The University of the State of New York

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

No. 24-464

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

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

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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals, arguing that the IHO lacked subject matter jurisdiction over the matter. 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 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

A CSE convened on March 15, 2023, determined the student was eligible to receive special education as a student with a speech or language impairment, and developed an IESP for the

student with a projected implementation date of March 31, 2023 (see Parent Ex. B).[1] The March 2023 IESP noted that the student was attending a nonpublic school and reflected counseling, teacher, and occupational therapy (OT) reports (id. at pp. 1, 3, 4). According to the IESP, the parent reported that the student had not "accessed physical and speech therapy due to lack of providers" and also reported that the nonpublic school "only allows 3 services per student" (id. at p. 1). The March 2023 CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS), two 30-minute sessions per week of individual counseling services, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual physical therapy (PT), and two 30-minute sessions per week of individual speech-language therapy (id. at p. 10).

On May 7, 2023, the parent signed a district form declaring that she had parentally placed the student in a nonpublic school and wanted the student's special education services from the district to continue for the 2023-24 school year (Parent Ex. H). On May 19, 2024, the parent electronically signed an agreement with Step Ahead acknowledging the rate the agency charged for SETSS and related services, that the services "being provided" to the student were consistent with the March 2023 IESP and would continue for the entire 2023-24 school year, and that if the district did not pay for the services, the parent would be responsible for payment (Parent Ex. C).[2] The student began receiving SETSS services through Step Ahead on September 6, 2023, OT on September 13, 2023, and counseling on September 14, 2023 (Parent Ex. G at p. 1).[3]

A. Due Process Complaint Notice

In an amended due process complaint notice dated June 30, 2024, the parent 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 student with the services recommended in the March 2023 IESP and that the parent was therefore obligated to find providers at higher than standard district rates (id. at p. 1). The parent requested direct funding for the student's special education and related services at an enhanced rate (id. at p. 2). The parent requested a pendency hearing and a pendency order (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 9, 2024 (Tr. pp. 1-36). In a decision dated September 10, 2024, the IHO found that although the parent signed a request for services on May 7, 2023, prior to June 1 statutory deadline, there was no indication "how, or when the letter was sent to District" (IHO Decision at p. 3). The IHO held that the parent therefore failed to make a timely request for the provision of special education services for the 2023-24 school year and denied the parent's requested relief (id.

[1] 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]).

[2] Step Ahead has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The student did not receive any speech-language or PT services during the 2023-24 school year, but the parent stated that "th[o]se two services [we]re not part of the appeal" (Req. for Rev. ¶ 2 fn. 1).

at p. 2). The IHO held that the district failed to prove that it provided the student with a FAPE for the 2023-24 school year (id. at p. 5). The IHO held in the alternative that if he had determined that the student was eligible to receive special education services for the 2023-24 school year under the dual enrollment statute, the parent met her burden of establishing that the OT and counseling services provided by Step Ahead were appropriate to meet the student's unique needs, but that the parent failed to establish that the Step Ahead SETSS services were "reasonably calculated to meet the Student's needs" (id. at pp. 6-7). The IHO held in the alternative that if the student had been eligible to receive special education services for the 2023-24 school year under the dual enrollment statute, the IHO would have awarded a bank of speech language and PT services for the 2023-24 school year (id. at p. 7). Regarding equitable considerations, the IHO found in the alternative that the parent had not presented any evidence of a ten-day notice of unilateral placement, that the SETSS provider was not certified to teach students in the student's grade, and that the parent failed to sign the contract with Step Ahead until May 19, 2024 (id. at p. 8).[4] The IHO denied the parent her requested relief and dismissed the case with prejudice (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in holding that it was the parent's burden to prove that the district received the June 1 letter. First the parent contends that the request for dual enrollment services need only be sent once, but concedes that administrative hearing officers have routinely held that it must be sent to the district each year by the parent.[5] Next, the parent argues that it is the district's burden to prove, through documentary evidence or testimony, that the district did not receive a June 1 letter from a parent. The parent requests that the IHO's denial of SETSS at an enhanced rate be reversed, arguing that Burlington-Carter is not an appropriate analysis in SETSS reimbursement cases. The parent further requests that the IHO's denial of funding for OT and counseling be reversed and that the parent be awarded funding for Step Ahead's provision of OT and counseling services at enhanced rates. The parent contends that the IHO's equitable findings were flawed and should be reversed. The parent asserts that the IHO engaged in an unequal balancing of the equities, favoring the district to the parent's detriment. The parent argues that the fact that the parent did not enter into a written contract with Step Ahead until May 19, 2024 is not a reason to reduce relief.

In an answer and cross-appeal, the district argues that the IHO's holding that the parent failed to prove that she sent the June 1 letter should be affirmed. The district asserts that the IHO erred because the parent failed to prove that the services provided by Step Ahead were appropriate to meet the student's unique needs and that all requested relief including OT and counseling services should be denied. The district alleges that equitable considerations favor denying the parent all requested relief. In its cross-appeal, the district also asserts as a threshold issue that the IHO lacked subject matter jurisdiction over the parent's claims.V. Applicable Standards

[4] The IHO noted that if he had awarded the parent relief, he would have reduced the award to the services provided after May 19, 2024 because the parent failed to establish that she had a financial obligation to Step Ahead prior to May 19, 2024 (IHO Decision at p. 8).

[5] It is well settled that the parent's argument on that point is contrary to the plain language of the statute which is set forth below and the argument is rejected (Educ. Law § 3602-c[2]).

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]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] 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.

[6] 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]).

[7] 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.

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

At the outset, it is necessary to address the issue of subject matter jurisdiction, which the district alleges the IHO lacked due to clarifying amendments published by the New York State Department of Education. Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630). The district argues that that there is no federal right to file a due process claim regarding services recommended in an IESP and that "neither the SRO nor the IHO ha[ve] subject matter jurisdiction over the claims in the DPC".

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 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 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 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.

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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]).[8]

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

Section 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

[8] 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]).

> 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.

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.).[9] 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 Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

[9] The due process complaint in this matter was filed with the district on October 10, 2023 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

> 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).[10]

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint for implementation of IESP claims or enhanced rate for services" and that "[s]ection 3602 remains unchanged by the preliminary injunction issued by the New York Supreme Court", State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

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

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

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

[11] 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.

divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

B. June 1 Deadline

I will turn next to the IHO's finding "that without any additional evidence to establish its delivery, or testimony from Parent to corroborate Parent Representative's assertion that this document was sent, I find that Parent has not established that a timely request for services was made…" (id.). The parent asserts that the IHO erred in his decision to dismiss the parent's case based on the June 1 affirmative defense and that the district waived its June 1 affirmative defense by creating the March 15, 2023 IESP.

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. 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 IHO correctly found that the district raised the June 1 affirmative defense in a timely and adequate fashion. The district clearly raised the affirmative defense at the initial hearing (Tr. p. 11). Notably, the parent does not challenge the timeliness of the assertion of the defense in her request for review, and instead argues that the district was required to prove that it did not receive the parent's notice.

Contrary to the parent's argument, 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"). The IHO specifically stated that the photograph of the June 1 form submitted by the parent was insufficient to prove that the form was submitted to the district (IHO Decision at p. 4; see Parent Ex. H). I agree with the IHO that the photograph the parent provided as evidence is devoid of any indication of whether it was provided to the district or how (Parent Ex. H). Furthermore, the parent did not testify that she sent the document or otherwise appear or participate at the hearing. Therefore, the parent failed to prove that she submitted the June 1 letter to the district.

Next, I will address whether the district impliedly waived the June 1 affirmative defense. The IHO further found "that the IESP at issue was to be implemented during the 2022-2023 school year, and thus its development would not constitute a waiver of the June 1 requirement" (IHO Decision at pp. 4-5). 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 in March 2023it shows the effort of the district to comply with its annual review requirement, not a clear and unmistakable waver of the June 1 requirement (Dist. Ex. 2 at p. 1). Accordingly, the evidence in hearing record does not support a finding that the district impliedly waived the June 1 defense through its 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]).

Thus, the IHO's determination that the parent failed to establish either through testimony or documentation that the June 1 letter was actually sent to the district will not be disturbed because an annual review was conducted and an IESP was developed and the parent's arguments to the contrary are without merit.

VII. Conclusion

As described above, the district's argument IHO lacked subject matter jurisdiction over the parent's claims must be rejected. However, the IHO correctly found that the parent's claims were foreclosed based on the district's assertion of a June 1 affirmative defense. The evidence in the hearing record supports the IHO's conclusion that the parent failed to establish that she provided the district with a request for dual enrollment services prior to the June 1 deadline.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 20, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER