The University of the State of New York

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

No. 24-392

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:
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 that portion of a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund compensatory education special education teacher support services (SETSS) for the student related to the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which rejected the district's arguments to dismiss the parent's claims. The appeal must be sustained in part. 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse.

A CSE convened on August 12, 2020, found the student eligible for special education as a student with a learning disability, and developed an IESP for the student, recommending five periods per week of group SETSS in English (Parent Ex. B at pp. 1, 6).[1]

In a 2023 SETSS authorization form letter, the district notified the parent that the student had been recommended to receive SETSS, and informed the parent of a district website that listed "eligible independent provider[s]" from whom the parent could select (see Parent Ex. C).[2] The student attended a nonpublic school during the 2023-24 school year (see Parent Ex. A at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated May 20, 2024, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent alleged that the district failed to provide the SETSS recommended in the student's August 2020 IESP and that the parent was unable to locate a provider who could provide the services (id. at p. 1). The parent also alleged that the student had pendency entitlements arising from prior due process disputes and that the district failed to implement the student's services during those prior pendency periods (id.). The parent requested a finding that the district failed to provide a FAPE for the 2023-24 school year and an order from the IHO compelling the district to fund a bank of special education services not provided to the student for the 2023-24 school year at an enhanced rate (id. at p. 2).[3] The parent further sought an order of pendency (id. at p. 3).

On May 29, 2024, the district notified the parent that it would assert an affirmative defense that the parent was not entitled to recovery because the parent did not submit a written request to the district for special education services prior to June 1, 2023 (see Dist. Ex. 1).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on July 11, 2024 (Tr. pp. 1-48). In a decision dated August 3, 2024, the IHO initially noted that the district did not contest that it did not convene to create an IESP for the student for the 2023-24 school year or that it failed to implement the services in the student's August 2020 IESP (IHO Decision at p. 3).[4] In regard to the district's

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] The district form letter states a "Date of Issuance" as "2023" on page 1, and also as August 26, 2022 on page 2 (see Parent Ex. C at pp. 1-2). Despite this discrepancy, the letter also stated that the SETSS may not begin before September 1, 2023 or continue beyond June 30, 2024 (id. at p. 1).

[3] In the due process complaint notice, the parent asserted that according to the IESP, the student is mandated to receive five periods per week of SETSS in Yiddish (Parent Ex. A at p. 1; see also Req. for Rev ¶ 1). This claim is factually untrue, as the student's August 2020 IESP states that the SETSS were to be delivered in English (Parent Ex. B at 6).

[4] The IHO issued a final decision on August 3, 2024; however the IHO made ministerial, non substantive clarifications to the list of evidence appended to the decision on August 12, 2024. For appeal purposes, the parent

affirmative defense that it was not obligated to provide equitable services to the student because the parent failed to make a timely request, the IHO found that the district failed to provide adequate evidence to establish that the parent did not request services by June 1 of the preceding school year (id. at p. 7). The IHO concluded from the district's SETSS authorization form letter that the district had already determined that the student was eligible to receive services for the 2023-24 school year (id.; see Parent Ex. C).

The IHO further found that although "the parent located an available provider", the parent failed to establish an evidentiary basis that the services that would be provided by Kinship Resources LLC (Kinship) would be appropriate for the student (IHO Decision at p. 8; see Parent Ex. D).[5] From this finding, the IHO concluded that compensatory education would not be an appropriate form of relief (IHO Decision at p. 8). As relief, the IHO ordered the district to reevaluate the student and reconvene the CSE within 90 days to create an IEP or IESP for the student as needed (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in not providing relief in the form of compensatory education for the 2023-24 school year. The parent further alleges that the district failed to implement services during the pendency of this proceeding and two prior due process proceedings, and that the district's failure to implement the student's pendency entitlements provided an alternative basis to award compensatory education relief.

The parent requests relief in the form of compensatory SETSS for the entire 2023-24 school year, equating to 180 periods. In the alternative, the parent requests compensatory SETSS for the five periods of weekly SETSS the student was entitled to under pendency, which the parent calculated to be 90 periods of SETSS. The parent requests that compensatory services be provided by a provider of the parent's choosing at the market rate. Finally, the parent requests that this bank of compensatory education be valid for two years.

In an answer and cross-appeal, the district argues that the IHO lacked subject-matter jurisdiction over the parents claim. The district argues that an emergency amendment to State regulations prohibits IHOs from having jurisdiction about disputes "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]).[6]

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was required to timely serve a request for review upon the district as calculated from the IHO's August 3, 2024 final decision and did so in this instance.

[5] The hearing record indicates that the parent had not entered into a contract with Kinship for the provision of unilateral SETSS to the student during the 2023-24 school year (Tr. p. 23). Kinship is a limited liability company and has not been approved by the Commissioner of Education as a school or company with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[6] Any due process complaint filed on or after July 16, 2024 concerning such issues shall be subject to dismissal on jurisdictional grounds (8 NYCRR 200.5[i][1]).

The district also argues that the hearing record established that parent did not request equitable services by the June 1 statutory deadline, and that the IHO erred in finding that the district failed to establish its affirmative defense. The district further argues that it did not implicitly waive its June 1 affirmative defense by sending the parent a SETSS authorization form.

The district argues that the IHO correctly determined that the student is not entitled to compensatory education, but the district concedes that the student was entitled to compensatory pendency for the periods in which due process complaints were pending. The district contends that services awarded should not exceed a reasonable market rate and the services should be provided by a provider certified in special education.

Finally, the district argues that the IHO erred in ordering the CSE to reconvene and reevaluate the student because the parent did not request that type of relief in his due process complaint notice.

The parent filed a reply and answer to the district's cross-appeal, arguing that the district's argument regarding the lack of subject matter jurisdiction should be dismissed, that the IHO correctly found that the district did not establish its affirmative defense, and that the student is entitled to compensatory relief.

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]).[7] "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

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

nonpublic schools located within the school district 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.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Preliminary Matters

1. 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 in this appeal. Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument at the IHO 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 argues that that there is no federal right to file a due process claim regarding services recommended in an IESP and that "Education Law § 4404 does not confer IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services" (Answer & Cr.-Appeal at ¶ 11).

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[8] 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.

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 alone 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 student's individual needs 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 a "carve-out" of jurisdiction for this issue explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶ 11).

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, 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.).[9] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of 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. 909589-24).[10]

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice but contends that the emergency regulation "merely codif[ies] NYSED's preexisting position on implementation claims" (Answer & Cr.-Appeal ¶ 11 n.3). 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.

[9] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

[10] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided. The IHO would not have known of the actions of the litigants or actions by Supreme Court at the time of the IHO's final decision.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[11]

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 amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document.

In this case, the parent's due process complaint notice was dated May 20, 2024, well before the July 16, 2024 deadline set forth in the July 2024 emergency regulation. Moreover, the adopted emergency regulation has been stayed through a temporary restraining order issued by Supreme Court, Albany County, and since then the regulation has now lapsed. For the reasons described above, the district's jurisdictional argument is without merit.

2. June 1 Deadline

Turning to the district's second defense, in this case, the district argues that the IHO erred in rejecting the argument that the parent failed to request special education services for the student for the 2023-24 school year by the June 1 deadline in Education Law § 3602-c.

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

[11]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). The guidance document is no longer available on the State's website; thus a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

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]).

At the hearing, the district offered its special education student information system (SESIS) events log for the student into evidence to show that there was no communication between the district and the parent between March 25, 2022, and July 12, 2023 (Tr. p. 27; Dist. Ex. 2 at p. 2). The parent does not dispute that he failed to request services by the June 1 deadline, rather the parent argues that the district waived the defense of the June 1 deadline through its conduct. The IHO agreed with the parent's position, finding that the district's SESIS log, without any testimony from a district's custodian of records to explain the entries, was insufficient to establish the district's June 1 affirmative defense, and the IHO further determined that the district waived the June 1 defense by sending the parent a form authorizing the parent to obtain the SETSS (IHO Decision at p. 7).[12]

A district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). 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]).

[12] I do not agree with the IHO's finding that a lack of a witness was problematic. It was incumbent on the parents to show that they made the request for dual enrollment services rather than on the district to prove that an event did not happen (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)"]). However, this point is not dispositive in this particular case because of the district additional conduct.

In this case, the evidence reflects that the parent received a district form authorizing him to obtain independent SETSS for parentally placed students, which stated that the student was entitled to receive a maximum of five hours per week of SETSS beginning September 1, 2023 (Parent Ex. C at p. 1). The SETSS authorization form further indicated that the services may not continue beyond a total of 360 hours or beyond June 30, 2024 (id.). Section 1 of the form, labeled "to be completed by [district] staff" was filled out with the student's relevant information and was consistent with the services listed in his August 2020 IESP (compare Parent Ex. B at p. 6, with Parent Ex. C at p. 1). This authorization form, which is essentially a voucher created by the district for the parent to obtain private special education services on terms identified by the district demonstrates the district's effort to ensure implementation of the student's SETSS during the 2023-24 school year and, therefore, the district's act of authorizing the parent to obtain the SETSS services from particular providers during the 2023-24 school year constitutes a "clear and unmistakable waiver" of the June 1 deadline.

Based on the foregoing, although the evidence in the hearing record shows that the parent failed to submit a request for the student to receive dual enrollment services for the 2023-24 school year by June 1, 2023, the district nevertheless waived the deadline through its conduct of completing and sending the authorization form to the parent that directed the parent to obtain the services from particular providers at district expense. Consequently, the admitted failure of the district to implement the services outlined in the student's IESP constitutes a denial of a FAPE for the 2023-24 school year.

B. Relief

1. Compensatory Education

The parent requests 180 periods of SETSS to be provided by a private agency to make up for the district's failure to implement the student's SETSS during the 2023-24 school year. As an alternative argument, the parent requests that the district provide compensatory relief in the form of five periods of weekly SETSS for the period of time in which the student was entitled to such services under pendency but were not delivered to the student during three different portions of the 2023-24 school year (see Req. for Rev. ¶ 9).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed

so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Moreover, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).[13]

[13] The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[13] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

The district argues in its cross-appeal that there is no evidence that compensatory educational services are appropriate as the parent failed to present evidence of the student's present performance levels or how the proposed services would meet the student's needs. However, the district's argument that the student is not entitled to compensatory education without this information is not persuasive. In this instance, the district was obligated to offer the student a FAPE and provide services to the student; however, the district failed not only in the provision of services, but also in its obligation to evaluate the student's needs and convene a CSE meeting to discuss those needs. As discussed above, the district was required to implement the student's SETSS during the 2023-24 school year, and failed to do so. It is undisputed that the student did not receive any unilaterally-obtained SETSS during the 2023-24 school year. Moreover, the district concedes in its answer with cross-appeal that parent is entitled to compensatory pendency services based on the district's pendency agreements with the parent, wherein the district acknowledges that the student's pendency services consisted of five periods per week of SETSS pursuant to the student's August 2020 IESP (Ans.¶ 25; see SRO Exs. A; B; C).[14] Thus, the district is obligated to deliver the services it failed to provide to the student during the 2023-24 school year in the form of compensatory education.

As there is no indication in the hearing record that the student was recommended for or required services on a 12-month basis, an appropriate compensatory education award should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). Accordingly, the student shall receive a total compensatory award of 180 periods of SETSS. This relief of 180 periods of compensatory SETSS shall also address the SETSS the student was entitled to under pendency that the district acknowledges it failed to provide. Services shall be delivered in English as reflected on the August 2020 IESP and shall be provided by the district unless the parties otherwise agree (Parent Ex. B at 6).

2. Reevaluation and CSE Meeting

Finally, the district cross-appeals from the IHO's order for the district to "convene to determine the [s]tudent's continued eligibility for special education services," as the parent never requested such relief and requests that the order to conduct evaluations and convene a CSE meeting be annulled (see IHO Decision at p. 9; Parent Ex. A at pp. 1-2).

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO should ensure that equitable relief awarded is designed to remedy an issue that was not raised. Generally, the party

[14] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The student's pendency programming was supposed to be ongoing during the impartial hearing process, and the district, by its own admission, failed to implement pendency. Thus, the three pendency implementation forms submitted by the parent in his request for review will be accepted on appeal.

requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). 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]). Moreover, it is essential that an 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., 502 F.3d 708 [7th Cir. 2007]).

The district is reminded of its obligations in that generally a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303 [a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The district is similarly reminded that the CSE is obligated by law and regulation to conduct an annual review for the student and there is some evidence that as of the filing of the due process complaint notice in this matter that the CSE had not conducted such review since its August 2020 meeting. Accordingly, while the parent did not seek a reconvene of the CSE as a remedy in this instance, the district nonetheless is required, even absent an order to do so, to fulfill its obligation to convene for the student's annual review in accordance with the aforesaid statutory and regulatory framework.

Notably, the district's diffident argument on this point lacks any assertion, much less evidence showing that student has been reevaluated or that the CSE has to address the student's needs since 2020. It was within the IHO's broad authority to order that the district fulfill its obligation to reevaluate the student and convene a CSE meeting as a form of appropriate equitable relief. Thus, I find no reason to disturb the IHO's order that the district shall reevaluate the student and convene a CSE meeting within 90 days to develop the student's educational program.

VII. Conclusion

As discussed above, the IHO had subject matter jurisdiction over the parent's claim and the district denied the student a FAPE for the 2023-24 school year by failing to implement special education services in accordance with an IESP after the district waived its June 1 deadline defense by its conduct. I further find that the parent is entitled to compensatory education as relief to remedy the district's failure to provide the student a FAPE for the 2023-24 school year and no reason to disturb the IHO's order that the district fulfill its obligation to reevaluate the student and convene a CSE meeting within 90 days.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision dated August 3, 2024, is modified by reversing that portion that found that the student was not entitled to compensatory educational services; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with 180 periods of compensatory education SETSS in English to be completed prior to December 31, 2025.

Dated: **Albany, New York**
November 14, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER