The University of the State of New York

The State Education Department
State Review Officer
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No. 23-036

**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 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the parents 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 parents' due process complaint notice. The appeal must be sustained.

### 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 included in the hearing record, a full recitation of the student's educational history is not possible. Based on the information available, a CSE convened on February 10, 2021 to develop an IESP for the student with an implementation date of March 12, 2021 (Parent Ex. B at pp. 1, 4-5). According to the February 2021 IESP, the student was assessed in 2021 "as part of a three-year evaluation" (id. at p. 1). At the time of the CSE meeting, the student had been recommended to receive speech-language therapy; however, the student's mother reported that the student did not receive speech due to the COVID-19 pandemic (id.). Finding the student eligible for special education as a student with a speech-language impairment, the February 2021 CSE recommended that the student receive three periods per week of direct, group special education teacher support services (SETSS) in Yiddish and two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at pp. 4-5). As of February 2021, the student was parentally placed in a nonpublic school (id. at pp. 1, 6).

On May 12, 2022, the parent executed a contract with "Yes I Can," for the delivery of special education services to the student (Parent Ex. F). The educational director of Yes I Can, the agency that delivered the student's SETSS program (SETSS director), testified that for the 2022-23 school year the student was "receiving 3 hours of SETSS support per week . . . [in] individualized sessions" (Parent Ex. G ¶¶ 5, 11). The SETSS director noted that informal assessments were conducted to gauge the student's areas of need for the 2022-23 school year (id. at p. 2). The SETSS director testified that the student "require[d] the continuation of 3 hours of SETSS on a 1:1 basis per week because he [wa]s performing below grade level in all content areas" (id. at p. 3).

The hearing record also includes a letter dated June 2022, which the parent testified was sent on behalf of the parent by Yes I Can to the CSE chairperson, indicating that the parent was placing the student at a nonpublic school and requesting that the district provide the student with educational services pursuant to an IESP (Parent Exs. D; H¶ 7).

### A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, the parents alleged that the district failed to develop an educational program for the student for the 2022-23 school year (Parent Ex. A). The parents asserted that the February 2021 IESP was the student's last IESP and that although the parents agreed with the majority of the recommendations, the parents disagreed with the student receiving group SETSS because they felt he required "1:1 instruction in order to make educational progress" (id. at pp. 1-2). According to the parents, the district did not implement the student's educational program during the 2021-22 school year and they requested an impartial hearing through which the student received SETSS and speech-language therapy under pendency (id. at p. 2). The parents argued that the district failed to evaluate the student in all areas of suspected disability (id.). In addition, the parents alleged that the CSE did not provide the student with an updated educational program for the 2022-23 school year and failed to implement the student's last agreed upon educational program (id.). Further, the parents asserted that the district did not provide them with prior written notice and that that they were denied the opportunity to participate in the educational decision-making process (id.). The parents then invoked the student's pendency rights, requesting that he continue to receive three periods per week of SETSS in Yiddish

and two 30-minute sessions per week of speech-language therapy in Yiddish pursuant to the February 2021 IESP (id.). As relief, the parents requested the provision and funding of three periods per week of individual SETSS in Yiddish and two 30-minute sessions per week of speech-language therapy in Yiddish along with district funding for an updated psychoeducational evaluation and an updated speech-language evaluation by evaluators chosen by the parents (id.).

### B. Impartial Hearing Officer Decision

On December 12, 2022, an impartial hearing was held before the office of administrative trials and hearings (OATH), with only the parents' attorney and the IHO in attendance; no one appeared on behalf of the district (Tr. pp. 1-11).[1] At the hearing, the parents' attorney submitted eight exhibits into evidence, including the testimony of two witnesses via affidavit (Tr. pp. 5-6).

In a decision dated January 20, 2023, the IHO reviewed the State's "'dual enrollment' statute," noting that parents of a student with a disability placed in a nonpublic school may seek services "by filing a request for such services in the district . . . 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" (IHO Decision at p. 5). The IHO then focused on the deficiencies of the June 2022 letter, which did not contain proof of service and did not indicate what day in June it was sent (IHO Decision at p. 6; see Parent Ex. D). The IHO found that the letter did not prove that the parents timely notified the district of their request for an IESP (IHO Decision at p. 6). The IHO then determined that since the parents failed to prove that they notified the district of their request for an IESP for the 2022-23 school year by the June 1 deadline, they were not entitled to services for the 2022-23 school year (id.). Finally, the IHO noted that he found discrepancies in the parents' exhibits; specifically, that the parents submitted a call log showing that they called district SETSS providers in September 2022, while they had already executed an agreement with their chosen provider four months earlier (id. at p. 7). For the reasons listed above, the IHO denied the parents' request for relief and dismissed their due process complaint "in its entirety with prejudice" (id.).

## IV. Appeal for State-Level Review

The parents appeal from the IHO's decision and argue that the decision was not based on the record before him. Specifically, the parents allege that the "hearing officer 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 parents emphasize that the district failed to appear at the hearing and therefore did not raise any defenses or make any arguments. The parents address the June 2022 letter and argue that the issue of whether it complied with the dual-enrollment statute was not raised by either party during the hearing. The parents also allege that the IHO improperly shifted the burden of proof to the parents by requiring that they produce evidence showing that they requested an IESP prior to June 1, 2022. Additionally, the parents assert that the district was required to convene a CSE to develop an IESP by February 2022, prior to the June 1 deadline. In

[1] In his decision, the IHO noted that a settlement conference was held on November 28, 2022; however, a transcript of that conference was not included as a part of the hearing record (see Tr. pp. 1-11; IHO Decision at p. 3). According to State regulation, the hearing record should include "written and electronic transcripts of the hearing," and for prehearing conferences either a transcript or written summary of the prehearing conference (8 NYCRR 200.5[j][3][xi], [5][vi][e]).

addition, the parents submit proposed additional evidence consisting of an affirmation of their attorney and a letter from the parents' attorney dated May 31, 2022 to the chairperson of the CSE notifying the district that the parents were requesting development of an IESP for the student for the 2022-2023 school year (Req. for Rev. Ex. A). Finally, the parents argue that the IHO erred in finding a discrepancy in the parents' evidence, asserting that they signed the agreement the same month as they made calls to SETSS providers and that their calls to SETSS providers were not relevant to the proceeding.

For relief, the parents request a reversal of the IHO's dismissal of the parents' due process complaint notice and a finding that the district failed to provide the student with an IESP for the 2022-23 school year. The parents also seek three periods per week of SETSS in Yiddish for the student along with two 30-minute sessions of individual speech-language therapy in Yiddish, as well as a finding regarding the student's placement during the pendency of this proceeding (id.).

In an answer, the district admits that it did not convene to review the student's IESP for the 2022-23 school year, but argues that the IHO's dismissal of the due process complaint was correct because the district was not required to offer the student an IESP because the parents failed to comply with the June 1 deadline. The district alleges that the IHO had authority to raise the June 1 issue sua sponte and argues that the proposed parent exhibit should be disregarded as it was not offered on or before the hearing. The district further argues that the parents were not entitled to funding for the SETSS and speech-language services because they did not prove that they were financially obligated to pay for those services. Finally, the district alleges that equitable considerations do not favor the parents because they did not provide the district with a ten-day notice of their intent to unilaterally obtain services for the student.

In a reply, the parents argue that the district raises the issue of the parents' obligation to pay for SETSS for the first time on appeal and that the argument is therefore improper. The parents also note that "the district did not defend its failure to create an IESP" for the 2022-23 school year. The parents request the same relief as in their request for review, but add that in the alternative to the special education services being provided by the current provider, that the district be ordered to provide three hours weekly of SETSS and two 30-minute sessions of individual speech-language therapy services 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]).[2] "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.).[3]

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 the State's dual enrollment statute 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][a]). In fact, the statute is written in a manner that indicates that the district's obligation to provide services to parentally placed student's is triggered by the parent making the request in writing, specifically providing that districts "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 or person in parental relation of any such student" (Educ. Law § 3602-c[2][a]). It further provides that "[i]n the case of

[2] 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]).

[3] 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.).

education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location on or before the first of June preceding the school year for which the request is made" (id.).

The hearing record that was before the IHO contains no evidence satisfying this requirement under section 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding the 2022-23 school year (see generally Tr. pp. 1-11; Parent Exs. A-H).[4]

The parents allege that the burden of proof, production, and persuasion was on the district and the district failed to present any testimonial or documentary evidence in this proceeding. The parents further argue that if the district wanted to deny the student services based on the parents' failure to file a written request for services, the burden of proof was on the district to present an argument or challenge to the evidence presented by the parents. Additionally, the parents argue that even if the June 1 deadline is at issue, their additional evidence should be accepted on appeal to show that they requested an IESP by the June 1 deadline.

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 this instance, the IHO based his decision, rejecting the parents' due process complaint notice, on the parents' failure to produce timely notice requesting an IESP from the district (IHO Decision at p. 5).

Whether the IHO was permitted to raise this issue on his own turns on whether the June 1 deadline should be treated as a jurisdictional rule or as a procedural defense. A State level administrative decision reviewing whether the district could waive the June 1 deadline, found that a district may through its actions waive it as a defense (Application of the Bd. of Educ., Appeal No. 18-088). In another decision, an SRO found that "the district was not required to develop an

[4] If the parent did not make such a request in writing, the district remained obligated to offer the student a FAPE and should have developed an IEP for the student. However, it is worth reminding the parties and the IHO that 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]).

IESP for the student absent a timely request" (Application of a Student with a Disability, Appeal No. 21-138). In another recent State level administrative review, an SRO found that the June 1 deadline was not jurisdictional and was waived by the district failing to raise it as an affirmative defense during the impartial hearing (see Application of a Student with a Disability, Appeal No. 23-032). However, as noted after research by that SRO, "there [wa]s no caselaw [found] addressing whether a school district is barred from dually enrolling a student who has missed the June 1st deadline" (id. n. 7). Additionally, in reviewing the dual enrollment statute, the language used raises questions as to what aspects of dual enrollment should be subject to review as a part of the due process procedures.

As noted above, in reading the statute, written notification by the parent is what triggers the district's obligation to develop an IESP (Educ. Law § 3602-c[2][a]). The statute also provides that a CSE "shall develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (Educ. Law § 3602-c[2][b]). Under this provision, the statute then provides that "[r]eview of the recommendation of the [CSE] may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter," which effectuates the due process provisions called for by the IDEA (id.; Educ. Law § 4404). Notably, this provision, providing jurisdiction for review of the recommendations of the CSE, is specific to the CSE's recommendations and omits review of whether a district was obligated to furnish services to a student who attends a nonpublic school (Educ. Law § 3602-c[2][a], [b]).[5] This may be because the dual enrollment statute does not only apply to special education for students with disabilities, but also for career education or services to gifted students (Educ. Law § 3602-c[2][a]). Nevertheless, the statute provides that a request for services for students with disabilities must be made to the trustees or board of education of the school district of location and review of the statute does not indicate that due process is the appropriate procedure for review of the decision made by the trustees or board of education with respect to the deadline (Educ. Law § 3602-c[2][a], [b]).

Turning to this proceeding, the parents' main argument regarding the 2022-23 school year was that the district did not develop an IESP for that school year (Parent Ex. A). Review of the transcript of the hearing shows that parents' counsel brought up the parents' June 2022 letter to the district, with counsel for the parents arguing that the parents reached out to the CSE chairperson to request an IESP for the student for the 2022-23 school year, but the district did not respond to the request (Tr. pp. 7-8). The IHO then followed up by questioning counsel for the parents as to when the parents made the request for an IESP and counsel for the parents indicated that she did not know the exact date in June that the request was made (Tr. pp. 8-9).

In considering the parents' claim and the evidence presented in support of it, it appears reasonable for the IHO to have questioned whether the parents had requested an IESP from the district prior to the June 1 deadline, thus triggering the district's obligation to develop an IESP for the student as it is an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]) and a district is not required to develop an IESP absent a

[5] The dual enrollment statute also provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law 3602-c[2][c]).

timely request (Educ. Law § 3602-c[2][a]; Application of a Student with a Disability, Appeal No. 21-138; see Lee-Holowka v. Emma Willard Sch., 149 N.Y.S.3d 890 [NY Sup. Ct., Rensselaer County 2021] [requesting an IESP "is a necessary prerequisite to invoking the statute's benefits"]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). However, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this instance, as discussed above, the transcript of the hearing does indicate that the June 1 deadline was at issue during the hearing (Tr. pp. 7-9). Still, while the IHO was justified in questioning the evidence presented by the parents, the IHO could have explained his intent to do so to counsel for the parents during the course of the hearing so that counsel would have known if additional evidence regarding the parents' request for an IESP was required (see Tr. pp. 8-9). This was made more apparent on appeal, as the parents have presented additional evidence indicating that the parents requested an IESP from the district on May 31, 2022, prior to the June 1 deadline (Req. for Rev. Ex. A). As this additional evidence calls the IHO's finding into question and the IHO did not provide a sufficient explanation to the parents so that they would have known this additional evidence was required at the time of the hearing, the parents should have the opportunity to present this additional evidence to the IHO.

Accordingly, 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, including the issue of the June 1 deadline in consideration of the additional evidence presented by the parents on appeal. 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]).

Additionally, 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 [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 SETSS 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 SETSS obtained by the parent from Yes I Can constituted appropriate unilaterally obtained services for the student such that the cost of the SETSS 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.

As discussed above, there are legitimate concerns as to whether the June 1 deadline is jurisdictional, and whether, based on the language of the statute, a district's failure to develop an IESP due to the lack of a request for services should be the subject of a due process proceeding. However, the parties should have the opportunity to present cogent arguments to the IHO to address this issue, with the inclusion of the parents' additional evidence which appears to show that the parents provided the district with a request for services prior to the deadline. The IHO should also address the district's obligation to provide the student with a FAPE, notwithstanding the request for services at the nonpublic school. Finally, even if I were to accept the parents' arguments on appeal, remand is still required for the IHO to address the parents' burden of proving the appropriateness of the unilaterally obtained services in the first instance.

## 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.**

**IT IS ORDERED** that the IHO's decision, dated January 20, 2023, is modified by vacating the IHO's dismissal of the parents' due process complaint notice with prejudice and the matter is remanded for further proceedings consistent with this decision.

**Dated:** **Albany, New York**
**March 31, 2023**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**