The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-192

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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 denied her request to be reimbursed for unilaterally obtained services delivered to her daughter by Benchmark Student Services (Benchmark) for the 2022-23 school year on the basis that the parent did not notify respondent (the district) of her request for equitable services prior to June 1, 2022. The district cross-appeals from that portion of the IHO's decision which found that equitable considerations favored the parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

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 here in detail. Briefly, a CSE

convened on May 27, 2020 and determined that the student was eligible for special education as a student with a learning disability (Parent Ex. B at p. 1).[1] The May 2020 CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) as well as one 30-minute session per week of individual counseling and one 30-minute session per week of group counseling services (id. at p. 8).[2] The IESP reflects a projected implementation date of September 9, 2020 and that for the 2020-2021 school year the student was "Parentally Placed in a Non-Public School" (id. at pp. 1, 10).

According to the parent, prior to the 2022-23 school year, she did not receive any "communication" from the district with regard to "an updated IESP" for the 2022-23 school year (Parent Ex. F ¶ 3). For the 2022-23 school year, the parent executed a contract with Benchmark to provide SETSS for the student consistent with the "most-current agreed-upon IEP or IESP" (Parent Ex C).[3] According to the Benchmark administrator, Benchmark began delivering SETSS to the student "on or about September 13, 2022" (Parent Ex. G ¶¶ 1, 3).[4]

The parent, through a lay advocate, filed a due process complaint notice, dated July 19, 2023, alleging that the district "failed to furnish the student with all the recommended services for the 2022-2023 school year" (Parent Ex. A at p. 1). The parent requested that the district fund the student's private services from Benchmark and provide a bank of compensatory education for any services not provided (id. at p. 2).

Following a prehearing conference, held on August 25, 2023, an impartial hearing convened and concluded, before the Office of Administrative Trials and Hearings (OATH), on September 28, 2023 (Tr. pp. 1-90). At the hearing, the lay advocate clarified that the parent would only be seeking reimbursement for the SETSS the student received during the 2022-23 school year and would not be seeking compensatory services (Tr. p. 32). The parent testified that, in January

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 8 NYCRR 200.1[zz][6]).

[2] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[3] The Benchmark administrator testified that the contract was not executed by the parent until January 2023 (Tr. 77-78; see Parent Ex. C at p 2).

[4] The Commissioner of Education has not approved Benchmark as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

2023, she notified the district she would be seeking equitable services from the district for the 2022-23 school year (Tr. p. 52-55).[5]

The parties were to submit written closing briefs by October 23, 2023 (Tr. p. 86). The district submitted its brief timely; however, the parent's lay advocate requested the record be reopened for the submission of additional testimony of the parent to "clarify her responses" as the lay advocate alleged the parent "did not properly understand the questions she was asked" (IHO Exhibit III at pp. 11-12). The advocate also indicated that she had requested the opportunity to bring the parent back for rebuttal, but in a "haste to wrap up the case. . . mistakenly agreed to rely only on closing briefs" (id. at p. 12). The district objected to reopening the hearing record on several grounds and the parties had some back and forth regarding their positions(id. at pp. 1-10).

In a decision dated April 5, 2024, the IHO found that the parent failed to comply with the statutory requirements of Education Law § 3602-c to notify the district by June 1, 2022 of her request for equitable services for the 2022-23 school year (IHO Decision at pp. 4, 22). Initially, the IHO rejected the parent's request to reopen the hearing for rebuttal testimony finding that the parent had an "ample opportunity during the hearing to provide documentary or testimonial evidence regarding all of the issues presented" (id. at p. 18). The IHO then recounted the parent's testimony and found that the parent testified that she did not request equitable services from the district prior to June 1, 2022 and that there was no additional evidence to show that the parent provided notice to the district prior to June 1 (id. p. 18-22). The IHO also noted that the parent's advocate stated during the hearing that there was no additional evidence, and the IHO reasoned further, that even if she allowed an additional opportunity to rehabilitate the parent's testimony, such testimony would not change the outcome of the ultimate issue that the parent did not notify the district by June 1 (id. at p. 19). Although the IHO denied the parent's request for reimbursement due to her failure to comply with the June 1 deadline, the IHO made alternative findings and indicated that, if not for the finding as to the June 1 deadline, the IHO would have awarded the parent funding for SETSS for the 2022-23 school year at a reduced rate due to the parent's failure to provide the district with a 10-day notice (id. at pp. 23-32). The IHO also noted that the last educational program in the hearing record was developed in May 2020 and ordered the district, if it had not already done so, and if the parent's consent, to conduct a reevaluation of the student and to reconvene a CSE to determine whether the student remained eligible for special education and related services (id. pp. 32-33).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the parent's due process complaint on the basis that she failed to provide the district with a request for equitable services pursuant to Education Law § 3602-c. The parent alleges that the IHO erred in placing the burden of proof on the parent to show that she sent a request before June 1, 2022. She further asserts that the district was required to notify her of the requirement for a June 1 notice and failed to do so.

[5] While this is the main issue on appeal, the hearing record reflects the parent was asked several times throughout the course of her testimony to clarify when she notified the district. Each time she was asked she testified she notified the district she would be seeking reimbursement for the 2022-23 school year in January 2023 (Tr. pp. 52-59.). Additionally, the lay advocate indicated she would address the issue of the June 1 deadline in her written closing and that there was no need to submit additional evidence (Tr. pp. 84-87).

Additionally, the parent asserts that the district did not appropriately raise the June 1 defense, asserting that it was required to raise the defense in its response to the parent's due process complaint notice. Moreover, the parent also appeals from the IHO's failure to address her request for an award of pendency services.

In an answer and cross-appeal, the district argues that the IHO correctly found that the parent did not comply with the requirements of Education Law § 3602-c. Moreover, the district argues that the parent's claim for pendency is not properly raised on appeal. The district cross-appeals from the IHO's decision regarding equitable considerations. The district argues that even if the June 1 defense does not apply, the parent would not be entitled to reimbursement because the evidence in the hearing record did not establish that a contractual relationship existed between the parent and the provider. According to the district, the contract was signed after services began and the contract language was insufficient to establish the parent's obligation to pay for services for the entire 2022-23 school year.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

[6] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing

The parent requests, on appeal, that the district be directed to fund services during the period of pendency, which the parent identifies as February 7, 2023 through April 21, 2023.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In the instant matter, the July 19, 2023 due process complaint notice contained a request for pendency asserting that the May 2020 IESP was the student's last agreed upon placement (Parent Ex. A at p. 2). Subsequent to the filing of the due process complaint, the parent's lay advocate withdrew the motion for pendency on the record stating unequivocally, "I'm actually going to [] withdraw the motion on pendency . . ." (Tr. p. 5). The parent's lay advocate affirmed her intention to withdraw the motion on pendency as placing the student in a pendency program would not have any effect for the 2022-23 school year (id.). Additionally, to the extent that the parent is seeking pendency services from February 7, 2023 through April 21, 2023, the due process complaint notice in this matter was filed on July 19, 2023 (see Parent Ex. A). According to the parent a prior matter was proceeding from February 7, 2023 through April 21, 2023 (Req. for Rev. ¶3); however, as that proceeding concluded the parent would have had to bring a subsequent proceeding requesting compensatory pendency services for that period of time and the parent did not make such a request in the July 2023 due process complaint notice in this proceeding (see Parent Ex. A).

Therefore, based on the above, there are no issues related to pendency that are properly before me.

2. Additional Evidence

The parent seeks to submit as additional evidence marked as "SRO Exhibit A" a "Guide to Special Education School Age Services" alleged to be published by the district to indicate the district's conduct waived its June 1 defense.

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]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a

Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Initially, the parent's representative did not offer this document at the prehearing conference on August 25, 2023, nor was it offered at the impartial hearing on September 28, 2023 (see Tr. pp. 1-90). Additionally, the parent's lay advocate indicated that she would not be submitting any additional evidence at the close of the hearing in response to the district raising the June 1 defense (Tr. pp. 86-87). The parent cannot now be allowed to present additional evidence in support of an argument that was not presented at the hearing, particularly where she was given an opportunity to do so before the close of the hearing and chose not to.

Finally, even if I were to accept the parent's additional evidence, the parent's argument related to the information contained within the document is without merit. The parent asserts that the district was required to provide her with notice of the June 1st deadline in compliance with its own policies. The thrust of the parent's argument is that the lack of notice would excuse the parent's compliance with the June 1st deadline due to a lack of knowledge of the requirement; however, this is not a valid argument as a lack of knowledge would not relieve the parent of the notice obligation under the statute.[8] The Commissioner of Education has previously addressed this issue and determined that a parent's lack of awareness of the June 1st statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1st 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). Accordingly, the parent's argument is without merit.

Therefore, for the reasons set forth above, the parent's request for consideration of the additional evidence is denied.

B. Individualized Education Services Program (IESP) - June 1 Deadline

The threshold issue challenged by the parent is whether the IHO erred in finding 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 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

[8] The parent's assertion is also inconsistent with what is contained within the submitted district policy, which provides that "[i]f you think you should have received this letter and did not, or if you have any questions about parentally placed students, contact your CSE" (SRO Ex. A at p. 27).

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]).

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

In this instance, the district first raised the issue of the June 1 deadline during cross-examination of the parent following questioning as to when the parent first notified the district she was placing the student in a nonpublic school and requesting services from the district (Tr. pp. 52-55). While best practice would have been for the district to have raised the issue of the June 1 defense in an response to the parent's due process complaint notice or during the prehearing conference, the parent was provided with a sufficient opportunity to rebut the defense during the hearing.

As determined by the IHO, the parent confirmed repeatedly during cross-examination at the impartial hearing that she notified the district of her request for equitable services in January 2023 and that she had not signed "the document" requesting equitable services prior to June 1, 2022 (see IHO Decision at pp. 18-19; Tr. pp. 52-59). The hearing record does not contain any further evidence that the parent requested equitable services prior to June 1, 2022, nor has the parent offered any proof that such a request was made despite having had ample opportunity to do so (see Parent Exs. A-G; see generally IHO Ex. III). Thus, the hearing record contains no evidence the parent satisfied the notice requirement under Education Law § 3602-c, namely, that the parent made a written request for equitable services by June 1 preceding the 2022-23 school year (see generally Tr. pp. 27-89; Parent Exs. A-G).

Additionally, the parent's advocate was provided with the opportunity to respond to the district's June 1 defense at the hearing and at that time primarily objected to the district raising the defense during cross-examination of the parent (Tr. pp. 82-83). The parent indicated that she intended to present a rebuttal on this issue, but when asked if that included witnesses or evidence, or a written closing, she indicated that she only wanted a written closing (Tr. p. 83). Then, when

asked if she would be submitting any further evidence along with the written closing, the parent's advocate stated that there was no additional evidence (Tr. p. 87). The parent then elected not to submit a closing brief and instead submitted a request, on the due date for the closing brief, to reopen the hearing record so that the parent could rehabilitate her testimony as to the June 1 issue (IHO Decision p. 22; IHO Ex. III). However, even if the parent had been permitted to reopen the hearing, as the IHO properly pointed out, at no point did the parent assert that she requested equitable services for the student for the 2022-23 school year from the district prior to June 1, 2022. This is just as true on appeal, where the parent's arguments are focused on the district's actions and at no time does the parent make an assertion that she requested equitable services from the district prior to the deadline to make such a request. As such, there is insufficient basis to overturn the IHO's determinations and the parent is not entitled to equitable relief.

VII. Conclusion

Based on the above, the parent's request for pendency services during the 2022-23 school year was not a part of this proceeding and with respect to equitable services for the 2022-23 school year, the hearing record supports the IHO's determination that the parent failed to request such services prior to the statutory deadline. I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

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

STEVEN KROLAK
STATE REVIEW OFFICER