The University of the State of New York

The State Education Department
State Review Officer
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No. 23-012

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
The Law Firm of Tamara Roff, P.C., attorneys for petitioners, by Tamara Roff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the respondent's (district's) Committee on Special Education (CSE) was not responsible for creating an individualized education service program (IESP) for the parents' son for the 2022-23 school year because the parents' request for services was untimely. The district cross-appeals, alleging that the parents failed to demonstrate an obligation to pay for the student's services or the appropriateness of such services. The appeal must be sustained in part. The cross-appeal must be dismissed. The matter must be remanded to the IHO 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 Individuals with Disabilities Education Act (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 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 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

Given the limited information provided in the hearing record, a full recitation of the student's educational history is not possible.

The parents became concerned about the student's weak fine motor skills, sensory processing, ability to follow directions, and loss of focus when he was approximately three years of age (Parent Ex. G ¶ 7).[1] On June 11, 2019, the Committee on Preschool Special Education (CPSE) convened and recommended that the student receive three hours per week of special education itinerant teacher (SEIT) services and two 30-minute sessions of 1:1 occupational therapy (OT) per week on a 10-month basis (id. ¶¶ 8, 9). For the 2020-21 school year, the CSE convened in March 2020 when the student was "aging out of preschool" and according to the parents "declassified" him, after which the parents filed a due process complaint notice and the student received services provided by an agency, Yes I Can, through pendency (id. ¶¶ 11-15). According to the parent, the CSE did not convene to conduct an annual review of the student's educational program for the 2021-22 school year, develop a new educational program, or "implement his last agreed upon services", and again the parents requested an impartial hearing (id. ¶¶ 16, 17). During a prior administrative proceeding, an unappealed IHO decision dated July 19, 2022 was issued with regard to the student's pendency (stay-put) placement, consisting of the program provided for in the last agreed upon individualized educational program (IEP) dated June 11, 2019 and was retroactive to the date of the due process complaint notice in the prior proceeding of September 1, 2021 (Parent Ex. C).

In a letter to the "Chairperson" the parents stated their intention to place the student in a parochial school for the 2022-23 school year and requested that the district "provide the educational services that my child is entitled to as a result of having an IEP/IESP" (Parent Ex. B). The letter was dated "June, 2022" but not signed until August 10, 2022, by the student's father (id.).

The parents executed a contract for special education services with Yes I Can on August 10, 2022, which was countersigned by the agency on September 5, 2022 (Parent F).

According to a call log with various dates from September 12 through 15, 2022, the student's father contacted providers from the district's list of special education teacher support services (SETSS) providers to ask if they would be able to "fill the SETSS mandate on [the student's] IESP; however, they were not able to" for various reasons (Parent Ex. E).

In a sworn statement dated December 1, 2022, a representative of Yes I Can stated that the agency was providing "1:1 SETSS Services" to the student for the 2022-23 academic school year at an estimated cost of $23,640 for the period September 8, 2022 to June 30, 2023, based on 40 weeks of services, three hours per week, at a rate of $197 per hour (Parent Ex. D).

[1] The paragraph numbering in the parent's affidavit begins by numbering paragraphs 1-17; however, after paragraph 17, the numbering starts over at paragraph 7 and runs through paragraph 18 (Parent Ex. G at ¶¶ 1-17, 7-18). Due to the limited nature of this appeal and the information contained in the second set of paragraphs, citations are only made to the first set of paragraphs in the parent's affidavit (Parent Ex. G at ¶¶ 1-17).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, the parents alleged that the district failed "to provide and implement a procedurally valid and substantively appropriate educational program in a timely manner for [the student] for the 2022-2023 school year"; provide the student with a FAPE; conduct and consider sufficient evaluations; and provide adequate prior written notice (Parent Ex. A at p. 1). The parents further alleged that the district precluded them from fully participating in the educational decision-making process (id.).

The parents requested that the student remain in his last agreed upon IEP dated June 11, 2019, for the pendency of this proceeding, which included three hours per week of SEIT services, and two 30-minute sessions of 1:1 OT per week (Parent Ex. A at p. 2).

Specifically with respect to the parents' substantive challenges, the parents argued that "to date" the CSE had not convened to develop an educational program for the student for the 2022-23 school year, had not convened to comprehensively discuss the student's educational needs in over three years, had not provided the parents with an updated educational program "(an IEP and/or IESP)" for the 2022-23 school year, had failed to arrange for the provision of services for the student for the 2022-23 school year, and had failed to offer "viable providers to implement [the student's] last agreed upon services" (Parent Ex. A at p. 2). Further the parents argued that the district had not conducted a formal assessment of the student's "wide range of needs" in over three years (id.).

As relief, the parents requested: (1) continuation and implementation of three hours per week of SEIT services and two 30-minute sessions of 1:1 OT per week, each funded at an enhanced/market rate; (2) a finding that the district failed to appropriately evaluate the student in all areas of suspected disability and funding for all needed evaluations with evaluators chosen by the parents; (3) and a finding that the district failed to provide the student with an appropriate public education for the 2022-23 school year (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH). The IHO conducted a prehearing conference on November 10, 2022,[2] before the parties proceeded to an impartial hearing on the merits on December 8, 2022 (Nov. 10, 2022 Tr. pp. 1-22; Dec. 8, 2022 Tr. pp. 1-29).

At the December 8, 2022 hearing date, the IHO asked the parties for clarification regarding the date of the parents' letter of intent to place the student in a parochial school for the 2022-23 school year and request for the district to provide educational services the student is entitled to as a result of having an IEP/IESP:

[2] In an interim decision dated November 10, 2022, the IHO found that the student's pendency program lay in his June 11, 2019 IEP, which mandated three 60-minute sessions per week of SEIT services in a group and two 30-minute sessions per week of individual OT for the 10-month school year retroactive to the date of filing of the due process complaint notice (September 8, 2022) (Interim IHO Decision on Pendency).

IHO WOLF: Ms. Matear, I do have, I do have one clarifying question, and I'm looking at Exhibit B, it's been marked as B-1. I see that it's, it's generally dated is June 2022. The Parent's signature has a date of August 10. Is there, is there anything you'd like to say about that?

MS. MATEAR: One second, please. So it's actually dated August 10th in the, in the exhibit list on the first page. I believe the 2 -, the June 2022 is maybe when it was drafted and then it wasn't signed 'til August 10th, so I believe that's probably why there's a discrepancy there, but we are indicating that it, that it's dated August 10, 2022.

IHO WOLF: Okay. Thank you. I believe that's everything. And I will ask you last, Ms. Thompson, if there's any rebuttal that you would like to provide?

MS. THOMPSON: No rebuttal.

(Dec. 8, 2022 Tr. p. 26).

In a final decision dated November 14, 2022, the IHO found the parents did not submit a timely written request for services by June 1, 2022, failing to comply with the statutory requirements in accordance with Education Law section § 3602-c (IHO Decision at pp. 4-5). In the absence of such a request, the IHO stated that the parents "cannot now claim any disagreement with services (or lack of services) for the 2022-23 school year, because the [p]5ren't was not entitled to receive any services" (id.). The IHO went on to state that "[i]f the [p]5ren't intends to continue to enroll the [s]tudent in a nonpublic school and wants [the district] to provide services for the student, the [p]5ren't must comply with Educ. Law § 3602-c by, among other things, submitting a timely written request for special education services" (IHO Decision at p. 4). Further, the IHO stated that "[s]hould the [p]5ren't find that [the district] failed to engage in the special education planning process or failed to send a teacher to the private school to provide the requisite special education services, the procedure for obtaining private services is to send a timely notice of unilateral placement then obtain reliable[] proof of an agreement between the [p]5ren't and the private entity that details the essential terms under which the special education services are provided and who is legally responsible for the costs" (id.). The IHO noted that she did not credit the parent's testimony by affidavit because the affidavit indicated the parent sought a SETSS provider at the district rate before contracting with the SETSS provider at an enhanced rate; however, the parent signed the contract one month prior to the parent's call log (id. n. 16). Based on the "[p]arents' failure to comply with Educ. Law § 3602-c by failing to provide the district with the requisite timely notice and request for services," the IHO "d[id] not find that [the district] violated [f]ederal or State law" and further found that the district "[wa]s not obliged to provide the [s]tudent with § 3602-c services for the 2022-2023 school year" (IHO Decision at pp. 4-5). The IHO denied the parents' requested relief and dismissed the due process complaint notice with prejudice.

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in failing to base her decision "solely upon the record of the proceeding." Specifically, in concluding that the parents did not submit a request for services by June 1, 2022, in accordance with the regulatory requirements, the parents argue

that the IHO went beyond the scope of the hearing record and decided an issue that was not raised by either party, nor supported by the facts in the hearing record. The parents further argue that the district did not establish that it was not required to provide the student with an IESP. The parents assert that the IHO erred by improperly shifting the district's burden of proof to the parents in finding that "the [p]arent did not make a timely written request for services." The parents further assert that the district did not raise the issue of the student's eligibility for services, and the IHO failed to acknowledge that the district had the opportunity but decided not to defend its failure to create an IESP. The parents assert that the district did not raise this issue because a timely request for services was provided to the district, and the parents include additional evidence with their request for review consisting of an email and letter dated May 31, 2022 to the CSE stating that "the parents . . . are requesting development of an IESP for services to be provided in a non-public school for the 2022-2023 school year" (proposed Parent Ex. I).[3] Finally, the parents argue that the IHO made factually incorrect conclusions in deciding not to credit the parent's affidavit. The parents argue that the IHO did not clarify these concerns with the parent during testimony and include possible explanations for the apparent inconsistencies.

As relief, the parents request that the IHO's decision be reversed, a finding that the district failed to provide the student with an appropriate IESP and services for the 2022-23 school year, an order that the district provide the student with three hours of special education teacher services and two 30-minute individual sessions of OT per week, and an order that the district fund evaluations of the student's needs (such as psychoeducational and OT evaluations), by an evaluator chosen by the parents.

In an answer and cross-appeal, the district argues that the IHO properly found that the student was not entitled to an IESP as the request was not timely made by the June first deadline. The district also asserts that the IHO did not impermissibly raise the issue sua sponte because the parents first raised the issue of the student's entitlement to an IESP in their due process complaint notice and followed up on the issue of timeliness by submitting the August 10, 2022 letter requesting services. The district further argues that, in any event, the IHO acted fairly and in accordance with due process by bringing up the ambiguity of the parents' letter regarding its timeliness at the hearing and giving the parents an opportunity to respond. The district also asserts that the parents did not raise a request for an IEP in the request for review, and accordingly, only the request for an IESP should be addressed on appeal. Next, the district argues that the parents' additional evidence should be rejected because the evidence was available at the time of the hearing, the parents' arguments that they were "blindsided" by the IHO reaching this issue and therefore failed to realize the necessity of offering the evidence at hearing are "disingenuous at best," and accepting it on appeal would prevent the district from having an opportunity to reach its credibility. Further, the district asserts, regarding the parents' appeal of the IHO's finding that the parent's affidavit was not credible, that the IHO's finding had no bearing on the IHO's ultimate determination and the IHO's reading of the parent's affidavit was fair. Finally, the district also asserts that the parents' request for review included a conclusory statement that the district failed to appropriately evaluate the student; an assertion that the district contends is procedurally infirm

[3] An attorney affirmation is included with proposed Parent Ex. I, which stated that the parents' proposed exhibit was "a letter sent by a legal intern" from her office to the regional chairperson of the CSE via email on May 31, 2022, and that the document was not introduced at the impartial hearing because the district was not challenging receipt of the letter nor did it raise any issue as to whether the student's parents had requested services, nor did the district submit a response to the parents' due process complaint notice.

and should be denied as the allegation did not include any grounds for reversal or modification of the IHO's ruling.

For a cross-appeal, the district argues that the parents bore the burden of proof on the unilaterally obtained services and failed to sufficiently demonstrate an obligation to pay for SEIT or OT services or the appropriateness of OT services, as they did not provide evidence that they paid for services provided by Yes I Can and the contract was missing essential terms such as the services to be provided and the rate to be charged. In particular, the district contends that the contract and all other documents included in the hearing record indicated that the student should receive SEIT services; however, the affidavit of services indicated that Yes I Can was providing the student with SETSS. Moreover, the district argues, as the witnesses recanted their statements regarding the provision of OT, that there is no evidence in the hearing record establishing the appropriateness of OT services and the parents' request for relief should be denied. As relief, the district requests that the appeal be dismissed, the IHO decision be affirmed, and the cross-appeal be sustained.

In an answer to the district's cross-appeal, the parents allege that the district raises, for the first time on appeal, the question of whether the parents "sufficiently demonstrated their obligation to pay for special education teacher services." The parents argue that as the district failed to argue the insufficiency of the contract between Yes I Can and the parents at the hearing, the IHO properly did not consider or rule on this issue, and the issue of whether the contract was sufficient is not properly before the SRO. Next, regarding the district's argument that the parents have not established that they paid for the services provided by Yes I Can, the parents allege that they were not required to make payments because the student's services were paid for pursuant to pendency. Finally, the parents argue that the district did not defend its failure to create an IESP, or its prior declassification of the student and the parents are simply seeking continuation of the services that the parties last agreed were appropriate as the district failed to provide such services. The parents reiterate their request for relief outlined in their request for review and, in the alternative to the services being provided by Yes I Can, request that the SRO order the three hours per week of SEIT services and the two 30-minute individual sessions per week of OT to be provided by a provider of the district's choosing.

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 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]

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 main issue presented on appeal is whether the IHO erred in dismissing the parents' due process complaint notice for failing to timely file a written request for services under Education Law § 3602-c for the 2022-23 school year.

Generally, the State's dual-enrollment statute requires parents of a New York State resident student with a disability who was placed in a nonpublic school and who sought to obtain education "services" for his or her child to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]). The hearing record before the IHO contains no evidence satisfying this requirement under section 3602-c, namely, that the parents made a written request for equitable services by June first preceding the 2022-23 school year (see generally Nov. 10, 2022 Tr. pp. 1-22; Dec. 8, 2022 Tr. pp. 1-29; Parent Exs. A-H).

Although the parties' main focus on appeal relates to whether the parents filed a timely written request for services under Education Law § 3602-c, a threshold issue must first be

[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.).

addressed as, according to the parents, the student was previously declassified by the CSE in March 2020 (Parent Ex. G at ¶¶ 11-12).

As noted above, the student first began receiving special education during the 2019-20 school year based on an IEP developed in June 2019—which the student has received services under pursuant to pendency for the 2020-21 and 2021-22 school years—as part of prior administrative proceedings, and the 2022-23 school year as part of this proceeding (Parent Exs. A at p. 2; C at p. 6; G at ¶¶ 8-9, 14-15, 17; Interim IHO Decision on Pendency). In her direct testimony by affidavit, the parent testified that she agreed with the recommendation made at the June 2019 CPSE, consisting of three hours per week of SEIT services and two 30-minute sessions per week of 1:1 OT (Parent Ex. G at ¶¶ 9-10). However, the parent further testified that the CSE convened in March 2020 when the student was "aging out of preschool" and that "the district "declassified [the student] without explanation and refused to recommend any special education services or supports for him for the 2020-2021 school year" (id. at ¶ 12). The parent testified that she felt that this was "very inappropriate, and [she] was not given any reason for this decision" (id. at ¶ 13). Nowhere in the record did the IHO follow-up on the parent's statement that the student had been declassified, nor did the district, which declined to cross-examine the parent on her testimony (Dec. 8, 2022 Tr. pp. 1-29).

As discussed, above the hearing record indicates that the student was not found eligible for special education as a student with a disability when transitioning from the CPSE to the CSE.[6] Accordingly, based on the limited facts in the hearing record, the student qualified for services as a preschool student with a disability "through the month of August of the school year in which the child first bec[ame] eligible to attend school pursuant to section [3202 of the Education Law]" (Educ. Law 4410[i]; NYCRR 200.1 [mm][2]), and after the March 2020 CSE determined that the student was not eligible for special education as a student with a disability, as of September 2020, based on the declassification, the student was no longer eligible for special education and related services.

However, the limited factual information, discussed above, does not even include the parties' positions as to the student's current eligibility for special education services under IDEA. In this matter, although the parent testified that she did not believe the student's declassification was appropriate and that she was not given any reason for the March 2020 CSE's decision to declassify the student (Parent Ex. G at ¶¶ 12-13), the due process complaint notice in this proceeding did not raise any allegations related to improper declassification or determination of ineligibility by the CSE (see Parent Ex. A). In fact, after noting that the student was classified in June 2019 as a preschool student with a disability, the parents omitted facts related to the declassification, asserting that the "CSE [wa]s required to convene annually to discuss [the student's] educational program"; however, "the CSE has not convened to develop an educational program for [the student] for the 2022-23 school year" and "has not convened to comprehensively discuss [the student's] educational needs in over three years" (id. at p. 2). Accordingly, under the circumstances presented in the due process complaint notice, it appears the parents' request for relief in this matter relates back to the student's classification as a preschool student with a disability in June 2019 and the recommendations contained in the June 2019 IEP (see Parent Ex.

[6] It should be noted that a preschool student with a disability and a school-age student with a disability are defined differently pursuant to State regulations (compare NYCRR 200.1 [mm][2] [defining preschool student with a disability], with 200.1 [zz] [defining students with a disability and related disability classifications]).

A). The parents' allegations related to the district's later actions, i.e., an alleged failure to evaluate the student, failure to convene a CSE to discuss the student's educational programming, and a failure to develop an IEP or an IESP for the student for the 2022-23 school year assume that the student was eligible for special education. However, taking the parent's testimony at face value, the student was not eligible for special education as of the 2022-23 school year.

The record in this matter was also inadequately developed by the IHO based upon the fact that for the 2020-21 and 2021-22 school years, the parents filed due process complaint notices "seeking continuation of the services in the June 11, 2019 IEP" and it was her "understanding" that the student received those services through pendency (Parent Ex. G at ¶¶ 14-15, 17). The record contains some corroborating evidence of prior due process proceedings. However, while a July 2022 pendency order is included as a part of the hearing record and indicates that it is retroactive to September 1, 2021, the hearing record does not include any potentially useful exhibits from that matter such as the parents' September 2021 due process complaint notice (see Parent Ex. C). The hearing record also does not include the underlying June 2019 IEP, the determination of the March 2020 CSE, or the parents' due process complaint notice related to the student's receipt of pendency during the 2020-21 school year, or any other explanatory information to piece together what happened with the student's eligibility for special education while the student received pendency service, or whether the parents challenged the March 2020 CSE's determination that the student was not eligible for special education and what resulted from such a challenge.[7] Critically the IHO failed make any inquiry about the status of the prior due process proceedings involving any challenge(s) by the parent to the student's declassification, and it would have been highly relevant to know if the CSE's eligibility determination(s) had been previously upheld or overturned by another IHO, or if any such proceedings were still pending or had been withdrawn by the parent.

Turning to the 2022-23 school year, the parties' focus on appeal is whether the parents failed to request services for the student for the 2022-23 school year prior to the June first deadline; however, as discussed above, the hearing record does not include sufficient information regarding the student's eligibility for special education in order to reach the June first deadline issue. In particular, the June first deadline does not apply for students who are first identified during the school year for which services are being sought (Educ. Law 3602-c[2][a]). For students first identified between the first day of June preceding the school year for which the request is made and the first day of April of the next school year, the request for services must be submitted within

[7] I note that the standard stay-put analysis does not apply to a student who is not eligible for special education (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 n.8 [S.D.N.Y. 2005]). Generally, the stay-put provision does not apply beyond expiration of the student's eligibility for special education (see Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654 [7th Cir., 1996]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 385-90 [N.D.N.Y. 2001]). However, courts have found that a student should remain in a stay-put placement in instances where one of the purposes of the pending proceedings is to challenge the factor which terminated the student's eligibility, i.e., to challenge the age limit on special education (see A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] [finding that stay put applied for a student with a disability who challenged state-imposed age limits on IDEA eligibility, even though the student exceeded that age limit while the proceedings were pending]) or to challenge whether the disabled student met the requirements for graduation (see R.Y. v. Hawaii, 2010 WL 558552, at *6-*7 [D. Haw. Feb. 17, 2010] [noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2010 WL 557058, at *2-*4 [S.D. Ind. Feb. 10, 2010]; Cronin v. E. Ramapo Cent. Sch. Dist., 689 F. Supp. 197, [S.D.N.Y. 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]).

thirty days after the student is first identified (id.). For students first identified after March first of the current school year, where a request for services is submitted on or after April first of the same school year, the request is deemed timely for services to be delivered in the following school year (id.). Accordingly, with the hearing record indicating that the student was declassified, and without information regarding the parties' positions as to the student's current eligibility, the IHO's finding related to the timeliness of a request for an IESP was incomplete.

Adding to this confusion are almost three school years now in which the student has been receiving services through pendency with the hearing record failing to address the alleged declassification of the student or whether it was pursued as an issue in one of the prior proceedings—and, possibly as a result of this confusion—for the most recent two school years it appears that the CSE has not convened, evaluated the student's needs, or developed a program, whether it be an IESP or an IEP.

In order to have properly addressed the parent's assertions as raised in the due process complaint notice, specifically that the district failed to evaluate the student and failed to develop an education program for the student, the preceding questions regarding the student's eligibility for special education must be addressed first, as eligibility for special education as a student with a disability is a prerequisite for the development of an IEP or an IESP (see 20 U.S.C. § 1414[d][1][A][i], [2][A]; Educ. Law § 3602-c[2]).

Initially, the district would have the responsibility to carry the burden of proof at the impartial hearing on the question of the student's eligibility if it were raised and addressed; however, as noted above, the parties' positions as to the student's current eligibility for special education is unclear. Further, there is some authority that supports the position that relief may not be warranted in a dispute absent a finding that a student is eligible for a FAPE (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249-50 [3d Cir. 2012]; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. June 1, 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225-26 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding consideration of alleged procedural errors of IDEA unnecessary when student was not eligible for special education services]; D.H.H. v. Kirbyville Consol. Ind. Sch. Dist., 2019 WL 5390125, at *6 [E.D. Tex. Jul. 12, 2019] [finding a school district does not violate the IDEA if it declines to provide special education to a student who does not need special education and does not qualify as a child with a disability under the IDEA]; see also Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 [5th Cir. 2003]). However, an IHO may find that procedural inadequacies rise to the level of a denial of a FAPE if they significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]) and there is no prerequisite in the statute or regulations that the student be eligible for special education in order for an IHO to reach such a conclusion. Moreover, I am not aware of any authority from a jurisdiction such as New York, which places the burden of proof on the district, that supports the premise that the district can avoid its burden of proof on the question of eligibility but ultimately prevail by relying on the challenged finding of the CSE that the district failed to defend (i.e., the student's ineligibility).

Having found that the IHO failed to develop the hearing record or the parties' positions regarding the issue of whether the student was declassified in or around March 2020 or whether a decision on the merits of that issue was rendered in a due process proceeding,[8] the IHO's decision must be vacated and the matter remanded to the IHO. 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]).

In accordance with the foregoing, prior to reaching the issue of the June first deadline for IESP services, after providing the parties with an opportunity to be heard, a determination must first be made why the student is or is not eligible for special education as a student with a disability since the only information currently is that the parent had challenged the district's determination to declassify the student in a different proceeding.[9] In the event the IHO determines that the student is currently identified as a student with a disability, the district will then have the burden of going forward with evidence regarding the reasons why "to date, the CSE has not provided [the student's] parents with an updated educational program (i.e.: an IEP and/or IESP) for the 2022-2023 school year" (Parent Ex. A at p. 2). In the event that the IHO again reaches the issue of the June first deadline in this proceeding, the IHO should consider whether the district took sufficient steps to raise this as an issue during the hearing such that it is within the IHO's authority to rule on it (see Application of a Disability, Appeal No. 23-032). Additionally, regarding the parents' additional evidence presented on appeal indicating that the parents, through their attorney, provided the district with a request for an IESP prior to the June first deadline, the parents may present this evidence to the IHO to review and consider upon remand. The parties have at this juncture have had ample opportunity to consider the May 31, 2022 letter and email, as well as the January 2023 affirmation of the parent's attorney. Had the IHO fully disclosed her level of concern regarding compliance with the June 1st deadline rather than surprising the parties with the determination in a final decision on an incomplete hearing record, the parent might have allayed such concerns with a more robust showing.

Further, the IHO must determine whether the parents proved the appropriateness of the unilaterally obtained services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719

[8] It is also possible that the student was referred by the parent to the CSE for another eligibility determination after March 2020, but that question was also not broached at the impartial hearing.

[9] The hearing record should include documentary evidence to support such a determination.

[U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). The parents' request for privately-obtained services should be assessed under this framework; namely, if it is found that the district failed to offer the student a FAPE or appropriate equitable services during the 2022-23 school year, the issue is whether the educational program obtained by the parents constituted appropriate unilaterally obtained services for the student such that the cost of the services is reimbursable to the parents upon presentation of proof that the parents have paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parents are legally obligated to pay but do not have adequate funds to do so.[10]

VII. Conclusion

The finding by the IHO dismissing the parents' due process complaint notice must be reversed and the matter remanded for a determination regarding the parents' claims for the 2022-23 school year.

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 December 14, 2022, is modified by reversing the IHO's dismissal with prejudice of the parents' due process complaint notice and the matter is remanded for further proceedings consistent with this decision.

Dated: **Albany, New York**
April 5, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] I note that when a student is receiving services pursuant to pendency, the district is obligated to deliver or fund those services and a parent is not required to show a financial obligation for services the district was required to fund (see Application of a Student with a Disability, Appeal No. 21-245 [in discussing services delivered to the student under pendency, it was determined that there was no remaining dispute as to the provision of, or payment for the services already provided to the student under pendency]; Application of a Student with a Disability, Appeal No. 20-042 [discussion of rate for services only addressed services provided prior to the commencement of pendency, after which point district was obligated for payment]).