



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-015

**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 Williamsville Central School District**

### **Appearances:**

Kenney Shelton Liptak Nowak LLP, attorneys for petitioner, Patrick M. McNelis, Esq., of counsel

Hodgson Russ LLP, attorneys for respondent, Andrew J. Freedman, Esq., of counsel

## **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 to direct respondent (the district) to provide her daughter with special education instruction and related services at the student's nonpublic school during the 2015-16 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, 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**

Due to the disposition of this appeal based on a procedural issue, a full recitation of the student's educational history is unnecessary. Briefly, the student attended public school in her district of residence during the 2014-15 school year, and in mid July 2015 she was voluntarily enrolled by her parents at a nonpublic school in the district of location (the district) (IHO Exs. I at p. 2; II at p. 11). On September 14, 2015, the parent submitted a request for dual enrollment at the nonpublic and public schools (IHO Ex. II at pp. 25, 26; see Educ. Law § 3602-c[2]).<sup>1</sup> On September 24 and October 8, 2015, the district convened a CSE to develop the student's

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<sup>1</sup> Under State law, when a student with a disability is dually enrolled by the parent in both a nonpublic school and a public school, the district where the nonpublic school the student attends is located develops an individualized education service program "in the same manner and with the same contents as an individualized education program"; however, special education programs and services are available "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" (Educ. Law 3602-c[2][b][1]).

individualized education service program (IESP) under the procedures set forth in the dual enrollment statute (IHO Ex. II at pp. 30, 33, 48, 51, 54; see Education Law § 3602-c[2][b]). The minutes of the CSE meetings reflected that the district's policy was that it would provide the recommended 15:1 special class for math and English and the 5:1 resource room programming at its middle school pursuant to "our agreement with non-publics [sic] schools", and that the district was precluded from recommending the services of an itinerant teacher at the nonpublic school (id. at pp. 34, 52).

Unsatisfied with the CSE's decision, the parent filed a due process complaint notice dated October 15, 2015 (see IHO Ex. I). An IHO was appointed but the impartial hearing dates were adjourned for multiple reasons (IHO Decision at p. 3). Prior to the first day of the impartial hearing, the district notified the IHO and parent that it intended to file a motion to dismiss, and the IHO set a timeline for filing of the motion, a parent response, and a district reply (id.).

On January 20, 2016, the district filed a motion to dismiss with 10 attachments (see IHO Ex. II).<sup>2</sup> The district argued that the parent's claims should be dismissed because: (a) the parent's due process complaint notice was invalid as it failed to state a legally cognizable claim; (b) the parent failed to timely request special education services by June 1 of the proceeding school year, as required by Education Law § 3602-c(2)(a); and (c) the exception to an untimely request for special education services did not apply (id.).

The parent filed a response, arguing that the request for dual enrollment was timely. The parent asserted that the June 1 deadline did not apply, because the student was neither enrolled, nor entitled to be enrolled, in the district until after June 1 (IHO Ex. III at p. 1). The parent contended that Education Law § 3602-c(2)(a) provides an exception "where a student is first identified as a student with a disability after the first day of June of the preceding school year" and argued that "first identified" is not defined in the dual enrollment statute, that the district improperly conflated the term with an initial evaluation and eligibility determination, and that the term should be read to mean when the student is first identified by or to the district of location (IHO Ex. III at pp. 2-5). The parent also argued that, assuming she failed to adhere to the June 1 deadline, the district was precluded from enforcing the June 1 deadline on the theory of implied waiver based on the district convening multiple CSE meetings, creating an IESP, and not indicating, prior to the motion to dismiss, that it would not provide any services to the student (id. at pp. 5-6). Finally, as an analogous argument, the parent contended that equitable considerations, specifically the doctrine of laches, precluded the district from raising the June 1 deadline as a defense (id. at pp. 6-7).

In a reply memorandum, the district argued that the parent's interpretation of the term "first identified" is inconsistent with State regulations, and that as found in the dual enrollment statute, the term only applies to students who are newly identified as students eligible for special education during the school year (IHO Ex. IV at pp. 3-5). The district also contended that, using the parent's interpretation of the term, a student who moves every year would be "first identified" every school year, and, further asserted that a prior version of the statute, that carved out an exception for student's establishing residency in a new district, was superseded by the current statute (id. at p. 4). With respect to the issue of implied waiver, the district argued that the parent bore the burden

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<sup>2</sup> The motion to dismiss and all attached exhibits were received as one exhibit, and therefore all the pages are counted as if sequential, 1-67, not including the index tabs (IHO Ex. II).

of proving that the conduct asserted amounted to an implied waiver and that she did not meet her burden (*id.* at pp. 6-8). With respect to the parent's laches claim, the district argued that equitable considerations are not relevant as the motion to dismiss was based on the facial invalidity of the due process complaint notice (*id.* at pp. 8-9). The district also argued that, even assuming equitable considerations were relevant, the parent was advised of the June 1 deadline as evidenced by a bolded statement found on the dual enrollment form (*id.*). Further, the district argued that its act of good faith, that is, choosing to provide the student with related services during the school year until the dual enrollment services could begin the following school year, rather than not providing the student with any services due to the parent's untimely request, does not weigh against the district equitably (*id.* at p. 9).

In a decision dated February 9, 2016, the IHO granted the district's motion and dismissed the parent's due process complaint notice (IHO Decision at p. 9). In doing so, the IHO found that the parent did not notify the district of the student's dual enrollment status prior to June 1, 2015, in contravention of § 3602-c, and that the exception to the deadline in the statute did not apply (*id.* at pp. 6-7).<sup>3</sup> The IHO rejected both of the parent's arguments that the deadline did not apply because the student was "first identified" during the September 2015 CSE meeting and that the district should be barred from enforcing the deadline because it offered to provide the student with special education services at the nonpublic school (*id.* at pp. 6-8). With respect to the parent's first argument, the IHO found that the exception to the June 1 deadline only applied "when a student is first identified as a student with a disability" and determined that the student was first identified as a student with a disability by the district of residence from which she had previously received special education (*id.* at p. 7). With respect to the parent's claim that the district was barred from enforcing the June 1 deadline, the IHO determined that the district's willingness to convene a CSE and develop an IESP did not preclude the district from enforcing the requirements set forth in the statute (*id.* at p. 8).

#### **IV. Appeal for State-Level Review**

The parent appeals, asserting that the IHO erred by: (a) finding that the parent's request for dual enrollment was untimely and the dual enrollment statute foreclosed the parent from bringing any administrative proceeding; (b) failing to find that the district waived enforcement of the June 1 deadline; and, (c) failing to find that equitable considerations did not preclude the district from enforcing the deadline. The parent requests that the district's motion to dismiss be denied and the matter remanded to the IHO for further proceedings.

In its answer, the district admits and denies the assorted allegations in the petition, and affirmatively asserts that service of the parent's petition was improper. Attached to its answer, the district provides two affidavits detailing how the petition and accompanying papers were delivered to a receptionist and averring that the receptionist was not authorized to accept service—one from the receptionist, who was the recipient of the papers, and one from the director of communications, who witnessed the service (March 30, 2016 Receptionist Aff.; March 30, 2016 Director Aff.).

In her reply to the district's answer, the parent asserts that there is no evidence that the receptionist indicated she was not authorized to accept service during the service event. The parent

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<sup>3</sup> The exception is for students who are "first identified" as a student with a disability after the June 1 deadline, but before April 1 of the following school year (Educ. Law § 3602-c[2]).

contends that the service should not be found to be improper because the receptionist did not deny accepting service, the district's ability to respond to the petition was not impaired by the service irregularity, and that the district was granted a two-week extension to respond to the petition. The parent's attorney, who served the petition, also submits an affidavit recounting the steps that he took in serving the petition and supporting papers (April 5, 2016 Aff.).

## V. Discussion

### A. Initiation of Appeal

As a threshold matter, it must be determined whether or not the petition should be dismissed based upon the district's defense of improper service based on the parent's attorney's service of the petition on an employee of the district who was not authorized to accept service.

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Personal service on a school district is made "by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service" (8 NYCRR 275.8[a]; see 8 NYCRR 279.2[a]). In general, the failure to properly serve a petition and supporting papers may result in dismissal (see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 364-65[S.D.N.Y. Sept. 6, 2013]; R.S. v. Bedford Cent. Sch. Dist., 899 F. Supp. 2d 285, 289 [S.D.N.Y. 2012]).

In this instance, the parent's attorney executed an affidavit of service annexed to the petition, in which he avowed that he delivered the petition and memorandum of law to a district employee who "indicated she [was] authorized to accept service" on behalf of the district (Parent Aff. of Service). With its answer, the district provides affidavits from the receptionist, who received the papers, and the district's director of communications, who witnessed the service (March 30, 2016 Receptionist Aff.; March 30, 2016 Director Aff.). According to the affidavit of the receptionist, she was serving as the receptionist in the district administrative offices on March 7, 2016, the day the papers were delivered to the district (March 30, 2016 Receptionist Aff. ¶ 3). A man entered the office with a sealed envelope and declared that he had papers to drop off for the district (id.). The receptionist sought out the director of communications to find out how to proceed (id. ¶ 4). The director of communications spoke with the man and asked "if the papers were legal documents that required a signature"; the man responded that they were not and he only needed to know the name of the person he was leaving the papers with (id. ¶ 5). The receptionist provided her name, accepted the envelope, and placed the envelope in the district mailbox without opening it (id.). The receptionist also averred that she is not authorized to accept service on behalf of the district and she did not make any such representation to the man who delivered the papers (id. ¶ 6). The affidavit of the director of communications corroborates the receptionist's account of the interaction (March 30, 2016 Director Aff.). Along with the parent's reply, the parent's attorney submitted an affidavit describing his recollection of the March 7, 2016 service, which is not markedly different from the receptionist's description (April 5, 2016 Aff.). The parent's attorney stated that he asked to see the district clerk when he arrived at the district's administrative offices and the receptionist told him that neither the district clerk nor the superintendent was in the office (id. ¶¶ 2-3). He further stated that the receptionist went into the back and returned with another woman, presumably the director of communications, who asked if the papers were a

subpoena and if they required a signature (*id.* ¶¶ 3-5). The attorney stated that he responded that the papers were not a subpoena and did not require a signature, that he identified the papers as a petition to the Office of State Review, that the director of communications "indicated to [the receptionist] that it might be acceptable for her to accept [the] documents," and that the receptionist then accepted the documents (*id.* ¶¶ 6-9). The parent's attorney did not directly address the receptionist and director of communications statement that the receptionist never indicated she was authorized to accept service.

The appeals procedures in the Office of State Review have their historical roots in the appeals procedures before the Commissioner of Education pursuant to Education Law § 310, and the service regulations in appeals to an SRO continue to cross-reference and be governed by the service provisions in appeals before the Commissioner (8 NYCRR 275[8]; 279.2[a]). Although administrative in nature, decisions of the Commissioner interpreting the regulation dictating the method for personal service offer some guidance and the Commissioner has consistently dismissed petitions where service was made on a person who was not authorized to accept service (*see e.g.*, Appeal of Terry, 50 Ed. Dep't Rep., Decision No. 16,117 [service found improper where service made on a district family advocate and a copy of the petition was left at the home of the secretary to the superintendent]; Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service upon unidentified receptionist found improper]; Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696 [service upon the executive secretary to the superintendent found improper]; Appeal of Lilker, 39 Ed. Dep't Rep. 614, Decision No. 14,328 [service upon a member of the district's clerical staff who averred she never represented that she was authorized to accept service found improper]; Appeal of Ponella, 38 Ed. Dep't Rep., Decision No. 14,103 [substituted service on district's clerk's children found improper where no allegation that prior attempts were made to serve district clerk personally]; Appeal of Ameri, 37 Ed. Dep't Rep. 652, Decision No. 13,949 [service upon the secretary to the superintendent found improper where she did not represent herself as being authorized to accept service]). The Commissioner has also repeatedly found that "[w]hen there is no proof that an individual is authorized to accept service on behalf of the school board or the superintendent, service on that individual is improper and the appeal must be dismissed" (Appeal of Wilder, 55 Ed. Dep't Rep., Decision No. 16,839, Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696; Appeal of J.L., 47 Ed. Dep't Rep. 151, Decision No. 15,654; Appeal of D.P., 46 Ed. Dep't Rep. 516, Decision No. 15,580).<sup>4</sup>

In slight contrast to the decisions rendered by the Commissioner of Education, SROs have, as the parent points out in her reply, on rare occasions accepted petitions that were not properly served. The parent presents for consideration several instances when SROs have allowed a petition to proceed to the merits despite an acknowledgement of improper service—specifically, Application of a Student with a Disability, Appeal No. 08-089, Application of the Dep't of Educ., Appeal No. 07-037, and Application of a Child with a Disability, Appeal No. 93-2. However, the cases presented by the parent, as well as the few other instances in which an SRO has exercised

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<sup>4</sup> Additionally, in interpreting the statute governing personal service on a school district (NY CPLR § 311[7]; Educ. Law § 2[13], State courts have not been sympathetic to deviations in service, requiring "strict compliance" with the statutory procedures for the initiation of claims (Franz v. Bd. of Educ., 11 A.D.2d 934, 934-35 [2d Dep't 1985]; *see Puchalski v. Depew Union Free Sch. Dist.*, 119 A.D.3d 1435, 1438-39 [4th Dep't 2014]). Where strict compliance is required, reliance upon the representation of a person who is not authorized to accept service that they are authorized to receive service is not sufficient to effect service (Franz, 11 A.D.2d at 935).

discretion in excusing improper service, are not analogous to the circumstances surrounding the service of the petition in this matter.

In Application of a Student with a Disability, Appeal No. 08-089, the parent had the petition served on the district's superintendent for business, who the district alleged was not authorized to accept service. The SRO found that it was proper to exercise his discretion to accept the petition despite the irregularity in service as the parent was unrepresented and the sole irregularity was "the mistaken service upon a high ranking district representative or official who [wa]s nevertheless unauthorized to accept service" (Application of a Student with a Disability, Appeal No. 08-089). In this instance service was effected by the parent's attorney on a receptionist in the district's administrative office (March 30, 2016 Receptionist Aff.; April 5, 2016 Aff.). Accordingly, the mistaken assumption by a pro se parent that a high ranking district representative would be authorized to accept service is not present in this matter.

In Application of the Department of Education, Appeal No. 07-037, the petitioner, at the request of respondent's counsel, agreed to serve the petition on respondent's counsel; however, upon attempting to serve respondent's counsel, it was found that the attorney had left for day, and the process server left the papers at the law office. The petitioner then quickly and expeditiously endeavored to comply with the regulation by attempting to personally serve the respondent without success. In this case, the district did not waive service upon the persons expressly identified in the regulations as being authorized to accept service and leaving papers at an attorney's office cannot be equated with leaving papers at the district's administrative office.

In Application of a Child with a Disability, Appeal No. 93-2, the process server averred that when she tried to serve the district clerk, she was directed to serve the papers in the superintendent's office, and that the superintendent's secretary expressly represented that she was authorized to accept petitioner's papers. Further, the district did not present any affidavit to counter the parent's claim. That is not the case here. In this proceeding, the parent's attorney, who also served the papers, was not affirmatively told that the person served had been authorized to accept service. On the contrary, when the staff at the district's office questioned the attorney as to the contents of the envelope being served, and informed him that they could not sign for legal documents, the attorney, given his actual profession and the area of practice, should have been alerted to the fact that the district's receptionist either actually was not or was unlikely to be authorized to accept service of the petition.

Given the decisions of the Commissioner of Education enforcing the requirements for service on a school district, and in light of the parent's attorney not challenging the statements in the affidavits submitted by district receptionist and director of communication indicating that the receptionist was not authorized to accept service on behalf of the district and that she did not represent to the parent's attorney that she was authorized to accept service, under the circumstances of this case, the petition must be dismissed for improper service.

#### **B. Delivery of 3602-c services at the Nonpublic School**

Although this matter is being dismissed on procedural grounds, and it is unnecessary to reach the merits of the parties claims, considering that it is possible, if not likely, that the parties will continue to have the same disagreement and continue to litigate the nature and location of the delivery of special education programs and services required under Education Law § 3602-c, it

may be helpful to provide the parties with some considerations as they conduct educational planning for the student for the upcoming school year.

While, 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]), 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], 300.140[a]). However, 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]). Pertinent to the parties claims in this proceeding, part of the consultation process is supposed to include a discussion of "how, where, and by whom special education and related services will be provided... including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made" (20 U.S.C. § 1412[a][10][A][iii][IV]).

Separate from the services plan envisioned under the IDEA, the Education Law has provided parents of students with disabilities who are residents of New York 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.).<sup>5</sup> 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]).<sup>6</sup>

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<sup>5</sup> Additionally, unlike the proportionate share and services plan provisions of the IDEA, § 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (Educ. Law § 3602-c[2][b][1]). The dual enrollment option and due process rights conveyed in § 3602-c are unavailable to students who do not reside in New York (Educ. Law § 3602-c[2][a], [2-b]).

<sup>6</sup> State guidance explains that providing services on an 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," VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). 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.).



New York's Court of Appeals has also shed some light on whether a district must provide special education programs and services to a student with a disability at the nonpublic school the student attends (Board of Educ. v. Thomas K., 14 N.Y.3d 289 [2010]; Board of Educ. v. Wieder, 72 N.Y.2d 174 [1988]). In interpreting the prior version of Education Law § 3602-c, the Court of Appeals found that the location where the services must be provided should be based on the student's individual educational needs in consideration of the least restrictive environment (Thomas K., 14 NY 3d at 293). In finding that the district was required to provide the services of a 1:1 aide at the student's nonpublic school, the Court of Appeals noted that if the services were not provided at the school, "it would be necessary for the child to withdraw from the school his parents selected for him in order to receive the required services" (id. at p. 294).

However, as alluded to above, the statutory language that the Court was interpreting was amended in 2007, striking the language directing the CSE to follow the process "in accordance with the provisions of section forty-four hundred two" and adding language directing the CSE to "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" (NY Session Laws L.2007 c.378).<sup>7</sup> The intention of the above is to highlight some of the intricacies of the dual enrollment statute and the changes in its language since it was last judicially interpreted, as this is the statutory language that is squarely implicated by the parties' dispute. Accordingly, while it is not an exhaustive analysis, the expectation is that the parties, if they continue to litigate, should provide an IHO or SRO with sufficient information with regard to their legal interpretation of § 3602-c and its changes when framing their respective factual arguments as to how the student's special education program should be developed, the type of services the student is entitled to on an "equitable basis," and whether particular special education services either can permissibly be or must be provided at the student's nonpublic school.

In addition, if litigation continues, the parties should consider the effect of the federally required consultation between the district and the nonpublic school under the Part B proportionate share and services plan provisions, as any services already being provided to the student under that funding scheme may have considerable relevance to the appropriate relief in a dual enrollment dispute under § 3602-c.<sup>8</sup> The parties should take care to distinguish the meaning of services being provided on an "equitable basis" under Education Law § 3602-c versus the meaning of "equitable services" in the federal regulations and seek to enter into the hearing record how the meaning of those terms affect the services that the student has or is likely to receive. Additionally, both parties should be prepared to explain the operation of, and if necessary, state their position on the least

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<sup>7</sup> Education Law § 4402(2) describes how a board of education is responsible for and selects services for a public school student, but the language is considerably different from the language in § 3602-c, probably due to the fact that a student is voluntarily enrolled in a school of the parent's choosing in the § 3602-c scheme. As in many § 3602-c disputes, and this one is no exception, the issue does not erupt out of the conceptual differences between the two schemes, but in the requirements surrounding delivery of classroom-level services under § 3602-c.

<sup>8</sup> To be clear, however, this point is in regard to development of an adequate hearing record about the student's educational experiences with relevant, necessary information in a § 3602-c due process proceeding, and is not intended to suggest that parents have a private right of action under the federal proportionate share provisions – they do not.

restrictive environment and any potential effect of the student's removal from the nonpublic school on her ability to benefit from the instruction in the general curriculum at the nonpublic school.

## **VI. Conclusion**

Having found that the parent did not serve the petition and supporting papers on a person authorized to accept service on behalf of the district and that under the circumstances presented it would be improvident to reject the district's defense and exercise discretion to accept a petition with defective service, the appeal is dismissed.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 6, 2016**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**