due Process Complaint Notice

In an amended due process complaint notice dated November 2, 2024, the parents alleged that the district implemented the January 2024 IESP beginning in January 2024 but failed to arrange for providers to implement the January 2024 IESP for the 10-month 2024-25 school year despite the IESP covering that period of time (IHO Ex. I at p. 2).[4] As relief, the parents requested reimbursement for private tutoring services for the 2024-25 school year and make-up hours for SETSS, OT, and speech-language therapy services that have not been provided by the district for the 2024-25 school year (id.).

[4] The parents filed an initial due process complaint notice on September 13, 2024 (Dist. Ex. 7 at pp. 1-3, 26).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 15, 2024 (Tr. pp. 27-58).[5] In a decision dated November 15, 2024, the IHO initially found that the parents failed to request equitable services for the 2024-25 school year by June 1, 2024; however, the IHO determined that the parents were not required to provide the district with a notice of intent for the 2024-25 school year (IHO Decision at pp. 7-8). Additionally, the IHO determined that the parents were not provided a copy of the procedural safeguards notice for the 2024-25 school year, and that the district had "set a precedent for the [p]arent[s] during prior school years that the June 1 notice was not needed" (id. at pp. 8, 9).

Turning to the parents' request for funding for unilaterally-obtained services, the IHO declined to assess the parents' claims using the three prong Burlington/Carter analysis (IHO Decision at pp. 9-11). The IHO granted the parents' requests for compensatory speech-language therapy, OT, and SETSS (id. at pp. 14-15). The IHO also found that the parents were entitled to reimbursement for private tutoring services (id. at p. 15).

The IHO determined that the district failed to provide the student a FAPE for the 2024-25 school year and ordered the district to "immediately" fund three periods per week of direct, group SETSS, two 60-minute sessions per week of individual speech-language therapy, and two 45-minute sessions per week of individual OT, all to be delivered by providers of the parents' choosing for the entirety of the 2024-25 school year (IHO Decision at p. 16). The IHO further ordered the district to assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parents regarding the implementation of her order and to provide contact information to the parents within five business days (id.).

Next, the IHO ordered the district to fund and or reimburse privately obtained tutoring services provided to the student during the 2024-25 school year at a rate of $145 per hour (IHO Decision at p. 16). The IHO further ordered the district to fund a bank of compensatory education services consisting of 108 hours of direct, group SETSS or individual if not possible to obtain group, 72 hours of individual speech-language therapy, and 54 hours of individual OT, all to be delivered by providers of the parents' choosing at the rates of the providers (id.).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the district waived the June 1 defense. The district further argues that the IHO incorrectly assumed that because the student received services in accordance with a January 2024 IESP during the 2023-24 school year that the district was obligated to continue implementing the January 2024 IESP for the 2024-25 school year without a separate request from the parents for equitable services. The district also asserts that the IHO erred in finding that the parents were not provided with a procedural safeguards notice for the 2024-25 school year. The district argues that the district was not required to provide a

[5] A prehearing conference was held on October 16, 2024 (Tr. pp. 1-26). The IHO noted in his decision that the district had made a motion to dismiss the parents' due process complaint notice on the ground of subject matter jurisdiction, which the IHO denied because the "case ha[d] nothing to do with enhanced rates for private" SETSS or related services (IHO Decision at pp. 3-4).

procedural safeguards notice for the 2024-25 school year because the parents did not request equitable services for the 2024-25 school year. The district further argues that the parents received a prior written notice and procedural safeguards notice after the January 2024 CSE meeting for the 2023-24 school year.

Next, the district alleges that the IHO erred in declining to examine the parents' claims using a Burlington/Carter analysis and that if she had, she would have found the parents' unilaterally-obtained services were not appropriate. The district further asserts that the IHO erred in treating the parents' requested relief as compensatory education and further erred in awarding compensatory education. Lastly, the district contends that the IHO erred in awarding relief that she was not empowered to order in directing the district to provide the parents with a contact person at the district's implementation unit. As relief, the district requests reversal of all of the IHO's awarded relief.

The parents did not interpose an answer to the district's request for review.

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 education programs and services provided to other students with disabilities attending public or

[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]).

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

Review of the hearing record supports the district's arguments. The district raised the June 1 deadline as an affirmative defense during the prehearing conference and the impartial hearing and the parents conceded that they did not request equitable services for the 2024-25 school year before June 1, 2024 (Tr. pp. 7, 32-33, 49-50, 51-55).[8]

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[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.

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

The 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]).

Initially, the IHO erred in finding that the June 1 deadline affirmative defense was waived because the student was known to the district and in finding that the district did not require any notice for the 2024-25 school year. 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 parents also argue that the district failed to send them notice that they were required to request services by June 1, 2024 for the 2024-25 school year and further assert that the district had only ever sent a notice during the 2022-23 school year. 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 IHO further erred to the extent the IHO found any failure to provide the parents with a procedural safeguards notice for the 2024-25 school year resulted in the parent not being aware of her rights. A copy of the procedural safeguards notice must be given to the parents of a student with a disability, at a minimum one time per year and upon certain events which are not at issue here (8 NYCRR 200.5[f][3]). In this instance, the parents were provided with prior written notice of the January 2024 CSE recommendations (Dist. Ex. 2). Within the prior written notice, the district provided the parent with a link to access the procedural safeguards notice and the name and contact information for someone in the district who could provide the parent with a copy of the notice (id. at p. 2). During the hearing, the parents and IHO discussed the procedural safeguards notice as a document that would have notified the parents of certain rights, notices, and required deadlines; however, no one discussed whether the procedural safeguards notice would have informed the parents of the requirement to file a request for equitable services prior to June 1, 2024 (Tr. pp. 18, 21-24).

Although the provision of a link to the procedural safeguards notice may not meet the district's obligations, review of a copy of the notice, which is posted online by the Education Department, shows that it does not provide any information regarding Education Law 3602-c, the provision of equitable services other than as part of consent for services, or the June 1 deadline (see Procedural Safeguards Notice, available at https://www.nysed.gov/sites/default/files/programs/special-education/procedural-safeguards-notice-english.pdf [last updated May 2024]).[9] Accordingly, the hearing record does not support finding that the parents were not informed of their rights to the extent that it would justify a failure to provide the district with the required notice prior to June 1, 2024.

Based on the foregoing, the hearing record shows that the parents did not send the district notice that they were requesting equitable services from the district for the 2024-25 school year prior to the June 1, 2024 deadline.

VII. Conclusion

In summary, the IHO incorrectly determined that the student was entitled to equitable services for the 2024-25 school year and erred in awarding the parents any of their requested relief. The hearing record demonstrates that the parents did not comply with the June 1 deadline under Education Law § 3602-c, and thus, the district was not required to provide equitable services to the student under Education Law § 3602-c during the 2024-25 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 15, 2024, is modified by reversing those portions which found that the parents were entitled to equitable services for the 2024-25 school year and which awarded the parents relief, including direct funding, reimbursement, and compensatory education.

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

STEVEN KROLAK
STATE REVIEW OFFICER

[9] In response to a question as to whether a link within a notice to parents was sufficient for a district to meet its obligation to provide a copy of the procedural safeguards notice, the Office of Special Education Programs (OSEP) has indicated that "[a]lthough IDEA permits an [district] to post a copy of the procedural safeguards notice on its web site, the public agency would not meet its obligation to provide a parent the notice of procedural safeguards by simply directing a parent to the web site" (Letter to Nathan, 73 IDELR 240 [OSEP 2019], available at https://sites.ed.gov/idea/idea-files/osep-letter-jan-29-2019-to-nathan/). According to the guidance, "it would be reasonable for the public agency to document that it offered a printed copy of the notice" if a parent declined an offer of a printed copy or indicated a preference for an electronic copy (id.).