The University of the State of New York

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

No. 24-630

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:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, 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 his request that respondent (the district) fund the costs of his son's private services delivered by AY Learning LLC (AY Learning) for the 2023-24 school year. The district cross-appeals asserting that the parent's unilaterally obtained services were not appropriate and should also be denied due to equitable considerations. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, on September 1, 2022, the parent signed a services agreement with AY Learning to provide the student with SETSS during the 2022-23 school year at an hourly rate of $195.00 (Parent Ex. E).[1]

A CSE convened on September 23, 2022, found the student eligible for special education as a student with a speech or language impairment, and formulated an IESP for the student for the 2022-23 school year with an implementation date of October 11, 2022 (see Parent Ex. C).[2] The CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS), one 40-minute session per week of individual counseling services, two 40-minute sessions per week of individual occupational therapy (OT), one 40-minute session per week of group OT, and two 40-minute sessions per week of individual speech-language therapy (id. at pp. 8-9).[3] The IESP notes that the student was parentally placed in a nonpublic school (id. at p. 12).

In an undated due process complaint notice, the parent, through a lay advocate, alleged, in pertinent part, that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year by developing an IEP for the student with a recommendation for a 12:1+1 special class and failing to explain to the parent that he could have requested SETSS and related services for the student while the student remained in a private school (Parent Ex. A at p. 1).[4] The parent further alleged that the student received SETSS during the 2022-23 school year and the parent signed a contract with a provider agreeing to be responsible for the costs of those services (id. at p. 2). Therefore, the parent requests that the district assume the costs of the SETSS at the provider's rate (id.).[5]

Following a prehearing conference held on July 1, 2024, and an August 7, 2024 appearance, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) was held on September 30, 2024 (Tr. pp. 1-59). The parent limited his requested

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

[2] 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]).

[3] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[4] An email header indicates that the due process complaint notice was sent to the district on May 28, 2024 (Parent Ex. A at p. 4).

[5] The due process complaint notice references an IEP that allegedly recommended that the student attend a 12:1+1 special class; however, no IEP appears in the hearing record.

relief to payment of SETSS provided to the student during the 2022-23 school year at the contracted for rate (Tr. p. 28). During the hearing, the district asserted that the parent failed to submit a request for equitable services prior to June 1, 2022 and, thus, the district was not required to provide the student with services at his nonpublic school for the 2022-23 school year (Tr. p. 29). In response to that argument, the advocate for the parent asserted that the district failed to implement the September 2022 IESP (Tr. p. 30). The district repeated it's June 1 argument in its closing statement (Tr. pp. 51-52). In response, the advocate for the parent indicated that the parent "d[id] not exactly remember what he responded, but he [wa]s fairly certain that he responded, and [the] CSE never notified him accordingly that he hadn't or asked any questions," further indicating that there was no discussion of the lack of a June 1 notice at the September 2022 CSE meeting (Tr. p. 54).

In a final decision dated November 13, 2024, the IHO concluded that the parent's claim was barred by his failure to request equitable services on or before June 1 preceding the 2022-23 school year (IHO Decision at p. 6). The IHO found that the district raised the June 1 defense at the impartial hearing (id.). In response to the parent's closing arguments, asserted by his lay advocate, that the parent could not remember, but "must have responded" to the district, the IHO cited the fact that the parent did not testify at the hearing and that the representations made by the parent's lay advocate were not in evidence (id.). Further, in response to the parent's argument that he was present at the CSE meeting to develop the September 2022 IESP and was not informed of the absence of a June 1 letter, the IHO ruled that the district was under no obligation to post notice of the June 1 deadline (id.). The IHO concluded that the fact that a parent may have been unaware of the deadline does not provide a legal basis for the waiver of the deadline (id.). The IHO added that the June 1 deadline was applicable even if the student had already been identified as a student with a disability and had previously received equitable service pursuant to an IESP (id.).[6]

IV. Appeal for State-Level Review

In a request for review dated December 23, 2024, the parent, now represented by legal counsel, appeals the IHO's denial of his claim for direct funding of five sessions per week SETSS provided to the student during the 2022-23 school year based on the June 1 defense. The parent argues, in pertinent part, that no June 1 notice was required because the CSE did not create an IESP for the student until September 23, 2022, after the start of the 2022-23 school year. In addition, the parent argues that the district effectively waived the June 1 defense due to its prior knowledge that the student had been parentally placed in a private school and by the creation of an IESP for the student for the 2022-23 school year. The parent further argues that "although not included in evidence," the parent clearly must have sent a request for an IESP to the district as the student previously had an IEP and the district developed an IESP in September 2022. Generally,

[6] No IEP or IESP relating to a school year prior to the 2022-23 school year was admitted into evidence, nor was any the subject of testimony at the impartial hearing. Immediately following closing arguments, but while still on the record, the IHO asked the parent's lay advocate whether or not an IESP existed prior to that of September 2022 (Tr. p. 56). The lay advocate responded that she believed that there was but that the district would have more ready access to it (id.). The district then appears to have indicated that there was a prior June 7, 2022 IEP; however, due to audio interference, the transcript is not clear on whether the district referenced an IEP or IESP (Tr. pp. 56-57).

the parent asserts that the district bore the burden of proof on all matters and failed to prove that a June 1 letter was not timely sent or that the district did not waive the defense.

The district submits an answer and cross-appeal. According to the district, the IHO's decision should be upheld and, to the extent that the dismissal of the parent's claim based on the June 1 defense may not be upheld, the parent failed to show that SETSS were appropriate and the provider's rate was excessive.

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]).[7] "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.).[8] Thus, under State law an eligible New

[7] 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]).

[8] 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

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

Turning to the district's June 1 defense, 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 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]).

Here, a review of the parent's due process complaint notice in this matter shows that the parent alleged he was not aware that he could request equitable services to be provided at the student's nonpublic school (Parent Ex. A at p. 1). Rather, the parent's due process complaint notice

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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.

focuses on allegations that the district failed to inform him that he could obtain equitable services for the student at the nonpublic school and that the development of an IEP with a recommendation for a special class was not appropriate (id. at pp. 1-2). During the hearing, the advocate for the parent referred to the matter as "an implementation case" and an "[e]nhanced [r]ate case" (Tr. p. 7). The parent advocate then indicated the parent would "be abandoning any other issues that may have appeared in the hearing request" (id.). In her opening statement, the parent asserted that the district failed "to implement the student's IESP" (Tr. p. 30); however, the due process complaint notice did not include any claim for implementation and was never amended (Parent Ex. A). Accordingly, the matter proceeded as if the parent had alleged a failure of the district in implementing the September 2022 IESP and the district asserted it was not required to implement the September 2022 IESP as the parent did not request equitable services by June 1, 2022 (Tr. pp. 29, 51-52). An assertion that fits with the facts of the matter as alleged in the parent's due process complaint notice, specifically that the parent was not aware he could make such a request (see Parent Ex. A at p. 1).

Accordingly, as identified by the IHO, the district raised the June 1 affirmative defense at the impartial hearing (IHO Decision at p. 5; Tr. pp. 29, 51-52). The parent, through a lay advocate, asserted in his closing argument that the parent of the student always responded to all documents sent to him by the district and therefore "they must have also responded because they heard nothing from the CSE to the contrary" (Tr. p. 54). Further, the parent advocate argued that the parent could not remember if he responded but was "fairly certain" that he did (id.). Finally, the lay advocate argued that the district presented no evidence in support of its position that parent failed to provide a June 1 notice (Tr. p. 55). The IHO immediately ruled that the information presented by the advocate was improper "as the parent wasn't here to testify to that information" and it was not in evidence (Tr. pp. 55-56). In addition, in response to the IHO's inquiry as to whether a June 1 letter appeared in the parent's disclosure packet, the parent's lay advocate answered in the negative (Tr. pp. 57-58).

The IHO concluded that the parent's failure to provide a June 1 request precluded any award (IHO Decision at p. 5). Contrary to the parent's argument, once the district has raised the defense, although the district would generally have the burden of proof on an affirmative defense, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] ["it is unclear how the school district could have proved such a negative"). Here, the parent, through her lay advocate, introduced no evidentiary proof to counter the June 1 affirmative defense. The parent elected not to testify at the impartial hearing and therefore provided no affirmative assertion that a timely notice had, in fact, been furnished to the district. The IHO correctly ruled that statements made by the parent advocate in her closing arguments that were attributed to the parent were not admissible evidence (IHO Decision at p. 6; Tr. pp. 55-56). Additionally, as noted above, the parent's due process complaint notice in this matter indicates that at the time the parent was required to send a request for equitable services, he was not aware that he could have made such a request (Parent Ex. A at p. 1).[9]

[9] With respect to a parent's awareness of the June 1 requirement, the Commissioner of Education has previously 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

On appeal, the parent takes no issue with the IHO's finding that he failed to provide a June 1 notice for the 2022-23 school year. Instead, the parent maintains that no June 1 notice was required because the district did not create an IESP for the student until September 23, 2023, after the start of the 2022-23 school year (Req. for Rev. ¶¶ 16-18). In addition, the parent argues that the June 1 deadline was waived by the district's knowledge that the student had been parentally placed in a private school and by the CSE's creation of an IESP for the 2022-23 school year (id. ¶¶ 22-23).

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]).[10] 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 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

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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, 44 Ed. Dep't Rep. 352).

[10] 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).

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, 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.

In this instance, the hearing record does not include an educational planning document prior to the September 2022 IESP. According to the district representative, the prior educational planning document for the student was developed in June 2022; however, it is unclear if the representative indicated if it was an IEP or an IESP (Tr. pp. 56-57). Additionally, while the parent asserts that the student had an IEP with a recommendation for a special class prior to the development of the September 2022 IESP, the parent did not offer the date of that IEP or any explanation as to what actions led up to the development of the September 2022 IESP (Req. for Rev. ¶6). Accordingly, overall, the hearing record does not indicate that the district made a clear and unmistakable waiver of the June 1 deadline in this matter.

Based on the foregoing, the hearing record supports finding that the parent did not submit a request for dual enrollment services for the 2022-23 school year by June 1, 2022, as the parent did not submit any evidence that a notice was sent and indicated in the due process complaint notice that he was not aware that he could request equitable services to be delivered at the student's nonpublic school. Additionally, although a district may waive the June 1 deadline, the circumstances presented do not present a clear and unmistakable waiver. The convening of the September 2022 CSE and the development of an IESP for the student, without more, does not demonstrate a waiver of the June 1 defense. Accordingly, the IHO correctly determined that the parent's claims were barred by the June 1 notice requirement.[11]

VII. Conclusion

The parent did not provide the district with written notice requesting dual enrollment services prior to June 1, 2022 as required by Education Law § 3602-c[2], and the convening of the September 2022 CSE and creation of an IESP for the student did not constitute a clear and unmistakable waiver as to the parent's request for equitable services. Therefore, the student was not entitled to equitable services for the 2022-23 school year. As such, the parent's appeal from

[11] It must be noted that the lack of a June 1 notice bars the parent's claims asserted on appeal in this matter, specifically as they relate to implementation of the September 2023 IESP; however, as noted above, review of the due process complaint notice in this matter shows that it does not contain any allegations related to implementation of the September 2022 IESP and the parent never moved to amend the due process complaint notice.

the IHO decision which denied his request that the district fund the costs of his son's SETSS delivered by AY Learning for the 2022-23 school must be denied.

In light of these determinations, I find it unnecessary to address the parties' remaining contentions, including the district's cross-appeal relating to the appropriateness of services provided by AY Learning or equitable considerations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 25, 2025

STEVEN KROLAK
STATE REVIEW OFFICER