The University of the State of New York

The State Education Department
State Review Officer
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No. 24-509

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

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay Maione, 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 Yes I Can Services Inc. (Yes I Can) for the 2023-24 school year and her request for compensatory education. The district cross-appeals the IHO's decision raising alternative grounds to deny the parent's requested relief. The appeal must be sustained in part. The cross-appeal must be dismissed. The matter must be remanded for further administrative proceedings.

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 (see Parent Ex. B at pp. at pp. 1,16).[1] A psychoeducational evaluation report contained in the hearing record indicates that, according to the parent, the student had attended the nonpublic school since kindergarten (Dist. Ex. 6 at p. 1).

On November 3, 2023, a CSE convened to conduct an initial review, determined the student was eligible for special education as a student with a learning disability, and developed an IESP with a projected implementation date of November 17, 2023 (Parent Ex. B at p. 1).[2, 3] The November 2023 CSE recommended the following supports and services: five periods of special education teacher support services (SETSS) per week in a group setting; one 30-minute session of individual counseling per week; and two 30-minute sessions of individual occupational therapy (OT) per week (id. at pp. 13-14).

On November 14, 2023, the parent electronically signed an agreement with Yes I Can, which stated that the parent was requesting that the company provide the student with SETSS for the 2023-24 school year (Parent Ex. D).[4] Under a section marked "Financial Responsibility," the parent agreed to pay the balance of any fee not covered by the district's prospective payment and acknowledged that she was aware of a schedule of fees (id. at p. 2).

On December 22, 2023, the parent's counsel sent the district a "10-Day Notice" letter via email advising that the parent had been unable to locate providers to implement the SETSS and related services recommended in the November 2023 IESP at the district's standard rate and that, therefore, she had "no choice but to implement the IESP on [her] own or seek reimbursement or direct payment" from the district for the costs of the private services (Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year and failed to implement the student's IESP (see Parent Ex. A). The parent

[1] The hearing record contains duplicative copies of the November 2023 IESP (compare Parent Ex. B, with Dist. Ex. 4). For purposes of this decision, only the parent's exhibit is cited.

[2] The student, who was in the fifth grade at the time of the November 2023 CSE meeting, was referred for an initial evaluation by her parents and the private school (Parent Ex. B. at p. 1). The parent's main area of concern was the student's academics, focusing, and behaviors at school, including difficulty with managing her emotions (id.). The CSE team utilized a social history evaluation, psychoeducational evaluation, occupational therapy evaluation, speech-language evaluation, fourth-grade report card, teacher progress report, and parent input in developing the IESP (id.). The parent attended the November 2023 CSE meeting (see id. at pp. 16-17).

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

[4] Yes I Can in a private corporation and 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).

contended that the student was entitled to pendency services pursuant to the November 2023 IESP, which consisted of five hours per week of SETSS in a group, one 30-minute session of individual counseling services per week, and two 30-minute sessions of individual OT per week (id. at p. 4). The parent alleged that she had been unable to locate SETSS and related service providers on her own for the 2023-24 school year, that the district failed to implement the CSE's recommendations, that the parental mainstream placement was untenable without special education supports, and that the district's failure to implement the services or provide a placement constituted a denial of a FAPE for the 2023-24 school year (id.).

As relief, the parent requested a finding that the district denied the student a FAPE for the 2023-24 school year, direct funding from the district for the parent's chosen providers for the 2023-24 school year at their contracted rate, and an order directing the district to fund a bank of compensatory periods of SETSS and related services for the 2023-24 school year – or the parts that were not serviced – at the agency's contracted rate (Parent Ex. A at p. 5).

In a response to the due process complaint notice dated July 12, 2024, the district asserted that it intended to pursue all applicable defenses during the impartial hearing, including, among others, that the parent failed to send a written request for equitable services prior to June 1 preceding the school year at issue, as required by New York State Education Law §3602-c(2) (see Response to Due Process Compl. Not. at pp. 1-2). Attached to its response, the district submitted a prior written notice dated November 10, 2023 and documentation indicating that the parent provided consent to services (id.at pp. 3-10).

B. Impartial Hearing Officer Decision

An impartial hearing was held before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 4, 2024 (Tr. pp. 1-52).

In a decision dated September 26, 2024, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at p. 5). The IHO found that the district did not waive its June 1 defense by raising it for the first time in its opening statement because the parent was given the opportunity during the impartial hearing to respond to the defense, the parent's own evidence suggested that the parent did not comply with the June 1 notice requirement, and the parent was subpoenaed by the district and afforded the opportunity to testify regarding the issue to complete the record but "refused" to appear and did not ask to present additional evidence of her alleged compliance with the June 1 deadline (id. at pp. 3-4). The IHO acknowledged that the district disregarded her standing order, which required the parties to assert any affirmative defenses in writing within 10 business days of the hearing date, but noted that the parent was given the opportunity to place her arguments on the record and to present evidence of compliance with the June 1 deadline but failed to do so (id. at p. 4). The IHO noted that the district subpoenaed the parent prior to the hearing date and included the subpoena with its disclosures and that the parent did not object or respond to the district's subpoena prior to the hearing and did not appear at the hearing (id.). The IHO indicated that the district was entitled to issue its own subpoena for the parent's testimony and, in such case, it did not need to request the IHO's signature or to follow the standing order's requirement that a subpoena submitted for the IHO's signature include a statement explaining why the subpoena was relevant or required (id.). The IHO indicated that the district raised several factual issues directly related to its June 1 defense and that she ordered the parent to

appear in order to rebut or present evidence of any mitigating circumstances but that the parent did not appear or request an adjournment (id.). Therefore, the IHO found that the parent had an opportunity to present evidence in response to the district's June 1 defense but declined to do so and that the parent's refusal to testify obstructed the district's ability to present a case and a defense (id.). Based on these findings, the IHO found that the student was not entitled to services for the 2023-24 school year and dismissed the parent's due process complaint with prejudice (id. at pp. 4-5).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the due process complaint notice based on the district's assertion that the parent did not provide a timely written request for equitable services.[5] Regarding the district's defense, the parent argues that the district failed to abide by the IHO's standing order, which required that the district notify the parent of its intent to raise an affirmative defense in writing within 10 business days of the scheduled hearing, and that the district's failure to timely raise the affirmative defense prevented her from adequately preparing a response. In any event, the parent argues that the district's conduct in creating the November 2023 IESP constituted an implied waiver of the requirement for a written request for services from the parent set forth in Education Law §3602-c. The parent also argues that she could not have placed the district on notice that she wanted services delivered on or before June 1, 2023 because the services were not mandated until November 2023. The parent contends that whether the matter should be dismissed due to her failure to notify the district of her request for equitable services by June 1 was a question of law, not of fact, and her testimony was unnecessary. In the alternative, the parent argues that she was justified in ignoring the subpoena because the district did not give her sufficient notice pursuant to the IHO's standing order and because the IHO did not sign the subpoena. As relief, the parent seeks an order requiring the district to fund privately-obtained SETSS and compensatory counseling and OT services. In the alternative, the parent requests that the matter be remanded to the IHO to consider the parent's requested relief.

In an answer and cross-appeal, the district responds to the parent's allegations and argues that the IHO's decision regarding its June 1 affirmative defense should be upheld in its entirety. As for its cross-appeal, the district argues that, if it is determined that the student was entitled to equitable services for the 2023-24 school year, it should be found that the parent failed to meet her burden to establish that the unilaterally obtained services were appropriate and that equitable considerations do not weigh in favor of an award of funding for services since as the parent waited

[5] With her request for review, the parent submits four documents and requests that they be considered as additional evidence. 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 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]). The first three documents offered by the parent as additional evidence are already included in the hearing record (see IHO Exs. I; III; IV), and the fourth document presented is not necessary in order to render a decision in this matter. Accordingly, the parent's additional evidence is not considered.

until December 22, 2023, a month and a half after she signed the agency contract, to send her 10-day notice to the district and the parent's contract with Yes I Can is unenforceable. The district further argues that compensatory education is not an appropriate remedy.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[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

[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 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

The threshold issue for determination is whether the IHO correctly found that the student was not entitled to equitable services under Education Law § 3602-c because the parent failed to provide the district with timely notice of her request for such services and that the district did not waive this affirmative defense.[8]

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]). For a student first identified as a student with a disability after the first day of June, the parent must file a request for services within thirty days after the student is first identified as student with a disability (id.).

Here, the student was first identified as a student with a disability at the November 2023 CSE meeting (Parent Ex. B at p. 1). The parent was therefore required to submit her request to the district no later than December 3, 2023, 30 days after the November 2023 CSE (see Educ. Law

[8] With respect to the timing of the district raising the defense, 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"]). Here, the IHO's standing order provided that any affirmative defense had to be articulated and communicated in writing within 10 business days of the scheduled hearing date, else it could be considered waived (IHO Ex. I at pp. 1-2). The IHO's standing order related to treating defenses waived was permissive, not mandatory, and, generally, IHOs are afforded broad discretion as to the manner in which the impartial hearing is conducted. The district raised the affirmative defense in its due process response dated August 27, 2024, less than 10 business days before the scheduled hearing date of September 4, 2024 (compare Response to Due Process Compl. Not. at p. 1, with Tr. p. 1). The district again raised the June 1 defense at the September 4, 2024 impartial hearing in its opening and closing arguments (Tr. pp. 14, 28). Given the permissive language in the standing order and the district's inclusion of the defense in its response to the due process complaint notice, I do not find that the IHO abused her discretion in considering the district's defense.

§ 3602-c[2]). As the IHO found, the hearing record does not include a written request by the parent for equitable services for the 2023-24 school year. However, in this instance, the lack of evidence of a written notice is not the end of the inquiry.

A district may, through its actions, waive the statutory requirement for written notice from the parent for equitable services (see Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a written notice requirement but does not specify that a school district is precluded from providing special education services to a student with a disability if a parent misses the statutory deadline (Educ. Law § 3602-c[2][a]).[9] The Second Circuit has held that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" and that a waiver will be implied if "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

While actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP, without more, constitutes a waiver. This is due, in part, because the district is required to navigate requirements in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. In addition, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under some circumstances, a district may be required to develop an IESP for the student rather than await a parent's written request for it to "furnish

[9] The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the statutory deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone does not clearly or unmistakably reflect the district's waiver of the June 1 deadline where it is called upon to convene and engage in special education planning for the student.

However, while convening the November 2023 CSE to create an IESP for the student may not, on its own, have constituted a waiver of the June 1 deadline, the language contained in the district's November 11, 2023 prior written notice—included in the hearing record as an attachment to the district's response to the due process complaint notice—lends further support to a finding that the district convened the CSE in response to the parent's request for dual enrollment services and, further, that it intended to arrange for delivery of the services recommended in the IESP to the student (see Response to Due Process Compl. Not. at pp. 3-4). Specifically, the November 2023 prior written notice documents that the parent informed the district "that [she] w[as] placing [her] child in a nonpublic school, at [her] own expense, and [was] seeking equitable services from the [district]" (id.). The prior written notice further stated that, "[t]herefore, an [IESP] was developed recommending the special education services [the student] will receive" (id. [emphasis added]). In other words, the language identifies that the CSE convened and developed an IESP because of the parent's communication to the district of her request for equitable services and not for an independent reason related to the district's obligation to develop an IESP or IEP for the student. Further, the communication from the district to the parents in the November 2023 prior written notice that the student "will receive" the equitable services is without qualification that such receipt would occur only if the district had received a timely written request for services.

Thus, the district's actions in convening the November 2023 CSE and sending the prior written notice described above reflect either a concession that the district received a written notice of the parent's request for the services or a waiver of the requirement for written notice. Accordingly, the evidence in the hearing record does not support the IHO's determination that the student was not eligible for equitable services for the 2023-24 school based on the district's affirmative defense that the parent did not submit a timely written request for services.

Having found that the student was entitled to equitable services for that portion of the 2023-24 school year after November 2023, the merits of the parents' claims and requests for relief remain to be addressed. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the matter is remanded to the IHO to address in the first instance the issues of whether the district failed to implement the November 2023 IESP; whether private services delivered to the student by Yes I Can during the 2023-24 schoolyear after November 2023 were, under the totality of the circumstances, specially designed to address the student's unique special education needs; whether equitable considerations weigh in favor of an award of district funding for the private services; and whether the student is entitled to compensatory education. I leave it to the IHO's sounds discretion to determine on remand whether any additional evidence is required to complete the record.

VII. Conclusion

The evidence in the hearing record does not support the IHO's finding that the parent's claims were foreclosed based on the lack of evidence of a timely written request from the parent for dual enrollment services. As the IHO did not address the district's implementation of the IESP, the appropriateness of the parent's unilaterally-obtained services, equitable considerations, or compensatory education, this matter is remanded to the IHO to make determinations on these issues.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 26, 2024, is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to determine whether the district implemented the services mandated in the November 2023 IESP; whether unilaterally obtained services provided to the student by Yes I Can were appropriate for the student for the 2023-24 school year; whether equitable considerations weigh in favor of granting funding for the costs of the services provided by Yes I can; and whether compensatory education is warranted.

Dated: **Albany, New York**
January 13, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER