The University of the State of New York

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

No. 24-404

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 Lindsay R. VanFleet, 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 her request for funding of private services delivered by HLER, LLC (HLER) for the 2023-24 school year. Respondent (the district) cross-appeals, among other things, that portion of the IHO's decision which determined that the student was eligible for equitable services for the 2023-24 school year under State law. The appeal must be dismissed. The cross-appeal must be sustained to the extent indicated.

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

At all relevant times, the student was parentally placed at a nonpublic school (Dist. Exs. 2 at p. 16; 3 at p. 13).[1]

On March 29, 2019, a CSE convened to develop the student's "Turning 5" IESP as he was aging out of his preschool program (Dist. Ex. 3 at pp. 1, 13). The March 2019 CSE determined the student to be eligible for special education as a student with a speech or language impairment and developed an IESP with a projected implementation date of September 4, 2019 (id. at p. 1).[2] The March 2019 CSE recommended the following supports and services: 10 periods of special education teacher support services (SETSS) per week in a group setting; two 30-minute sessions of individual occupational therapy (OT) per week; two 30-minute sessions of individual speech-language therapy per week; one 30-minute session of group speech-language therapy per week; and one 30-minute session of individual physical therapy (PT) per week (id. at pp. 1, 9-10).

On June 20, 2023, the parent signed an enrollment contract for the 2023-24 school year with HLER, an educational agency that provides SETSS, special education itinerant teacher services (SEIT), and related services (Parent Ex. E ¶ 1; IHO Ex. I at p. 3). Under the contract's terms, the parent is obligated to pay for services, which "will be provided in frequency and duration as listed in the last agreed upon IEP/IESP/FOFD" at a rate of $192.00 per hour for individual services and a rate of $144.00 for group sessions (Parent Exs. C ¶¶ 1, 3; E ¶¶ 5, 15).

Beginning on September 11, 2023, HLER provided SETSS to the student through four different providers (Tr. pp. 31-32; Parent Ex. E ¶¶ 6-7). The student received SETSS in a group setting at school and individually at home (Tr. pp. 29-30; Parent Ex. E ¶ 6).

On April 3, 2024, a CSE convened and developed an IESP for the student with a projected implementation date of April 18, 2024 (Dist. Ex. 2 at p. 1). The April 2024 CSE recommended the following supports and services: four periods of SETSS per week in a group setting; two 30-minute sessions of individual OT per week; and one 30-minute session of individual speech-language therapy per week (id. at p. 13).

A. Due Process Complaint Notice

In a due process complaint notice dated June 6, 2024, the parent, through a lay advocate, alleged that the district failed to provide the student with equitable services for the 2023-24 school year (Parent Ex. A).[3] Specifically, the parent alleged that the district failed to supply providers to deliver the recommended services and failed to inform the parent how to find providers for the

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[1] Parent Exhibit B is duplicative of District Exhibit 3. For purposes of this decision, only the district exhibit will be 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] Parent Exhibit A is duplicative of District Exhibit 1. For purposes of this decision, only the parent exhibit will be cited.

2023-24 school year (id. at p. 2). The parent further alleged that, due to the district's failure to implement the recommended services set forth in the student's March 2019 IESP, she was unable to secure a provider for the 2023-24 school year at the district rates and had no choice but to obtain services, unilaterally, at the provider's enhanced rates (id. at pp. 1-2). The parent requested pendency based on the March 2019 IESP (id. at p. 2). As relief, the parent sought funding of the cost of all services recommended in the March 2019 IESP for the 2023-24 school year at the provider's enhanced rates, as well as a bank of compensatory services to compensate for the services the student did not receive due to the district's failure to supply providers (id. at p. 3).

B. Impartial Hearing Officer Decision

On July 16, 2024, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-61). The IHO admitted all but one of the parent's exhibits into evidence (see Tr. pp. 16-21).[4] Among the documents entered into evidence by the parent was a district form, bearing the date of April 21, 2023, which purported to request educational services under the State's dual enrollment statute for the upcoming 2023-24 school year (Tr. pp. 13, 20-21; Parent Ex. J at p. 1).[5] An educational supervisor at HLER testified for the parent via affidavit and gave live testimony during the hearing (see Tr. pp. 13-15, 21, 28-50; Parent Ex. E). The district presented no testimony but did offer several documents, each of which the IHO admitted into evidence (Tr. pp. 7-11, 26).

In a decision dated August 15, 2024, the IHO found that the record lacked credible evidence that the parent submitted the purported request for dual enrollment services to the district on or before June 1, 2023 (IHO Decision at pp. 1, 6-7, 14). According to the IHO, however, the district effectively waived the aforesaid statutory submission requirement by developing an IESP for the student 10 months later on April 3, 2024, to be implemented during the 2023-24 school year (id. at p. 6). The IHO therefore determined that the student was eligible for equitable services beginning on April 18, 2024, the implementation date of the April 2023 IESP, through June 26, 2024, the end of the 2023-24 school year (id. at pp. 6-7). According to the IHO, the district was not obligated to implement the March 2019 IESP, which, upon development of the April 2024 IESP, was not the operative IESP (id. at p. 7). Ultimately, the IHO denied the parent's requested relief in full because her due process complaint notice alleged only the district's failure to implement the March 2019 IESP (id. at pp. 7, 14).[6]

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[4] The IHO excluded only Parent Exhibit I from admission into evidence because the IHO determined the proffered exhibit that was described as district implementation unit correspondence dated March 2024 was irrelevant and did not pertain to the student (Tr. pp. 16-21).

[5] The form was not complete.

[6] The IHO made an alternative determination that, "[i]n the event that [the parent's] inaccurate [due process complaint] is not fatal, did not prejudice [the district], or that [the district] 'opened the door' to the implementation of the newer program," the district failed to comply with its obligation to provide the student with equitable services from April 18, 2024 through the end of the 2023-24 school year (IHO Decision at pp. 7, 13). Then, for completeness of the record, the IHO addressed whether the services unilaterally obtained from HLER were appropriate for the student (id. at p. 7). In that regard, the IHO determined that, "[b]ased on a totality of the record," the parent failed to meet her burden of proving that HLER provided a program of services which was

IV. Appeal for State-Level Review

The parent appeals for state-level review, and the district cross-appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. Although not raising the argument before the IHO, on appeal the district asserts that the IHO lacked subject matter jurisdiction to hear the disputes. Thus, the parties dispute the following issues: whether the IHO had subject matter jurisdiction to adjudicate the parent's claim in the first instance; whether the district was obligated to provide the student with equitable services during the 2023-24 school year and, if so, when did such obligation begin; whether the parent met her burden of proving that the unilaterally obtained services were appropriate for the student; and whether the equities favor the parent's request for relief.

V. Applicable Standards

A board of education must offer a free appropriate public education (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

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specially designed to meet the student's unique needs (id. at pp. 8-10). The IHO also found, however, that one out of the student's four SETSS providers delivered appropriate services and, if such a finding satisfies the parent's burden, then the parent would be entitled to relief, subject to any equitable considerations (id. at p. 10). According to the IHO, if the parent was entitled to relief, the award would consist of funding of only those services provided from April 18, 2024 through June 26, 2024 and deemed appropriate, with a 20% reduction in the requested rate due to equitable concerns (id. at pp. 6, 10-13).

[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]).

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.).[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. Subject Matter Jurisdiction

As a threshold matter, it is necessary to address the issue of subject matter jurisdiction which was raised in the district's cross appeal. The district argues that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application

[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.

of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

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 New York Education Law 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]).[9]

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]).

Education Law § 4404 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

[9] 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]).

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).[10] In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, 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. 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 recently attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, 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.).[11] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Bd. 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

[10] The district did not seek judicial review of these decisions.

[11] 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]). The due process complaint in this matter was filed with the district on June 6, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

> 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).[12]

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "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]).[13]

Given the implementation date set forth in the amendment's text and the temporary suspension of its application, the amendment may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Acknowledging that this matter has received new attention from State policymakers and appears to be an evolving situation, I nevertheless must deny the district's request for dismissal of the parent's appeal and underlying claim on jurisdictional grounds.

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[12] 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 (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

[13] Neither the guidance nor the district indicated if this 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.

B. June 1 Deadline

Having determined that the IHO had jurisdiction to adjudicate the parent's claim in this matter, I now turn to the parties' dispute as to whether the student was entitled to equitable services under New York Education Law § 3602-c and, if so, when such entitlement began. The parent contends that the IHO erred in determining that the student was not entitled to equitable services from the beginning of the school year. The parent argues that she submitted a timely June 1 notice, and, in any event, the district waived the defense of the June 1 deadline by developing an IESP later in the school year. The parent further argues that the March 2019 IESP was the last agreed upon program and the parent was not required to use the April 2024 IESP as the filing basis of her due process complaint notice. The district contends that the IHO erred in determining that the district's creation of the April 2024 IESP, without implementing it, constituted a waiver of the June 1 defense. Thus, according to the district, the lack of credible evidence of the parent's submission of a June 1 notice precluded any relief for the entire school year. The district argues, alternatively, that, if such a waiver occurred, then the IHO correctly determined that such waiver applies only from April 18, 2024 forward.

I will first address whether the parent complied with the June 1 requirement. The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school, and for whom the parents seek to obtain educational services, to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of

technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In this case, the district properly raised the affirmative defense of the June 1 deadline during the hearing (Tr. pp. 22-23, 53). It was then incumbent on the parent to show that she made the request for dual enrollment services rather than on the district to prove that an event did not happen (see Mejia v. Banks, 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 . . . a negative"]). While the hearing record includes a purported June 1 notice dated April 21, 2023, it lacks evidence that said notice was actually submitted to the district (Tr. pp. 13, 20-21; Parent Ex. J at p. 1). The parent's advocate asserted that the notice was sent by "[e]mail or mail" but presented no documentary evidence or witness testimony to that effect (Tr. pp. 20-21). Therefore, I find no basis to overturn the IHO's finding that the parent failed to provide the district with the required written request for equitable services prior to June 1, 2023 (cf. Application of a Student with a Disability, Appeal No. 24-446 [finding that the parent established compliance with the June 1 requirement where the parent testified that her former attorney copied her on an email with which the attorney submitted a June 1 notice to the district]).

Next, I will address whether the district impliedly waived the June 1 affirmative defense. 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]). While delivery of services reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP would, without more, constitute a waiver. For example, to the extent a district was navigating two requirements in tension with one another, i.e., to 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]) versus awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]), the occurrence of the meeting might not clearly or unmistakably reflect the district's waiver of the June 1 notice.

In this case, it is undisputed that the district provided no services to the student during the 2023-24 school year. Although the district created an IESP for the student in April 2024, the timing of the April 2024 CSE meeting, months into the school year, suggests an effort by the district to comply with its annual review requirement, not a clear and unmistakable waver of the June 1 requirement 10 months earlier (Dist. Ex. 2 at p. 1).[14] Accordingly, the evidence in hearing record does not support a finding that the district impliedly waived the June 1 defense through its

[14] Indeed, the projected annual review date in the March 19 IESP was March 29, 2020, and in 2024 the CSE convened at approximately the same time of year on April 2, 2024 (Dist. Exs. 2 at p. 1; 3 at p. 1).

actions (cf. Application of the Bd. of Educ., Appeal No. 18-088 [finding that the district impliedly waived the June 1 defense where the district created an IESP for the student and began providing services at the student's nonpublic school after the June 1 deadline]).

Based on the foregoing, I find that the district was not obligated to provide the student with equitable services for the duration of the 2023-24 school year.

VII. Conclusion

Having found no evidence showing that the parent submitted the written request for dual enrollment services to the district on or before June 1, 2023, as required by Education Law § 3602-c, and that the district did not waive the June 1 defense, I find that the student was not entitled to equitable services for the 2023-24 school year. Accordingly, the parent's requested relief in the form of funding for unilaterally obtained services must be denied. Considering this determination, I find it unnecessary to address the parties' remaining contentions relating to the appropriateness of the services provided by HLER and equitable considerations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 15, 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 on or before June 1, 2023 and, thus, had an obligation to provide the student with equitable services beginning on April 18, 2024 through the end of the 2023-24 school year.

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

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JUSTYN P. BATES
STATE REVIEW OFFICER