The University of the State of New York

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

No. 24-391

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 that respondent (the district) fund the costs of her son's private services delivered by Always A Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which determined that the district waived the requirement for written notice from the parent by June 1 and further asserts that the IHO lacked subject matter jurisdiction over the parent's claims. 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). 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 22, 2023, found the student eligible for special education as a student with a speech or language impairment, and formulated an IESP for the student for the 2023-24 school year (kindergarten) (see Parent Ex. B).[1, 2] The CSE recommended that the student receive ten periods per week of direct, group special education teacher support services (SETSS), four 30-minute sessions per week of individual speech language therapy, two 45-minute sessions per week of individual occupational therapy (OT), and two 45-minute sessions per week of individual physical therapy (PT), and that the parent receive one 60-minute session per month of parent counseling and training (id. at pp. 10-11).

The student attended a nonpublic school for the 2023-24 school year and began receiving private SETSSS, speech-language therapy, and OT in September 2023 (see Parent Ex. F-I). On December 26, 2023, the parent signed a document on Step Ahead's letterhead indicating she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the May 2023 IESP and that she was aware of the hourly rates charged by the company for the provision of SETSS and related services to the student and that, if the district did not pay for the services, she would be liable for the costs thereof (Parent Ex. C).

In a due process complaint notice, dated May 23, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to identify providers to deliver the student's special education and related services (Parent Ex. A at p. 1). The parent asserted that she was unable to locate providers to work with the student at the district's standard rates for the 2023-24 school year but found providers willing to deliver the services at "rates higher than standard [district] rate[s]" (id.). The parent requested an order awarding direct funding for ten sessions per week of SETSS at an enhanced rate for the 2023-24 school year along with direct funding of all related services as set forth in the IESP at the rate each provider charges even if higher than the standard district rate for each service (id. at p. 2).

An impartial hearing before the Office of Administrative Trials and Hearings (OATH) convened and concluded on July 22, 2024 (Tr. pp. 6-52).[3] In a final decision dated July 29, 2024, the IHO noted that the district raised, as an affirmative defense, that the parent failed to provide a timely notice or request for equitable services for the student by June 1, 2023 for the 2023-24 school year (IHO Decision at p. 4). However, the IHO determined that, in developing an IESP for the student for the 2023-24 school year with an implementation date of September 1, 2023, the district waived the requirement for the June 1 notice (id.). Consequently, the IHO found that the student was eligible to receive services for the 2023-24 school year (id.). Next, the IHO determined that it was undisputed that the district had failed to implement the May 2023 IESP for

[1] The hearing record contains two copies of the May 2023 IESP (compare Parent Ex. B, with Dist. Ex. 3). For purposes of this decision, only the parent's exhibit is cited.

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] An initial hearing date convened on July 9, 2024; however, the district did not appear, and the matter was adjourned (see Tr. pp. 1-5).

the 2023-24 school year and that, therefore, the district had failed to meet its burden of proving that it provided the student a FAPE (id. at pp. 5-6).

The IHO then turned to a determination as to whether the SETSS and related services unilaterally obtained by the parent were appropriate (see IHO Decision at pp. 5-7). Based on the parent's signed contract with Step Ahead, together with attendance records, providers' certificates, and progress reports, the IHO determined that the parent had met her burden of proving that the speech-language therapy and OT services were specially designed to meet the student's needs and were, therefore, appropriate (id. at p. 6). As to the unilaterally obtained SETTS, however, the IHO determined that the parent failed to meet her burden (id.). The IHO noted that the IESP established no needs or goals regarding SETTS (id.). Further, the IHO found no evidence in the hearing record to demonstrate that the student was assessed at the start of the 2023-24 school year to ascertain his needs (id.). Still further, the IHO found the SETTS progress report to be incredible and unreliable and noted that the attendance records contained no notes or descriptions of sessions from the start of the school year until March 1, 2024 and inconsistent notes thereafter (id. at pp. 6-7). As for those notes recorded in the attendance records, the IHO noted the overlap of skills addressed with the student's other related services (id. at p. 7).

Turning to equitable considerations, the IHO reduced the requested relief in the form of funding for speech-language therapy and OT services provided by Step Ahead at enhanced rates by 10 percent citing the parent's failure to present any evidence of a ten day notice (IHO Decision at p. 8). The IHO found that, given the lack of notice, the district did not have an adequate opportunity to address the parent's concerns (id.). Noting that the contract with Step Ahead for the 2023-24 school year was not signed by the parent until December 26, 2023, the IHO ordered direct funding of the speech-language therapy and OT services at 90 percent of the respective providers' rates for related services delivered between December 26, 2023 and the end of the school year (id. at pp. 8-9). The IHO ordered that, for speech-language therapy and OT services provided from September 7, 2023 through December 25, 2023, the district was to directly fund the services at a reasonable market rate to be determined by the district's implementation unit (id. at p. 9). The IHO also noted that the hearing record established that the SLT provider was registered in New York through May 31, 2024 and there was no evidence presented at the IHO hearing regarding the registration status after that date (id. at p. 8). Therefore, even though SLT services were provided in June 2024, the IHO awarded direct funding of those services only through May 31, 2024 (id. at pp. 8-9).

As to PT services, the IHO noted that the parent's attorney at the impartial hearing indicated that the parent was seeking a bank of compensatory hours for PT as the student had not received any sessions (IHO Decision at p. 7). The IHO determined that the hearing record did not establish whether the student had received any PT services during the 2023-24 school year and, therefore, found that the parent had not met her burden (id.).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed, and therefore, the allegations will not be recited here. The threshold issues of the appeal and cross-appeal are whether the IHO had jurisdiction to address the parent's claims raised in the due process complaint, and, if so, whether the district waived the requirement for the parent to

submit a written request for equitable services by June 1 by developing an IESP for the student for the 2023-24 school year.

V. Discussion

A. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time on this appeal. Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007][ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630). The district raised the issue of subject matter jurisdiction in its answer and cross appeal and the issue of subject matter jurisdiction may be raised at this level (Answer & Cr.-Appeal at ¶¶ 9-11).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint with respect to implementation of "an IESP" (Answer & Cr.-Appeal at ¶ 10).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as

compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department (SED) made this "carve-out" of jurisdiction explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶ 10).

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law § 4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the

> first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5 which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.). Second, since its adoption, the amendment has been enjoined and suspended in an Order Show Cause dated October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).

The district acknowledges the limitation on applicability of the regulation amendments relating to the date of the due process complaint notice and, further, submits a letter to the Office of State Review acknowledging the temporary injunction arising from the pending litigation regarding the regulation, but contends that the regulation "merely codify NYSED's preexisting position on implementation claims" (Answer & Cr.-Appeal ¶ 10 n.2; Oct. 9, 2024 Letter from

Dist). Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[4]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendment to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

B. June 1 Deadline

Having decided that the IHO had jurisdiction to address the parent's claim in this matter, I now turn to the district's contention regarding the parent's request for dual enrollment services for the student.

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, the district raised the June 1 defense in a July 3, 2024 disclosure email to the IHO and again at the impartial hearing (see Tr. pp. 27-31, 40-41), and the parent did not dispute that she did not submit a request for equitable services to the district for the 2023-24 school year. Instead, during the impartial hearing, the parent argued that certain statements in the May 2023

[4] Neither the guidance and nor the district indicated if jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). A copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

IESP and/or a prior written notice provided thereafter reflected the district's awareness that the student would be parentally placed, which made further notice from the parent unnecessary (see Tr. pp. 32-34).

The IHO agreed with the parent's position, finding that the district waived the June 1 defense by developing an IESP for the student (IHO Decision at p. 4). Indeed, a district may, through its 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 special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[5] However, the 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]).

A "clear and unmistakable waiver" of the statutory requirement of a parent request for services before June 1 has been found to exist where the CSE decided to create an IESP for the student after the deadline and then began providing services at the student's nonpublic school (see Application of the Board of Education, Appeal No. 18-088). Here, however, the district's creation of the student's IESP in May, without more, does not rise to the level of conduct that would constitute a waiver of the June 1 deadline.

While 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, without more, constitutes a waiver. 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

[5] The statute supports a policy of excluding State-resident students from receiving services under an IESP if parents miss 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 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).

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.

On the other hand, 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 the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone 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.

Based on the foregoing, the evidence in the hearing record shows that the parent did not submit a request for dual enrollment services for the 2023-24 school year by June 1, 2023 and does not lead me to the conclusion that the district waived its defense of the June 1 request deadline.

VI. Conclusion

Although the IHO had subject matter jurisdiction over the parent's claims, the parent did not provide the district with written notice requesting dual enrollment services prior to June 1, 2023 as required by Education Law § 3602-c(2), and, therefore, the student was not entitled to equitable services for the 2023-24 school year, and the parent's requested relief in the form of funding for unilaterally obtained services must be denied. In light of this determination, I find it unnecessary to address the parties' remaining contentions relating to the appropriateness of services provided by Step Ahead or equitable considerations.

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 that portion which found that the district waived the statutory requirement for a written request from the parent for dual enrollment services by June 1 and, therefore, had an obligation to provide the student with equitable services for the 2023-24 schoolyear.

Dated: **Albany, New York**
October 30, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER