The University of the State of New York

The State Education Department
State Review Officer
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No. 24-384

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 Cynthia Sheps, 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, in part, her request that respondent (the district) fund the costs of her son's unilaterally-obtained special education itinerant teacher (SEIT) and speech-language therapy services delivered by EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals from the IHO's decision. The appeal must be dismissed. The cross-appeal must be sustained in part.

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[a]). 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 evidence in the hearing record regarding the student's educational history is sparse. Briefly, a Committee on Preschool Special Education (CPSE) convened on May 5, 2021, and, finding the student eligible to receive special education as a preschool student with a disability,

developed an individualized education program (IEP) for the student with a projected implementation date of July 12, 2021 and a projected annual review date of May 5, 2022 (see Parent Ex. B at pp. 1-2).[1] The May 2021 CPSE recommended that the student receive five hours per week of individual SEIT services and two 30-minute sessions per week of individual speech-language therapy services (id. at pp. 1, 14).[2, 3]

Turning to the 2023-24 school year at issue, on September 19, 2023, the parent electronically signed an "Enrollment Agreement for the 2023-2024 School Year" with EDopt for the delivery of "certain services listed in the attached Schedule A," which, as relevant to this appeal, included special education services and speech-language therapy services ($195.00 per hour, individually; $145.00 per hour, group) for the 2023-24 school year from September 2023 through June 2024 (Parent Ex. C at pp. 1-3).[4]

The hearing record includes a letter dated September 21, 2023, with the salutation "Dear Chairperson," from Prime Advocacy, LLC (Prime Advocacy), which indicated it was authorized to communicate on the parent's behalf and advised the "Chairperson" that the district had failed to assign the student any providers to deliver the student's mandated services for the 2023-24 school year (Parent Ex. D). Additionally, according to the letter, the parent requested that the district

[1] When a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local CPSE that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

[2] 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). 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] [emphasis added]; see Educ. Law § 4410[1][k]). Although a school district would generally not deliver a service designed exclusively for preschool students to a school-aged student, here, the individual special education teacher services the student continued to receive as a school-aged student during the 2023-24 school year at the religious, nonpublic school are referred to in the hearing record as SEIT services.

[3] Given the student's birthdate, he would have been considered, chronologically, as a kindergarten student during the 2022-23 school year and thus, eligible for school-age special education services through a CSE, as opposed to preschool-age services through a CPSE (see Parent Ex. B at p. 1). Additionally, State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend" school as a school-aged student (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Thus, for July and August 2022, the student remained entitled to receive special education and related services under the CPSE (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

[4] EDopt is a limited liability company that has not been approved by the Commissioner of Education as a company or school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

"fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

Evidence in the hearing record reflects that the student received private SEIT services from EDopt from approximately October 17, 2023 through May 22, 2024 (Parent Ex. H at pp. 1, 8).[5] Evidence also reveals that the student received "Speech" from EDopt from approximately October 17, 2023 through May 30, 2024 (Parent Ex. I at pp. 1, 8).

A. Due Process Complaint Notice

By due process complaint notice dated May 15, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) "and/or Equitable Services" (see Parent Ex. A at p. 1). According to the parent, the district impermissibly shifted its responsibilities to the parent when it failed to "supply providers for the services it recommended for the [s]tudent and failed to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school year at enhanced rates (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's 12-month programming consisting of five hours per week of SEIT services and two 30-minute sessions per week of speech-language therapy services at enhanced rates, and an award of compensatory educational services for any mandated services not provided by the district (id. at p. 3).

B. Impartial Hearing Officer Decision

On June 24, 2024, the parties proceeded to an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (see Tr. p. 1). When asked to present their respective positions in this matter, the district representative stated that he would not proffer any witnesses but raised a "June 1st defense" on the district's behalf (Tr. pp. 2-3). The IHO clarified that the matter involved the 2023-24 school year and the district's alleged failures to hold a CSE meeting and to implement services (see Tr. p. 3). The parent's advocate confirmed that the matter involved the district's failure to implement the student's "last agreed-upon program," consisting of 12-month programming, SEIT services, and speech-language therapy services; she further confirmed, however, that these services were not the student's "last created program" (Tr. pp. 3-4). Upon additional inquiry, the district representative indicated that another IESP—dated April 4, 2024 (April 2024 IESP)—had been created prior to the parent filing the instant due process complaint notice (Tr. pp. 4-5).

[5] Evidence in the hearing record reflects that the student's SEIT provider was registered in the State as a speech-language pathologist who held an initial certificate for "Speech And Language Disabilities," which expired on August 31, 2024 (compare Parent Ex. H at p. 1, with Parent Ex. J at pp. 1-2). The student's speech-language therapy provider was registered in the State as a speech-language pathologist, however, the evidence demonstrates that the provider was not certified during the 2023-24 school year (compare Parent Ex. I at p. 1, with Parent Ex. K at pp. 1-3).

With regard to 12-month programming for the 2023-24 school year, the IHO asked whether the parent had requested these services; initially, the parent's advocate responded "[y]es," and pointed to the parent's 10-day notice, dated September 21, 2023, which she averred placed the district on "notice for the fact that the student needed the services" (Tr. p. 5). The IHO asked, again, whether the parent had requested 12-month programming prior to the "extended school year" (id.). After looking for information to respond to the IHO's question, the parent's advocate stated that she could not locate any request (id.). The parent's advocate asked the IHO if she was looking for an "authorization or a different type of document"; the IHO responded, "[n]o," and asked if the parent "ever requested summer services, and/or if they ever requested equitable services" for the 2023-24 school year (Tr. pp. 5-6). The IHO noted that the "deadline for the request for equitable services [wa]s June 1st" (Tr. p. 6). The parent's advocate indicated that she would make sure she had the requested "information prior to the next appearance" (id.). The IHO emphasized the need for that information because the parent's "entitlement to any relief" rested on when those requests were made (id.).

After scheduling the next date for the impartial hearing, the IHO explained the deadlines for disclosure to the parties, as well as the type of evidence expected, and that the issues to be resolved would be limited to those raised in the due process complaint notice (see Tr. pp. 6-9). The IHO specifically noted that the parent was expected to "show evidence" of a timely request for equitable services at the impartial hearing (Tr. p. 9). The IHO further explained that both parties must be prepared to present evidence with regard to the "June 1st defense," but noted that the district's "obligation to provide equitable services [wa]s only triggered by that timely request" (Tr. p. 10). Thereafter, the IHO explained the parties' respective burdens of proof, including that the parent must demonstrate more than just that the unilaterally-obtained services matched the services on the "last agreed-upon IEP" (Tr. pp. 10-11).

The impartial hearing resumed, and concluded, on July 10, 2024 (see Tr. pp. 15-59). After entering the parent's and the district's documentary evidence into the hearing record as evidence, the IHO asked the district's attorney to provide him with a copy of the student's April 2024 IESP, since neither party had disclosed it (see Tr. pp. 19-23). While awaiting a copy of the April 2024 IESP, the IHO asked the parent's advocate to confirm that she had not disclosed a "request for equitable services or a request for summer services prior to the [parent's 10]-day notice in September" (Tr. p. 24).[6] According to the parent's advocate, no prior request had been sent (id.). However, the parent's advocate argued that it was the district's burden, in raising the affirmative defense, to come forward with proof that "they first sent the parent a notice that they [we]re actually obligated to inform the [d]istrict" (Tr. pp. 24-25). Absent such proof, the parent's advocate asserted that the district was "improperly shifting their burden" (Tr. p. 25). In addition, the parent's advocate indicated that a request for tuition reimbursement "must not be reduced or denied for

[6] Once the IHO received a copy of the student's April 2024 IESP, he entered into the hearing record as evidence without objection by either party (see generally Tr. pp. 25-26; IHO Ex. I). According to the April 2024 IESP, which was developed at a CSE meeting held on April 4, 2024 during the 2023-24 school year, the student was attending first grade at a "parochial school" (IHO Ex. I at p. 1). In addition, the April 2024 IESP indicated that the student was eligible to receive special education as a student with an other health impairment (id.). The attendance page of the April 2024 IESP reflects that the parent attended the CSE meeting via telephone, along with the educational supervisor from EDopt, the agency delivering SEIT and speech-language therapy services to the student during the 2023-24 school year (see id. at p. 16).

failure to provide notice if you have not received notice of your responsibility to provide the notice" (id.).

The IHO disagreed with the parent advocate's stated position and noted that she had "warned [her] at [the] prehearing conference that the [d]istrict's obligation to provide equitable services would only be triggered by a timely request" (Tr. p. 25). The IHO also reminded the parent's advocate that she had put her on "notice that [she had] expected [her] to provide that evidence at the [impartial] hearing" (id.). Therefore, the IHO asked the parent's advocate to confirm that "there was no request here"; the parent's advocate stated that the IHO was correct (id.). The parties then presented opening statements and witness testimony, concluding the impartial hearing with closing statements (see Tr. pp. 26-58).

In a decision dated July 29, 2024, the IHO made findings of fact, which included that the parent "neither requested summer services" from the district "nor did they submit a timely request for equitable services by June 1 for the 2023-24 school year" (IHO Decision at p. 5). After describing the student's needs, the IHO noted that the parent's contract with EDopt did not "specify the services to be provided to the student, except by reference to the last agreed upon IEP," and listed rates for individual and group services that, according to the EDopt contract, were based on "reasonable market rates for similar agencies and services as well as rates approved by the [district] for similar services during the 2022-23 school year" (id.). The IHO also found that the parent was financially obligated to pay for the services obtained (id.).

Next, the IHO examined the testimony adduced at the impartial hearing from the educational director of EDopt (see IHO Decision at pp. 5-6). Based on her testimony, the IHO determined that EDopt paid the student's SEIT provider $95.00 per hour and the student's speech-language provider $120.00 per hour (id. at p. 5). The IHO noted, however, that the educational director could not explain why EDopt charged clients the same rate for both services when the providers were paid different rates (id. at pp. 5-6). The IHO also noted the educational director's testimony concerning the agency's rate-setting process (id. at p. 6).

With respect to the SEIT services, the IHO determined that the SEIT provider was a "licensed speech pathologist and licensed to teach student with speech and language disabilities" (IHO Decision at p. 6). In addition, the IHO found that the speech-language provider was "also a licensed speech pathologist licensed to teach students with speech and language disabilities and the speech and hearing handicapped" (id.). The IHO noted, however, that the hearing record lacked any evidence that the student had been diagnosed as having a speech-language disability (id.). The evidence did reflect that the SEIT and speech-language therapy services took place at the student's religious, nonpublic school (id.). The IHO also noted that "both the SEIT and [speech-language therapy] sessions start[ed] the week of October 30, 2023 through the end of May, 2024" (id. at p. 7).

Next, the IHO indicated that the parent sent a 10-day notice of unilateral placement, dated September 21, 2023 to the district, and the notice "did not mention any failure to develop or implement a program for summer services" (IHO Decision at p. 6). The IHO then described the information within a SEIT progress report (January 2024) and a speech-language therapy progress report (January 2024); she similarly described information within the session notes for both the SEIT service and speech-language therapy services, as well as the timesheets submitted into the

hearing record as evidence (id. at pp. 6-8). Based on the foregoing evidence, the IHO found that the student received "more hours of SEIT services than [the p]arent was contractually obligated to pay" (id. at p. 8). The IHO also described the educational director's testimony about the student's progress during the 2023-24 school year and why the SEIT services—while generally for preschool students—were appropriate for this student "based on his executive functioning and social-emotional deficits" (id.).

Turning to the district's evidence, the IHO found the "report from the American Institute for Research ('AIR Report') . . . to be of no evidentiary value" with respect to the reasonable market rates for services (IHO Decision at p. 8). The IHO also gave "no evidentiary weight" to the district's evidence within the "'Related Services—Independent Provider Rate Schedule'" entered into the hearing record as evidence (id. at pp. 8-9).

The IHO then set forth the legal framework applicable to the issues in this matter, focusing on the State's dual enrollment statute and the Burlington/Carter analysis (see IHO Decision at pp. 9-14). Initially, the IHO determined that, for "purposes of analysis," "three relevant time periods" existed: 12-month programming for the 2023-24 school year, implementation of services prior to the date of the April 2024 IESP, and implementation of services after the date of the April 2024 IESP (id. at p. 14). As relevant to this appeal, the IHO found that the parent did not timely request equitable services by June 1, and therefore, the parent was not entitled to equitable services prior to the date of the April 2024 IESP from September 2023 through April 18, 2024 (id. at pp. 14-15). The IHO determined that, while the development of an "IESP after a belated request ha[d] been deemed to be a waiver of the June 1 defense after the implementation date of the IESP, it d[id] not imply a waiver for the portion of the school year prior to that date" (id. at p. 15). The IHO also rejected the parent's argument that the district was "obligated to inform" her of her "obligation to comply with the statutory requirement to submit a written request for equitable services" (id.). Having found that the district timely raised the June 1 defense and the parent failed to provide evidence of a timely request for equitable services, the IHO concluded that the student was not entitled to receive the same for the 2023-24 school year "prior to the waiver by the district" (id.).

With respect to the final time period identified by the IHO, the IHO concluded that the parent sustained her burden to establish the appropriateness of the unilaterally-obtained SEIT and speech-language services delivered by EDopt from April 19, 2024 through June 30, 2024 (see IHO Decision at p. 15). The IHO also found that the both the SEIT and speech-language providers were "appropriately qualified" to "teach students with language disabilities" and the parent was not required to establish that the providers met "all State certification guidelines" (id.). In addition, the IHO indicated that the evidence demonstrated "how and where the services [we]re being provided, by whom, and how they [we]re tailored to meet the student's needs," as well as noting that the student made progress (id.).

Having found that the parent sustained her burden with regard to the unilaterally-obtained services delivered by EDopt from April 2024 through June 2024, the IHO then turned to equitable considerations (see IHO Decision at pp. 15-16). Based on the parent's contract with EDopt, the IHO determined that the parent was financially obligated to pay for the services, but her financial obligation was limited to those mandated by the student's May 2021 IEP, to wit, five hours per week of SEIT and up to one hour per week of speech-language therapy services (id.). As a result, the IHO capped the district's obligation to fund the student's services at five hours per week of

SEIT services, notwithstanding that the evidence in the hearing record revealed that "there were weeks in which [EDopt] provided more than" five hours per week of SEIT services (id.). In addition, the IHO rejected the district's arguments concerning the reasonableness of the contracted rates for both SEIT and speech-language therapy services, noting that EDopt's rates were "consistent with the market rates" within the geographical location and the evidence did not otherwise provide a basis upon which to reduce the contracted rates for services (id. at p. 16).

In light of the foregoing, the IHO ordered the district to fund the student's SEIT services (up to five hours per week) and speech-language therapy services (up to two 30-minute sessions per week) at the parent's contracted rate of $195.00 per hour for both services from April 19, 2024 through June 30, 2024 upon receive of invoices and sessions logs for these dates of service (see IHO Decision at p. 16).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy and alleges that the IHO erred by finding that the district was not obligated to fund the student's SEIT services and speech-language therapy services, delivered by EDopt, from the beginning of the 2023-24 school year. More specifically, the parent contends that, by developing the April 2024 IESP, the district waived requirement for a timely parent request for dual enrollment services for the entire 2023-24 school year. The parent also alleges that the IHO erred by finding that she was not financially obligated to fund the student's services. As relief, the parent seeks an order directing the district to fund the costs of the unilaterally-obtained SEIT and speech-language therapy services at the contracted rates, delivered by EDopt, from September 2023 through April 18, 2024.

In an answer, the district initially responds to the parent's allegations and generally argues to reject the parent's contentions that the district waived the requirement for a written request for dual enrollment services entitling the parent to receive funding for the costs of the student's SEIT and speech-language therapy services from September 2023 through June 2024. As a cross-appeal, the district initially asserts that the IHO erred by improperly expanding the scope of the impartial hearing to find that the district waived the requirement for a written request for services. Alternatively, the district asserts that the IHO erred by finding that the district impliedly waived the requirement. Next, the district argues that the IHO erred by finding that the parent sustained her burden to establish the appropriateness of the unilaterally-obtained SEIT and speech-language therapy services. As a final point, the district alleges that the IHO erred by finding that equitable considerations weighed in favor of the parent's requested relief because the hearing record lacked evidence that the parent was financially obligated to pay for the SEIT and speech-language therapy services due to the vague language in the parent's contract with EDopt. As relief, the district seeks to annul the IHO's entire award to the parent.

In a reply to the district's answer and cross-appeal, the parent continues to assert arguments in support of her contention that the development of the April 2024 IESP impliedly waived the requirement for written notice from the parent for dual enrollment services and argues she need not have raised the implied waiver in the due process complaint notice. The parent also continues

to argue that the services delivered by EDopt were appropriate and that she is entitled to an award of funding for such services at the contracted rates.[7]

The district responded to the parent's assertions in a reply, arguing that the parent failed to timely serve her responsive pleading, and therefore, it must be dismissed.[8]

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]).[9] "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.).[10] Thus, under State law an eligible New

[7] In this case, the parent's advocate requested, and received, an extension from the Office of State Review to file a responsive pleading to the district's answer and cross-appeal by October 7, 2024.

[8] Upon review, the affidavit of service for the parent's reply to the district's answer and cross-appeal reflects that, consistent with the district's contentions, it was untimely served on October 9, 2024 (see Parent Aff. of Personal Serv.). The parent, thereafter, prepared and served a sur-reply, which is precluded under State regulations (see 8 NYCRR 279.6). Consequently, the parent's reply to the district's answer and cross-appeal—which was untimely served—and the parent's sur-reply will not be considered.

[9] 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]).

[10] 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

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—June 1 Deadline

The crux of the parties' appeal and cross-appeal in this matter focuses on the IHO's finding that the development of an April 2024 IESP during the 2023-24 school year constituted an implied waiver of the requirements that a parent provide written request for dual enrollment service to the district by June 1, 2023.

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]). Here, in connection with the district raising the June 1 defense at the impartial hearing, the IHO informed the parent that the district's obligation to provide equitable services to the student for the 2023-24 school year was only triggered by the parent providing the district with timely notice seeking equitable services by June 1 (see Tr. pp. 5-6, 9-10). In addition, the IHO specifically instructed the parent that it was incumbent upon her to present evidence that she made a request for equitable services (see Tr. p. 9). The IHO also noted that, since the district had raised the June 1 defense, both parties should be prepared to address that issue with evidence (see Tr. p. 10). However, notwithstanding the IHO's instructions, the parent did not disclose any documentary evidence of a request for equitable services by June 1 at the impartial hearing, and she confirmed that "no prior request [was] sent" (Tr. p. 24; see generally Parent Exs. A-N).

Instead, the parent's advocate asserted that it was the district's burden, having raised an affirmative defense, to present its own case and its own evidence that the district had "first sent the

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.

parent a notice" obligating the parent to inform the district of a request for equitable services (Tr. pp. 24-25). 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).[11]

At the impartial hearing, the IHO correctly rejected the parent's assertion on this point (see Tr. p. 25). Given that the district was not required to provide the parent with notice of the June 1 deadline for equitable services and the parent essentially conceded that no written notice was provided, the district was not required to present any evidence at the impartial hearing that it provided the parent with notice of the June 1 deadline for dual enrollment applications or that the district did not receive written notice from the parent prior to the deadline (see Mejia v. Banks, et al, 2024 WL 4350866, at *6 [S.D.N.Y. Sept. 30, 2024] [noting that "it [wa]s unclear how the school district could have proved such a negative (or why it would attempt to do so when there was no [10-day notice] letter submitted before the IHO)"]).

In the decision, the IHO found that, although the district properly raised the June 1 defense at the impartial hearing and the parent did not timely request equitable services by June 1, the parent was nevertheless entitled to equitable services for the student for the portion of the 2023-24 school year falling after the development of the April 2024 IESP, which document, according to the parent and the IHO, impliedly waived the district's June 1 defense (see IHO Decision at pp. 4-5, 9-10, 14-15). Under certain circumstances not present in this matter, it has been found that a district may, through its own actions, waive the statutory requirement for the June 1 notice (Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[12] However, the

[11] The dual enrollment statute and June 1 request provision applies to services for "gifted pupils, career education and education for students with disabilities" with a 30-day legislative exception if a student with a disability is first identified as such during the school year in question (Educ. Law 3602-c[1][a], [2]).

[12] The statute supports a policy of excluding State-resident students from receiving services under an IESP if parents fail to request services prior to the June 1 deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing

Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

On appeal, the parent, in seeking to overturn the IHO's decision on appeal with respect to whether the student was entitled to receive equitable services from September 2023 to April 2024, mistakenly relies on Application of the Board of Education, Appeal No. 18-088. In that appeal, after the June 1 deadline, the CSE decided to create an IESP for the student but impliedly waived its defense of the June 1 deadline because it actually began providing the dual enrollment services to the student at the student's nonpublic school (see Application of the Bd. of Educ., Appeal No. 18-088). In this matter, although the evidence demonstrates that a CSE apparently developed an IESP for the student in April 2024, the evidence also demonstrates that the district did not provide any services to the student during the 2023-24 school year (see Tr. pp. 31-32; see generally Tr. pp. 1-30; 33-59; Parent Exs. A-N; Dist. Exs. 1-2; IHO Exs. I-II).

Therefore, while the actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP would—as in this case—without more, constitute a waiver.[13] This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("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 3206-c" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. In addition, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for a nonpublic school student

prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

[13] The parent mistakenly relies on Application of a Student with a Disability, Appeal No. 23-033, as support for the assertion that the district's development of the April 2024 IESP acted an implied waiver of its June 1st defense, as the facts of that appeal are markedly to the facts in this matter (see Req. for Rev. ¶ 1). In that appeal, the district did not appear at the impartial hearing and failed to raise the June 1 affirmative defense at any point in the administrative proceedings; therefore, the affirmative defense was properly deemed waived (see Application of a Student with a Disability, Appeal No. 23-033).

rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]).[14] Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP along does not clearly or unmistakably reflect the district's waiver of the June 1 notice where it is called upon to convene and engage in special education planning for the student.

Moreover, even if the occurrence of an April 2024 CSE meeting could form a basis for a finding that the district waived the June 1 requirement going forward, when the parent first raised this argument in her opening statement during the impartial hearing, the IHO noted that the parent had neither asserted any challenges to the April 2024 IESP in her due process complaint notice, which was prepared on May 15, 2024, nor amended the due process complaint notice prior to the impartial hearing to contest the April 2024 IESP (see Tr. pp. 31-32; see generally Parent Ex. A). Therefore, the hearing record was not developed concerning the occurrence of the April 2024 CSE meeting or the development of the April 2024 IESP (see generally Tr. pp. 1-59; Parent Exs. A-N; Dist. Exs. 1-2; IHO Exs. I-II).[15] Additionally, the parent did not pursue the implied waiver of the June 1st defense as part of her closing statement at the impartial hearing, but rather, repeated her initial argument that the district had failed to provide the parent with notice of the requirement for a written request for dual enrollment services prior to June 1 (see Tr. pp. 53-57). The parent added, however, that the district's June 1 affirmative defense must be deemed waived because the district failed to timely raise it in its response to the parent's due process complaint notice (see Tr. pp. 56-57).[16]

On appeal, the parent continues to assert a similar argument, noting that the district waived the June 1 defense because it was not raised within the "10-day deadline of their hearing," and points to Application of a Student with a Disability, Appeal No. 23-225, to support this assertion

[14] There is no requirement that the annual review by the CSE for nonpublic school students with disabilities must occur only after June 1 of each school year.

[15] The parent did not appear at the impartial hearing or proffer any testimonial evidence by affidavit (see generally Tr. pp. 1-59; Parent Exs. A-N; Dist. Exs. 1-2; IHO Exs. I-II).

[16] Generally, 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]).

(Req. for Rev. ¶ 1). However, in that appeal, the district failed to raise the June 1 affirmative defense in a manner that was consistent with the timeframes set forth in the IHO's prehearing order (id.). An SRO determined that it was within the IHO's discretion to require a district to raise affirmative defenses within a timeframe stated in a prehearing order (id.). Here, the hearing record does not include any prehearing order by the IHO, and the district raised the June 1st defense on the first day of the impartial hearing; therefore, the parent's argument is without merit.

VII. Conclusion

In light of the foregoing, the IHO erred by finding that, by developing the April 2024 IESP, the district impliedly waived the requirement for the parent to submit a written request for dual enrollment services prior to June 1, and thus, the IHO erred by awarding the parent funding for the student's unilaterally-obtained SEIT and speech-language therapy services from April 19, 2024 through June 30, 2024. The IHO's award must be vacated.

I have considered the parties' remaining contentions and find that I need not address them in light of these determinations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 29, 2024, is modified by reversing the IHO's directive for the district to fund the student's unilaterally-obtained SEIT and speech-language therapy services delivered by EDopt to the student during the 2023-24 school year from April 19, 2024 through June 30, 2024.

Dated: **Albany, New York**
November 12, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER