The University of the State of New York

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

No. 23-032

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the parent failed to timely request equitable services pursuant to New York State Education Law section 3602-c for the 2022-23 school year and dismissed the parent's due process complaint notice. The appeal must be sustained and the matter remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the 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 §§ 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 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.

According to the parent, a CSE last convened on December 21, 2020 and developed an IESP for the student that recommended four periods per week of SETSS (Parent Ex. A at p. 1).[1, 2]

A prior impartial hearing concerning the student's first year of special education eligibility, the 2020-21 school year (seventh grade), resulted in an IHO decision, dated July 13, 2021, in which an IHO found that the district failed to provide the student "a FAPE" for the 2020-21 school year and ordered the district to provide the student with eight periods per week of SETSS for the 2020-21 school year (Parent Ex. B at pp. 3-4, 12-14). The IHO in that matter further ordered the district to directly fund and reimburse the parent for the costs of the SETSS delivered to the student by private providers from November 8, 2020 through the remainder of the 2020-21 school year (id. at pp. 14-15). The July 2021 IHO decision was not appealed.

On September 1, 2022, the parent entered a contract with an agency, All Kidz R Star Kidz LLC, for delivery of SETSS to the student during the 2022-23 school year (ninth grade) (Parent Ex. G; see Parent Ex. H at p. 1).

B. Due Process Complaint Notice

In a due process complaint notice dated September 1, 2022, the parent alleged that the district "failed to provide adequate special education and related services for the student for the 2022-2023 school year" and failed to offer the student a FAPE (see Parent Ex. A at p. 1). More specifically, the parent argued that the CSE last convened and developed an IESP for the student on December 21, 2020, which recommended "only" four periods per week of SETSS (id.). The parent indicated that the student received eight periods of SETSS during the 2021-22 school year as part of a pendency (stay-put) placement (id.).

For the 2022-23 school year, the parent claimed that the student required eight periods per week of SETSS and "dispute[d] any other program that the [district] developed that removed and/or reduced these services, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (Parent Ex. A at p. 1). The parent also alleged that the district did not deliver the student's special education services during the 2022-23 school year and that she was unable to locate providers to deliver the services at the district's standard rates (id.). However, according to the parent, she did find providers "willing to provide the student with all required services for the 2022-23 school year, however, at rates higher than standard [district] rate" (id.).

[1] During the impartial hearing, neither party offered any IEP or IESP into evidence. In her request for review, the parent states that, in addition to the December 2020 IESP, another IESP was developed on August 19, 2021 but indicates that this IESP mandated the same services (Req. for Rev. ¶ 4 n.2).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

The parent requested a hearing on the issue of pendency and alleged that the student's pendency placement consisted of eight periods per week of SETSS "at an enhanced rate" (Parent Ex. A at p. 2). As relief, the parent requested an award of district funding of the costs of eight periods per week of SETSS at an enhanced rate for the entire 2022-23 school year (id.).

C. Impartial Hearing Officer Decision

On September 9, 2022, the district agreed to provide the student with eight periods per week of direct SETSS pursuant pendency based on the unappealed IHO decision dated July 13, 2021 (IHO Decision at p. 3; Sept. 9, 2022 Pendency Implementation Form; see Parent Ex. B; IHO Ex. I).

An IHO from the Office of Administrative Trials and Hearings (OATH) conducted a prehearing conference with the parties on October 12, 2022 (Oct. 12, 2022 Tr. pp. 1-7). On November 15, 2022 and December 6, 2022, the IHO conducted status conferences with the parties (Dec. 6, 2022 Tr. pp. 1-7; see IHO Decision at p. 3).[3] On January 5, 2023, the parties appeared for an impartial hearing date devoted to the merits (Jan. 5, 2023 Tr. pp. 1-36).

At the outset of his decision, the IHO acknowledged that the district failed to offer any documentary evidence or testimony (IHO Decision at p. 3).

Next, the IHO recited the requirements of Education Law § 3602-c and indicated that, pursuant to that law, a parent "must first file a written request for such services in the district in which the home school is located on or before the first day of June preceding the school year for which the request for services is made" (IHO Decision at p. 6).[4] The IHO found that such a request, triggers the CSE's obligation to develop an IESP for the student and assure that special education services are made available to the student (id.).

The IHO found that, during the impartial hearing, the parent failed offer evidence that she made a written request for services for the 2022-23 school year by June 1, 2022 (IHO Decision at p. 6). Consequently, the IHO held that the parent was "not entitled to claim any disagreement regarding services for the 2022-[23]" school year as the parent failed to timely request services (id.). The IHO held that, since the parent failed to timely request services, the district did not "fail to provide [the] Student with a FAPE for the 2022-2023 school year by not providing [the] Student with SETSS" (id. at pp. 6-7). Accordingly, the IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice (id. at p. 7).

[3] According to a clarification from the IHO, the November 15, 2022 status conference was not held on the record and, therefore, was not transcribed.

[4] Although the IHO uses the term "home school" the language of Education Law § 3602-c provides that the request for services must be filed with the "school district of location" of the nonpublic school (see Educ. Law § 3602-c[2][a]).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision, arguing that there was "no factual or legal basis" to dismiss the complaint for the failure to timely file a request for services by June 1, 2022 under Education Law § 3602-c. The parent contends that Education Law § 3602-c "does not require the [p]arent to file a written request for services every June 1 prior to a school year." The parent argues that the request for services only needs to be made once at the time of the initial request for services. After the initial request is made, the parent contends that the district is required to develop an IESP and provide equitable services to the student each year thereafter without the requirement for filing a request for the same on an annual basis.

Alternatively, the parent argues that, even if Education Law § 3602-c required her to file an annual request for dual enrollment services, the burden to demonstrate whether the parent made such written request was on the district. In this matter, the parent contends that the district failed to make any arguments or present any evidence at the impartial hearing on this issue. Furthermore, the parent argues that the district waived the issue by failing to "raise any argument that there was no required request for services or that it had no obligation to provide the services [the] [p]arent [was] requesting."

The parent argues that the IHO should have ordered district funding for eight periods per week of SETSS at an enhanced rate for the 2022-23 school year. The parent argues that she entered a contract into evidence for the provision of SETSS services for the 2022-2023 school year at a specified rate per hour and that the agency provided the student with eight periods of SETSS per week. Since the district was obligated to provide the student's SETSS, the parent argues that the "financial burden" should fall on the district to fund the SETSS.

In an answer the district denies the material allegations contained in the parent's request for review. The district asserts that the IHO properly dismissed the due process complaint notice and correctly found that the district was not responsible to offer "a FAPE" to the student for the 2022-23 school year. The district argues that the IHO had the authority to sua sponte raise the issue of whether the parent requested equitable services. The district also contends that the parent incorrectly argues that the issue of timeliness of the June first request was waived by the district. Lastly, the district argues that the parent failed to establish a financial obligation to pay for the privately obtained SETSS and that equitable considerations did not favor relief to the parent.

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]).[5] "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.).[6]

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 parent's due process complaint notice for because the parent failed to offer evidence of a timely 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 educational "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 contains no evidence satisfying this requirement under section 3602-c, namely, that the parent made a

[5] 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]).

[6] 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.).

written request for equitable services by June first preceding the 2022-23 school year (see generally Jan. 5, 2023 Tr. pp. 1-36; Parent Exs. A-I).

The parent first argues that Education Law § 3602-c does not require that a written request for services be filed "every June 1 prior to a school year" (Req. for Rev. ¶ 8). She claims, instead, that a "parent seeking equitable services for their child attending a non-public school for the first time" must file the request prior to June first of the school year in which the services are requested but that, thereafter, the CSE is required to annually review the student's IESP (id.). However, this argument is in direct contravention of the requirement set forth in Education Law § 3602-c, which states that the request be filed "on or before the first of June preceding the school year for which the request is made" (Educ. Law § 3602-c[2][a] [emphasis added]). The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services.

However, the inquiry does not end there, because the State law also addresses how matters should be addressed through an impartial hearing. In the present matter, the IHO erred in finding that the "[p]arent failed to introduce any evidence that [the parent] made a timely written request for services for the 2022-[23] school year by June 1, 2022" (IHO Decision at p. 6). That is because the district carried the burden of proof at the impartial hearing on this question. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In her due process complaint notice, the parent set forth allegations that the district was obligated to but failed to develop an IESP and deliver services to the student during the 2022-23 school year (see Parent Ex. A). The district failed to present evidence to counter such allegations. Thus, failed to meet its burden of production and persuasion.

Further, as the parent argues, the district waived the defense in this case. The district had several opportunities to raise the issue of the parent filing a request for services by June 1st under 3602-c — the October 12, 2022 prehearing conference; the November 15, 2022 and December 6, 2022 status conferences; and the January 5, 2023 impartial hearing — but failed to do so (see generally Oct. 12, 2022 Tr. pp. 1-7; Dec. 6, 2022 Tr. pp. 1-7; Jan. 5, 2023 Tr. pp. 1-36). There is also no evidence in the hearing record showing that the district responded to the due process complaint in accordance with State regulations which require that

> (i) If the school district has not sent a prior written notice pursuant to subdivision (a) of this section to the parent regarding the subject matter in the parent's due

process complaint notice, such school district shall, within 10 days of receiving the complaint, send to the parent a response that shall include:

(a) an explanation of why the school district proposed or refused to take the action raised in the complaint;

(b) a description of other options that the committee on special education considered and the reasons why those options were rejected;

(c) a description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action; and

(d) a description of the factors that are relevant to the school district's proposal or refusal.

8 NYCRR 200.5[i][4]). Additionally, the district was provided an opportunity to present an opening statement, evidence, and a closing argument but, once again, declined to do so (IHO Decision at p. 3; see Jan. 5, 2021 Tr. pp. 6-7, 11, 33).

Thus the district concedes that it did not raise this issue during the impartial hearing, arguing instead that the IHO correctly raised the question as a matter of subject matter jurisdiction. However, at least one State level administrative decision, explicitly addressing waiver of the June first deadline, found that a district may through its actions waive it as a defense (Application of the Bd. of Educ., Appeal No. 18-088). The district's jurisdictional argument is questionable at best. The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1st notice requirement but it does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1st deadline (Educ. Law § 3602-c[2][a]).[7] Accordingly, without a further developed argument, there is insufficient basis to find that the June first deadline relates to subject matter jurisdiction as asserted by the district. Rather, in review of the parties' arguments, the issue fits more with other affirmative defenses, such as the defense of the statute of limitations, which require that they be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of

[7] The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the Jun 1st deadline. But read as a whole, the statute does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline. For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6][emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Research by the undersigned has revealed no caselaw addressing whether a school district is barred from dually enrolling a student who has missed the June 1st deadline and the parties have pointed to none.

the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

"By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In this matter, because the district did not raise the timeliness of the parent's request for equitable services before the IHO, the hearing record is not fully developed in a way that would permit the undersigned to make a finding as to whether the parent violated the regulation or is otherwise barred from public school admission under the dual enrollment statute. For example, the district had the burden to come forward with evidence that the parent failed to request services on or before June first. By failing to produce such evidence, there is no basis to determine whether the district agreed to provide the services without the parent's request as the district is not prevented from providing services to the student if the parent fails to file such request (see Application of a Student with a Disability, Appeal No. 21-138; Application of the Bd. of Educ., Appeal No. 18-088).

It is also problematic that the IHO did not place the parties on notice of his intent to consider the issue of whether the parent filed a request for services by June first under Education Law § 3602-c (see Oct. 12, 2022 Tr. pp. 1-7; Dec. 6, 2022 Tr. pp. 1-7; Jan. 5, 2023 Tr. pp. 1-36). Instead, the IHO surprised the parties for the first time in his decision by raising that the parent did not comply with the requirement for filing a request for services by June 1, 2022 (see IHO Decision at pp. 6-7). It was incumbent upon the IHO to disclose his intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]).

Since the IHO did not provide notice to the parties of his intent to raise the issue of the request for services, and the parties did not have an opportunity to be heard on the issue, I find that the impartial hearing was not conducted in a manner consistent with due process and the IHO's must be vacated. In addition, the IHO erred in failing to address the parent's request for relief requested in her due process complaint notice. In particular, the IHO did not address the parent's claims regarding the unilaterally obtained SETSS and equitable considerations in connection with obtaining the SETSS.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims

that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO's decision regarding the 2022-23 school year must be vacated and the matter remanded to the IHO to address the parent's request for relief as set forth in the September 1, 2022 due process complaint notice. As the hearing record was fully developed, the IHO's decision on remand shall be based on essentially the same hearing record that was available at the time of the initial appeal.[8] In other words, the district failed to produce evidence that a CSE meeting was held for the 2022-23 school year, that an IESP was developed for the 2022-23 school year, or that it provided the student with any services during the 2022-23 school year, or alternatively that it was not obligated to provide the student special education services for the 2022-23 school year,. Thus, the district failed to meet its burden of proof regarding its offer or provision of equitable services to the student for the 2022-23 school year and the remand of this matter to the IHO is not for the purpose of allowing the district a second bite at the proverbial apple to attempt to rehabilitate its lack of participation in the hearing process. Rather, on remand, the IHO should constrain his determinations to whether the parent met her burden to demonstrate the appropriateness of the unilaterally-obtained SETSS and whether equitable considerations support an award of district funding for the costs of those services.[9]

Going forward, if they have not done so already, both parties should also return to using the appropriate CSE planning process called for by State law and the parent should ensure that she adheres to the June 1st deadline for requesting section 3602-c services if she intends to place the student in a nonpublic school and seek dual enrollment services.

[8]The IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

[9] If the parent did not make such a request in writing, the district may have remained obligated to offer the student a FAPE and should have developed an IEP for the student. If the parent's alleged failure to make a written request for IESP services in a manner consistent with State law was an issue in dispute, courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. For example, in E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537 (S.D.N.Y. Nov. 26, 2012), after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T., 2012 WL 5936537, at *16). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"] [emphasis added]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

VII. Conclusion

Based on the above discussion, the IHO's dismissal of the parent's due process complaint notice must be vacated and the matter remanded for a determination regarding the parent's 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.

IT IS ORDERED that the IHO's decision, dated January 9, 2023, which dismissed the parent's due process complaint notice with prejudice is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings consistent with this decision.

Dated: **Albany, New York**
March 29, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER