The University of the State of New York

The State Education Department
State Review Officer
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No. 23-162

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 the decision of an impartial hearing officer (IHO) which denied her request to be fully reimbursed for her daughter's privately obtained special education teacher support services (SETSS) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's award of relief to the parent. The appeal must be dismissed. The cross-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 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

During the 2020-21 school year the student attended ninth grade at a nonpublic parochial school and received five sessions of SETSS per week (Parent Ex. B at p. 1). On November 17, 2020 the CSE convened for the student's annual review, and, finding that the student was eligible for special education programming as a student with a learning disability, developed an IESP that offered five sessions per week of direct SETSS in a group and one 40-minute session per week of individual counseling (id. at pp. 1, 12, 15).[1]

On September 12, 2022, the parent entered into a contract with Headway Services, requesting that the agency implement the student's November 2020 IESP "to whatever extent possible" (see Parent Ex. F). The contract indicated that Headway Services would "make every effort to implement" the student's program, that the parent was "liable to pay the Agency the full amount for all services delivered," and that the rate for the SETSS was "$90-200/hr depending on the provide [sic]" (id. at p. 2).

By letter dated September 28, 2022 the parent informed the CSE chairperson that she consented to the services recommended in the November 2020 IESP, but had no way of implementing the recommendations and was not able to locate providers at the district's rates (Parent Ex. C at p. 2). The parent advised the district that she would "implement the IESP on [her] own and seek reimbursement or direct payment" from the district (id.). The district sent an acknowledgement to the parent that same day indicating that it received the letter (id. at p. 1).

In a due process complaint notice dated September 28, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) because the CSE failed to convene a meeting to recommend services in an IESP for the 2022-23 school year (see Parent Ex. A). The parent requested an order that the district continue to fund the program from the student's November 2020 IESP at the provider's prevailing rate (id. at p. 3).[2]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 31, 2023 and concluded on February 6, 2023 after two days of proceedings (Tr. pp. 1-70). In a decision dated June 26, 2023, the IHO determined that the parent's failure to request dual enrollment services by the June 1 deadline in Education Law 3602-c did not apply in this matter and that the district "procedurally" waived the June 1 deadline as a defense (IHO Decision at pp. 13-25). Next, the IHO found that the district failed to implement the student's IESP, which constituted a denial of a FAPE for the 2022-23 school year (id. at p. 26). The IHO determined that a 25 percent reduction of the SETSS rate was warranted because the SETSS provider was not sufficiently qualified, and the parent offered no explanation as to why the SETSS

[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]; 8NYCRR 200.1[zz][6]).

[2] The parent also requested pendency and argued that the services recommended in the November 2020 IESP constituted the last agreed upon program (Parent Ex. A at pp. 2-3).

were provided individually rather than in a group as recommended in the student's IESP (id. at pp. 28-30). Lastly, the IHO awarded the parent's request for compensatory education counseling services (id. at pp. 31-32).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. whether the district waived the June 1 deadline defense under Education Law 3602-c; and

2. whether the June 1 deadline applies.

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]).[3] "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.).[4]

[3] 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]).

[4] State guidance explains that providing services on an "equitable basis" means that "special education services

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Education Law § 3602-c & June 1 Deadline

The threshold issue challenged by the district is whether the IHO erred in finding that the district waived its argument that the parent was precluded from receiving any relief for the 2022-23 school year because she failed to request equitable services under Education Law Section 3602-c for the 2022-23 school year by the June 1 deadline.

The IHO held that the district waived the affirmative defense of the June 1 deadline "procedurally," in that raising the issue for the first time during the district's summation was untimely, and that failing to offer "witnesses, affidavits, or exhibits" rendered the issue "unproven" (IHO Decision at p. 13). The IHO reasoned that the district failed to offer evidence on the issue and that the parent was not required to refute an unsupported allegation (id.). However, the IHO found that the district did not "waive[] the defense substantively, either expressly or impliedly," because contrary to the parent's position, the district did not engage with the parent after June 1, 2022 and the November 2020 IESP did not guarantee services after June 1, 2022. The IHO found that the lack of the promise of services from the district during the 2022-23 school year "forestall[ed] a substantive/implied waiver argument against the [district's] June 1 position" (id. at pp. 13-14).

Further, the IHO found that even if the district had properly raised the issue, the June 1 deadline did not apply to the student in this case because, although the June 1 notice provision in Education Law § 3602-c read in isolation is plain and unambiguous, it becomes ambiguous when read with other provisions in other subsections of the statute (IHO Decision at pp. 14-16). In particular, the IHO seemed to interpret the requirement that a CSE assure that special education programs and services are made available to students attending nonpublic schools on an equitable basis, as a requirement that all nonpublic school students must receive equitable services, regardless of whether a request was made prior to the statutory deadline (id. at p. 16-17). The IHO then engaged in a review of the State Education Law and what the IHO believed to be the underlying purpose of Education Law § 3602-c and concluded that "the legislature envisioned a more generous application of § 3602-c(2), at least on par with services that must be provided to public school students receiving a FAPE under the IDEA, who face no June 1 constraint" (id. at

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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.).

pp. 17-19). The IHO then considered a district's child-find obligations and the consultation with nonpublic schools required under the IDEA and determined that the requirement for a notice prior to each school year was inconsistent with those provisions (id. at pp. 20-21). According to the IHO, the district should not be rewarded for the dereliction of its duty to confirm a student's status by conducting an annual IESP review each year by claiming lack of notice (id. at p. 21). The IHO also noted that there was nothing in the hearing record regarding the CSE's obligation to provide a request for IESP services form to the parent by April 1 pursuant to the district's standard operating procedure manual (SOPM), which the IHO took as an indication that the district did not intend for the State law to deny services for students whose parents did not have notice of the June 1 provision (id. at pp. 21-22). The IHO held that the June 1 notice requirement did not extend to students already known to the district as having received special education programming, but found that he could still equitably reduce an award for a parent's lack of notice to the district (id. at p. 24).

In its cross appeal, the district argues that the June 1 provision is a strict deadline and that the IHO improperly created a judicial exception which was in direct contradiction to the wording of the statute (Answer with Cross Appeal ¶ 22). The district asserts that the IHO was correct that the district did not substantively waive the June 1 defense but erred in finding that the defense was procedurally waived because the district properly raised the issue during the closing argument of the impartial hearing (id. at ¶ 23).

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]).

Accordingly, it must first be determined whether the IHO properly found that the district waived the June 1 defense procedurally by first raising the issue in its closing argument (IHO Decision at p. 13).[5] The issue of the June first 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

[5] As noted previously, the IHO did not find that the district substantively or impliedly waived the defense (IHO Decision at p. 14).

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]). In this instance, during the district's opening statement included an argument that the parents were not entitled to the services being requested, but without further clarification (Tr. p. 9);[6] then the district raised the specific issue of the June 1 deadline during its closing argument, asserting that the parent failed to show that she requested equitable services from the district prior to the June 1 deadline (Tr. pp. 56-58). Although, it would have been preferable for the district to have raised the issue more specifically at a prehearing conference or one of the status conferences, the district did raise it at the initial hearing level and the parent had the opportunity to respond to the defense. In particular, counsel for the parent responded to the district's closing statement and rather than asserting that the parent sent a letter to the district requesting equitable services prior to the June 1 deadline, the parent raised a number of reasons why the lack of such a letter should not result in dismissal the parent's due process complaint notice (Tr. pp. 61-64). Therefore, the IHO erred by finding that the district waived the defense.

Next, it must be determined whether the hearing record supports the IHO's other determinations regarding the June 1 deadline. For the reasons discussed below, it does not, and the parent's failure to comply with the June 1 deadline under Education Law § 3602-c bars her requested relief.

Untangling all of the IHO's missteps in interpreting Education Law 3602-c is not necessary; however, a few points must be highlighted to get to the heart of the matter. Perhaps the first mistake that led the IHO down the path of trying to interpret a statute he found ambiguous was his statement that "Nothing in § 3602-c(2) explicitly states that the request must be made every preceding June 1" (IHO Decision at p. 16). This finding 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]). Any interpretation that finds that a parent is not required to request IESP services each school year would conflict with the statutory language that requires the request to be made in the school year preceding the school year for which the request is made. Additionally, 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, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services.

[6] Counsel for the parent acknowledged the district's entitlement to services argument in his opening statement, but he argued that it was bizarre because the district offered the 2020 IEP into evidence (Tr. p. 11). Further issue clarification and hearing management may be accomplished using tools such as requiring parties to submit prehearing memorandums of law, to present opening statements with specific issue identification instead of broad statements of the parties' positions, and provision of disclosures before the start of the impartial hearing to ensure that parties can identify disputed areas of fact and be on notice of the issues to be addressed during the impartial hearing (see, e.g., Application of a Student with a Disability, Appeal No. 23-121; see also, Application of a Student with a Disability, Appeal No. 23-157); however, the IHO did not attempt to clarify the disputed issues with any prehearing procedures.

Another error in the IHO's findings relates to his apparent confusion between the requirements set forth under the IDEA and the State's dual enrollment statute, as is shown by the IHO's reliance on the IDEA consultation process as a basis for explaining away the significance of State law requiring that a parent notify the district of a request for IESP services prior to June 1 of the school year preceding the year for which the request is made (IHO Decision at pp. 20-21). Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). The services plan provisions under federal law also clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR § 300.137 [a]).

However, separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment 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]). For requests pursuant to § 3602-c, 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.).[7] Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs (see Educ. Law § 3602-c[2][b][1]; Thomas K, 14 N.Y.3d at 293). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]). Accordingly, the IHO's unnecessary creation of an ambiguity in the statutory language requiring that a request be made prior to June first of the school year preceding the school year for which the request is made, followed by reliance on the federal scheme to supplement what the IHO incorrectly found as ambiguous was in error.

Nevertheless, the IHO's apparent confusion between the two schemes is not something that is new to disputes in the due process system (see Application of a Student with a Disability, Appeal No. 16-015). Additionally, the IHO did correctly point out that the State dual-enrollment statute carries with it some of the same requirements as those called for under the IDEA, such as the requirement that an IESP be developed based on a student's individual needs in the same manner and with the same contents as an IEP (Educ. Law § 3602-c[2][b][1]); however, the exact contours

[7] Additionally, unlike the proportionate share and services plan provisions of the IDEA, § 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (Educ. Law § 3602-c[2][b][1]). The dual enrollment option and due process rights conveyed in § 3602-c are unavailable to students who do not reside in New York (Educ. Law § 3602-c[2][a], [2-b]).

of the "equitable basis" requirement called for in § 3602-c[1] is not unmistakably defined and does not necessarily carry with it all of requirements as a FAPE.[8] State guidance explains that providing services on an 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," 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.).

Throughout the proceeding the parent made it sufficiently clear that she was seeking IESP services for her daughter at the private school, and I see no evidence of a desire on the part of the parent to place the student in the public school with IEP services. The parent did not notify the district of her intent to unilaterally place the student until September 28, 2022, the same day she sent the due process complaint notice (see Parent Exs. A; C). Moreover, the parent signed the Headway Services contract on September 12, 2022, approximately two weeks before providing the district with notice that she was seeking SETSS and counseling (see Parent Ex. F). Assuming without deciding that the district was obligated to develop a public school IEP for the student but failed to do so, I would not permit the parent to seek IESP services as equitable relief and evade the requirements discussed above.[9] If the parent seeks services pursuant to an IEP, the parent may

[8] With respect to public school placements under IDEA, there has been an ample number of judicial interpretations from federal courts that have provided greater clarity regarding the contours of a FAPE in specific circumstances; however, there have been far fewer cases pursued in the New York State courts that have examined precisely how far a public school district's obligations extend in various circumstances under the dual enrollment statute in which a large portion of the student's educational services and experiences are heavily influenced by the parent's selection of a private school that is not under the direct everyday control of the public school officials.

[9] The United States Department of Education posed the following interpretive guidance:

> If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?
>
> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and

at any time request the CSE to convene and develop a proposed IEP for the student for placement in the public school.

Turning away from the IHO's statutory interpretations, in this case, there is no evidence in the hearing record showing that the parent complied with the notice requirement on or before June 1, 2022, and on appeal the parent does not assert that she provided timely notice. Rather, the parent points to a section of the district's SOPM and asserts that the district failed to "prompt" her by April 1 to request special education services from the district.[10] The manual referenced by the parent to counter the district's argument does not appear in the hearing record. Even if it had, the thrust of the argument is that it would excuse the parent's compliance with the June 1 deadline due to a lack of knowledge of the requirement; however, that would not relieve the parent of the notice obligation under the statute. The Commissioner of Education has previously addressed this issue and 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).

Thus, the hearing record contains no evidence satisfying the requirement under Education Law § 3602-c, namely, that the parent made a written request for IESP services by June 1 preceding the 2022-23 school year (see generally Tr. pp. 1-70; Parent Exs. A-G). As such, the parent is not

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New York State (NYS) Education Law Section 3602-c" Attachment 1 at p. 12 available at https://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). Courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. On the one hand, it is clear that a district violates the IDEA by refusing to convene an IEP meeting when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. V. Lua, 832 F. App'x 493, 496 [9th Cir. 2020]). In another instance, in E.T. v. Board of Education of Pine Bush Central School District, after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"] [emphasis added]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

[10] The parent also reasserts some of the arguments she made in front of the IHO, such as that the district waived the June 1 deadline by its conduct during the 2022-23 school year (Answer to Cross-Appeal at pp. 7-8). However, the IHO made an explicit finding that the district did not waive the June 1 deadline by its conduct (IHO Decision at pp. 13-14). As the parent did not appeal from this finding in her request for review, this determination has become final and binding on the parties and will not be reviewed on appeal (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]).

entitled to equitable relief. Additionally, even if the June 1 deadline was not a determining factor in this matter, as discussed below, the parent failed to meet her burden to show that the unilaterally obtained SETSS the student received during the 2022-23 school year was appropriate to meet his needs.

B. SETSS

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that she unilaterally obtained private services from Children's Resources for the student and then commenced due process to obtain remuneration for the services provided by Children's Resources. Accordingly, the issue in this matter is whether the SETSS obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Children's Resources upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Accordingly, the parent's request for district funding of the privately obtained SETSS at issue here must be assessed under this framework.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]

["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

In a cross-appeal, the district asserts that "the IHO should have determined that the [p]arent failed her burden of showing the unilateral placement was appropriate" and denied the parent's request for funding of the unilaterally obtained SETSS. Specifically, the district argues that the IHO's equitable consideration of the SETSS provider qualifications and that the student received individual rather than group services should have been analyzed as "prong 2 concerns" according to a Burlington/Carter analysis. Next, the district alleges that the hearing record does not contain any testimony from the student's SETSS provider regarding the appropriateness of the SETSS provided by Headway Services, nor does the parent's affidavit include relevant information on this topic. Additionally, the district contends that the hearing record is devoid of documentary evidence such as progress reports or assessments of the student supporting that Headway Services provided SETSS to the student, and the agency educational director's testimony was insufficient.[11]

[11] Initially, the parent requests that the undersigned accept a January 18, 2023 progress report as additional evidence on appeal in support of the unilaterally obtained SETSS (Answer to Cross at p. 4; proposed Parent Ex. H). Notably, this exhibit was not admitted into evidence during the impartial hearing nor did the parent propose to enter it as an exhibit at the impartial hearing (see Tr. pp. 7-8). [I]n general, documentary evidence not presented at an impartial hearing may be 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

According to the district, the hearing record does not contain evidence "'that demonstrates what services the student received or how the contracted agency addressed the student's needs.'" Review of the evidence in the hearing record shows that the district is correct that the hearing record does not show that Headway Services provided specially designed instruction to the student.

Although not in dispute on appeal, a discussion of the student's needs is warranted to determine whether the SETSS Headway Services provided to the student was appropriate to meet his needs. The hearing record contains little evidence regarding the student's needs during the 2022-23 school year, rather, most of the information about the student is from the 2020-21 school year.

According to a November 2020 SETSS report reflected in the November 2020 IESP, the student's reading skills were at a fourth-grade level, and he fluently read words he was familiar with, but had difficulty with unfamiliar words or words that required decoding of multiple syllables (Parent Ex. B at pp. 1, 2). The parent reported and the IESP reflected that seeking relevant information in a text was very difficult for the student (id. at p. 3). In math, the IESP reflected a SETSS report that the student's math skills were at a third to fourth grade level, and he was "well versed in basic calculations (addition subtraction multiplication division) but d[id] not remember the operations of solving fractions and decimals" (id. at p. 1). Math strengths included that the student absorbed new rules and exhibited organized note taking; however, it took multiple trial and errors "until he learn[ed] to apply the rules to solve examples" (id. at pp. 1-2). With regard to written language, the IESP reflected reports that the student's writing was at a third-grade level, he had difficulty expressing himself through writing, his word structure in a sentence was incomplete, and he stated points of an idea but not a fully worded sentence (id. at p. 2). The IESP reflected parent concerns about the student's writing skills, which included his use of paragraphs, punctuation, organization, and sentence structure (id. at p. 3). The IESP indicated that the student comprehended spoken language, used simple language when expressing himself, and gave short and sometimes "curt" answers without elaboration when responding to questions (id. at p. 2).

The student's social/emotional present levels of performance at the time of the November 2020 IESP included that he reacted to stress, disappointment and frustration by simply giving up, he did not have internal motivation to aspire to excel in academics, when pushed to participate or put in effort he would "lash out," and that although he interacted with peers if interested, he hesitated to cooperate with adults as he viewed them as "an instrument of pushing him out of his comfort zone" (Parent Ex. B at p. 3). The IESP reflected parent report that, at times, the student did not want to try to complete academic work because it was too difficult for him (id.). According to the IESP, the student's physical development was typical, he did not have any medical issues, and the parent did not have any concerns at that time (id. at p. 4). Management needs identified at that time included the following: graphic organizers; visual aids; informational charts and graphs; teacher and peer modeling; peer to peer editing; reference tables; small group brainstorming sessions; mnemonics; daily planner; colored/numbered folders to promote organization of

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]). The two impartial hearings in this matter were held on January 31, 2023 and February 6, 2023; therefore, as the evidence was available at the time of the impartial hearing and could have been offered at that time, I decline to accept the additional evidence now on appeal.

materials; brief, clear instructions; hands-on learning activities; visual and verbal cues; checks for understanding; repetition of information; frequent, positive feedback (id. at p. 5). Given these needs, the November 2020 CSE recommended that the student receive five periods of direct SETSS per week in a group "to address reading, writing, and math deficits," and one 40-minute session per week of individual counseling "with a focus on motivation and self-confidence with regard to academic deficits" (id. at pp. 5, 12).

In an affidavit the parent testified that she was unable to find a district provider to implement the SETSS recommended in the November 2020 IESP so she contacted Headway Services (Parent Ex. D ¶¶ 3, 4, 6). The educational director of Headway Services (director) testified that the agency offered SETSS, occupational therapy, physical therapy, health paraprofessional services, and oral transliterator services (Tr. p. 22). Although Headway Services had never arranged for counseling, the director testified that counseling could be provided if a student needed it (Tr. pp. 22, 24-25). According to the director, SETSS providers review students' IEPs and goals, speak with teaching staff and parents, and observe "where the child [was] struggling," identify the students' weaknesses and strengths, and "provide remedial services according to what they need" (Tr. p. 26).[12]

During the 2022-23 school year Headway Services planned to provide five hours of SETSS per week to the student (Parent Exs. D ¶ 7; E ¶ 12).[13] The director testified that she was the educational supervisor for the student's SETSS provider, who was "certified by [New York State] to teach students with disabilities," and "trained and experienced to teach literacy and comprehension to school aged children" (Parent Exs. E ¶¶ 4, 13, 14; G). According to the director, the agency needed "a very highly qualified provider for this case" as the student was in high school and functioning on a fifth-grade level (Tr. pp. 29-30).[14] The director testified that in addition to "providing direct 1:1 service" to the student, the SETSS provider also "t[ook] time to prepare for sessions, create[d] goals, w[rote] progress reports, and m[et] with teachers and parents" (Parent Ex. E ¶ 16). The student's SETSS were "typically provided outside of the classroom" and were "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 19). The director testified that the student's progress was measured through quarterly assessments, consistent meetings with teachers and school staff, observation of [the student] in the classroom, and daily session notes (id. ¶ 20). According to the director, the student had "already shown signs of progress" with his SETSS provider; however, the student's "academic and social delays warrant[ed] the need for" five periods per week of SETSS on a 1:1 basis for the 2022-23 school year (id. ¶¶ 21, 22).

[12] The director testified that SETSS providers did not accompany students to "religious-based classes or subjects" (Tr. p. 26).

[13] The parent's affidavit was signed on January 18, 2023, and the director's affidavit was also signed on January 18, 2023 (Parent Exs. D at p. 3; E at p. 4). On February 6, 2023, the parent testified that she had not yet received a bill from Headway Services (Tr. pp. 53-54).

[14] The director testified that she provided "training and supervision" to the student's SETSS provider, and agency staff provided "individualized support" in the form of "weekly meetings with a supervisor to make sure that he [was] reaching his goals" (Tr. p. 30).

Regarding the district's argument on appeal that the hearing record did not contain evidence that the student actually received SETSS during the 2022-23 school year, the IHO "found no reason to doubt [the witnesses'] veracity, with respect to the facts they related or to the opinions of the [d]irector, and [the IHO] credit[ed] all the testimony as well" (IHO Decision at p. 10). Review of the hearing record does not provide a basis to overturn the IHO's finding with regard to witness credibility, and both the director and parent testified that as of January 18, 2023, the student was receiving five periods per week of individual SETSS from Headway Services (Parent Exs. D ¶ 7; E ¶ 12). As to the district's claims about the SETSS provider's credentials, I note that the private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14), and therefore this, in and of itself, would not be a bar to reimbursement.

However, while it appears that the student did receive SETSS from Headway Services, the district is correct in asserting that the hearing record does not contain evidence of how the services provided were specially designed to meet the student's needs, aside from rather vague assertion from the director that the SETSS provider implemented "individualized sessions that include[d] a great deal of specialized instruction" (see Parent Ex. E ¶ 19). Despite testimony that the SETSS provider created goals and prepared progress reports, the hearing record is devoid of this information or any evidence regarding how the sessions were "specialized" to the student, what student needs the sessions addressed, and whether the services were appropriate. Therefore, the evidence in the hearing record does not support a finding that the parent sustained her burden to show that the SETSS provided by Headway Services constituted specially designed instruction appropriate to meet the student's special education needs.[15]

VII. Conclusion

Based on the foregoing, the IHO erred in finding that the parent was not required to provide the district with timely written notice of a request for equitable services for the student by June 1, 2022 for the 2022-23 school year, and, accordingly, the district was not required to develop an IESP or to implement the student's November 2020 IESP during the 2022-23 school year. Therefore, the parent's request for relief is denied.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

[15] The parent's request for funding of the unilaterally obtained SETSS is separate from her request for compensatory counseling services; however, as she failed to show that she requested any services from the district by June 1, 2022, she is also not entitled to compensatory counseling services. I note that the parent testified she attempted to obtain counseling services but was unable to locate providers (Tr. pp. 51-52; Parent Ex. D ¶ 11). Additionally, there is no indication in the hearing record that the parent requested that the district provide counseling services to the student prior to her contracting with the SETSS provider or seeking compensatory education. Moreover, as previously noted, the parent testified that she did not contact the SETSS provider until after sending the 10-day notice; however, the contract is clearly dated September 12, 2022, two weeks before the 10-day notice (Parent Exs. C at p. 1; D ¶¶ 5-6; F at p. 2).

IT IS ORDERED that the IHO decision dated June 26, 2023 is modified by reversing that portion which found the district was required to offer the student a FAPE or equitable services during the 2022-23 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated June 26, 2023 is modified by reversing those portions which directed the district to fund the unilaterally obtained SETSS and counseling services for the 2022-23 school year.

Dated: **Albany, New York**
October 6, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER