The University of the State of New York

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

No. 24-405

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund the costs of his son's special education teacher support services (SETSS) delivered by Proceed Services, Inc. (Proceed Services) for the 2023-24 school year.[1] The district cross-appeals asserting, in pertinent part, that the IHO incorrectly denied its motion to dismiss the parent's claims based on a lack of subject jurisdiction. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, on April 16, 2021, a CSE convened, found the student eligible for special education as a student with a learning disability, and developed an IESP for the student with an implementation date of April 30, 2021 (see Parent Ex. B).[2] The CSE noted that the student was parentally placed in a nonpublic school and recommended that he receive five periods per week of direct, group SETSS in Yiddish in a separate location (id. at pp. 6, 8).

In a letter dated May 25, 2023, the district advised the parent that according to the district's records, the student had been placed in a nonpublic school at the parent's expense and that should the parent wish to have the student receive special education services for the 2023-24 school year, the parent must sign the attached form requesting services and return it to the district by June 1, 2023 (Dist. Ex. 2 at pp. 1-2).

On September 5, 2023, the parent signed a "Parent Service Contract" with Proceed Services indicating that the student was entitled to receive five periods of SETTS per week from the district and that he understood that Proceed Services intended to provide SETSS "at a rate of $195" (Parent Ex. E at pp. 1-2). The parent confirmed that in the event he was unable to secure funding from the district or elsewhere, he was liable to pay Proceed Services the full amount for all services delivered (id. at p. 1).

The hearing record includes a prior written notice sent to the parent, which indicated the student was due for a reevaluation but no additional assessments were necessary as part of the reevaluation and the CSE intended to rely on teacher progress reports and related service providers' reports to determine the student's continuing eligibility for services (Dist. Ex. 3).

In a letter dated April 15, 2024, the parent notified the CSE that he had no way of implementing the services recommended on the student's most recent IESP and that he will be making his best effort to locate providers, but was "far from certain that [he] will be able to secure any providers" (Parent Ex. C).

In a due process complaint notice, dated May 17, 2024, the parent alleged that the April 2021 IESP was outdated and expired and that the district's delay in convening and recommending a proper placement and services was a denial of a FAPE for the 2023-24 school year (Parent Ex. A at p. 2). Further, as to the services recommended in the IESP, the parent asserted that he had been unable to locate a provider willing to accept the district's contract (id.). According to the parent, without the supports, the parental mainstream placement was untenable, and the failure to either implement the services or provide a placement was a denial of a FAPE for the 2023-24 school year (id.). The parent requested an order, in pertinent part, directing the district to fund the program outlined in the April 2021 IESP at the provider's contracted rate (id. at p. 3).

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on July 16, 2024, during which the IHO

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

acknowledged that the district had asserted a June 1 affirmative defense (Tr. p. 4). Thereafter, a hearing convened and concluded on July 29, 2024 (Tr. pp. 9-46). At the hearing, the district made a motion to dismiss the due process complaint notice for lack of subject matter jurisdiction (Tr. pp. 13-14; IHO Ex. I). The IHO reserved decision on the motion and stated that it would be addressed in her final decision (Tr. p. 13). In a decision, dated August 30, 2024, the IHO denied the district's motion to dismiss ruling that she had jurisdiction to hear the matter (IHO Decision at p. 4). Next, in analyzing the issue of a FAPE, the IHO ruled that the district had developed an IESP for the student in 2021, which had recommended SETSS, and the district failed to implement the recommended SETSS for the 2023-24 school year (id. at p. 5). However, the IHO concluded that while the parent had notified the district of his request for equitable services for the 2024-25 school year, he had failed to do so for the 2023-24 school year (id. at pp. 5-6). Accordingly, the IHO ruled that the district was not obligated to provide the student with SETSS for the 2023-24 school year (id. at p. 6).

As a matter of completeness of the hearing record, the IHO concluded that the privately obtained SETSS were appropriate as they were tailored to meet the unique needs of the student and the student was making progress (IHO Decision at p. 7). In addition, the IHO concluded that there was no basis to find the contracted hourly rate of $195 to be excessive (id.).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed, and therefore, the allegations will not be repeated. Briefly, based on additional evidence that accompanied the request for review, the parent, through his attorney, maintains that he provided a notice requesting equitable services for the 2023-24 school year to the district prior to June 1, 2023. The parent further asserts that the district failed to assert a June 1 defense in a timely and adequate fashion. Finally, the parent asserts that the district waived the June 1 defense by its conduct in sending a SETSS authorization form during the 2023-24 school year.

The district submits an answer and cross-appeal. The district argues for upholding the IHO's determination that the district was not required to provide equitable services to the student during the 2023-24 school year and cross-appeals from the IHO's denial of its motion to dismiss the due process complaint due to a lack of subject matter jurisdiction. In the alternative, the district asserts that should the merits of the parent's claim be reached, the parent failed to meet his burden to prove the appropriateness of the SETSS and equitable considerations favored the district. As such, the district asserts that the parent's requested relief should be denied.

The parent submits a reply to the district's answer, in which the parent also answers the district's cross-appeal asserting that the impartial hearing process has jurisdiction over matters involving implementation of equitable services.

V. Discussion

A. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district in its motion to dismiss submitted prior to the hearing and raised again in its answer and

cross-appeal (see IHO Ex. II; see Answer & Cr.-Appeal). The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that the parent never had the right to file a due process complaint with respect to implementation of an IESP.

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

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to determine claims from parents seeking implementation of equitable services (Answer & Cr.-Appeal at ¶ 14 (id. at ¶¶ 13-15).

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

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

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

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue. Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5 which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate

charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[3] Second, since its adoption, the amendment has been enjoined and suspended in an Order Show Cause dated October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[4]

In a letter to the Office of State Review, dated October 9, 2024, the district acknowledges the Order to Show Cause but contends that the injunction does not change the plain meaning of the Education Law and that under the Education Law, "there is not, and never has been, a right to bring a complaint for the implementation of [IESPs] or to seek enhanced rates for equitable services" (Oct. 9, 2024 letter [emphasis omitted]). 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.

[3] 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]).

[4] 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]).[5]

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.

Finally, in this case, the parent's due process complaint notice was dated May 17, 2024, prior to 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.

B. Additional Evidence

The parent, through his attorney, attached documents to the request for review which he requests be considered on this appeal in opposition to the district's June 1 defense. The documents purport to show that on May 23, 2023, the parent notified the district via email that he had parentally placed the student in a nonpublic school and wanted the student's special education services to continue during the 2023-24 school year (Req. for Rev. Ex. 1). The documents further purport to evidence a written response by the district to the email together with the parent's subsequent return of a form letter requested by the district, indicating that the parent desired the special education services to continue in the upcoming school year (id. at pp. 3-4). The letter was signed by the parent on May 25, 2023 and purportedly transmitted to the district via email on May 29, 2023 (id.). Also attached to the request for review was a letter from the parent's attorney to the district with a transmittal email dated November 20, 2023 which details the attorney's views on alleged deficiencies in the district's record keeping of June 1 notices and its conduct in responding to due process complaints (see Req. for Rev. Attachment 2).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this

[5] 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 in this matter.

evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

I find the parent's attorney's letter to the district to be irrelevant to this proceeding. In addition, I find that the documents submitted with the request for review were available prior to the hearing and will therefore not be considered. Notably, the parent was advised of the district's June 1 affirmative defense well before the July 29, 2024 hearing; in fact, the district first advised the parent of the affirmative defense as part of a June 20, 2024 Omnibus Docket Status Conference (see IHO Exhibit I). The assertion of the affirmative defense was then addressed at the preliminary hearing conference held on July 16, 2024 (Tr. p. 4). In fact, in light of the affirmative defense, the IHO expressly requested that the parent attend the hearing to provide testimony regarding the June 1 notice (id.). Accordingly, if the parent was in possession of a letter to the district that could have resolved this issue, the parent should have submitted it at the stage of the impartial hearing, where it could have been introduced as evidence and subjected to cross-examination to establish its authenticity. As the parent chose not to submit the letter or emails at the impartial hearing and has not offered a reason for not submitting them until the current appeal, I decline to accept them as additional evidence.

C. June 1 Deadline

Having decided that the IHO had jurisdiction to address the parent's claim and that the additional evidence offered by the parent should not be considered, I now turn to the district's contention that the parent failed to provide the district with written notice requesting dual enrollment services prior to June 1, 2023 as required by Education Law § 3602-c(2), and, therefore, the student was not entitled to equitable services for the 2023-24 school year.

Generally, 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]).

As such, 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]).

Here, the district raised the June 1 affirmative defense in a timely and adequate fashion. As set forth herein, the defense was addressed at a June 20, 2024 omnibus conference and again at the July 16, 2024 preliminary conference and then testimony was taken from the parent on the issue at the hearing (Tr. pp. 4, 23-26; IHO Ex. I).

Once the district has raised the defense, although the district would generally have the burden of proof on an affirmative defense, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] ["it is unclear how the school district could have proved such a negative"). Here, as noted by the IHO, the district submitted into evidence a letter dated May 25, 2023 that it ostensibly sent to the parent acknowledging that the parent had placed the student in a nonpublic school for the 2023-24 school year and notifying the parent that if he wished to have the student receive special education services in the upcoming school year the attached form needed to be signed by the parent and returned to the district by June 1, 2023 (IHO Decision at p. 5; Dist. Ex. 2). There was no evidence of any parent response (IHO Decision at p. 5).

Having proffered no proof that the parent requested equitable services from the district prior to June 1 of the 2023-24 school year, the parent argues that the district waived its June 1 defense by sending a SETSS authorization form to the parent (Req. for Rev. at p. 6; Parent Ex. D). A district may, through its actions, waive the statutory requirement for the June 1 notice (Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June first filing deadline for a request for services but it does not specify that a school district is precluded from providing equitable services to a student with a disability if a parent misses the June first deadline (Educ. Law § 3602-c[2][a].[6] However, the Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that

[6] As an SRO recently observed:

> The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1st deadline. But read as a whole, the statute does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline. For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Research by the undersigned has revealed no caselaw addressing whether a school district is barred from dually enrolling a student who has missed the June 1st deadline and the parties have pointed to none.

(Application of a Student with a Disability, Appeal No. 23-032).

"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]).

Here, as noted by the IHO, a district SETSS authorization form with an issuance date of May 15, 2024 was entered into evidence by the parent (IHO Decision at p. 5; Parent Ex. D). The parent argues that the body of the exhibit indicates that services may not begin before September 1, 2023 and consequently, the district did not send the SETSS authorization form in response to a request for equitable services for the 2024-25 school year (Tr. 40; Dist. Ex. D at p. 2). The district responds that there is no authority to suggest that an unsigned SETSS authorization form can constitute a waiver of the June 1 defense, and, moreover, the 2023 language referenced in this specific authorization form may have been a "scrivener's error" (Answer & Cr.-Appeal at ¶ 2).

The testimony elicited from the parent by parent's attorney regarding the SETSS authorization form was extremely limited and reflected only that the parent received the letter from the district some time at the end of May 2024 (Tr. p. 24). On cross-examination by the district, the parent testified that while he could not recall precisely when in May he received the correspondence, it was received only after he requested services for the 2024-25 school year (id. p. 25). Notably, the SETSS authorization was unsigned and undated (Parent Ex. D at p. 2).

While a "clear and unmistakable waiver" of the statutory requirement of a parent request for services before June 1 has been found to exist where the CSE decided to create an IESP for the student after the deadline and then began providing services at the student's nonpublic school (see Application of the Board of Education, Appeal No. 18-088), I decline to find that an unsigned SETSS authorization form issued by the district sometime in May 2024, containing what appears to be conflicting language as to the provision of services not to begin before September of 2023, constitutes a "clear and unmistakable waiver" of the June 1 defense for equitable services for the 2023-24 school year.

VI. Conclusion

Although the IHO had subject matter jurisdiction over the parent's claims, the parent did not provide the district with written notice requesting dual enrollment services prior to June 1, 2023 as required by Education Law § 3602-c(2), and, therefore, the student was not entitled to equitable services for the 2023-24 school year, and the parent's requested relief in the form of funding for unilaterally-obtained services must be denied.

I have considered the parties' remaining contentions and find it is unnecessary to address them in in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 22, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER