The University of the State of New York

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

No. 23-035

Application of a STUDENT WITH A DISABILITY, by his 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:
The Law Firm of Tamara Roff, PC, attorneys for the petitioners, by Tamara Roff, 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 Education Law § 3602-c for the 2022-23 school year and dismissed the parent's due process complaint notice with prejudice. 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.

The student has been the subject of prior administrative hearings. On July 1, 2020, the parent filed a due process complaint notice challenging the appropriateness of the services recommended in an October 2019 IESP and alleging that the district failure to offer the student an appropriate program or services for the 2020-21 school year ("2020-21 proceeding") (Parent Ex. B at p. 3). A CSE subsequently convened on August 6, 2020 and determined the student continued to remain eligible for special education services as a student with a learning disability (Parent Ex. C at p. 1).[1] The CSE developed an IESP for the student for the 2020-21 school year in which it recommended that he receive three periods of direct special education teacher support services (SETSS) per week in a group in the general education classroom, three periods of direct SETSS per week in a group in a separate location, two 30-miutes sessions of individual speech-language therapy per week, two 30-miutes sessions of individual occupational therapy (OT) per week and one 30-minute session of group counseling services per week (id. at p. 7).

On September 9, 2020, as part of the 2020-21 proceeding, the parties entered into a pendency agreement based upon a prior unappealed IHO decision relating to the 2019-20 school year (Parent Ex. B at p. 9). Pursuant to the September 2020 pendency agreement, the student received ten periods of individual special educational itinerant teacher (SEIT) services per week from Special Edge Support, LLC (Special Edge), as well as individual speech-language therapy and OT, both for two 30-minute sessions per week (id.). In a decision dated August 4, 2021, the IHO assigned to the 2020-21 proceeding found that the district met its burden to prove that it offered the student a free appropriate public education (FAPE) for the 2020-21 school year and denied the parent's requested relief (Parent Ex. B at p. 12).[2]

By parent report, the CSE failed to convene and develop a program for the student for the 2021-22 school year and the student ultimately received services through a pendency agreement with the district (Parent Ex. A at p. 2). On July 1, 2022, the parent entered into a contract with Special Edge to provide the student with SEIT/SETSS services beginning July 1, 2022 and continuing through June 30, 2023 (Parent Ex. E).[3]

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

[2] Neither party appealed the August 4, 2021 IHO decision (see Parent Ex. A at p. 2).

[3] The contract with Special Edge dated July 1, 2022 indicates that Special Edge provides SEIT/SETSS services at an enhanced market rate as an independent contractor but does not identify further the frequency or duration of the SEIT/SETSS to be delivered to the student for the 2022-23 school year (see generally Parent Ex. E). According to an affidavit of the financial officer of Special Edge dated November 30, 2022, Special Edge was providing six periods of SETSS to the student during the 2022-23 school year at a specified rate (Parent Ex. F).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, the parent alleged that the district failed to "provide a timely, procedurally valid, and substantively appropriate educational program" for the 2022-23 school year (see Parent Ex. A at p. 1). Generally, the parent asserted that the district failed to provide the student a FAPE in compliance with the IDEA, State Education Law, and section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (id.). The parent alleged that the district failed to conduct and consider adequate evaluations of the student, failed to provide adequate prior written notice in accordance with the requirements of the IDEA and State law, and impeded the parent from fully participating in the educational decision-making process (id. at pp. 1-2). In addition, the parent contended that the district failed to convene a CSE to develop a program for the student for the 2022-23 school year or otherwise arrange for the student to receive special education services (id. at p. 2).

As relief, the parent requested that the district continue to fund six periods per week of individual SETSS, two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-miunte session of group counseling services per week (Parent Ex. A at p. 2). Further, the parent requested a finding that the district failed to appropriately evaluate the student in all areas of suspected disability and an order requiring the district to fund an independent educational evaluation (IEE) with evaluators to be chosen by the parent (id. at pp. 2-3).

Additionally, the parent sought to invoke the student's pendency rights "as outlined in the unappealed [IHO decision] dated August 4, 2021" consisting of six periods per week of SETSS, two 30-minute session of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-miunte session of group counseling services per week (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

On December 12, 2022, an impartial hearing was held before an IHO from the Office of Administrative Trials and Hearings (OATH), with only the parent's attorney and the IHO in attendance; no representative appeared on behalf of the district (Tr. pp. 1-12).[4] At the hearing, the parent submitted seven exhibits into evidence (Tr. pp. 5-6; see generally Parent Exs. A-G).[5] Further, at the impartial hearing, after the parent's attorney made her opening and closing statements, the IHO asked "with the exception of the [due process complaint notice], did the Parent request SETSS services?" to which the parent's attorney responded "[y]es, a letter was sent to the District . . . on May 31, 2022, from my office, indicating that the Parent was seeking an IESP for

[4] According to the IHO, a settlement conference was held on November 28, 2022 (IHO Decision at p. 3).

[5] The parent's attorney also made an opening and closing statement which reiterated the parent's requested relief of six periods of SETSS per week and related services as indicated in the September 8, 2022 due process complaint notice (Tr. pp. 6-9).

the upcoming school year" (see Tr. p. 9).[6] The IHO requested that the parent's attorney forward him a copy of the May 31, 2022 letter from the parent's attorney to the district (Tr. p. 10).

In a final decision, dated January 19, 2023, the IHO denied the parent's relief and dismissed the due process complaint notice with prejudice for the parent's failure to timely request services for the 2022-23 school year by June 1, 2022 pursuant to Education Law § 3602-c (IHO Decision pp. 6-7).

At the outset of his decision, the IHO acknowledged that the district failed to appear at the impartial hearing (IHO Decision at p. 3). Next, the IHO recited the legal standards under Education Law § 3602-c and the requirement that parents may seek to obtain education "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" (id. p. 5). The IHO found that, if such a request was filed, the CSE would be obligated to review the request and develop an IESP for the student (id.).

The IHO found that the parent failed to introduce evidence that she made a timely 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 (id.). The IHO held that the, since the parent failed to timely request services, the district did not deny the student "a FAPE" for the 2022-23 school year (id. at pp. 6-7). The IHO further noted a "discrepancy" regarding the parent's evidence, finding that, while the call log that the parent introduced into evidence showed the parent attempted to contact 13 SETSS providers via telephone on November 2, 2022, such attempts were made four months after the parent entered into an agreement with Special Edge (id.). Accordingly, the IHO denied the parent's relief and dismissed the due process complaint notice with prejudice (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision, arguing that the IHO went "beyond the scope of the record and decided sua sponte an issue that was neither raised by either party, nor supported by the factual record."

The parent argues that, since the district did not appear for the impartial hearing, it did not argue nor raise a defense to establish that it was not required to provide the student with an IESP and services. Further, the parent alleges that she provided the IHO with a copy of the parent's May 31, 2022 letter to the district seeking an IESP for the 2022-23 school year but that the IHO failed to discuss or acknowledge receipt of the letter and, therefore, erroneously concluded that the parent did not make a timely request for services. With her request for review, the parent submits a letter from the parent's attorney addressed to the district dated May 31, 2022 requesting an IESP for the 2022-23 school year, as well as an email correspondence with the IHO dated December 12, 2022.[7]

[6] At the impartial hearing, the parent's attorney conceded that the May 31, 2022 letter to the district was not included in the parent's disclosure packet for this proceeding (Tr. p. 10).

[7] The parent marked the documents as Parent Exhibit H, and, for purposes of convenience, they will be cited as

Next the parent argues that the IHO erred by improperly shifting the district's burden of proof to the parent. Further, the parent contends that pursuant to Education Law § 3602-c, districts are required to develop an IESP for students who are placed in private programs.

Lastly, the parent argues that the IHO failed to explain why the alleged "discrepancy" in the parent's evidence was relevant or would weigh in favor of denying the requested relief. The parent contends that Education Law § 3602-c places the responsibility of selecting and placing the student in a nonpublic school on the parent, but the implementation of the services called for by a student's IESP falls on the district.

The parent requests for her appeal to be sustained; a reversal of the IHO's decision; a finding that the district failed to provide the student with an appropriate IESP and services for the 2022-23 school year; six periods per week of individual SETSS, two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and a 30-mintue session of group counseling per week; and a "declaratory finding" that the student's last agreed upon program consisted of six periods per week of SETSS in a group, two 30-minute session of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and a 30-mintue session of group counseling per week, and that the district was obligated to provide this program during the pendency of current litigation.

In an answer the district generally 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 finding that the district was not responsible to offer a FAPE to the student for the 2022-23 school year. Next, the district contends that there is no evidence in the hearing record that establishes the parent provided written notice of her request for equitable services by June 1, 2022 and further that the parent concedes as much on appeal by way of failing to cite to any contrary evidence in the hearing record. Further, the district requests the undersigned to not consider the additional evidence submitted by the parent with her request for review.

Next, the district contends that the parent cites to "inapposite case law to argue that courts typically decide only issues and questions explicitly presented to them by the parties" to argue that the IHO improperly went beyond the scope of the record. To the contrary, the district argues that the parent's arguments completely ignore that "the scope of the record," which also includes the hearing exhibits presented by the parent at the hearing, and that a timely request for services pursuant to the dual enrollment statute was not among these exhibits. The district argues that the IHO had the authority to sua sponte raise the issue of whether the parent requested equitable services. In addition, the district argues that the parent is "needlessly" challenging the IHO's "discrepancy" finding and claims that the IHO merely "note[d]" the parent's "discrepancy" and, even then, only after concluding "that the District did not fail to provide Student with a FAPE for the 2022-2023 school year by not providing Student with the requested services."

Lastly, the district alleges that, even if the SRO finds that the district failed to offer the student a FAPE for the 2022-23 school year, the parent is not entitled to public funding because she failed to demonstrate a legal obligation to pay the cost for services and the equitable

such in this decision.

considerations do not favor relief. The district claims the parent's agreement with Special Edge dated July 1, 2022 fails to identify any of the services to be provided, the frequency and duration, or the cost. Further, the district claims the parent failed to provide the district with a 10-day notice of her intention to unilaterally obtain SETSS for the student for the 2022-23 school year. The district requests the parent's appeal be dismissed.

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]).[8] "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.).[9]

[8] 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]).

[9] 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.).

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 with prejudice 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 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]). In this instance, on the same day as the December 12, 2022 impartial hearing, pursuant to the IHO's request, the parent emailed the IHO a copy of a letter to the CSE dated May 31, 2022 showing that the parent requested an IESP for the student for the 2022-23 school year prior to the first of June (Tr. pp. 9-11; see Parent Ex. H). The IHO indicated during the impartial hearing that he "may introduce [it] as an IHO exhibit" but did not offer any discussion or ruling about entering the document into evidence in his decision or at the impartial hearing (see Tr. pp. 1-12; IHO Decision at pp. 1-7). The IHO did confirm on the record that the parent did not include the document in the disclosure provided to the district (see Tr. p. 10), possibly in reference to federal and State regulations which provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, given that the district did not appear at the impartial hearing and, there is no other indication in the hearing record that the district objected to the proffered evidence on the basis of the five-business day rule, this would not support the IHO's failure to enter the document into evidence. The IHO offered no other rationale for the failure to consider the document that was produced pursuant to his request. Thus, the IHO's 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" is not supported by the hearing record (IHO Decision at p. 6).

Further, the IHO's decision is problematic given the district's failure to appear at the impartial hearing or put forth a defense based on any allegation of nonreceipt of the May 31, 2022 letter from the parent or otherwise address its obligation to provide an IEP or IESP and any services recommended thereunder to the student. The district carried the burden of proof at the impartial hearing on these questions. 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, it failed to meet its burden of production and persuasion.

In particular, in addition to not appearing at the December 12, 2022 hearing date, there is also no indication in the hearing record that the district otherwise raised the issue of whether or not the parents submitted a request for services, for example, at the November 28, 2022 settlement conference or in a response to the due process complaint notice (Tr. pp. 1-12; IHO Decision at p. 3). State regulation requires 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]).

Based on its failure to appear at the impartial hearing, there is no dispute that the district did not raise this issue during the impartial hearing; however, the district argues 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]).[10] 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 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 any event, as discussed above, even assuming the IHO's authority to raise the issue sua sponte, he nevertheless then erred in failing to make a determination about the timeliness of the parent's request for equitable services based on evidence produced by the parent in response to his inquiry. While the district tries to argue that the parent did not prove delivery of the May 2022 letter, it failed to argue this at the impartial hearing. Thus, in this matter, the hearing record is not

[10] As an SRO recently observed:

> 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.

(Application of a Student with a Disability, Appeal No. 23-032).

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.

Since the IHO erred in failing to consider the May 2021 letter proffered by the parent and in shifting the burden of proof to the parent to offer evidence of a request for equitable services prior to the June first deadline absent any argument or evidence from the district that it was not required to develop an educational plan for the student, 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. Because the IHO found the question of the June first deadline determinative, he did not address the relief requested by the parent in her due process complaint notice. In particular, the IHO did not address the appropriateness of the parent's unilaterally obtained SETSS or equitable considerations.[11]

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 parents' claims as set forth in the September 8, 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, but with the addition of Parent Exhibit H, which should have been entered into evidence.[12] 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

[11] While the IHO noted a "discrepancy" in the timing of the parent's call log and the contract with Special Edge, he did not make any determination that such discrepancy would warrant a reduction or denial of relief (IHO Decision at pp. 6-7; Parent Exs. D; E). On remand, the IHO may revisit the question. I note, however, that generally a parent's pursuit of a private placement to the exclusion of a district offer is not a basis to deny tuition reimbursement on equitable grounds (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

[12] 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]).

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.[13]

VII. Conclusion

Based on the above discussion, the IHO's dismissal of the parent's due process complaint notice with prejudice 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 19, 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**
April 12, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[13] 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]).