The University of the State of New York

The State Education Department
State Review Officer
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No. 23-280

**Application of a STUDENT WITH A DISABILITY, by his 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:**
Shehebar Law, attorneys for petitioner, by Y. Allan Shehebar, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Daniel Costigan, 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 determined that the parent failed to timely request equitable services for his son pursuant to New York State Education Law § 3602-c for the 2023-24 school year and dismissed the parent's due process complaint notice with prejudice. Respondent (the district) cross-appeals from the IHO's determination that, had the parent shown that he submitted a timely request for equitable services, compensatory education would have been appropriate relief. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter must be remanded to the IHO for further administrative proceedings.

### 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 §§ 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

Given the limited information included in the hearing record, a full recitation of the student's educational history is not possible. A CSE convened on October 26, 2022 to formulate the student's IESP for the 2022-23 school year (see generally Parent Ex. B). The CSE recommended that the student receive special education teacher support services (SETSS) as a group service, for three periods per week; occupational therapy (OT) as an individual service for three 30-minute sessions per week; counseling as an individual service for one 30-minute session per week; and counseling services in a group for one 30-minute session per week (id. at p. 9).

By a due process complaint notice, dated August 29, 2023, the parent alleged that the district had failed to provide the student with the equitable services recommended in the October 2022 IESP for the 2023-24 school year and sought funding or reimbursement from the district for unilateral special education services obtained by the parent (see Parent Ex. A).

The parties convened for an impartial hearing on October 19, 2023 before the Office of Administrative Trials and Hearings (OATH) (Oct. 19, 2023 Tr. pp. 1-15).[1] By decision dated October 24, 2023, the IHO found that the parent was required to request equitable services from the district by June 1, 2023 and that the failure to do so constituted a bar to the parent's requested relief (IHO Decision at pp. 3-6). Initially, the IHO found that the district had established that it notified the parent by mail in May 2023 that, if he wanted the student to receive special education services from the district during the next school year, he would need to sign the attached form and return it "to the CSE by June 1, 2023" (id. p. 4). With respect to the timing of the district's assertion of the June 1 notice defense, although the IHO found "that the list of defenses in District Representative's Notice of Appearance did not a constitute a formal assertion of this defense,"[2] he did credit the "District Representative's representation that it was raised at the settlement conference" between the parties and further found that the district's pre-hearing disclosure "reiterated [its] intent to assert this defense," before asserting the defense "most recently" during the impartial hearing itself (id.). The IHO further found that the district had not waived its June 1 defense either procedurally or substantively but instead had asserted the defense "in practically every interaction they have had with Parent on this matter, yet Parent inexplicably has not offered any evidence to prove their compliance with the June 1 requirement in order to obtain the services at issue" (id. at p. 5).

After determining that the parent's failure to request equitable services warranted dismissal of the parent's due process complaint notice, the IHO proceeded to determine "for completeness of the record," whether, in the absence of a successful June 1 defense by the district, the parent

[1] With the hearing record on appeal, the district also includes the transcript of an "omnibus" status conference held on October 16, 2023 (Oct. 16, 2023 Tr. pp. 1-20), which is discussed further below.

[2] A notice of appearance submitted for the district dated August 31, 2023 is included in the hearing record. However, the notice of appearance does not include any statement of affirmative defenses to be asserted by the district at the impartial hearing. Instead, it appears that a different attorney for the district may have submitted a notice of appearance on September 15, 2023 pertaining to the cases that were part of the omnibus status conference (see Req. for Rev. ¶ 2); the September 2023 notice of appearance was not included in the hearing record on appeal. In a footnote to his decision, the IHO references, without citation to a particular document or transcript, that he "informed the Parties that the Notice of Appearance is not the appropriate time or forum to raise or assert any defenses" (IHO Decision at p. 3, n. 3).

would be entitled to relief sought (IHO Decision at p. 5). The IHO found that the parent was "not seeking to implement any services aside from those mandated by the District's own [October 2022] IESP" and "the District obviously did not deny that services were not being provided" (id.). As a result, the IHO determined that "[i]n the event that there was no June 1 issue, [he] would find that the District has failed to meet [its] burden regarding whether [it] provided Student with services on an equitable basis and would find that Student is entitled to compensatory services at a reasonable market rate" (id.).

## IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and will not be recited here in detail. The gravamen of the parent's appeal is that the IHO erred by finding that the district did not waive the June 1 defense and that the parent failed to provide timely written notice of a request for equitable services by June 1, 2023 for the 2023-24 school year. The district cross-appeals from the IHO's determination that compensatory education would have been appropriate relief absent the district's successful assertion of the June 1 defense.

## 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]). "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 nonpublic schools located within the school district (id.).[3]

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**

Unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

With respect to the "omnibus" status conference held on October 16, 2023, the proceedings were transcribed using a different case number than the matter on appeal (Oct. 26, 2023 Tr. p. 1). The IHO stated on the record that the parties and the IHO were "meeting . . . for a status conference on an omnibus batch that [were] scheduled for hearing th[at] Thursday, October 19th" (Oct. 16, 2023 Tr. p. 2). Without identifying the specific cases involved, the IHO noted that there were "20" separate matters included in the "omnibus batch," and that while the parents bringing the claims were "entitled to their day in court" and that he would "do [his] job for whatever case [wa]s before [him]," he intended to use the status conference as a means to determine "if there[ was] anything that c[ould] be resolved" or if there was any case in which there was "–no dispute," that could be "dispose[d] of . . . quickly" (Oct. 16, 2023 Tr. p. 3).

Possibly related to the October 16, 2023 omnibus status conference, the IHO and/or the parties refer to other meetings or documents that are not included in the hearing record, including: a prehearing order (that the parent indicates was dated September 6, 2023) and a notice of appearance from an attorney for the district that purportedly included a list of affirmative defenses,

[3] 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.).

including the June 1 defense (that the parent indicates was dated September 15, 2023).[4, 5] In addition, the parent refers to "status conferences" and the district refers to "other hearing dates," plural (Req. for Rev. ¶ 2; Answer ¶ 13), but, aside from the October 19, 2023 hearing date, only the October 16, 2023 transcript of the omnibus status conference was included in the hearing record. Further, it is unclear whether the parent was provided a verbatim record of the October 16, 2023 status conference or other proceedings as required by the IDEA (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]) since the parent asserts on appeal that there is "no transcript to demonstrate what was stated at one of the status conferences" (Req. for Rev. ¶ 2). It is unknown whether these items are not part of the hearing record because they do not exist or if they were not included because they were part of the matters treated together in the omnibus status conference and, therefore, did not bear the case number of the present matter. Although the district submitted a certification of the hearing record indicating that the record as submitted was complete, sufficient questions have been raised regarding the proceedings below that may be determinative of this matter, such that remand of this matter is necessary to clarify what transpired and, if necessary, to complete the hearing record.[6]

In particular, with respect to the prehearing order that the parent alleges the IHO issued, the parent asserts that it included language that required the district to raise affirmative defenses within a certain timeframe; accordingly, if the order exists, it could be relevant to the parent's claim that the district waived the June 1 defense (see, e.g., Application of a Student with a Disability, Appeal No. 23-225). In its answer, the district does not deny that a prehearing order exists but vaguely states that the IHO ruled that the district did not violate the "hearing rules."

In addressing the parent's argument that the district waived the June 1 defense, the IHO noted that district asserted the defense at a settlement conference, in a notice of appearance, and the district's October 12, 2023 disclosure email, only the lattermost of which is included in the hearing record on appeal (see IHO Decision at pp. 3, 4; see also IHO Ex. I). In addition, the IHO relied generally on the proposition that an affirmative defense is considered timely if it is raised at some point during the impartial hearing (see IHO Decision at p. 5, citing Application of a Student with a Disability, Appeal No. 23-162, and Application of a Student with a Disability, Appeal No. 23-140). However, in the matters cited by the IHO, no prehearing orders were issued to manage the proceedings (see Application of a Student with a Disability, Appeal No. 23-162, and Application of a Student with a Disability, Appeal No. 23-140). In other matters, SROs have found it within an IHO's discretion to require a district to raise affirmative defenses within a timeframe stated in a prehearing order (see Application of a Student with a Disability, Appeal No. 23-225). Based on the foregoing, it is unclear whether the IHO considered the parent's waiver argument in

[4] The parent alleges that the notice of appearance was submitted "in reference to a group of 21 cases in an OATH OMNIBUS instead of actually raising a specific defense to this specific child," and further misstated the student's name (Req. for Rev. ¶ 2).

[5] There is also reference to a settlement conference between the parties that the district indicates took place on September 29, 2023.

[6] One way to ensure that the hearing record is complete in a matter such as the present where the case was purportedly addressed during a proceeding that does not bear the identifying case number would be to include materials such as the omnibus status conference transcript and related materials as IHO exhibits.

light of the prehearing order, if one exists for this matter. Upon remand, the IHO should specify whether a prehearing order was issued in this matter and ensure that it is made part of the hearing record. The IHO should then address the parent's waiver argument accordingly.

The IHO's inclusion of this matter in a so-called "omnibus" status conference and his apparent treatment, more generally, of matters brought by the same parent's counsel with presumably similar, but not identical factual and legal issues, in an "omnibus" fashion, adds an element of confusion to the record given the potential for omnibus transcripts or orders to be classified in a "group" category as opposed to sorted individually by their unique impartial hearing case numbers. While I acknowledge the wide leeway afforded to IHOs in their conduct of impartial hearings and also appreciate the value of judicial economy, in this instance, the use of the "omnibus" approach has made the individual hearing record in this matter unclear and, as a result, the matter must be remanded to the IHO for the proceedings.[7]

An SRO may consider remand a matter to the IHO for further proceedings and/or determinations on claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). On remand, the IHO should clarify and complete the hearing record, including by identifying aspects that should be included in the hearing record from the omnibus proceedings, and revisit or clarify the question of whether the district waived the June 1 defense.

With respect to the district's cross-appeal, the evidence in the hearing record was not developed enough to support a remedy and, therefore, I agree with the district that the IHO erred. In the event that the IHO finds that the district waived the June 1 defense and, therefore, that relief may be warranted in this matter, the IHO may revisit the question of an appropriate remedy which he addressed in his decision only in the alternative.[8] According to the due process complaint notice, the parent obtained private services for the student and sought district funding for the costs thereof (see Parent Ex. A at pp. 2-3). The parent secondarily sought compensatory education for any lapses in services (id. at p. 2). However, the IHO identified compensatory education as the primary remedy that would have been awarded had the matter not been dismissed based on the parent's failure to show that he requested equitable services for the 2023-24 school year prior to

[7] While I do not directly address the parent's allegation that treatment of impartial hearings with other matters as part of an "omnibus" proceeding violates individual students' due process and privacy rights, I do have concerns that the approach causes much confusion and may run afoul of standard legal practice (see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [referencing IHOs discretion in conducting hearings so long as they are conducted in accordance with standard legal practice]).

[8] The district has not cross-appealed the IHO's determination in the alternative that, had the parent not failed to show that he timely requested equitable services for the 2023-24 school year, the district failed to meet its burden to prove that it implemented the student's special education services (see IHO Decision at p. 5). Accordingly, this determination has become final and binding on the parties and should not be revisited on remand (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

June 1 (IHO Decision at p. 5). In the event the IHO addresses relief on remand, he should address whether the parent's unilaterally-obtained services were appropriate and whether equitable considerations support the parent's claim using the Burlington/Carter framework (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., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). To the extent the IHO finds compensatory education is warranted, he should explain the record basis for his determination.

**VII. Conclusion**

Based on the foregoing, I find that the hearing record was insufficiently developed and/or maintained in order to rule upon the parent's allegation that the IHO erred in finding that the district did not waive the June 1 defense. Accordingly, the matter must be remanded to the IHO to clarify and complete the record. In addition, the IHO should revisit or clarify his finding regarding the district's waiver and, if necessary, revisit the parent's request for relief.

I have considered the remaining contentions and find it is unnecessary to address them at this time in light of my determinations above.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the matter is hereby remanded to the IHO to clarify and/or complete the record and clarify or revisit the question of the district's waiver of the June 1 defense and, if necessary, revisit and rule upon whether the parent's unilaterally-obtained services were appropriate and whether equitable considerations weigh in favor granting funding for the cost of the services.

**Dated:** **Albany, New York**
**January 22, 2024**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**