The University of the State of New York

The State Education Department
State Review Officer
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No. 18-088

Application of the BOARD OF EDUCATION OF THE LEWISTON-PORTER CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hodgson Russ LLP, attorneys for petitioner, by Ryan L. Everhart, Esq.

Kenney Shelton Liptak Nowak, LPP, attorneys for respondents, by Patrick M. McNelis, Esq. and Jessica N. Reich, Esq.

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to provide consultant teacher services to respondent's (the parent's) daughter in the student's nonpublic school for the 2017-18 school year and awarded compensatory education services. The 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 Individuals with Disabilities Education Act (IDEA), 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 §§ 3602-c; 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 related to IESPs, 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 of the IDEA and the analogous State law provisions governing dual enrollment programing is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (Educ. Law § 4404[1]; see 20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 (8 NYCRR 200.5[j][3][v], [vii], [xii]; see 20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.510[b][2], [c], 300.515[a]). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.515[c]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

The student has received a diagnosis of Down Syndrome (Tr. pp. 79-80; Dist. Ex. 4 at p. 1; 11 at p. 1). The student presents with significant delays in cognitive, speech and language development, and fine and gross motor development (Dist. Exs. 4; 5; 6 at p. 1; 7; 8; 10).

On June 20, 2016, a Committee on Preschool Special Education (CPSE) convened to develop the student's IEP for the 2016-17 school year (Parent Ex. E at p. 1). Finding the student eligible for related services as a preschool student with a disability, the June 2016 CPSE recommended a 12:1+3 special class in a preschool with related services of speech-language therapy (individual and small group), occupational therapy (OT) and physical therapy (PT) for summer 2016 (id. at p. 10). With respect to the student's 2016-17 school year, the CPSE recommended an 8:1+1 special class in an "integrated setting" with related services of speech-language therapy (individual and small group), OT and PT (id. at p. 9). On January 27, 2017, the CPSE convened to develop the student's IEP for summer 2017 (Parent Ex. D at p. 1). Finding that the student remained eligible for special education and related services as a preschool student with a disability, the January 2017 CPSE again recommended an 8:1+1 special class in an "integrated setting" with related services of speech-language therapy, OT and PT (id. at p. 11).

On May 26, 2017, the CSE convened to conduct a reevaluation of the student's program in preparation of her transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the remainder of the 2017-18 school year (Dist. Ex. 13 at p. 1). Finding the student eligible for special education and related services as a student with multiple disabilities, the May 2017 CSE recommended a 10-month program of integrated co-teaching services consisting of five 60-minutes sessions per week in both English language arts (ELA) and math, four 30-minute sessions of resource room per four day cycle, and five 30-minute sessions per week of adapted physical education (id. at pp. 1, 11-12).[1] Related service recommendations included two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of small group speech-language therapy, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual OT, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 11). Additionally, the May 2017 CSE recommended that the student receive a 1:1 personal care aide five times per week for six hours, a modified curriculum, and special transportation accommodations including a bus with a monitor, a bus escort, and a booster seat (id. at pp. 1, 12, 14).

In a letter, attached to an email, dated August 7, 2017, the parents notified the district that they reviewed the May 2017 IEP and were "in agreement with the plan and accommodations;" however, the parents left the May 2017 CSE meeting "questioning whether [district] staff was going to take the extra steps needed to help [the student] succeed" (Dist. Ex. 16 at pp. 1-2). As a result, the parents advised the district that they decided to place the student in a parochial school

[1] The May 2017 IEP describes the student's ICT services in ELA as "[c]onsultant [t]eacher in ELA"; however, the district's director of special education testified that this was a software error and there was no confusion at the CSE meeting (Tr. pp. 73-74; Dist. Ex. 13 at pp. 1, 11).

located within the school district and requested that the district provide the student with the program and services recommended in the May 2017 IEP at the parochial school (id. at p. 2).

In an email dated August 11, 2017, the district informed the parents that it would check for available providers for the student and noted that "[t]he [p]arent [r]equest for [s]pecial [e]ducation [s]ervices at a [n]on [p]ublic school is due by June 1 according to State regulations" (Dist. Ex. 17).

The parents responded to the district by email dated August 11, 2017, "apologiz[ing]" for the June 1 deadline (Dist. Ex. 18). The parents explained that they "had just recently made the decision" to send the student to the nonpublic school (id.). In addition, the parent thanked the district for "trying to help" with their request for services at the nonpublic school (id.).

In a meeting notice to the parents dated September 13, 2017, the district scheduled a meeting of a subcommittee of the CSE (CSE subcommittee) for September 20, 2017 to review the student's needs (Dist. Ex. 19).

On September 20, 2017, the CSE subcommittee convened to develop the student's IESP for the remainder of the 2017-18 school year (Dist. Ex. 20). The September 2017 CSE subcommittee recommended that the student receive five 60-minute sessions per week of direct consultant teacher services in the classroom in both ELA and math, one 30-minute session per week of individual PT, and 1:1 personal care aid, OT, speech-language services and curriculum modification consistent with the May 2017 IEP (compare Dist. Ex. 13 at pp. 11-12, with Dist. Ex. 20 at pp. 11-12). The September 2017 IESP indicated that the student was parentally placed in a nonpublic school (Dist. Ex. 20 at p. 14). The meeting information attached to the IESP indicated that the direct consultant teacher service "is recommended if in [d]istrict" (id. at p. 1).

By letter dated September 30, 2017, the parents notified the district that as of that date, the student still had not received direct consultant teacher services in either ELA or math at the nonpublic school as identified in the student's September 2017 IESP (Dist. Ex. 22). The parents further stated that they were concerned that the student had "gone a month without the recommended services" and that the student was "known to show regression after short beaks, when services are not provided" (id.). The parents also requested that the CSE reconsider providing the consultant teacher services at the nonpublic school (id.).

The district responded by letter dated October 5, 2017, advising the parents that it would provide consultant teacher services as indicated in the student's IESP, "if [the student] attended [the] district" (Dist. Ex. 23). The district also agreed to provide resource room services at the district as an academic support if recommended (id.). The district also noted that the student was receiving related services and a 1:1 teacher aide at the nonpublic school (id.).

A. Due Process Complaint Notice

By due process complaint notice dated December 20, 2017, the parent alleged that the district denied the student a free appropriate public education (FAPE) "by failing to properly develop and/or implement the [s]tudent's special education program and/or services" for the 2017-18 school year (District Ex. 1 at p. 4). Initially, the parent alleged that the district waived enforcement of the June 1 statutory deadline for requesting dual enrollment services because, despite having knowledge of the deadline, the district proceeded to develop and implement an

IESP for the student (id.). Next, the parent argued that the district failed to provide the student with consultant teacher services at the student's parochial school (id.). The parent argued that the district's contingent requirement that the student attend the district school in order to receive her consultant teacher services was improperly based on administrative convenience and not based on a determination of the student's needs (id. at p. 4). The parent also argued that student's IESP failed to identify the person responsible for modifying the student's curriculum and that the district failed to provide the parent with quarterly progress reports under the IESP, depriving the parent of the ability to adequately participate in future CSE meetings (id.).[2] Lastly, the parent argued that requiring the student to receive consultant services at the district school not only discriminated against the student on the basis of her disability, but also denied the parent her right of free exercise of religion protected by the federal and State constitutions (id. at pp. 4-5). As relief, the parent requested that the district provide the student with a FAPE, consultant teacher services at the nonpublic school, progress reports and monitoring, and additional services to compensate for the district's failure to provide the student with a FAPE (id. at p. 5).

B. Impartial Hearing and Decisions

An IHO was appointed to hear the matter and a prehearing conference was held on January 30, 2018 (IHO Ex. III). On April 30, 2018, the district moved to dismiss the parent's December 20, 2017 due process complaint notice (Dist. Ex. 3). In the motion to dismiss, the district alleged that the parent failed to request special education services by June 1 of the proceeding school year, as required by Education Law § 3602-c(2) (id. at pp. 6-7). The district also alleged that the parent's claim that the district violated her constitutional right to free exercise of religion was "misplaced" and that constitutional claims were not within the jurisdiction of the IHO (id. at p. 7). The parent submitted a memorandum in opposition to the motion to dismiss, dated May 3, 2018 arguing that the district waived its right to enforce the June 1 deadline under Education Law § 3602-c(2) based on its implied waiver (IHO Ex. XII at pp. 2-3). In addition, the parent stipulated to the dismissal of her constitutional claims, acknowledging that "an administrative due process hearing may not be the appropriate forum to address novel questions of constitutional law" (id. at p. 6).

By interim decision dated May 6, 2018, the IHO denied the district's motion to dismiss finding that it was clear that both parties regarded the passage of the June 1 deadline as a "possible practical impediment" to the district providing the student with special education services at the nonpublic school "rather than as an absolute legal impediment," and concluding that the district's actions "evince[d] a waiver" of its right to enforce the June 1 deadline under Education Law § 3602-c(2) (IHO Ex. XIV at p. 4). The IHO also noted that despite the parent's stipulation regarding the dismissal of her constitutional claims (while reserving the right to raise the claims in a subsequent proceeding in appropriate forum), the IHO found that the parties' submissions on the district's motion to dismiss were sufficient to decide the parent's free exercise of religion claim, determining that the parent's reasons for placing the student at the parochial school—her belief that the staff there would be more dedicated to the student's educational needs—were not religious in nature and, therefore, were not constitutionally protected (id. at p. 3). The IHO determined that

[2] On appeal the parties do not raise arguments related to the identification of the person responsible for curriculum modification or the lack of progress reports, which were not reached by the IHO, therefore these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][4]).

the appropriateness of the student's IESP must be addressed after an evidentiary hearing (id. at pp. 1, 4).

The IHO conducted an impartial hearing on May 8, 2018 (Tr. pp. 1-170). In a decision dated June 20, 2018, the IHO found that the district failed to offer the student a FAPE by not providing the student with consultant teacher services in ELA and math at the student's nonpublic school for the 2017-18 school year (IHO Decision at p. 9). The IHO reasoned that the CSE's recommendation that consultant teacher services in ELA and math be provided to the student at the district "might have resulted in the anomaly of [the student] receiving twice as much instruction in ELA and math as any other student on her grade level attending school either in the [d]istrict or in the nonpublic school" (id. at p. 8). The IHO further noted that even if the student's math and ELA instruction were provided at the public school at precisely the same time such instruction was provided to the student's peers at the nonpublic school, the recommendation "would have required that [the student] be removed from instruction, with her own teacher and classmates, at the school her parents selected for her, in order to receive the required consultant teacher services" (id. at pp. 8-9).

As relief for the district's failure to offer the student consultant teacher services at the nonpublic school, the IHO noted that compensatory consultant teacher services would not catch the student up to where the student might have been had the consultant teacher services been provided (IHO Decision at p. 10). Accordingly, the IHO ordered that the district provide the student with 40 hours of 1:1 tutoring by a certified special education teacher in the student's home on a prescribed schedule, to be completed by the end of the 2018-19 school year, unless the parties agreed on other compensatory services as an alternative (id. at p. 11). In addition, as determined in his interim decision, the IHO reiterated his dismissal of the parent's constitutional claims and denial of the district's motion to dismiss on the basis of the June 1 deadline for dual enrollment services (id. at pp. 10-11).[3]

IV. Appeal for State-Level Review

The district appeals, contending that the IHO erred in finding that the district was precluded from asserting the June 1 deadline as a ground to dismiss the parent's due process complaint notice because the district waived the June 1 deadline. Next, the district asserts that the IHO improperly ruled that the district must provide special education services to the student only on the premises of the nonpublic school and that the district had "no right to determine the location of such services." The district asserts that this finding is contrary to established case law and undermines the "consultation process" that must occur between the district and nonpublic schools. In an answer, the parent responds to the district's allegations and argues that the IHO decision should be upheld in its entirety.

[3] The parent has not appealed the IHO's determination regarding the dismissal of the parent's constitutional claims, and so it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 New York State resident student with a disability who is placed in a nonpublic school and who seeks to obtain educational "services" for his or her child may file a request for such services in the 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]).[4] "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.).[5] Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendations of the CSE pursuant to the impartial hearing and State-level review provisions of Education Law § 4404 (id.).

[4] 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]).

[5] 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 at p. 11, 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.).

VI. Discussion

A. Waiver of the June 1 Deadline under Education Law § 3602-c[2]

The district argues that the IHO erred in finding that the district waived the June 1 deadline under Education Law § 3602-c(2)(a), asserting that "any waiver must be explicit and concrete" and "no such waiver ever occurred." The parent argues that the IHO's determination was correct as the district "act[ed] in such a way as to demonstrate an implied waiver."

In considering whether the district waived the June 1 deadline, both parties cite to N.L.R.B. v. New York. Tele. Co., 930 F.2d 1009 [2d Cir. 1991], as authority on the topic of an "implied waiver." In N.L.R.B, the court 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" (N.L.R.B., 930 F.2d at 1011). In the instant case, the district advised the parents of the June 1 deadline in its email of August 11, 2017 (Dist. Ex. 17). The parents responded to the district and acknowledged the June 1 deadline by email of the same date (Dist. Ex. 18). Here, the parties were aware of their rights and do not dispute that the parents failed to request special education services by June 1. Thereafter, although aware of the June 1 deadline, the district prepared an IESP for the student and began providing related services and a 1:1 teacher aide to the student at the nonpublic school (see Dist. Ex. 23). Thus, by making the conscious choice to proceed after the June 1 deadline by providing services and an aide to the student "for whatever reason," the district's actions constituted an implied waiver.

The district further argues that it did not "directly" and "clearly" waive the June 1 deadline to the parents. In N.L.R.B, the court also held that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B., 930 F.2d at 1011). In the instant case, the district sent the parents a meeting notice informing the parents of a scheduled CSE subcommittee meeting to take place on September 20, 2017 (Dist. Ex. 19). On September 20, 2017, the CSE subcommittee convened and developed an IESP for the student and recommended that the student receive direct consultant teacher services in ELA and math, related services, and a 1:1 aide (Dist. Ex. 20). The September 2017 IESP also included the names of the service providers that would provide services to the student at the nonpublic school (id. at p. 1). Moreover, the district sent a letter to the parents approving the recommendations from the September 2017 CSE subcommittee (Dist. Ex. 24). Consequently, the district began providing the student with related services and a 1:1 teacher aide at the nonpublic school (see Dist. Ex. 23). Although the district argues that it did not explicitly waive the June 1 deadline in any statement to the parents, it is clear and unmistakable by the district's aforementioned conduct, that it waived the June 1 deadline.

The district also argues that it provided services to the student based on "good faith" and that the district should not be precluded from asserting the June 1 deadline as a result. However, as the district stated in its memorandum of law, "[a] school district's duty, first and foremost, is to assure that its students are being properly serviced and educated," which is a very important aspiration that the parent and district share (Dist. Mem. of Law at p. 7). Basic fairness requires that the parents' concerns be heard when the district went ahead and provided IESP services to the student after the deadline elapsed. The evidence below shows that the parents, too, have essentially the same goal as the district, seeking what they believe are appropriate services for their daughter. I agree that the district was acting in good faith and in alignment with its ideals, but that argument

is insufficient to overcome the IHO's waiver determination. Therefore, the IHO's finding that the district waived the June 1 deadline under Education Law § 3602-c(2)(a) is upheld.

B. Delivery of 3602-c Services at the Nonpublic School

On appeal, the district argues that the IHO improperly ruled that the district must provide special education instruction and services to the student only on the premises of the nonpublic school and that the district had no right to determine the location of delivery of such services. The parent argues that the IHO's determination was proper given the specific nature of the services at issue and the individual needs of the student.

In interpreting the provisions of § 3602-c, the New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to section 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to least restrictive environment principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]). In holding that the school district was required to provide the services of a 1:1 aide at the student's nonpublic school, the Court of Appeals noted that the "fallacy" of the district's position in providing the 1:1 services at the district "is that it advocates for the student, under the tutelage of an aide, to be kept focused and on task at a site removed from his own teacher and classmates, and indeed, from his regular school" (Thomas K., 14 N.Y. 3d at 293-94). The court further noted that "[a]s a practical matter, if the [district's] position were upheld, 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).

In the instant case, the meeting information attached to the September 2017 IESP, indicated that the direct consultant teacher services in ELA and math were "recommended if in [d]istrict" (Dist. Ex. 20 at p. 1). However, the IESP identified the location in which the direct consultant teacher services were to be provided as "[c]lassroom" (Dist. Ex. 20 at p. 11). Designating the consultant teacher services to be provided in the classroom on the student's IESP is appropriate because State regulations define "consultant teacher services" as

> direct and/or indirect services, as defined in this subdivision, provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers
>
> > (1) Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes

(8 NYCRR 200.1[m] [emphasis added]). State guidance indicates that direct consultant teacher services "support a student while he or she is participating in instruction in the general education class" and the "location where services will be provided needs to be stated specifically enough so

the CSE's recommendations regarding location of services is clear ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3, 7, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). In this case, the purpose of direct consultant teacher services is to develop the student's ELA and math skills to help the student benefit educationally from the instruction her general education classroom. Thus, similar to Thomas K., in order to provide such services effectively and practically based on the student's individual needs, it is necessary to provide the direct consultant teacher services in the student's regular class at the nonpublic school in which she attends. Insofar as the district's solution is to remove the student from her primary ELA and math instruction in the general education classroom at the nonpublic school, that is exactly what the dual enrollment statute and consultant teacher services are designed to avoid, and if the student instead attends the ELA and math instruction at the nonpublic school, the district provides no explanation of how the student would benefit from that instruction without special education support in that classroom. Consequently, the district's IESP, to the extent it requires the student to receive direct consultant teacher services at the district, is inappropriate to address the student's individual needs.

As support, the district relies on Application of a Child with a Disability, Appeal No. 06-069, in which an SRO held that the district was not required to provide resource room services to the student at the nonpublic school because the services were "severable" and could be provided at the district. However, the facts in Application of a Child with a Disability, Appeal No. 06-069, are easily distinguishable from the instant case due to the nature of resource room services at issue in that case. A resource room is defined as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Unlike the circumstances in this case, a student may depart from his or her regular classroom in order to attend a resource room setting. State policy guidance further clarifies that resource room services are for the purpose of "supplementing" instruction; meaning that the services are not provided in place of the student's regular academic instruction ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 9 Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf) [emphasis omitted]. However, direct consultant teacher services must be provided in the general education classroom while the student is receiving instruction and is not a pull out service (id. at p. 7). Therefore, the authority cited by the district does not apply to this case and, to the contrary, previous SRO cases that address disputes over consultant teacher services in the context of dual enrollment circumstances have held that the direct consultant teacher services must be provided in the student's general education class at the nonpublic school (see Application of the Board of Educ., Appeal No. 02-090; Application of a Child with a Disability, Appeal No. 01-106).

Lastly, the district argues that it has the right to choose the location of delivery of services for the student because there was no agreement between the district and the nonpublic school to provide direct consultant teacher services at the nonpublic school as part of their consultation agreement. The district's argument here is misplaced as the district conflates separate requirements under federal and State law.

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]). 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]). The services plan provisions under federal law also 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]).

However, separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[6] Thus, the State law dual enrollment option confers an individual right have the CSE design a plan to address the student's individual needs (see Educ. Law § 3602-c[2][b][1]; Thomas K, 14 N.Y.3d at 293). 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]). [7]

[6] 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]).

[7] 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.).

In the instant case, the district's director of special education testified that the district provided related services at the nonpublic school but that it "never" provided direct consultant teacher services at the nonpublic school because it was not part of the "consultation agreement" between the district and the nonpublic school (Tr. p. 47). Thus, it is the district's position that based on this consultation agreement, it was not required to provide direct consultant teacher services at the nonpublic school. Here, the district is correct that under federal law, it can decide which special education and related services the district can provide at the nonpublic based on a consultation agreement with the nonpublic school. However, under State law, the district has a more stringent requirement under § 3602-c to develop an IESP and deliver services to the student at the nonpublic school based on the student's individual needs. Therefore, because the district prepared an IESP for the student under § 3602-c which included consultant teacher services for ELA and math instruction, the district was required to provide the direct consultant teacher services for the student at the nonpublic school. Accordingly, I find insufficient basis to disturb the IHO's thorough and well-reasoned decision in favor of the parent. Under these circumstances—where neither party disputes the adequacy of the relief granted by the IHO—there is no reason to disturb the IHO's award of compensatory education.

VII. Conclusion

In summary, there is no reason to disturb the IHO's determination that the district failed to offer the student an appropriate IESP for the 2017-18 school year because it did not provide the student with direct consultant teacher services at the nonpublic school. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 31, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER