The University of the State of New York

The State Education Department
State Review Officer
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No. 23-121

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 Nate Munk, 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 held that the district did not deny her daughter a free appropriate public education (FAPE) for the 2022-23 school year and denied the parent's requested relief. The respondent (the district) cross appeals the IHO's determination that the parent was entitled to a due process hearing. The appeal and the cross appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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 § 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, incorporated among the procedural protections 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 detailed facts and procedural history of the case and the IHO's decision will not be recited here. Briefly, the CSE convened on February 28, 2018, to formulate the student's individualized education services program (IESP) for the 2018-19 school year in which the student was transitioning to school-age programming (see generally Parent Ex. B). The student continued to be parentally placed in a private school for her first, second and third grade years (Tr. pp. 34, 36, 50-51, 54-55). According to the parent, the student's third grade teachers realized in the middle of the year that the student

was not receiving special education services and brought it to the parent's attention (Tr. p. 34). During the student's third grade year, the parent filed a ten-day notice dated January 12, 2023, notifying the district that per the "most recent [individualized education program] meeting" the student had been recommended SETSS and related services, that she intended to "implement the IEP" on her own and "seek reimbursement or direct payment" from the district and identified the student's parochial school (see Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice, dated January 12, 2023, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 2). The parent requested pendency based on the student's February 28, 2018 IESP, which constituted the student's last agreed upon program consisting of five periods per week of group SETSS in English and three 30-minute sessions per week of individual speech language therapy services in English (id.; see Parent Ex. B. at p. 7).

The parent explained that the student was parentally placed in a private school for the 2022-23 school year but alleged that the district failed to convene the CSE to create a new IESP since February 2018 and that the student's 2018 IESP was outdated (Parent Ex. A at pp. 1, 2). The parent asserted that the district's delay in convening the CSE was a denial of a FAPE (id. at p. 2). The parent argued that the district failed to implement the services in the February 2018 IESP and that the only service providers that the parent was able to locate independently for the 2022-23 school year charge more than the prevailing rate (id.). As relief, the parent requested: a finding that the district's failure to convene the CSE since 2018 denied the student a FAPE; an order directing the district to fund the program outlined in the February 2018 IESP at prevailing provider rates; and an award of a bank of compensatory services for the student 2022-23 school year should the district fail to implement "pendency for the entire 2022-23 school year—or the parts of which were not serviced" (id. at p. 3).

B. Impartial Hearing Officer Decision

On February 10, 2023, the IHO directed the parties to submit to each other and to the IHO their opening statements in writing, their proposed disclosures and a prehearing memorandum of law five days before the hearing date (IHO Ex. I at p. 1). On February 14, 2023, the IHO issued an order to show cause to the parties regarding pendency, to which the district failed to respond (IHO Decision at p. 2; IHO Ex. II at pp. 3-5).[1] The IHO issued an interim decision regarding pendency dated March 2, 2023 (IHO Decision at p. 2; IHO Ex. II at p. 6). On March 17, 2023, the IHO conducted a prehearing conference in which she again notified the parties that they were to submit a prehearing memorandum of law five days before the hearing (Tr. pp. 4-5).

[1] The IHO noted that an impartial hearing consultant from the district had not been assigned to the case until after the deadline of the IHO's order to show cause and that another impartial hearing consultant had responded to "some, but not all, of the Orders to Show served on 02/14/2023" (IHO Decision at p. 2). The IHO used a process of sending documents to multiple recipients in multiple due process proceedings involving different students in a single e-mail, sometimes with a list of tabulated material, and the recipients were responsible to parse which documents belong to the appropriate proceeding; although unclear, the common thread may be that counsel for the parent was involved in all of the proceedings (IHO Ex. 1 at pp. 2-3; II at pp. 1, 5).

On March 22, 2023, a hearing on the merits was apparently scheduled together with other due process proceedings between 9:30 AM and 1:30 PM, but neither party had submitted the required opening statements and memorandum of law to the IHO and, therefore, the IHO seemed to use the time as a prehearing conference (IHO Ex. I at p. 1). The IHO granted an extension of time to give both sides the opportunity to serve disclosures, opening statements and a memorandum of law upon each other before the next scheduled hearing (id. at pp. 13, 15). It appears that both parties consented to the extension (id. at p. 15).[2] The IHO informed the parties that "any defense [that] is not included, [in] the memorandum of law shall be deemed waived" (id. at pp. 4-5). On April 13, 2023, the district submitted an opening statement, memorandum of law, and the district's disclosures (IHO Ex. III at p. 2; see SRO Exs. 1; 2).[3] The parent submitted an undated, unsigned opening statement and an undated memorandum of law in an email dated April 14, 2023 (IHO Ex. III at p. 4; see SRO Exs. 3; 4).

On April 20, 2023, the parties proceeded to an impartial hearing that included testimony from two witnesses and concluded that day (Tr. pp. 24-67). In her direct testimony by affidavit, the parent testified that she privately contracted with Step Forward to provide five hours per week of SETSS for the student "for the duration of the 2022-23 school year" and sought payment from the district for these services at a "reasonable market rate" and that the district should "fund the other related services for the rest of the school year, as per the IESP dated 2/28/2018" (Parent Ex. D at ¶¶ 6-11). The educational director from Step Forward testified that a special education teacher from Step Forward provided the student with 1:1 SETSS in pull-out sessions at the student's private school (Parent Ex. E at ¶¶ 13-21).

In a final decision dated May 15, 2023, the IHO noted the district's defense in its prehearing papers that the student was not entitled to dual enrollment services under Education Law § 3602-c first because the parent in this case failed to submit a request for such services on or before June 1, 2022, and second because parents as a general matter are not permitted to seek a due process hearing regarding the implementation of students' special education services under Education Law § 3602-c (IHO Decision at p. 3).

The IHO rejected the district's second argument that the parent was precluded from seeking a due process hearing (id. at pp. 13-15, 17). However, the IHO held that the district did not waive its June 1 defense under Education Law § 3602-c and that the parent failed to notify the district of her request for IESP services prior to the June 1 deadline (id. at pp. 6-7). The IHO determined that the 10-day notice of unilateral placement dated January 12, 2023 did not satisfy Education

[2] The March 22, 2023 prehearing conference, referred to by the IHO as an "omnibus" conference (Tr. p. 4), addressed matters in approximately seventeen separate proceedings (Tr. pp 4, 12-19). It is extremely difficult to follow which parts of the discussion on particular topics such as subpoenas, scheduling, enforcement, notarizations, and five-day disclosure applied to the particular proceeding involving this student.

[3] The IHO marked only the emails from the parties as IHO exhibits and did not identify the parties' actual submissions. Upon submitting the hearing record to the Office of State Review district duly adhered to State regulation that require "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" be deemed part of the hearing record (8 NYCRR 200.5[j][5][vi][b]). The undersigned has marked four of the documents as follows: SRO Exhibit 1 is the District's prehearing Memorandum of Law; SRO Exhibit 2 is the District's Opening Statement; SRO Exhibit 3 is the Parent's prehearing Memorandum of Law; and SRO Exhibit 4 is Parent's Opening Statement.

Law § 3602-c's statutory notice requirements and that duly enrolled students do not have a right to an annual review absent a parental request made by the parent by June 1 for each upcoming school year (id. at pp. 17, 19). The IHO noted that the district timely served its memorandum of law and that the parent had the opportunity to respond to the district's defense (id. at p. 20). The IHO held that the district was not obligated to implement the requested services or to provide the parentally placed student with a FAPE for the 2022-23 school year because the parent failed to comply with Education Law § 3602-c's June 1 notice requirement (id. at p. 21). The IHO also made an alternative finding that even if the parent had provided notice prior to the June 1 deadline, she would nevertheless have denied the parent's requested relief because Step Forward did not render services in "group sessions in a general education classroom" (id. at p. 20).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred because the district waived its June 1 notice defense under Education Law § 3602-c by failing to raise it at the initial March 22, 2023 hearing and that the IHO's denial of the parent's requested relief was based on the district's untimely defense. The parent asserts that the district failed to meet its burden of proof regarding the parent's alleged failure to comply with the June 1 notice. The parent argues that district failed to send the parent a request for special education services form by April 1 in accordance with a district procedural manual and the provision in State law. With regard to the IHO's alternative finding, the parent alleges that the IHO erred by not applying the Burlington-Carter analysis to this case, that the district's failure to reconvene the CSE for the 2022-23 school year was a denial of a FAPE, that Step Forward was not required to provide the services in a group setting at the student's private school, and that equitable considerations favored the parent. As relief, the parent requests that the district be ordered to "reimburse the SETSS and the related services at the reasonable market rate with direct payment to [Step Forward]" (Answer to Cross Appeal at p. 10).

In an answer and cross-appeal, the district responds to the parent's allegations and generally argues to uphold the IHO's decision that the district did not deny the student a FAPE for the 2022-23 school year. More specifically, the district argues that federal law carves out an exception to due process rights for those students who are dually enrolled. The district alleges that the State Legislature never intended for IESPs to be treated similarly to IEPs as demonstrated by the fact that the State Legislature separated IEPs from IESPs within the Education Law, placed limitations concerning due process, and did not include cross-references in the Education Law to allow for pendency for matters concerning IESPs. The district cross appeals, alleging that dually enrolled students are not entitled to due process rights under the IDEA. As relief, the district seeks dismissal of the parent's appeal and that the IHO's decision be sustained.

The parent filed a combined answer to cross appeal and reply, asserting that the IHO correctly determined that the student was entitled to due process under the IDEA even though she was dually enrolled. The parent argues that the district should have reconvened the CSE to create a new IEP even though the parent did not comply with the June 1 provision of Education Law § 3602-c. The parent reiterates student's individual SETSS services were appropriate for the student.

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 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]).

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[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.).

VI. Discussion

A. Conduct of Impartial Hearing

Turning first to the parent's allegations regarding the hearing process and contention that the IHO erred in allowing the district to proceed with its June 1 deadline defense at the April 20, 2023 hearing, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

A review of the hearing record reveals that both parties were unprepared for the March 22, 2023 hearing and that they consented on the record to allow additional time each other to present defenses, memorandum of law, and opening statements (Tr. pp. 4-5, 15; March 22, 2023 Extension Order). According to the hearing record, the district provided the parent with its disclosure, opening statement and memorandum of law via email dated April 13, 2023, a week before the April 20, 2023 hearing, and these documents notified the parent days before the hearing that the district "intended to rely on the June 1st defense" (IHO Ex. III at p. 2; see SRO Exs. 1;2), accordingly the parent had ample notice.[6] This is not a case of sandbagging the opposing party or litigation by ambush; the parent had the opportunity to respond with documentation establishing that she provided the district a written request for dual enrollment services before the June 1 deadline. That the parent was unable to produce such an exhibit cannot be deemed to be because they had no notice of the district's June 1 defense. It was also not inappropriate for the IHO to require the district to raise the issue of the parent's § 3602-c statutory notice as a defense and then provide the parent the opportunity to respond with evidence showing compliance because the document and its timing of its submission is the type of information that would tend to be primarily in the control of the parent, and the district should not be required to prove the nonexistence of a notice that is the parent's obligation to provide. As such, the IHO did not abuse her discretion in the conduct of the hearing and properly held that the district did not waive the June 1 notice defense, and I do not find that the IHO improperly shifted the burden of proof to the parent.

[6] The district's written opening statement dated April 13, 2023 states that "[p]arents have an affirmative obligation to request [equitable] services from the district for each new school year – no later than June 1 of the proceeding school year. No evidence has been provided showing that a request was made by the [p]arent prior to this date" (SRO Ex. 2 at p. 2).

B. Implementation of Equitable Services and Pendency

With regard to the merits of the parties' dispute, the district asserts as a threshold issue that the student does not have a right to due process or pendency under either federal or State law. Initially, the district asserts that federal regulations provide that, except for child find obligations, the procedures governing the procedural safeguards notice, mediation, and due process rights, do not apply to complaints that a district failed to meet the requirements regarding the provision of equitable services for students parentally-placed in nonpublic schools (see 34 CFR 300.132-300.139; 300.140[a][1]; 300.504-300.519). The district further references Education Law § 3602-c, stating that State law limits due process for disputes regarding IESPs under Education Law § 4404, in that it does not contain any language relating to disputes concerning the implementation of an IESP. By extension, the district argues that the State legislature did not intend for IESPs to be treated similarly to IEPs and that Education Law § 3602-c precludes a parent from seeking pendency in a dispute relating to implementation of an IESP.

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, as noted by the district, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not have a services plan developed pursuant to the federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to the federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment 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]). For requests pursuant to § 3602-c, 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.).[7] Thus, the State law

[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

dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

The district alleges that the State Legislature intended to place limits within Education Law § 3602-c concerning the availability of due process mechanisms. However, a review of Education Law § 3602-c and § 4404 and the legislative history behind the adoption and amendment of those statutes highlights the true intent of the State Legislature.

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law § 4410[1][a]; see 20 U.S.C. § 1415[b][6]). Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further 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]). The district argues that the language omits disputes concerning implementation of IESPs.

In 2004, the State Legislature amended subdivision two of the Education Law § 3602-c, to take effect June 1, 2005 (see L. 2004, ch. 474 § 2 [Sept. 21, 2004]). Prior to such date, the subdivision read in part:

> Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an

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.).

> appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 [June 6, 1990] [emphasis added]). The amendments that became effective on June 1, 2005, removed the last sentence of subdivision two relating to the review of a board of education's failure or refusal to provide equitable services by the Commissioner (L. 2004, ch. 474 § 2).

A review of the statute's history and the New York State Assembly Memorandum in Support of Legislation shows that the Legislature intended to remove the language that an appeal to the Commissioner of Education under Education Law § 310 was the exclusive vehicle for review of the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c, given that the earlier sentence in subdivision two of such section authorized review by an SRO from a district CSE's determination in accordance with Education Law § 4404 (Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). The Memorandum explains further:

> The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.

(Sponsor's Memo., Bill Jacket, L. 2004, ch. 474).

Thus, the amendments made by the State Legislature were intended to clarify the forum where disputes could be brought, not to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404.

Since then the State Department of Education issued guidance further interpreting Education Law § 3602-c after legislative amendments in 2007 took effect, which provides that "[a] parent of a student who is a [New York State] resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or the provision of special education services may submit a Due Process Complaint Notice to the school district of location" ("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 3206-c," Attachment 1 at p. 5, VESID Mem. [Sept. 2007] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/ policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf; see Answer ¶ 4). The State guidance further supports the conclusion that disputes about implementation of IESPs are to be reviewed in due process proceedings alongside disputes about development of and recommendations contained within IESPs.

Based on the above, I am unpersuaded by the district's argument that a student who has an IESP pursuant to New York State's dual enrollment statute has no right to due process – and thus pendency - when seeking to challenge the district's implementation of the plan. As indicated above, in 2004 the State Legislature removed the requirement that the Commissioner of Education had to review claims regarding the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c and, instead, left a cross-reference to Education Law § 4404 as the vessel for review for such claims (see L. 2004, ch. 474 § 2). Section 3602-c provides for review of IESPs pursuant to § 4404, and Education Law § 4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]; Application of a Student with a Disability, Appeal No. 17-034).

C. June 1 Deadline

The core issue challenged by the parent is whether the IHO erred in dismissing the parent's due process complaint notice with prejudice for failing to timely file a written request for services under Education Law Section 3602-c for the 2022-23 school year by the June 1 deadline. The parent argues that because the district did not follow its own standard operating procedure manual by failing to provide the parent with a form to request special education services by April 1, 2022, the parent was unaware of the June 1 deadline and thus should be excused for not notifying the district of their request for special education services before the June 1 deadline (see Tr. pp. 62-64).

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file 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 (Educ. Law § 3602-c[2]). In this case, there is no evidence in the hearing record showing that the parent complied with the notice requirement on or before June 1, 2022, and on appeal the parent does not even assert that she provided timely notice but merely alleges that the IHO erred in her findings on this point. The manual referenced by the parent to counter the district's argument does not appear in the hearing record.[8] Even if it had, the thrust of the argument is that it would excuse the parent's compliance with the June 1 deadline due to a lack of knowledge of the requirement; however, that would not relieve the parent of the notice obligation under the statute. The Commissioner of Education has previously addressed this issue and

[8] As it appeared between April 1, 2022 and June 1, 2022.

determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 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 waiver of the statutory deadline for dual enrollment applications (Appeal of Austin). The parent's challenge to the IHO's decision on this basis is without merit.

Last, the parent's request for review also contains an allegation that the CSE delayed convening to create an IEP for student, which would be the type of planning document used by the parent to enroll the student in the public school. However, throughout the proceeding the parent made it sufficiently clear that she was seeking IESP services for her daughter at the private school, and I see no evidence of a desire on the part of the parent to place the student in the public school with IEP services. There is a paucity of evidence in the hearing record regarding these arguments, and the hearing record was not developed by either side on this issue. There is no evidence that the parent was anything other than silent since the 2018 IEP and the student's third grade school year in the parochial school. Assuming without deciding that the district was obligated to develop a public school IEP for the student but failed to do so, I would not permit the parent to seek IESP services as equitable relief and evade the requirements discussed above.[9] If the parent seeks

[9] The United States Department of Education posed the following interpretive guidance:

> If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?
>
> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "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. 12 available at https://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). 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. On the one hand, its is clear that a district violates the IDEA by refusing to convene an IEP meeting when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. V. Lua, 832 F. App'x 493, 496 [9th Cir. 2020]). In another instance, 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

services pursuant to an IEP, the parent may at any time request the CSE to convene and develop a proposed IEP for the student for placement in the public school.

VII. Conclusion

Based on the foregoing, the IHO did not err in finding that the district did not waive its June 1 defense and that the parent was not entitled to the requested relief for the 2022-23 school year.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

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]).