The University of the State of New York

The State Education Department
State Review Officer
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No. 21-069

Application of the BOARD OF EDUCATION OF THE HARRISON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, 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 or Harrison) appeals from a decision of an impartial hearing officer (IHO) which determined that the district's Committee on Special Education (CSE) was responsible for creating an individualized education service plan (IESP) for respondent's (the parent's) son for the 2020-21 school year. The appeal must be sustained in part.

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 Individuals with Disabilities Education Act (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 related to IESPs, 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 of the IDEA and the analogous State law provisions 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

The essential facts in this proceeding are undisputed by the parties, but the district's obligation to provide special education services to the student are sharply disputed. Prior to the

2020-21 school year, the student in this appeal attended a nonapproved, nonpublic school (NPS), located within the geographic boundaries of the White Plains City School District (White Plains) and the student's parents resided in the New Rochelle City School District (New Rochelle) (see Dist. Exs. 1 at p. 5; 5 at p. 1). For the 2020-21 school year, the parents submitted a request to White Plains prior to June 1, 2020 for the student to receive dual enrollment special education instruction and the related services of occupational therapy (OT) and physical therapy (PT) (id.).[1]. In August 2020, the NPS relocated inside the boundaries of the Harrison Central School District, the petitioning district in this appeal (see Tr. pp. 34, 43; Dist. Ex. 1 at p. 5). On or about the same day that the parent learned of the relocation of the NPS in August 2020 to a larger building within Harrison's geographic boundaries to comply with COVID-19 safety precautions, the parent requested that the district provide special education services to the student (see Tr. pp. 45-46, 51; Dist. Ex. 6). In response, Harrison denied the parent's request, asserting that the parent had failed to comply with the June 1, 2020 deadline for requesting special education services under the dual enrollment statute (Dist. Ex. 7 at p. 1).

A. Due Process Complaint Notice

In an October 30, 2020 due process complaint notice, the parent requested an impartial hearing asserting that Harrison failed to provide special education services to the student for the 2020-21 school year (Dist. Ex. 1 at pp. 3, 5). The parent described the above information concerning the NPS's relocation inside Harrison's boundaries, the timely request for related services from White Plains, as well as Harrison's denial of that request (Dist. Ex. 1 at p. 5). The parent requested that the district provide IESP services to the student as relief (id. at p. 6).

B. Impartial Hearing Officer Decision

By letter dated November 17, 2020, the district made a motion to dismiss the underlying due process complaint notice before the IHO, asserting that the due process complaint notice was insufficient as a matter of law, and that the parent failed to provide Harrison with notice of a request for services before the June 1, 2020 deadline as required under section 3602-c (Dist. Ex. 2). In a November 22, 2020 interim decision, the IHO denied the district's motion to dismiss finding that the district did not specifically set forth why the complaint was insufficient, but rather generally alleged its insufficiency (Dist. Ex. 3 at p. 2).

The impartial hearing convened on December 9, 2020 and concluded on December 21, 2020 after two hearing dates (Tr. pp. 1-65). As noted above, the contents of the due process complaint notice were admitted as stipulated facts (Tr. p. 53). [2] In a final decision dated January

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

[2] District Exhibit 1 in this case is the parent's due process complaint notice, and while generally a due process complaint notice is not considered evidence, the district's counsel stipulated during the impartial hearing that the facts in the due process complaint notice could be used as such (Tr. p. 53). The district's cross-examination regarding the due process complaint notice was limited to testimony by the parent about a meeting she had with the district's special education and support services director concerning the parent's options for trying to secure the student's special education services with either the district of residence or through private providers (id. at pp. 53-55), none of which is disputed. The district did not attempt to rebut those facts in the due process complaint

22, 2021, the IHO—comparing the request for related services filed with White Plains prior to the June 1, 2020 deadline to a "defective pleading,"—determined that the parents acted with reasonable diligence in timely filing for related services with White Plains and then renewing the filing (with Harrison) on August 17, 2020 upon notice of relocation of the NPS (IHO Decision at p. 8). Further, due to those circumstances beyond their control—the relocation of the NPS after the June 1 deadline—the IHO found that there was simply no way for the parents to anticipate a change in the district of location and presumptively file the request in Harrison before the June 1 deadline, and therefore the time period within which to file for those related services was "tolled," and the parents acted with reasonable diligence upon the NPS relocation (id.). The IHO also found that the circumstances were so extraordinary that the June 1 deadline should not apply due to the pandemic which forced the NPS to relocate to a larger building after the deadline in order to accommodate in-person instruction consistent with COVID safety regulations (id.).

As a result, the IHO found that the district was responsible for providing the student with special education, and ordered the CSE to convene within five days, review the parent's request for related services, and develop an IESP for the student (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The district appeals, asserting the IHO erred in denying the district's motion to dismiss the due process complaint notice as legally deficient. The district asserts that where, as here, the due process complaint notice, on its face, indicates that it had no duty with respect to any "matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child," the due process complaint notice is fatally deficient as a matter of law. Specifically, the district asserts that the parent failed to give the district "proper notice of any objections that she had a legal right to assert" against the district through the due process provisions of the IDEA and, as the student was not a resident of the district, no duty existed to provide the student with a FAPE. The district further asserts that the parent's timely submission of a request for related services to White Plains did not satisfy the requirements of section 3602-c because the request must be timely made to the "district of location," of the NPS which the district asserts was not done here.

With respect to the IHO's determination that the June 1, 2020 deadline for requesting special education services from the district was equitably tolled due to the pandemic, the district asserts the IHO "essentially re-wrote" section 3602-c and established an exception to the clear and unambiguous statutory deadline for requesting special education services from a district that would otherwise have no legal obligation to the non-resident student. The district asserts that the IHO's characterization of the request made to White Plains as a defective pleading was unavailing.

The district also asserts that the IHO's determination is inconsistent with State guidance which states that "if a parent does not file a written request by June 1, nothing would prohibit a school district from exercising [its discretion] to provide special education services subsequently requested for a student, provided that such discretion is exercised equally among all students with

notice related to the parents' timely request for related services submitted to White Plains (id.). As such, those facts are unrefuted facts for purposes of this appeal.

disabilities who file after the June 1 deadline."[3] The district asserts that it did not abuse its discretion because any discretionary decision to grant belated requests for services would obligate the district to grant all such untimely requests including "numerous untimely requests on behalf of students attending a new, albeit temporary, school that opened in the District that had not been planned for" as well as any untimely requests submitted on behalf of classified students from any other public school district who decided for reasons related to COVID-19 to attend a private school in the district due to "more desirable educational opportunities [being offered] than [in] their district of residence."

The district requests that the undersigned find that the IHO erred in denying the district's motion to dismiss the due process complaint notice as legally deficient and in determining that the June l deadline for requesting special education services from the district was equitably tolled, and find that the district's determination not to offer special education services to the student constituted a permissible exercise of its discretion.

The parent, who appeared pro se during the impartial hearing, did not file an answer to the district's request for review (see 8 NYCRR 279.5). Notwithstanding the parent's failure to answer, I have examined the entire hearing record and make an independent decision based on the entire hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

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 district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish

[3] Frequently Asked Questions and Answers Regarding the Provision of Services to Students with Disabilities During the 2020-21 School Year, Office of Special Educ. Mem. [Oct. 2020], was included as an attachment to the request for review and is available at http://www.nysed.gov/common/nysed/files/programs/reopening-schools/special-education-faq-2020-21.pdf. The line in the guidance following the one cited by the district captures the spirit in which it was intended—"For the 2020-21 school year, school districts are encouraged to honor parent requests for special education services for parentally placed and homeschooled students with disabilities who may be impacted by COVID-19" (id.).

[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in

services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[5]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). Generally, a remedy for a deficiency in equitable services under State law should be similar to a remedy for deficient services under the IDEA.

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., 694 F.3d at 184-85).

VI. Discussion

A. Motion to Dismiss

Turning first to the district's assertion the IHO erred in denying its motion to dismiss based on the legal sufficiency of the due process complaint notice, as relevant to this matter, State regulations provide that a parent or district may file a due process complaint notice " with respect to any matter relating to the identification, evaluation or educational placement of a student with

[Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

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][7][A][ii]; 34 CFR 300.508[b]). Specifically, a due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (id.). Further, a due process complaint notice is insufficient if it does not meet the requirements of "paragraph (1) of this subdivision" (8 NYCRR 200.5[i][3]).

A review of the due process complaint notice reveals that the parent provided (i) the name of the student; (ii) the student's address; (iii) the name of the NPS the student was attending; (iv) a description of the nature of the problem (the district's refused initiation of special education services under section 3602[c]) and the circumstances surrounding the problem (the NPS relocation, the timeliness of the request for related services prior to the relocation); and (v) a proposed solution (to have the district provide those special education services). Given the information provided, the parent clearly met the requirements for a legally sufficient due process complaint notice, and the IHO did not err in so finding.

Instead it is the district which improperly conflated the legal sufficiency requirements of a due process complaint notice under the State regulations (citing them in its motion to dismiss) with general civil procedure doctrines in civil courts such as a motion to dismiss because the pro se parent did not state a claim upon which relief can be granted (8 NYCRR 200.5[i][6]; see e.g., CPLR 3211 [a][7]). The IHO did not err in finding the due process complaint sufficient.

B. Dual Enrollment Services

The district also asserts the IHO erred in finding that Harrison was responsible for providing the student with related services through an IESP. State law provides that parents who are residents of this State may seek services for students with disabilities who attend an NPS if such parents make a written request to the district of location where the nonpublic school is located on or before the first day of June (Educ. Law § 3602-c[2]). The district relies on the parent's August 17, 2020 request to assert that the request was untimely.

Ultimately I agree with the IHO that the district is responsible for providing the student's related services at the NPS, however, I do not adopt all of the IHO's reasoning, such as her analogies to a "defective pleading" or finding that the June 1 deadline in Section 3602-c did not apply because of the COVID-19 pandemic.

The IHO points out that Section 3602-c does not explicitly provide for the relocation of an NPS into a different school district after the June 1 timeframe for requesting the provision of special education services for a student with disabilities. However, the language of the statute is clear and unambiguous as to the district's responsibility in stating that "[b]oards 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" and that "such a request shall be filed with the trustees or board of education of the school

district of location on or before the first of June preceding the school year for which the request is made" (Educ. Law § 3602-c[2][a]).

The district's assertion that section 3602-c does not provide for an exception to the "clear and unambiguous statutory deadline" for requesting special education services focuses too narrowly on the parent's communication with Harrison in August 2020. However, as the district points out, the statute clearly and unambiguously requires that parents make their request to "the district of location" where the nonpublic school was located on or before the first day of June (citing Educ. Law § 3602-c[2]). The district's argument in this case, ignores that the parent did file a request, and she did so with the correct and only school district of location at that time, White Plains, and the district does not dispute that fact (Dist. Ex. 1 at p. 5). Accordingly I find that the parent followed the letter of the statute as written, and the student thereafter became entitled to the 3602-c services. It is true that the NPS relocated into Harrison after the parent's request was filed with While Plains, but the statute provides that "[b]oards 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" [emphasis added]). There is no provision that removes the eligibly of disabled children to their special education services once they have met the June 1 deadline, and I decline to write one into the statue.

The district has not been unduly prejudiced as a factual matter. On or about the same day the parent learned that the NPS was relocating to a larger building within the Harrison's boundaries, the parent requested that the district provide related services and special education instruction to the student (see Tr. pp. 45-46, 51; Dist. Ex. 6). Thus the parent was proactive and provided another notice even though the statute only requires one notification or request (see Dist. Exs. 1 at p. 5; 6).

VII. Conclusion

In accordance with the foregoing, I find that the IHO properly denied the district's motion to dismiss the due process complaint notice for lack of sufficiency. I also find that the IHO's determination that Harrison must provide the student with special education services under Education Law 3602-c should not be disturbed, but I reach that determination with different reasoning.

I have considered the district's remaining contentions and find they are without merit.[6]

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that portion of the IHO's decision dated January 22, 2021 which found that the June 1 deadline for requesting related services from the district through the dual enrollment statute was not applicable is hereby reversed, and,

[6] While I am cognizant of the district's claim of a lack of resources, the district is still required to provide all students with disabilities in its geographic boundaries with the necessary special education instruction and related services, without regard to resource allocation—that issue is addressed in State Education Law—and to the extent the district relies on the lack of resources as a defense, that argument is without merit (see Educ. Law § 3602-c[7][b],[c]).

IT IS FURTHER ORDERED that the district shall, within 15 days of the date of this order, create an IESP for the student; and,

IT IS FURTHER ORDERED that the district shall, within 15 days, begin providing those related services to the student.

Dated: Albany, New York
April 2, 2021

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JUSTYN P. BATES
STATE REVIEW OFFICER