The University of the State of New York

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

No. 24-203

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:
Kerben Law Group, PLLC., attorneys for petitioner, by Janaya S. Kerben, Esq.,

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 for denied her request that respondent (the district) fund the costs of her son's private services delivered by Early Intervention Matters, Inc. (Early Intervention Matters) for the 2023-24 school year. The district cross-appeals from that portion of the IHO decision which determined in the alternative that a reduction of funding of services from Early Intervention Matters would be appropriate. 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 fully recited.

Briefly, on November 15, 2022 a Committee on Preschool Special Education (CPSE) convened to review the student's educational programming (Parent Ex. B). The CPSE found that the student continued to be eligible for special education as a preschool student with a disability and recommended that the student continue to receive five hours per week of individual special education itinerant teacher (SEIT) services, three 30-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of individual speech-language therapy per week, and added three 30-minute sessions of individual physical therapy (PT) per week beginning in January 2023 (id. at pp. 21, 25).[1, 2] Prior to developing school-age programming for the 2023-24 school year, a psychoeducational evaluation of the student was conducted by the district on March 29, 2023 (Parent Ex. F).

On May 23, 2023, a CSE convened to develop an IEP for the student for the 2023-24 school year (Parent Ex. P). At the meeting, the parent expressed concern regarding the student's delayed adaptive language, fine and gross motor skills and her belief that the student required adult supervision in the classroom as well as on the bus due to his inability to function without an adult (id. at p. 28). The CSE recommended that the student be placed in a 6:1+1 special class in a specialized school and specified that the student would receive eight periods per week each in math and English language arts, and four periods per week each in social studies and sciences (id. at p. 21). Additionally, the CSE recommended the student receive related services of one 30-minute session per week of OT, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, and a health paraprofessional (id. at 22). The district sent a prior written notice to the parents on June 1, 2023 summarizing the services in the May 2023 IEP (Parent Ex. Q).

On June 9, 2023 the parent submitted an application to a different program, namely the district's Acquisition Integrated Services Meaningful Communication, and Social Skills (AIMS) Program for the 2023-24 school year (Parent Ex. R). According to the parent, she was notified that all seats in the AIMS program were full for September 2023 and that the program would retain the application in the event a seat became available, the student would be placed on a waitlist, and

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

[2] The student's eligibility for special education as a preschool student with a disability for the 2023-24 school year is not in dispute (see 34 CFR 200.1[mm]; 8 NYCRR 200.1[mm]).

that student would receive the services in the school location letter (IHO Exhibit I).[3] On August 15, 2023, the parent notified the school district of her intent to homeschool the student (Parent Exs. M, N; Tr. pp. 83-84).

A. Due Process Complaint Notice

In a due process complaint notice dated November 8, 2023, the parent, through her attorney, alleged that the district failed to provide a FAPE "and/or equitable services" because the district did not implement the recommended SEIT services from the January 5, 2023 IEP (January 2023 IEP) developed by the CPSE during the 2023-24 school year (Parent Ex. A at p. 1). The parent alleged that the last agreed upon program was the January 2023 IEP and that the student was recommended to receive 12 hours per week of SEIT and "related services" and that the district did not provide those services for the 10-month 2023-24 school year (id.). The due process complaint notice stated that "[t]he parent disputes any subsequent program or action taken to reduce, deactivate or declassify this student from being eligible to receive services" (id.). The parent also alleged that she was unable to find a provider at the "standard" rate, however, they were able to locate a provider at an "enhanced rate" (id. at p. 2). As relief, the parent sought, among other things, 12 hours of SEIT services at an "enhanced rate," and all related services recommended on the IEP for the 10-month 2023-24 school year through either related services authorizations (RSA), if RSAs are accepted by the parent's provider, or direct funding to the parent's chosen provider at the rates they each charge.

B. Impartial Hearing Officer Decision

The IHO held a preliminary conference on December 11, 2023 (Tr. pp. 1-15). On January 10, 2023 the IHO advised the parties that they should be prepared to address the student's eligibility for services at the due process hearing (IHO Exhibit II).[4] An impartial hearing on the merits convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on January 16, 2024, and concluded after three days of hearings on April 8, 2024 (Tr. pp. 19-210). The district did not present any witnesses or offer any documents into evidence (Tr. p. 25). The parent called three witnesses including, the parent, a director from the provider agency, and the SEIT provider (id.). The IHO admitted all of the parent's offered exhibits into evidence without objection (Tr. pp. 25-30). During the first day of the hearing, the IHO requested that the parent's attorney clarify the parent's claim in the due process complaint (Tr. pp. 23-24). In her opening statement, the parent's attorney argued that the district failed to provide a FAPE for the 2023-24 school year and reiterated the parent's request for an award of related services pursuant to the last agreed upon IEP from January 5, 2023 (Tr. pp. 31-33).

In a decision dated April 19, 2024, the IHO reviewed the facts regarding the creation of the January 2023 IEP by the CPSE, the development of the May 2023 IEP by the CSE, the parent's

[3] As indicated in the IHO Decision, IHO Exhibit I was received after the hearing due to the fact that Parent Exhibit S was "materially altered" and does not contain a date (IHO Decision at p. 11).

[4] The IHO also reminded the parties before the entry of evidence and opening statements that he required the parties to address the student's eligibility for services, to which the parent's attorney referred the IHO to Parent Ex. T (see Tr. pp. 23, 33).

application to the AIMS program, and the parent's August 2023 application to home school the student (IHO Decision at pp. 4-5). The IHO found that the parent alleged that the district had failed to implement the January 2023 preschool IEP during the 2023-24 school year in the due process complaint notice, but that the parent did not specifically challenge the CSE's May 2023 school-age IEP and did not even acknowledge the subsequent events or the fact that the student had aged out of preschool services (id. at p. 6). The IHO found that the parent failed to present any credible evidence that she notified the district of her intention to secure special education services as required by Education Law § 3602-c (id. p. 9). Moreover, the IHO concluded that the district was not on notice as to the parent's request that special education services be provided to her son and therefore was under no obligation to implement services pursuant to Education Law § 3602-c (id.). The IHO held that the district had no legal obligation to implement the January 2023 IEP and thus no analysis was required as to the appropriateness of the parent's unilaterally-obtained SEIT provider and the claim was dismissed with prejudice (id. at pp 9, 11).

With regard to equitable considerations, the IHO found that the parent did not submit a 10-day notice advising the district of her specific concerns with the IEP (IHO Decision at p. 9). The IHO further found he could not rely on the director's testimony and thus found the $200 hourly rate charged for the SEIT services provided to the student was unjustified and would award $100 plus a percentage for operating costs (id. at p. 10).[5] Finally, the IHO held that the parent submitted a materially altered document in her disclosure (Parent Ex. S) (id.).[6] The IHO found that the parent's subsequent submission included a more complete version which included the notification to the parent that the student would be placed in a district school consistent with the school location letter (id. at 11.) The IHO found the submission of the altered document "misleading at best and, at worst, was offered in furtherance of a false narrative" in an attempt to show the district was not implementing the May 2023 IEP and , therefore, the parent's submission of the altered document casted a shadow on all claims by the parent in the matter (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by not making a determination as to whether the district failed to provide the student with a FAPE for the 2023-24 school year, and improperly denied the parent's request for funding of SEIT services for the 2023-24 school year. The parent argues that the IHO "acted arbitrarily and capriciously" in failing to make a determination as to whether the district denied the student a FAPE. The parent argues that the district was required to demonstrate how it had fulfilled its obligations under the IDEA and did not submit any documentary evidence or testimony despite having the burden of proof.[7] The parent argues that

[5] The IHO refers to the SETSS provider rate, however, the testimony provided indicates she was providing SEIT services to the student (see Parent Ex. I at ¶ 12).

[6] The IHO found the parent's testimony to be in conflict with other witnesses, specifically the services agency director, and therefore found her not to be credible (IHO Decision p. 9).

[7] In the request for review, the parent does not challenge any of the IHO's findings regarding the fact that a subsequent IEP was created in May 2023 that offered the student special education services a public school, and that the parent failed to challenge the most recent programming offered to the student by the district. Accordingly, those determinations have become final and binding on the parties and will not be further discussed or reviewed

the district "conceded that it did not offer the student a FAPE" and the IHO did not make a finding on this point.

Next the parent argues that the IHO impermissibly dismissed the case by raising the June 1 defense sua sponte on behalf of the district. The parent argues that the district failed to address the issue despite the IHO's reminder that eligibility was at issue. The parent argues further that the district did not comply with its own procedure manual which was a "condition precedent" to raising the defense and cannot be used to "foreclose the parent's relief." Finally, the parent argues that the IHO impermissibly allowed the district's attorney to challenge a term of the parent's contract with the private provider in contravention of New York contract law. As relief the parent seeks full funding of the services the parent obtained from Early Intervention Matters.

In an answer and cross-appeal, the district responds to the parent's argument that an analysis of the district's failure to provide the student with equitable services was not required because there was no demonstrated obligation by the CSE to provide the student with services under Education Law § 3602-c, both because the parent failed to notify the district as required, and more specifically, that the parent failed to plead the appropriate claim in the due process complaint and properly identify a genuine issue of material fact. The district also argues in the alternative that the hearing record does not support the appropriateness of the parent's unilateral placement as there was no basis in the record that the student, now in kindergarten, required SEIT services. Finally, the district cross-appeals the IHO's determination that would, in the alterative, award $100 per hour plus a percentage for operating costs arguing that the record supports a total denial of funding of the services privately obtained from Early Intervention Matters because the parent failed to provide a 10-day notice to the district and the director's testimony did not credibly establish a reasonable rate for the services provided. The district otherwise seeks affirmance of the IHO's decision.

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

on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

services is made (Educ. Law § 3602-c[2]).[8] "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.).[9] 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. For purposes of obtaining equitable services from a district under New York's dual enrollment statute "a student in a home instruction program submitted by his or her parent or person in parental relation for review pursuant to the regulations of the commissioner shall be deemed to be a student enrolled in and attending a nonpublic school eligible to receive services pursuant to subdivision two of this section" (Educ. Law § 3602-c[2][a], [2-c]).

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. Dual Enrollment Services – June 1 Deadline

Initially, it should be noted that there is no requirement for the district to notify parents of students who are homeschooled of the June 1st deadline. The State's dual enrollment statute

[8] 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]).

[9] 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.

requires parents of a New York State resident student with a disability who is in a home instruction program and for whom the parent seeks 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-c]). Moreover, the IDEA and its implementing regulations provide that an IHO must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). 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]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

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]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously 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, 44 Ed. Dep't Rep. 352).

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]).

The above notwithstanding, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Here, the due process complaint notice identified the student a home schooled and IHO initially inquired about the student's eligibility for services on January 10, 2024, six days prior to the scheduled hearing on January 16, 2024 (Parent Ex. A at p. 1; IHO Exhibit II). The IHO again asked the parent's attorney to address the student's eligibility for services on January 16, 2024 prior to the submission of evidence and thus placed the parties on notice of his intention to address the issue at the hearing on the merits. The parent's attorney failed to address the issue in her opening statement or at any other time during the hearing, despite the IHO's reminder (see Tr. pp. 33-34). The record does not contain any documentary or testimonial evidence that the parent ever requested equitable services from the district (see Parent Exs. A-U). The IHO was permitted address the issue of eligibility for equitable or dual enrollment services and I find the parties had more than sufficient notice that the IHO intended to address the issue.

The parent takes the position on appeal that because she was not notified of the June 1 notification requirement pursuant to the district's SOPM she should not now be foreclosed from pursuing her claims through due process. This argument has no merit. With respect to a parent's awareness of the requirement, the Commissioner of Education has previously 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, 44 Ed. Dep't Rep. 352). That requirement also applies to equitable services for homeschooled students with disabilities and is therefore dispositive in the instant case (see Educ. Law § 3602-c[2-c]).

Here, there is no evidence that the parent sought dual enrollment services from the district prior to the June 1 deadline. The parent's own documentary submissions indicate she received the prior written notice advising her of the services recommended for the student by the May 2023 CSE and was also notified that the student would be placed in a public school when her AIMS application was waitlisted (Parent Ex. Q, see IHO Exhibit I). The evidence in the record reflects

that the parent made a plan in mid-August 2023 to home school the student long after the deadline to request equitable services had passed, and there is no reason to disturb the IHO's determination that the parent's claim for equitable services was without merit and that the parent was not entitled to relief (see Parent Exs. M, N, U, IHO Ex. I). There is no need to address the district's cross-appeal of the IHO's alternative finding with regard to equitable considerations.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination to dismiss the parent's claims, the necessary inquiry is at an end.

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 DISMISSED.

Dated: **Albany, New York**
August 8, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER