The University of the State of New York

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

No. 23-114

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Fiona M. Dutta, 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 from respondent (the district) pursuant to Education Law § 3602-c for the 2022-23 school year and denied the parent's request for direct funding of services and compensatory education. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. A CSE convened on May 23, 2017, and determined that the student was eligible for special education programming as a student with a speech or language impairment (Parent Ex. D at p. 1). For the 2017-18 school year, the CSE recommended that the student receive the following services on a weekly basis: five periods of special education teacher support services (SETSS) in a group in Yiddish, two 30-minute sessions of individual speech-language therapy in Yiddish, two 30-minute sessions of individual physical therapy (PT) in English, two 30-minute sessions of individual occupational therapy (OT) in English, and one 30-minute group counseling session in Yiddish (id. at pp. 5-6).

In a due process complaint notice dated August 24, 2022, the parent alleged that the May 2017 IESP had expired, and the district failed to convene a CSE meeting to develop an IESP for the 2022-23 school year, which denied the student a free appropriate public education (FAPE) (see Parent Ex. A).[1, 2] The parent also informed the district that the student was parentally placed at a nonpublic parochial school for the 2022-23 school year (id. at p. 1).

An impartial hearing convened on February 21, 2023, and concluded on April 21, 2023, after three days of proceedings (Tr. pp. 12-54).[3] In a decision dated May 12, 2023, the IHO determined that the evidence in the hearing record showed that the parent failed to timely request services by the June first deadline pursuant to Education Law § 3602-c and dismissed the parent's due process complaint notice (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and

[1] The student has been the subject of a prior administrative hearing regarding the 2020-21 school year (Parent Ex. B). In that matter, the parent filed a due process complaint notice on or about December 14, 2020 and alleged that the district failed to offer the student a FAPE for the 2020-21 school year (id. at p. 3). Furthermore, on December 15, 2021, the IHO in that matter found that the last program the CSE recommended for the student was the May 2017 IESP, that the district failed to offer the student a FAPE for the 2020-21 school year, and that the student was entitled to receive a bank of seventy-five hours of compensatory education in the form of direct group SETSS to be provided by a provider of the parent's choosing at a market rate (id. at pp. 8-9). The IHO also ordered the CSE to reconvene to conduct the student's triennial review and create a new IESP (id. at p. 9).

[2] After the parent filed her August 2022 due process complaint notice, by letter to the district dated September 1, 2022, titled "10-Day Notice of Private Placement," the parent indicated that she consented to all services recommended in the May 2017 IESP but had been unable to locate providers for the SETSS and related services at the district's "standard rates" and that she intended to implement the May 2017 IESP and commence a proceeding to seek reimbursement from the district (Parent Ex. C at p. 2).

[3] Pre-hearing conferences were held on October 19, 2022, November 15, 2022, and December 8, 2022 which the district did not attend (Tr. pp. 1-12). On December 30, 2022, the parties attended a pendency hearing in which both parties agreed that the student's placement during the pendency of this proceeding was based on a prior unappealed IHO decision dated December 15, 2021 (see Tr. pp. 13-24; Parent Ex. B). A representative from the district did not attend the April 21, 2023 impartial hearing (see Tr. pp. 51-54).

arguments will not be recited. The gravamen of the parties' dispute on appeal is whether the IHO erred by dismissing the parent's due process complaint notice because the parent failed to request equitable services by the June first deadline as set forth in Education Law § 3602-c.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

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

In this matter, the student has been parentally placed in a nonpublic parochial school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the last program developed for the student was the May 2017 IESP and that the district did not supply any providers to deliver services to the student during the 2022-23 school year, and as a self-help remedy she unilaterally obtained private services for the student, and then commenced due process to obtain reimbursement for the costs thereof. The main issue presented on appeal is whether the IHO erred in dismissing the parent's due process complaint notice because the parent failed to timely send a written request for equitable services pursuant to 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]).

Although the parent does not assert that she sent a notice to the district prior to the June first deadline, she raises several arguments as to why the deadline should not apply. The parent argues that it is the district's burden of proof to show that the parent did not meet the deadline and further, that the June first deadline is an affirmative defense, which the district waived as it failed to raise the issue at the initial administrative hearing (Req. for Rev. at p. 4).

As discussed above, the evidence in the hearing record shows that, on September 1, 2022, the parent, through her attorney, emailed a "10-Day Notice of Private Placement" letter to the CSE chairperson notifying the district of the parent's intent to implement the student's May 2017 IESP at the student's nonpublic parochial school during the 2022-23 school year (Parent Ex. C). According to the letter, the parent consented to all the recommended services in the May 2017 IESP but had not been able to locate providers for SETSS at the district's "standard rate" and thus had to implement the May 2017 using unilaterally obtained providers and seek reimbursement (id. at p. 2). Although the parent had the opportunity during the hearing to address the district's allegation that she did not send the district notice requesting equitable services prior to the August due process complaint notice and the September letter, the parent did not argue, either during the hearing or on appeal, that she sent such a notice to the district.

The issue of the June first deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to 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]).

However, the parent's argument that the district waived this defense because it did not raise this argument on the "initial" hearing date held October 12, 2022 misconstrues the caselaw cited in support of the argument. In M.G., the term "initial administrative hearing" referred to the impartial hearing conducted at the local level before an IHO. However, the parent's interpretation of "initial administrative hearing" as the first date of the impartial hearing is not supported by a review of the district court's decision. Therefore, applying M.G. to the instant case, as long as the district raised the June first deadline as an affirmative defense at any time during the impartial hearing, the district did not waive its defense. In this instance, during the February 21, 2023 impartial hearing, in its opening statement, the district argued that the parent was not entitled to relief because the student was parentally placed and the parent failed to timely notify the district of location that the student needed an IESP prior to the June first deadline, thus the district's defense was not waived (Tr. pp. 28-29).[6]

Next, the parent argues that the district waived the June first deadline through its conduct. A district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]). The parent's reliance on Application of the Board of Education, Appeal No. 18-088 is misplaced. In that appeal, after the June first deadline, the CSE decided to create an IESP for the student and began providing services at the student's nonpublic school, which constituted an implied waiver of the deadline (see Application of the Bd. of Educ., Appeal No. 18-088). In this matter, the CSE did not create an IESP for the student for the 2022-23 school year nor did the district provide any services to the

[6] The parent argues that the district waived the June first deadline by failing to respond to the parent's due process complaint notice. In this matter, the district should have produced a response to the parent's due process complaint notice in accordance with State regulations, which require districts to respond to a due process complaint notice within 10 days of receipt if it has not yet sent the parent prior written notice regarding the subject matter of the parent's due process complaint notice (8 NYCRR 200.5[i][4]). However, as the district timely raised the defense of the June first deadline in its opening statement, there is no basis for finding that the failure to raise it earlier should result in a waiver of the defense and there is equally no basis for finding that the failure to provide a response to the due process complaint notice equates to a denial of equitable services.

student during the 2022-23 school year (see Parent Ex. A). Accordingly, the district did not implicitly waive the deadline by its actions taken after the deadline.

To the extent that the parent argues the district agreed to provide services because it sent related services authorizations (RSAs) to the parent to obtain services during the 2022-23 school year, the parent did not submit the RSAs into the hearing record or include such documents to be considered as additional evidence on appeal. Additionally, the student is entitled to SETSS from the district as part of his pendency program, which is an automatic injunction (see Interim IHO Decision at pp. 3-5; Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). Accordingly, the provision of SETSS as part of the student's pendency program would not constitute an implicit waiver of the June first deadline. Additionally, even if the district had provided the student with services in a prior school year, such action does necessitate an implied waiver through conduct for the following school years.

The parent next cites to Application of the Board of Education, Appeal No. 21-069 to support her argument that her due process complaint notice was not facially insufficient for failure to comply with the June first provision. However, in Application of the Board of Education, Appeal No. 21-069, the parents sent a request for services prior to the June first deadline to the nonpublic school district of location (see Application of the Bd. of Educ., Appeal No. 21-069). After the June first notice, and due to no fault of the parents, the nonpublic school decided to relocate outside of that district of location to a larger building to comply with COVID-19 safety precautions and the parents sent a new written notice to the new district of location (id.). The new district of location declined to convene and create an IESP because the parents did not comply with the June first deadline (id.). The SRO in that matter upheld the IHO's determination that the new district of location had to provide services to the student because the parents had initially complied with § 3602-c and provided a written request to the original district of location (id.). That appeal is unlike this proceeding because there is no evidence in the hearing record that the parent ever requested services prior to June first of the 2022-23 school year.

The parent argues that the dismissal of her August 8, 2022 due process complaint notice pursuant to § 3602-c contradicts the "clear provisions" set forth in 8 NYCRR 200.5[i][6] because her due process complaint notice was facially sufficient. However, in this matter the IHO did not dismiss the due process complaint notice because the parent failed to satisfy the statutory requirements for a due process complaint notice pursuant to 8 NYCRR 200.5[i][1]. Generally, if there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint notice must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]). In this matter, the district never took issue with the sufficiency of the parent's due process complaint notice and the IHO found the due process complaint notice to be sufficient as the parties did proceed to an impartial hearing on the merits of the parent's claims (see Tr. pp. 1-54). Ultimately, the IHO dismissed the parent's due process

complaint notice for her failure to comply with the June first deadline pursuant to Education Law § 3602-c, not for a failure to satisfy the statutory requirements for a due process complaint notice and thus this argument must fail (see IHO Decision at p. 7).

As previously discussed above, at the first impartial hearing held on February 21, 2023, the district specifically argued that the parent did not send a written request for services by the June first deadline in its opening statement (see Tr. pp. 28-29). The parent did not address the district's argument and instead argued that it was the district's burden to prove that the parent did not meet the June first deadline (see generally Tr. pp. 1-54). The IHO found that the parent's statement that she sent a ten-day notice letter in September 2022 was a confession that she did not comply with the June first deadline (IHO Decision at p. 7). On appeal, the parent asserts that her affidavit "made no mention at all" of when she requested special education services and "merely stated" when she sent a ten-day notice letter (Req. for Rev. at p. 4). Based on the foregoing and because there is no evidence that the parent requested services from the district at any time prior to June 1, 2022, I find that the parent's failure to indicate that she requested equitable services prior to June first amounts to an admission to the fact that she did not timely request services.[7]

Based on the above, I do not find that the district waived the June first deadline defense through its conduct. However, as stated above, the district is reminded that it must respond to a parent's due process complaint notice within 10 days of receipt if it has not yet sent the parent prior written notice regarding the subject matter of the parent's due process complaint notice (8 NYCRR 200.5[i][4]).

Next, the parent argues that the § 3602-c provision must be considered in connection with the district's standard operating procedures manual (SOPM). More specifically, according to the district's SOPM, the CSE sends a request for special education services form to the parents of parentally placed students by April first every school year. The parent alleges she was never received such a form from the district and was not informed by the district that she was required to request services by June first. As identified by the district in its answer, there is no similar requirement set forth in State or federal regulations mandating the district to send a request for special education services form to the parents of students with IESPs by April first every year and, generally, defects arising out of the SOPM that do not also constitute a violation of State or federal laws and policy do not appear to constitute a deprivation of a FAPE or a denial of equitable services (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *9-*10 [S.D.N.Y. Aug. 27, 2010]). Additionally, the Commissioner of Education has previously addressed this issue and determined that a parent's lack of awareness of the June first statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June first deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the

[7] Here, the parent offered no additional documentary evidence with her request for review to contradict the district's argument that the parent did not timely request services by the June first deadline (see 34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]).

waiver of the statutory deadline for dual enrollment applications (Appeal of Austin). As a result, even if the district violated its policy as articulated by the parent, a violation of the district's policy or SOPM, standing alone, would not constitute a per se failure to offer the student a FAPE. Consequently, the parent's argument thereto must be dismissed.

Further, the parent argues that State law does not specify consequences for failing to abide by the June first deadline. In fact, Education Law § 3602-c 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 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.). As argued by the district in its answer, the statute does provide a consequence if a parent fails to timely request services by June first – the district will not be required to develop an IESP or provide special education to a parentally placed student (see Educ. Law § 3602-c[2][a]).

Lastly, the parent argues that the district went to court with "unclean hands" and should be estopped from raising the June first deadline as a timing defense (Req. for Rev. at p. 8). The parent argues that the district's failure to convene "an IEP meeting" for the 2022-23 school year, in itself, should result in a denial of FAPE for that school year because it never notified her of her parental rights or the June first deadline. However, the parent's argument about the district's obligation to annually review the student's IEP and to provide prior written notice conflates the district's obligations under the IDEA with the requirements of Education Law § 3602-c in an effort to excuse the parent's failure to comply with Education Law § 3602-c. Here, the IHO found that the parent did not request services in accordance with Education Law § 3602-c. When the parent's failure to make a written request for IESP services in a manner consistent with State law was 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, 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" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]). 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]). Here, upon review of the parent's due process complaint notice, it does not appear that the parent sought a public placement for the student (see Parent Ex. A). Nevertheless, the district should convene a CSE to further determine the parent's intentions and, if the parent desires, develop an IEP for the student for placement in the district public schools.

Based on the foregoing, there is no basis to disturb the IHO's determinations that the parent was required to file a request for equitable services prior to June 1, 2022 for the 2022-23 school

year and that, because there was no evidence or arguments made that the parent provided such a notice, she was not entitled to the relief sought.

VII. Conclusion

Based on the foregoing, the IHO correctly determined that the parent failed to provide timely written notice of a request for equitable services by June 1, 2022 for the 2022-23 school year. The IHO's dismissal of the parent's due process complaint notice is affirmed.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 25, 2023

STEVEN KROLAK
STATE REVIEW OFFICER