The University of the State of New York

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

No. 23-118

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the parent failed to timely request equitable services pursuant to New York State Education Law § 3602-c for the 2022-23 school year and dismissed the parent's due process complaint notice with prejudice. Respondent (the district) cross-appeals from the IHO's failure to determine that the services privately obtained by the parent for her daughter for the 2022-23 school year were not appropriate. The appeal must be dismissed. The cross-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

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 March 4, 2019 to develop an individualized education services program (IESP) for the student to be implemented on March 5, 2019 (Parent Ex. B at pp. 1, 2, 5, 8). The March 2019 CSE found the student eligible for special education and related services as a student with a learning disability and recommended that the student receive five periods per week of direct, individual special education teacher support services (SETSS) in English (id. at pp. 1, 5).[1, 2]

The parent entered into an agreement with Special Edge Support, LLC (Special Edge), dated July 1, 2022, for the agency's provision of SETSS to the student for the 2022-23 school year (Parent Ex. D at pp. 1, 3).

The student began receiving five hours per week of SETSS from a provider employed by Special Edge on March 1, 2023 (Parent Ex. E at ¶¶ 2, 4, 5).

On the same day, by letter dated March 1, 2023, the parent advised the district that it had failed to assign a provider for the services mandated in the student's IESP for the 2022-23 school year (Parent Ex. C at p. 1). The parent requested that the district provide the services recommended and if the district failed to do so, the parent provided ten-day written notice of her intent to unilaterally obtain a private provider to implement the services (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated March 1, 2023, the parent asserted that, for the 2022-23 school year, the district failed to supply providers for the services recommended in the March 2019 IESP and failed to inform the parent how the services would be implemented (Parent Ex. A at p. 1). The parent further alleged that the district improperly shifted the burden and responsibility of locating providers for the student's services to the parent, that in preparing for the 2022-23 school year the parent attempted to locate a provider at the district's published rates, and that despite her efforts she was unable to locate a provider for the student (id.). Thus, according to the parent, she had no choice but to retain the services of an agency to provide the mandated SETSS services at an enhanced rate (id.). The parent further alleged that the district failed to offer

[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] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

the student a free appropriate public education (FAPE) by failing to arrange for a SETSS provider for the student for the 2022-23 school year and that the district's failure to implement the student's services denied the student's right to equitable special education services (id. at pp. 1-2). The parent also asserted a right to pendency based on the March 2019 IESP, which recommended five periods per week of SETSS (id. at p. 2).

As relief, the parent requested a pendency hearing and order, a declaratory judgment that the district failed to provide the student a FAPE and failed to provide the student with equitable services, an award of funding for five periods per week of SETSS at an enhanced rate for the 2022-23 school year, and an award of "all related services set forth on the [s]tudent's last IESP" for the 2022-23 school year (Parent Ex. A at p. 2).[3]

B. Impartial Hearing Officer Decision

After a prehearing conference on April 3, 2023, and two separate status conferences on April 27, 2023, the parties convened for an impartial hearing on May 9, 2023 (Apr. 3, 2023 Tr. pp. 1-9; Apr. 27, 2023 Tr. pp. 1-24; May 9, 2023 Tr. pp. 1-29).[4] By decision dated May 12, 2023, the IHO found that the parent was required to request equitable services from the district by June 1, 2022 and that the failure to do so constituted a bar to the parent's requested relief (IHO Decision at pp. 5, 6). In making the determination, the IHO reviewed a memorandum in support of a 2004 amendment to Education Law section 3602-c and found that the plain meaning of the statute required a parent to request equitable services by June 1 of the year in which the parent seeks services (id. at pp. 5-6). The IHO further found that the parent did not request services for the 2022-23 school year until March 1, 2023, and that the district had not waived the June 1st deadline (id. at p. 6). The IHO recounted the parent's four arguments for the proposition that June 1st was not a prerequisite for receiving equitable services and found all of them unpersuasive (id.). For those reasons, the IHO dismissed the parent's March 1, 2023 due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO misconstrued the facts and the law and that the IHO's decision should be reversed. The parent asserts that the burden of proving that the parent did not provide a written request for equitable services by June 1st was on the district and the IHO's reliance on only the evidence submitted by the parent was error. The parent next alleges that she did not concede on the record that she failed to provide written notice to the district by June 1, 2022, and that the IHO erred by assuming that the parent's ten-day written notice to the district was the only letter the parent sent to the district. Accordingly, the parent asserts that the lack of written notice in the hearing record does not meet the district's burden of demonstrating that the parent did not provide written notice of a request for equitable services.

[3] The March 2019 IESP did not recommend any related services (Parent Ex. B at pp. 5-6).

[4] The transcripts were not paginated consecutively. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

The parent further argues that the district has not conducted an annual review or developed an individualized education program (IEP) for the student for the 2022-23 school year; therefore, the parent contends any lack of notice was the district's fault and she cannot be found to be untimely in requesting services to continue for the 2022-23 school year. Further, the parent asserts that, had the district complied with its obligations, it would have known that the parent wanted equitable services for the 2022-23 school year. The parent also argues that Education Law § 3602-c does not require a parent to request services every June 1st and that the statute only requires a written request for services for the first year in which the parent requests services.

Next the parent asserts that the district was required to raise the defense of the June 1st notice requirement in its response to the parent's due process complaint notice or else the district should be deemed to have waived the defense. The parent also argues that Education Law § 3602-c does not set forth consequences for the failure to provide a written request for equitable services by June 1st. For all of these reasons, the parent argues that the IHO's interpretation of Education Law § 3602-c must be rejected and the IHO's decision must be reversed.

Finally, the parent alleges that the district is required to fund the services obtained by the parent for the 2022-23 school year and that the district should be ordered to directly fund Special Edge at enhanced market rates. The parent next argues that use of a Burlington/Carter analysis in cases involving the district's failure to implement an IESP is not based on binding legal precedent and violates Education Law § 4404(1)(c) by shifting the burden to the parent. In the alternative, the parent argues that she is entitled to her requested relief under a Burlington/Carter analysis. As relief, the parent requests direct funding of the cost of the student's receipt of five hours per week of SETSS for the 2022-23 school year at enhanced market rates or in the alternative, reversal of the IHO's dismissal of the due process complaint notice and remand to the IHO to hold further proceedings.

In an answer and cross-appeal, the district denies the parent's claims and argues that the IHO applied the correct legal standards and correctly found that the parent's failure to provide a written request for equitable services by June 1, 2022 barred the parent's requested relief. The district further asserts that the IHO correctly found that the parent did not dispute the fact that she had failed to send a written request to the district by June 1, 2022. The district claims that the parent's counsel implicitly conceded this fact when, in response to the IHO, he gave four meritless reasons during the hearing why the parent was not required to comply with the June 1st deadline, stating in conclusion that the lack of a June 1st letter was immaterial. The district further asserts that the IHO drew a fair inference from these statements that the parent conceded that a timely request for equitable services was not made. The district also alleges that the parent was aware that the June 1st notice would be an issue at the impartial hearing because the district and the IHO discussed the issue repeatedly at the status conferences. The district asserts that the parent's argument that she did not concede the lack of a June 1st written notice is contradicted by the hearing record and the only evidence of a request for services is the March 1, 2023 ten-day notice letter. The district further contends that no exceptions to the June 1st notice requirement apply to the student in this matter. Next, the district contends that the parent has raised five meritless arguments on appeal and addresses each of them.

As a cross-appeal, the district alleges the parent failed to meet her burden that the privately obtained services were appropriate and that the parent failed to demonstrate a financial obligation

to the provider. As relief, the district requests that the parent's request for review be dismissed and that the cross-appeal be sustained.

In a reply and answer to the cross-appeal, the parent denies the district's allegations and reasserts the arguments made in the request for review. The parent also asserts that the student is entitled to pendency regardless of the issue regarding the requirement for written notice by June 1, 2022.[5] As relief, the parent requests reversal of the IHO's dismissal of the parent's due process complaint notice, an award of direct funding of the cost of the student's five hours per week of SETSS for the 2022-23 school year at an enhanced market rate, and in the alternative a remand to the IHO to hold further proceedings.

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]).[6] "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

[5] Although the parent requested a pendency hearing in the due process complaint notice, the parent did not request a pendency hearing or request an order on pendency from the IHO during any of the hearing dates (Apr. 3, 2023 Tr. pp. 1-9; Apr. 27, 2023 Tr. pp. 1-24; May 9, 2023 Tr. pp. 1-29). Further, despite the parent's allegations to the contrary (see Reply& Answer to Cr.-Appeal ¶ 23), there is no evidence of an agreement between the parties regarding pendency. On the contrary, the district's representative at the impartial hearing indicated that there was no pendency in place for this student (May 9, 2023 Tr. p. 17). Accordingly, while the parent asserts the student's entitlement to pendency in accordance with the May 2019 IESP, the hearing record is not developed on this point. Thus, absent evidence of the parties purported agreement to which the parent refers, I decline to opine about the student's entitlement to services as part of a stay-put placement as an alternative basis to award the parent the relief sought.

[6] 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]).

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.).[7]

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 based on the parent's failure to timely file a written request for services under the State's dual enrollment statute for the 2022-23 school year.

As noted above, 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]).

Before addressing the parties' arguments, the manner in which the issue was raised and addressed at the impartial hearing will frame the discussion. During the April 27, 2023 status conference, the district's attorney stated that, upon review, the matter would not be settled and the district would be requesting a subpoena to verify that the services had been provided and that the parent had actually requested the services (Apr. 27, 2023 Tr. p. 5). The district's attorney noted that the last developed IESP for the student was the March 2019 IESP and further stated that "there would be an issue over whether the parent had requested the equitable services on or before June 1st, 2022-2023 school year" (Apr. 27, 2023 Tr. p. 16).

With regard to the June 1st deadline, the IHO stated, "that's a factual issue . . . you've raised it now at the status conference. So, [the parent's attorney] should anticipate that that would be an issue at the hearing" (Apr. 27, 2023 Tr. p. 17). After discussing the district's request for a subpoena directed to the student's provider, the IHO indicated that she was not inclined to sign a subpoena and again informed counsel for the parent that "[the district] did raise the June 1st deadline, so that's something that would have to be addressed at the hearing" (Apr. 27, 2023 Tr. pp. 18-20).

[7] 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 district's attorney then requested a subpoena for the parent's testimony, to which the parent's attorney responded that the parent was generally required to attend the hearing and therefore a subpoena was not necessary (Apr. 27, 2023 Tr. p. 20). After receiving assurances that the parent would attend the impartial hearing, the district then indicated that it would not be calling any witnesses, "our argument is going to be a legal argument based on the June 1st issue . . . but there's no dispute that the student was not provided the services in the 2019 IESP for the 2022-23 school year" (Apr. 27, 2023 Tr. p. 22). The IHO then asked that "both sides . . . be prepared with case law in support of [their] respective positions" (id.).

At the impartial hearing held on May 9, 2023, the district's and the parent's attorneys, respectively, identified their positions regarding the June 1st deadline in their opening and closing statements (May 9, 2023 Tr. pp. 6-9, 16-25).

Initially, regarding the district raising the issue of the notice, as noted in prior SRO decisions, the issue of the June 1st 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"]). As further noted in prior SRO decisions, the June 1st deadline may be waived; however, the mere failure to raise it in a response to the parent's due process complaint notice is not a waiver, especially here where the parent was notified that it was at issue during a status conference prior to the commencement of the merits portion of the impartial hearing (see e.g., Application of a Student with a Disability, Appeal No. 23-032).

Turning to parent's argument about the burden of proof regarding whether the parent provided a written request for equitable services by June 1st, 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).

While a school district carries the burden of proof at the impartial hearing, here the parent was the individual in whose custody and control the purported notice would have rested. The district sought to subpoena the parent to solicit evidence about the June 1st notice and the parent's attorney made assurances that a subpoena would not be necessary as the parent would attend the

final hearing date (Apr. 27, 2023 Tr. pp. 5, 20, 22). Without explanation, however, the parent did not attend the impartial hearing (see May 9, 2023 Tr. pp. 1-29). Further, the parent, through her attorney, did not deny that no request for equitable services was submitted to the district prior to June 1st despite the IHO's repeated warnings that the factual question was an issue that she expected the parent to address at the impartial hearing (see Apr. 27, 2023 Tr. pp. 17-20, 22). Similarly, on appeal, the parent also does not affirmatively assert or argue that she did provide timely notice but alleges that the IHO erred in her findings. Under the circumstances, I do not find that the IHO improperly shifted the burden of proof to the parent.

Thus, the hearing record contains no evidence satisfying the requirement under Education Law § 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding the 2022-23 school year (see generally Apr. 3, 2023 Tr. pp. 1-9; Apr. 27, 2023 Tr. pp. 1-24; May 9, 2023 Tr. pp. 1-29; Parent Exs. A-E).[8]

The parent also argues that she was not required to submit a request for equitable services. 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 equitable 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

[8] As noted in prior matters, 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, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). 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. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf). During the impartial hearing, the parent's attorney seemed to indicate that the district's actions in other matters could be implied to waive the June 1 deadline for this student (see Tr. pp. 7-8, 24-25). However, the parent did not present evidence in support of this argument and has not pursued this argument on appeal. Accordingly, there is no need to further discuss it.

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 ever sought a public placement for the student (see Parent Ex. A).

Next, the parent asserts that Education Law § 3602-c does not require that a written request for services be filed "every June 1 prior to a school year" but instead only requires the notice for the first school year in which such services are requested. However, this argument is in direct contravention of the requirement set forth in Education Law § 3602-c, which states that the request be filed "on or before the first of June preceding the school year for which the request is made" (Educ. Law § 3602-c[2][a] [emphasis added]). The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services.

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 that the parent provided such 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 with prejudice 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.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 7, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER