The University of the State of New York

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

No. 24-571

**Application of a STUDENT WITH A DISABILITY, by his 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:**
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas Burke, 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 denied her request to be reimbursed for her son's private services delivered by EDopt, LLC (EDopt) for the 2023-24, and 2024-25 school years. The district cross-appeals from that portion of the IHO's decision that held the district waived its affirmative defense to Education Law § 3602-c for the 2023-24 school year by developing an individualized education services program (IESP). The appeal must be dismissed. The cross-appeal must be sustained.

## II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an 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 March 15, 2023 and found the student eligible for special education, and

developed an IESP (Parent Ex. B).[1, 2] The CSE recommended that the student receive three periods per week of direct special education teacher support services (SETSS) in a group and two 30-minute sessions per week of group speech-language therapy (id. at p. 11). The IESP reflects that the student was "parentally Placed in a Non-Public School" (id. at p. 14).

The district sent a prior written notice on March 20, 2023 summarizing the IESP meeting (District Ex. 2). In a letter dated August 28, 2023, the parent's advocate notified the CSE that if it was unable to assign a provider that the parent would "unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D). On November 21, 2023, the parent electronically signed a contract with a service provider to provide group SETSS services to the student at a specified rate from November 8, 2023 for the 2023-24 school year (see Parent Exs. C, H, F at ¶¶ 2, 7).

On March 1, 2024, a CSE convened for an annual review of the student's IESP and determined the student remained eligible for special education services, however, the CSE increased the recommended services to five periods per week of individual and group SETSS, and two 30-minute sessions of group speech-language therapy (Dist. Ex. 3 at p. 11). At the March 1, 2023 meeting, the parent expressed concern with the student's current grades, and agreed with the district's recommendation to increase the periods of SETSS services to address those deficits (Dist. Ex. 5). The district sent a prior written notice on March 1, 2024 summarizing the IESP meeting (Dist. Ex. 4).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 14, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24, and 2024-25 school years. The parent alleged that the district denied the student a FAPE for the 2023-24 school year by failing to supply providers and implement services recommended in the March 2023 IESP (see Parent Ex. A at p.2). Moreover, the parent also alleged that the district denied the student a FAPE for the 2024-25 school year by failing to develop a "current and appropriate program" of services (id. at p. 2). As relief, the parent requested an order that the district implement the March 2023 IESP and award the parent funding for the recommended services for the 2023-24 school year (id. at p. 3). Additionally, the parent requested the IHO issue an order implementing the March 2023 IESP for the 2024-25 school year at an enhanced provider rate and include a bank of compensatory education services for those services not provided by the district (id. at p. 3).

In a response, the district denied the material allegations contained in the due process complaint notice, raised several defenses including that the parent failed to send requests for dual enrollment services to the district and that the IHO lacked subject matter jurisdiction over the

[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] The hearing record contains two copies of the March 2023 IESP (compare Parent Ex. B, with Dist. Ex. 1). For purposes of this decision, only the parent's exhibit is cited.

parent's claims, and requested that the parent "be ordered to appear at the next scheduled appearance" (Due Process Response).

**B. Impartial Hearing Officer Decision**

After a prehearing conference was conducted on August 20, 2024 (Tr. pp. 1-9), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 8, 2024 (Tr pp. 10-74). In a decision dated October 22, 2024, the IHO found that district failed to demonstrate it provided the student a FAPE for the 2023-24 school year, that the parent failed to demonstrate that the unilaterally obtained services from EDopt were appropriate to meet the student's educational needs, and that equitable considerations did not favor the parent or warrant any reduction in the reimbursement rate (IHO Decision at pp. 3, 4-7).

The IHO summarized the procedural history and summarized the factual findings in the case (IHO Decision pp. 2-3). The IHO next discussed the merits of the parent's argument for the 2023-24 school year. The IHO held that because the district did not assign the student a SETSS provider for the 2023-24 school year, the obligation of the district of locating and obtaining a SETSS provider improperly "compel[led the] parent to resort to self-help" in violation of state law (id. at p. 4).

The IHO determined that the parent failed to establish that the unilaterally obtained services were appropriate because when "taken as a whole, the testimony and documentary evidence" did not provide educational instruction specifically designed to meet the unique needs of the student (id. at p. 5). The IHO held that the hearing record lacked testimony from any of the student's providers or their supervisors (id.) The IHO found that the parent's only witness was not convincing because he did not observe, assess or meet with the student and did not have any information with regard to the student's evaluations, clinical assessments, or session notes (id.). The IHO held that "the lack of evaluative data renders the contents of the [p]rogress [r]eport unpersuasive" (id.). The IHO also reasoned that there was a lack of testimony from the parent regarding the observations of the student over the course of the school year or the impact that the unilaterally obtained services had on the student (id.). Accordingly, the IHO concluded that the parent's evidence did not show that the services from EDopt were appropriate under the Burlington/Carter standard.

The IHO made alternative findings with regard to equitable considerations and determined that facts in this case "would warrant complete denial of an award or a reduction of the requested fees to the lowest rate set by the [district]" (IHO Decision pp. 6-7). Broadly, the IHO cited a lack of demonstrable evidence as the basis for this finding. For example, the IHO found that no evidence was presented that the parent sought a provider at the district approved rates nor was there any evidence in the hearing record to justify the education, training, experience or qualifications of the provider the parent privately obtained (id. at p. 7). The IHO found the parent did not demonstrate she acted in good faith in contracting with the provider (id. pp. 6).[3]

[3] After considering equitable factors, the IHO appeared to revisit facts indicating that parent had failed to demonstrate methodologies used with the student, an assessment of the student's abilities changed over the school year, a lack of testimony from the provider of special education about the activities done with the student, the

Next, the IHO addressed the district's assertion that the parent failed to submit a written request for equitable services prior to June 1, 2023 (i.e., a June 1 defense) (IHO Ex. p. 9). The IHO determined that the hearing record indicated the parent gave the district sufficient notice and the district was aware of the parent's request for services as demonstrated by the district's creation of IESPs in March 2023 and 2024 (id.). The IHO held "based on the facts in this action the imposition of a complete dismissal of the action would be inequitable" and found the parent's due process claim for the 2023-24 school year was not barred for failing to comply with Education Law § 3602-c requirement that a parent request dual enrollment services prior to June 1, 2023 (id.).

The IHO then addressed the district's motion to dismiss for lack of subject matter jurisdiction and denied it as being without merit citing, among other things, 2007 guidance from the State Education Department indicating that a due process complaint notice could be filed to address claims regarding the provision of services under Education Law § 3602-c (id. at p. 8-9).

Finally, the IHO denied the parent's request for funding for the 2024-25 school year on the basis that the parent failed to demonstrate compliance with Education Law § 3602-c by failing to timely notify the district that she was seeking special education services while the student was enrolled at a non-public school (IHO Decision at pp. 9-10). The IHO reasoned that, while the hearing record contained a letter signed by the parent, the hearing record did not contain proof of transmission or delivery of the required request to the district prior to June 1, 2024 and lack of such evidence did not entitle the parent to relief under Education Law § 3602-c (id.).

The IHO also made alternative findings that if the parent did demonstrate she had properly notified the district of her request for dual enrollment services prior to June 1, 2024, the hearing record nevertheless failed to contain any evidence of the appropriateness of the services provided for the 2024-25 school year, evidence that the parent was financially obligated to pay EDopt, or any notice, such as a ten-day notice of unilateral placement to the district describing her objection to the March 2024 IESP (id. at p. 11). Consequently, the IHO dismissed the parent's due process complaint in its entirety (id.).

## IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the due process complaint notice for evidentiary deficiencies. The parent argues that an IHO "cannot conduct a detailed, granular analysis of the private placement under Prong 2 of the Burlington/Carter test" and the analysis employed by the IHO was flawed by imposing additional requirements on the parent that were inconsistent with established precedent. The parent asserts that the record contained sufficient evidence of evaluative data for the IHO to decide that the unilateral placement was appropriate and that testimony as to the certification of the provider's credentials was not required. The parent argued that IHO erred in finding that the parent's witness was inadequately testified as

lack of information from the administrator or case coordinator and the concession that the administrator's sole contribution was processing invoices and he had not seen any session notes purportedly created with regard to the student' services (IHO Decision at pp. 6-7). These points are relevant to the assessment of the appropriateness of EDopt for the student, but it is not clear why the IHO found these facts particularly relevant to the parent's conduct or cooperativeness with the district, unless he was attributing all of these facts as reasons why the relief sought, namely EDopt's hourly rates, were excessive.

to the student's progress and that the IHO erred in finding that the parent failed to present testimony that the parent failed show what actions she took to obtain services at a district-approved rate. All of the parent's arguments addressed the IHO's adverse finings regarding the appropriateness of EDopt and its personnel or the parent's efforts in locating a provider at rates that were acceptable to the district.[4]

In an answer and cross-appeal, the district denies the parents material allegations in the request for review. The district alleges that the IHO correctly determined that the parent failed to show that she submitted her request for dual enrollment to the district prior to June 1, 2024 for the 2024-25 school year. The district asserts that the parent failed to demonstrate that the unilaterally obtained services were appropriate for the student and that equitable considerations do not favor an award of relief to the parent for both the 2023-24 and 2024-25 school years. In its cross-appeal, the district argues that the parent failed to timely request equitable services under the dual enrollment statute and the IHO incorrectly found that the district waived its June 1 defense for the 2023-24 school year.

## 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

[4] I note that the request for review does not conform to practice regulations governing appeals before the Office of State Review. The lay advocate "signed" the request for review (see Req. for Rev. at p. 9). This is not permitted under State regulation, which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]). Furthermore, I note that it appears that the parent's advocate served the district by email with consent; however, the affidavit is likely inaccurate in that it states that the lay advocate served the district by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or consenting to service by an alternate delivery method, both the method of service used as well as the identification of what papers were served must be accurately set forth in the affidavit of service. Furthermore, the affidavit was drafted as one to be notarized, which the advocate failed have performed. It appears that the lay advocate did not understand how to properly draft the affidavit of service, and while the district has waived any such defenses because no concerns regarding service issues were raised in its answer, the affidavit filed with the Office of State Review is defective in virtually all respects.

services is made (Educ. Law § 3602-c[2]).[5] "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.).[6] 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. Preliminary Matters—Scope of Review

At the outset, a determination must be made regarding which claims are properly before me on appeal. State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see

[5] 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]).

[6] 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 (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.

Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

I note that the parent has not challenged the IHO's adverse finding that she failed to notify the district prior to June 1, 2024 of her request for dual enrollment services pursuant to Education Law § 3602-c for the 2024-25 school year and the subsequent denial of the parent's claim for funding of services for EDopt on that basis. Accordingly, these determinations have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, I will turn next to the only remaining arguments which relate to the parent's claims related to the 2023-24 school year.

**B. June 1 Deadline**

First, I will address the district's cross-appeal alleging that the IHO improperly found the district waived its June 1 affirmative defense for the 2023-24 school year. 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 the instant matter, the hearing record contains no evidence that the parent submitted a request for equitable services on or before June 1, 2023 (see Parent Exs. A-K). However, the IHO found that the district waived the affirmative defense through its actions of developing IESPs over the course of 2023 and 2024 (IHO Decision at p. 7).

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 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]).

Moreover, 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]). 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]).

Here, in the prehearing order included in the hearing record, there is a section entitled "affirmative defenses," which specifically states that, if there was a "known or knowable affirmative defense" including under Education Law § 3602-c, that it "must be articulated and communicated in writing (via [due process response], motion, email, etc.) within ten (10) business days of the scheduled hearing date" (Prehearing Conference Summary and Order at p. 2). Below this section, the order states "The [district] gave notice it is raising a June First defense" (id.).

As for the IHO's finding that the district's convening of the CSE in March 2023 and development of an IESP constituted a waiver of the requirement that the parent submit a request for dual enrollment services by June 1, I note that a district may, through its actions, waive the statutory requirement for the June 1 notice (see Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[7] However, 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

[7] The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1 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).

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]).

While actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP, without more, constitutes a waiver. This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("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" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. In addition, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone does not clearly or unmistakably reflect the district's waiver of the June 1 deadline where it is called upon to convene and engage in special education planning for the student.

Based on the foregoing, the convening of the March 2023 CSE to create a new IESP for the student (or approximately one year later for an annual review in March 2024, for that matter), on its own, did not constitute a waiver of the June 1 defense. Accordingly, the IHO erred in deeming the defense waived on this ground. Furthermore, the district issued a prior written notice five days after the March 2023 CSE meeting requesting that the parent sign a form to consent to the student's services and that "no further action will be taken by the Committee until such consent is obtained "(Dist. Ex. 2 at p. 3). As noted above, there is no request by the parent for dual enrollment services for the 2023-24 school year in evidence or evidence of other communications from the parent until the August 28, 2023 10-day notice from Prime Advocacy, LLC indicating that the parent would unilaterally obtain private services (see Parent Ex. D). Therefore, I am constrained to find that the district was under no obligation to provide services to the student for the 2023-24 school year under the dual enrollment statute and the parent is not entitled to relief on her claims for that school year.

**VII. Conclusion**

Based on the findings above, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the IHO's decision dated October 22, 2024 which concluded that the district waived its June 1 defense for the 2023-24 school year is reversed.

**Dated:** **Albany, New York**
**April 18, 2025**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**