



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-082

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 Brian J. Reimels, Esq.

Gulkowitz Berger LLP, attorneys for respondent, by Shaya Berger, 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 the decision of an impartial hearing officer (IHO) which found that it failed to provide an appropriate educational program to respondent's (the parent's) daughter and ordered it to fund privately-obtained services for the 2022-23 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 programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 student attended the same nonpublic school since pre-kindergarten (Parent Ex. B at p. 4). On January 18, 2022, during the 2021-22 (fifth grade) school year, the student was initially referred for special education and a CSE convened, found the student eligible for special education

as a student with a learning disability, and developed an IESP for the student with a projected implementation date of April 11, 2022 (Parent Ex. B at pp. 1, 4).¹ The CSE recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group and one 30-minute session per week of individual counseling services (*id.* at p. 18).

On September 6, 2022, the parent brought a due process complaint notice through representatives, Thrive Advocacy, LLC, alleging that the district failed to "supply providers" to implement the January 2022 IESP and that the parent could not locate providers to deliver the services at the district's "published rates" (SRO Ex. 1 at pp. 1-2).² The parent stated that, therefore, she "had no choice but to retain the services of an agency to provide the mandated SETSS services at an enhanced rate" (*id.*). The parent sought relief for the 2022-23 school year to include district funding of SETSS "at an enhanced rate" and an award of "all related services" mandated on the student's IESP (*id.* at p. 2).

On February 20, 2023, the IHO assigned to preside over the impartial hearing arising from the parent's September 2022 due process complaint notice issued a final decision finding that the district failed to implement the student's IESP for the 2022-23 school year and ordering the district to "implement/fund" five periods of SETSS in ELA and one 30-minute session per week of counseling at "prevailing market rate" for the 2022-23 school year (SRO Ex. 3 at pp. 9-10). The IHO also directed the district to "continue to provide the related services" and indicated that, if the district ceased implementing related services without the parent's consent, the district would be required to fund services delivered to the student from a private provider chosen the parent (*id.* at p. 10).

A. Due Process Complaint Notice

In a second due process complaint notice dated February 22, 2023, the parent through her attorneys, Gulkowitz Berger LLP, brought another due process proceeding alleging that the district failed to provide the student "adequate special education and related services" and denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). The parent indicated that she agreed with the recommendations of the January 2022 CSE (*id.*). However, the parent again alleged that the district had not identified providers to deliver the services recommended on the January 2022 IESP and the parent had been unable to locate providers who would deliver the services at the district's "standard rates" due to the level of the

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 The district has offered several documents as additional evidence with its request for review and requests that they be considered. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (*see, e.g., Application of a Student with a Disability*, Appeal No. 08-030; *Application of a Student with a Disability*, Appeal No. 08-003; *see also* 8 NYCRR 279.10[b]; *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the manner in which the impartial hearing was conducted, including the district's ability to present evidence, is a matter in dispute, and I find that the additional evidence is necessary to render a decision on this issue, as well as on the issue of whether duplicative proceedings were initiated by the parent.

student's need, as well as the availability of providers (*id.*). The parent indicated that she located providers who were "willing to" provide the student's services for the 2022-23 school year but "at rates higher than standard [district] rates" (*id.*).

For relief, the parent requested an order requiring the district to fund SETSS delivered by "the student's special education teacher provider/agency . . . at an enhanced rate" for the 2022-23 school year (Parent Ex. A at p. 2). In addition, the parent requested that the student's related services be funded either through related services authorizations (RSAs) "if accepted by the parent's chosen providers" or by direct funding at the rates charged, "even if higher than the standard [district] rate for such service" (*id.*). The parent also invoked pendency, requesting that the district "continue" the student's services (*id.*).

B. Impartial Hearing Officer Decision and Intervening Events

The same IHO who presided over the matter arising from the parent's September 2022 due process complaint notice was assigned to the present matter (SRO Ex. 2). In email correspondence dated February 28, 2023, a district representative informed the parent's attorney that the February 2023 due process complaint notice was duplicative of the prior proceeding, and the parent's attorney responded that he would "clear it up" (SRO Ex. 4).

In an email dated March 14, 2023, an impartial hearing was scheduled for March 24, 2023 at 11:00 a.m. (SRO Ex. 5). The parent's attorney disclosed evidence in an email to the IHO and the district dated March 23, 2023, acknowledging that the disclosure was untimely (SRO Ex. 6).

An impartial hearing convened on March 24, 2023 at 11:04 a.m. (Tr. p. 1). The district did not appear at that time (Tr. pp. 1-4). The IHO received the parent's two exhibits into evidence (Tr. p. 4; Parent Ex. A-B). The IHO indicated that, because the district did not appear and, therefore, did not object to the relief requested by the parent, the relief would be granted (Tr. p. 5). The hearing concluded at 11:07 a.m. (Tr. p. 6).

In a final decision dated April 4, 2023, the IHO granted the parent's requested relief (IHO Decision at p. 11).³ The IHO noted that the district did not appear to defend the matter but, nevertheless, he went on to address "general" and "usual" arguments raised by the district in similar matters (*id.* at pp. 9-10). The IHO first addressed "the general objection often raised by the [district] that the issue of FAPE [wa]s not implicated" given that the matter arose under Education Law § 3602-c (*id.* at p. 9). The IHO rejected that premise, finding that Education Law § 3602-c, read in conjunction with Education Law § 4404, authorized the parent to pursue an impartial hearing when aggrieved by the district's "failure to generate an adequate IESP or implement mandated services" (*id.*). Next, the IHO found that, had the district argued that it had no obligation to provide equitable services absent evidence of a request from the parent filed by June first, such position would fail as the district "remain[ed] obligated to revisit and review yearly the program

³ Page five of the IHO's decision includes no text in the body but consists only of a page number and a footnote (IHO Decision at p. 5); it appears from context that the copy of the IHO's decision is complete and that the blank page was a computerized formatting issue.

designed for the student" and waived the June first notice requirement "by affixing a review date on the IEP/IESP" (*id.* at p. 10).

The IHO found that the district had a "nondelegable obligation" to identify providers to deliver the services mandated in the IESP and, having failed in this regard, denied the student "a FAPE" for the 2022-23 school year (IHO Decision at pp. 4, 10). The IHO also indicated that the district had failed, as of the date of the hearing, to fund the services independently obtained by the parent (*id.* at p. 10).

Based on the foregoing, the IHO ordered that the district fund five periods of SETSS per week in a group and one 30-minute session of individual counseling per week at "prevailing rate" for the 12-month 2022-23 school year by directly paying the providers upon submission of invoices (IHO Decision at p. 11). Finally, the IHO ordered that, to the extent the district was providing related services, it should continue to do so, else the parent would be entitled to secure the service from a provider of her choosing at market rate at district expense (*id.*).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in granting the parent's requested relief.⁴ The district argues that the IHO erred by failing to dismiss the present matter as barred by *res judicata*. In the alternative, the district argues that the IHO erred in holding the impartial hearing and issuing a decision without sufficient attempts to secure the appearance of the district and in accepting the parent's evidence despite that the parent's attorney disclosed the documents only one day earlier.

Turning to the IHO's substantive determinations, the district asserts that the IHO erred in finding that the district denied the student a FAPE, despite that the matter was brought pursuant to Education Law § 3602-c. The district also challenges the IHO's finding that the parent was not required to request equitable services for the student prior to June first.

As to relief awarded, the district argues that the IHO erred in ordering district funding of services without a finding that privately-secured services were appropriate or that equitable considerations supported the parent's requested relief. In addition, the district alleges that the IHO erred in ordering district funding of 12-month services for the student absent a request for the same in the due process complaint notice or evidence that the student experienced substantial regression. Finally, the district asserts that the parent failed to show any financial obligation for the private services.

The district requests that the IHO's decision be reversed in its entirety and the parent's due process complaint notice dismissed as barred by *res judicata*. In the alternative, the district requests that the matter be remanded for further proceedings.

⁴ The district submits additional evidence regarding the earlier proceeding arising from the parent's September 2022 due process complaint notice, as well as documents pertaining to the procedural details of the impartial hearing in the present matter, and requests that they be considered. As set forth above, the additional evidence has been considered.

In an answer, the parent responds to the district's material allegations with admissions and denials. The parent concedes that she obtained all of the relief sought in the prior proceeding and agrees with the district that the IHO's decision in the present matter should be vacated. The parent also concedes that she does not seek 12-month services for the student. The parent argues that the other issues raised by the district are moot. In the event the district's other arguments are reached, the parent argues that *res judicata* does not apply because "[t]here is no prejudice by the second Decision having been issued," the IHO did not err in conducting the impartial hearing in the district's absence and in admitting the parent's evidence despite the late disclosure, the IHO's reference to a "FAPE" did not change the analysis or outcome, and the district never raised the issue of the June first deadline for services under Education Law § 3602-c at the impartial hearing.

V. Discussion

A review of the allegations in the district's request for review, together with the parent's answer thereto, reveals that the parties now agree that the IHO improperly issued a duplicative decision involving the student, addressing the same underlying allegations pertaining to the 2022-23 school year and granting similar relief (compare SRO Ex. 3, with IHO Decision). The IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]). In the September 2022 and February 2023 due process complaint notices, the parent alleged the district failed to implement the student's January 2022 IESP and that the parent could not locate providers who would accept the district's standard rates (Parent Ex. A at p. 1; SRO Ex. 1 at pp. 1-2). As the parent concedes, the due process complaint notices raised identical issues. The IHO's February and April 2023 decisions granted identical relief in the form of requiring the district to "implement/fund" five periods of SETSS in ELA and one 30-minute session per week of counseling at "prevailing market rate" for the 2022-23 school year, with the exception being that in the present matter, the IHO granted the relief for a 12-month school year (IHO Decision at pp. 10-11; SRO Ex. 3 at pp. 9-10). The parent concedes that she did not seek 12-month services as relief in this matter.

This case certainly raises concerns about the first tier impartial hearing process, both in terms of the parent's own apparent lack of awareness of the impartial hearings proceeding being conducted on her behalf, the parent's attorney's failure to withdraw the duplicative due process complaint notice when notified of the prior proceeding, and the IHO's failure to manage his caseload in a way that would alert him to the duplication. Considerable public resources have been expended unnecessarily. The observation of the parent's attorney that a waste of judicial resources has occurred is entirely accurate, except that the parent and the parent's attorney are primarily responsible in the first instance because the second proceeding was brought by the parent after the first proceeding was filed and concluded. A parent is charged with the responsibility of being personally aware when due process proceedings have been brought in the name of the parent through counsel or representatives providing assistance to the parent.

VI. Conclusion

The IHO erred in issuing the April 4, 2023 decision, which was duplicative of the February 20, 2023 decision issued involving the same student and allegations pertaining to the same school year.

Given the parties' accord that the IHO's decision should be vacated as duplicative of a prior decision, it is unnecessary to reach the remaining arguments raised.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 4, 2023 is vacated in its entirety.

Dated: **Albany, New York**
 July 3, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER