The University of the State of New York

The State Education Department
State Review Officer
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No. 24-093

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 Cynthia Sheps, 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 the decision of an impartial hearing officer (IHO) which determined that he failed to timely request equitable services from respondent (the district) pursuant to Education Law § 3602-c for the 2023-24 school year and denied his request that the district fund his daughter's private special education services delivered by Always a Step Ahead Inc. (Step Ahead) for the 2023-24 school year. 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 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 § 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, 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 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 in detail. Briefly, a CSE convened on September 24, 2020, to formulate the student's IESP for the 2020-21 school year (see generally IHO Ex. I). Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended that she receive two 30-minute sessions per week of group speech-language therapy, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (id.).[1]

On December 12, 2023, the parent signed a letter acknowledging that the student was receiving special education teacher support services (SETSS) from a private agency, Always a Step Ahead Inc. (Step Ahead), at a specified rate "and that if the [district] d[id] not pay for the services, [he] w[ould] be liable to pay them" (Parent Ex. E).[2] According to a case manager from Step Ahead, the agency was providing the student direct speech services and the parent was requesting OT but a provider "ha[d] not yet been located" (Parent Ex. F).

In a due process complaint notice, dated December 4, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to provide special education and related service providers to the student (Parent Ex. A at p.1). The parent asserted he was unable to locate service providers on his own at the district's standard rates for the 2023-24 school year and the district failed to provide those services in accordance with the IESP (id.). The parent sought an order requiring the district to continue the student's services and an award of speech language therapy for one 30-minute individual session per week and two 30-minute group sessions per week and OT for two 30-minute sessions per week at the "enhanced rates" for the entire 2023-24 school year (id. at p. 2). The parent further requested an "allowance of funding" for payment to the student's providers/agencies for the provision of the services he sought to be awarded (id.).

After a prehearing conference on January 18, 2024, an impartial hearing convened on February 1, 2024 and concluded on February 5, 2024 (Tr. pp. 1-76). The IHO granted an adjournment at the February 1, 2024 hearing to allow the parent an opportunity to testify because the parent did not appear during the first hearing (Tr. pp. 11-75). The parent did not appear on February 5, 2024, after additional time was given to allow the parent's representative to attempt to arrange for his testimony (Tr. pp. 50-53).

In a final decision dated February 8, 2024, the IHO recited the legal standards under Education Law § 3602-c, including that the statute requires a parent to "file a written request for services 'on or before the first of June preceding the school year for which the request is made'" (IHO Decision at pp. 5-6). According to the IHO, the State statutory June 1 deadline for requesting

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] Step Ahead has not been approved by the Commissioner of Education as a private school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

equitable services is an affirmative defense and the district bears the burden of proof and persuasion (id. at p. 6). The IHO found that the parent was on notice that the affirmative defense would be raised at the hearing because the district's attorney asserted it at the prehearing conference and in his opening statement (id. at pp. 7-8). The IHO concluded that the district put forward sufficient evidence to support its affirmative defense to prove that the parent had failed to timely notify the district, and further found that the parent did not testify or otherwise show that he provided timely notice or met one of the exceptions to the notification requirements under the New York Education Law (id.). Accordingly, the IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice because the parent failed to comply with the June 1 deadline pursuant to Education Law § 3602-c (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals. 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 arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the parent complied with the June 1 deadline thus entitling the student to equitable services under New York 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 public school 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]).[3] "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 [individualized education plan (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

[3] 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]).

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.).[4] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

A. Additional Evidence

Initially, a determination must be made on whether to consider and accept the additional evidence submitted on appeal by the parent.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27,

[4] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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 guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In the instant matter, the parent seeks to submit as additional evidence a letter purportedly signed by the parent on June 1, 2023 advising the district that he placed the student in a nonpublic school at his expense and would be seeking special education services from the district for the student's 2023-24 school year (see Req. for Rev. ¶ 6). The parent's representative did not offer this document at the impartial hearing on February 1, 2024, nor was it offered at the subsequent hearing on February 5, 2024 (see Tr. p. 15; see also Tr. pp. 50-75). Moreover, during the impartial hearing, the parent's representative called a single witness who testified "[she was] not sure" if the parent ever requested services from the district and the only proof put forward by the parent to rebut the district's affirmative defense was the parent's undated "affirmation" admitted into the hearing record as Parent Exhibit G (see Tr. pp. 15, 19, 38; Parent Ex. G).[5] I am not persuaded by the parent's explanation on appeal that the additional evidence was not available at the time of the impartial hearing because the "[p]arent regularly deletes her emails" (Req. for Rev. ¶ 6). This explanation conflicts with the evidence already in the hearing record that the parent mailed the district written notification (see Parent Ex. G [parent affirming that his intent letter was sent to the district "via mail"]). The parent cannot now be allowed to present additional evidence he purports to be dispositive on the outcome of the hearing to fill the significant "gap" in the administrative record, particularly here, where the parent's representative had sufficient notice of the district's June 1 affirmative defense and failed to present this evidence at the time of the impartial hearing where it would be subject to challenge and/or cross-examination (see M.B., 2015 WL 6472824 at *2). Therefore, for the reasons set forth above, the parent's request for consideration of additional evidence is denied.

B. Individualized Education Services Program (IESP) - June 1 Deadline

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]).

The issue of the June 1 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

[5] The undated parent affirmation admitted into the hearing record as Parent Exhibit G did not conform to the requirements of New York State's Civil Practice Law and Rules (CPLR) for an affirmation effective at the time of its signature (see CPLR 2106). Nor did the affirmation meet the requires for direct testimony by affidavit in lieu of in-hearing testimony both because the document was not a sworn affidavit and because the parent was not available for cross-examination (8 NYCRR 200.5[j][3][xii][f]).

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]).

The district raised the issue of the June 1 deadline at the January 18, 2024 prehearing conference and it was included as an affirmative defense to be addressed at the subsequent impartial hearing in the IHO's Prehearing Conference Summary and Order (see Pre-Hr'g Conf. Sum. & Order ¶ 22[a]). The issue was raised again in the district's opening statement on February 1, 2024 (see Tr. pp. 16-17).

The parent does not allege that the district failed to raise the defense but, instead, contends that, if more evidence was required on the issue of the June 1 deadline, he should have been given additional opportunities to appear at the impartial hearing to testify. However, contrary to the parent's contention, the IHO granted an adjournment to allow additional opportunity for the parent to testify, but the parent did not avail himself of that opportunity (see Tr. p. 58). Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "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. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

After the parent did not appear at the February 1, 2024 hearing date, the parent's representative requested an additional date be scheduled, which the IHO granted, and both parties agreed to the February 5, 2024 date, with the caveat that, if the chosen date and time did not work for the parent, the date could be moved, but the IHO requested that he be informed of such "sooner rather than later" (Tr. pp. 39-46). It was not until the February 5, 2024 hearing date, that the parent's representative informed the IHO that he "did not manage to get the parent available th[at]

morning" and asked "for one more continuation to give a chance for that" (Tr. pp. 50-51). The IHO denied the parent's representative's request for another hearing date (Tr. p. 52).

The IHO's prehearing conference order specified that, if the either party was unable to appear or proceed on a scheduled hearing date or time, the party was required to "file an Affidavit of Unavailability and Request for Adjournment as soon as they bec[a]me aware of the unavailability or inability to proceed" (Pre-Hr'g Conf. Summ. & Order ¶ 15). No such written request or affidavit appears in the hearing record. The primary goal of the impartial hearing system under the IDEA is to ensure the timely resolution of disagreements and, while federal and State regulations provide that impartial hearings must be "conducted at a time and place that is reasonably convenient to the parents and child involved" (34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]),[6] the hearing record reflects that the parent's representative did not request a different date or time in the reasonable manner provided for by the IHO. The IHO engaged in effective hearing management, while still offering flexibility to the parent, and the IHO's denial of the request for an adjournment was not an abuse of discretion and did not deny the parent due process.

Accordingly, at this stage, the inquiry is limited to whether the hearing record supports the IHO's decision on the district's defense. For the reasons set forth below, I find the hearing record supports the IHO's determination that the parent did not comply with the June 1 deadline under Education Law § 3602-c.

The parent first argues that Education Law § 3602-c does not require that a written request for services be filed "every June 1 prior to a school year" (Req. for Rev. ¶ 12). He claims, instead, that "the legislature intended that the school districts of private schools be put on notice" and that a parent must file the request prior to June first of the school year in which the services are first requested but that, thereafter, the CSE is required to annually review the student's IESP (id.). 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.

Next, the parent argues that the district waived the June 1 defense by historically developing IESPs and providing services to the student in prior school years. 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

[6] As all hearing dates in this matter were conducted remotely (see Tr. pp. 1, 11, 48), it does not appear that the location of the hearing was inconvenient to the parent.

Application of the Board of Education, Appeal No. 18-088 is misplaced. In that appeal, after the June 1 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 2023-24 school year nor did the district provide any services to the student during the 2023-24 school year (see Parent Ex. A). Even if the district's past conduct with the student could form a basis for a finding that the district waived the June 1 requirement going forward, the parent did not present this argument during the impartial hearing and the hearing record is not developed on the question of the district's past involvement with the student.[7] Accordingly, the evidence in hearing record does not support a finding that the district implicitly waived the deadline by its actions taken before or after the deadline.

The parent further argues that the hearing record supports the parent's claim that he provided written notice and the district failed to meet its burden to prove otherwise. As previously stated, the parent's "affirmation" that he mailed an "intent letter" to the district prior to June 1 does not satisfy the statutory notification requirement (see Parent's Ex. G). Upon my independent review, I find that the parent's affirmation, signed on January 25, 2024, which was not properly sworn to or subject to cross-examination, is self-serving and I accord it little or no weight or evidentiary value for the purpose of proving the parent requested services for the 2023-24 school year as required by Education Law § 3602-c. Further, the IHO addressed the shortcomings of the evidence before her and ultimately made the determination that the evidence provided by the district was sufficient.[8] For all the foregoing reasons, I find no reason to disturb the IHO's finding that the district was not obligated to provide the student with equitable services because the parent did not comply with the June 1 deadline set forth in Education Law § 3602-c.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 19, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[7] As evidence of past conduct, the parent points to the district's events log, which does not include an entry reflecting the parent's request for equitable services prior to June 1 for the 2020-21 school year but does indicate that an IESP was developed (see Dist. Ex. 1 at pp. 1-2). I find this evidence, addressing the parties' conduct years prior without indication that, for example, the pattern of conduct repeated itself for the intervening school years, too tenuous to demonstrate a "clear and unmistakable waiver" of the June 1 deadline for the 2023-24 school year.

[8] The IHO acknowledged that the evidence submitted by the district "[did] not necessarily prove that Parent did not give notice"; however, the IHO found that the parent failed to appear and offer testimony after multiple opportunities to do so and therefore found the district's evidence sufficient (IHO Decision at pp. 7-8).