Board of Educ. of the Hewlett-Woodmere Union Free Sch. Dist. v City of New York
2021 NY Slip Op 31350(U)
April 21, 2021
Supreme Court, New York County
Docket Number: 161106/2015
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **52**

Justice

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BOARD OF EDUCATION OF THE HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION

Defendant.

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INDEX NO. 161106/2015

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for JUDGMENT - SUMMARY.

In this action pursuant to New York State Education Law § 3602-c, plaintiff Board of Education of the Hewlett-Woodmere Union Free School District (the School District) moves, pursuant to CPLR 3212, for summary judgment, seeking a judgment for reimbursement from defendant New York City Department of Education (DOE) for the special education services it provided to students who reside in New York City (mot seq 003).

Pursuant to the second amended complaint, the School District, which is not in New York City, seeks payment and reimbursement of the provision of special education and related services provided to New York City students during the 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2013-2014, 2014-2015, 2015-2016, and the 2016-2017 school years.

The crux of the School District's motion is that under Education Law § 3602-c, the "School District of Location" (DOL), where the subject students attend school, or receive services, is responsible for providing special education and related services to the children

attending nonpublic school in its school district. Under the statute, the "School District of Residence" (DOR), the district where the subject students reside, here the DOE, is the school district that is financially responsible for the services. The DOE has made some payments and not others on the stated grounds that the School District has not provided a complete set of timely parental consents. The School District argues that this demand for parental consents is arbitrary and has no basis in law. Thus, in this motion, the School District demands payment for all of the outstanding invoices.

BACKGROUND

Defendants are required by law, under the Federal Individuals with Disabilities Education Act (IDEA) and the New York State Education Law, to provide an education at public expense to all children whose parents or legal guardians reside within the jurisdiction of the New York City Department of Education. The School District commenced this action for the recovery of the cost and expense of special education and related services provided by it for the benefit of students who are residents of the City of New York.

In its second amended complaint, the School District alleges that approximately eighty-five students who maintained a domicile and residence in the City of New York, attended and were educated in nonpublic schools located within the boundaries of the Board of Education of the Hewlett-Woodmere Union Free School District during the 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2013-2014, 2014-2015, 2015-2016, and the 2016-2017 school years. It is the School District's contention that these students: (1) received evaluations that were conducted by or at the expense of the School District; (2) were the beneficiaries of Committee on Special Education ("CSE") meetings convened by the School District; and (3) were provided with special education services, and related services, pursuant to Individualized Education Service

Program ("IESPs") that had been devised and implemented by the School District for the benefit of these students and the City of New York.

In his affidavit in support of the motion, Joseph DiBartolo (DiBartolo), the Business Administrator for the School District, states that through the 2007-2008 and 2016-2017 school years, the School District has provided these services to "approximately 120 special education students . . . [who are indisputably] residents of NYC," and are the responsibility of the Department of Education (DiBartolo aff, ¶¶ 4-6). The School District further contends that this is so by virtue of the defendants' statutory responsibility, pursuant to the IDEA and the New York State Education Law (Education Law). According to these statutes, "the school district of residence must bear the financial responsibility for the provision of its student' special education and related services" (*id.* at ¶ 6).

Additionally, pursuant to New York State Education Law § 3602-c, as amended by Chapter 378 of the Laws of 2007, New York State resident students parentally placed in nonpublic schools in a school district other than their school district of residence, are entitled to receive special education and related services from the public school district in which the nonpublic school is located, also referred to throughout New York State Education Law as the "school district of location," through an IESP devised by that district.

Where parents choose to enroll their children in nonpublic elementary and secondary schools, and such schools are located outside of the school district of residence, pursuant to New York State Education Law § 3602-c, "a school district of location providing services to nonresident students shall be entitled to recover costs of services, costs of evaluation and costs of committee on special education administration directly from the district of residence of the

student if consent of the parent or person in parental relation is obtained to release of personally identifiable information concerning their child."

According to DiBartolo's sworn statements, the School District sent invoices for their services to the DOE beginning in 2007-2008. Although not objected to by the DOE, the invoice was unpaid. The School District sent invoices for the 2008-2009, 2009-2010, and 2010-2011 school years, which were neither disputed, denied, nor paid. The School District's invoices for the school years 2011-2012 and 2012-2013 were paid in full by the DOE prior to commencement of this action.

DiBartolo avers that after years of seeking reimbursements from the DOE, he finally included, in a May 28, 2014 email to the DOE, a summary of all the amounts that were owed for the 2007-2008; 2008-2009; 2009-2010; 2010-2011; and 2011-2012 school years. The DOE response did not deny payment but indicated that the requests were being processed. According to DiBartolo, the first time the DOE advised the School District that payments were delayed because of parental consent forms was in an August 14, 2014 email from Frank Lanore (Lanore), an Administrator in the DOE Non-Public School Payables department (NPSP). DiBartolo states:

> "In August 14, 2014, Mr. Lanore sent an email to me that NPSP was waiting for "required documentation (parent consent forms and IEP) for S[chool] Y[ears] 2007/2008 - 2011/2012. . . . " I recall that it is likely around this time, during the course of a series of phone conferences that were held pursuant to these emails, that NYC DOE first raised the parent consent form issue as being the reason for delaying payment. 25. On September 2, 2014, I responded to this August 14, 2014 email, advising Mr. Lanore that this appeared to me to be a new requirement. NYC DOE had never previously made it known to the DISTRICT that such documents would be required in order to process the outstanding special education costs claims"

(DiBartolo affidavit, ¶¶24-25).

Prior to this letter, DiBartolo, through emails to the DOE, acknowledged DOE's request for such documentation, parental consents, and stated that the School District "needed time to recover the documents from the archives," and that they are "actively working on this"

In the complaint, the School District alleges that it has parental consents for the students to whom it has provided services:

> "[the School District] has consents to exchange personally identifiable information with Defendants, from the parent or person in parental relation concerning nonresident students who attend nonpublic school within the boundaries of the [School District], and who have received services from [the School District]"

(Complaint, ¶ 23).

During his deposition, with respect to this allegation in the complaint, DiBartolo testified that when the School District sent the invoices to the DOE, the consents were, for the most part, forwarded as well:

> "A I believe when we forward invoices, the invoices have parental consents.
> Q Okay.
> A I don't know if that is the case every year, but I believe for the most part that is the case"

(Glotzer affirmation, exhibit O at 24).

According to the testimony of Frank Lanore (Lanore), an Administrator in the DOE office of Non-Public School Payables (NPSP), the "consent of the parent" in Education Law § 3602-c (7) (b), is the consent for the exchange of information between the school district of location and the school district of residence and is a condition of reimbursement by the DOE. Lanore testified that there are no other parental consents necessary to process reimbursement. Lanore further testified that NPSP requires that the date of the parental consent must be "within a couple of months of when the services are being rendered. . . . We would accept either or. In other words, it has to be a timely parental consent form. We can't get a form

that's dated three years prior to the services being rendered. That's outdated. . . . Either prior to the start of the school year or within a couple of months after the school year has ended" (Glotzer affirmation, exhibit P at 31).

Lanore testified that there is no specific time frame for submission of the parental consents. Instead, the timing of the consent is a judgment call made by his office: "Yeah, there is no, you know, cut off where -- you know, it's a judgment call. It's our judgment. If we feel that it's within reason, the timeline is within reason of the services, we would accept that" (*id.* at 33). According to Lanore this rule, regarding the timing of the parental consent is not written in the law or in any written document anywhere (Glotzer affirmation, exhibit P at 33-34). In an April 23, 2015 letter to the School District's attorney, Lanore stated that they are still waiting for the requested parental consents for school years 2007-2008 through 2010-2011:

> "As of today (almost one year from our initial conference call) we still have not resolved the required documentation in order to process payment to HWSD for the 2007/2008 through 2010/2011 school years. As such if we do not receive the required documentation by June 30, 2015, the NYC Department of Education will consider this matter closed"

(Kwee affirmation, exhibit 29). Lanore testified further that parental consent forms had to be dated within one year of the school year for which reimbursement is sought:

> Q So, the parent consent encompassed in the letter in [exhibit] 27 and the consent in Plaintiffs Exhibit 19, would not have met your requirements?
> A Correct.
> Q So, if Mr. DiBartolo had responded to this email wherein you list the names of students and his response was to send you the consent in Exhibit 19 and 26, you would have said that the consent forms were outdated?
> A That's right, because it looks like —yes, because this is for the '13-'14 school year and the consent forms would only be good for the 'l1-'12 or - actually, 'l1-'12 school year and maybe the '12-'13 school year, but definitely not '13-'14 school year.
> Q And it's your position that these consent forms wouldn't allow you to exchange information for years prior to the years that you just testified to?
> A No, we could exchange information, we just can't process payment based on it. Is that fair?

(Glotzer affirmation, exhibit P3 at 112-113).

Likewise, during his deposition, Lanore testified that the DOE made no payments to the School District for the 2007-2008 school year because there was documentation missing, and did not make all payments for the 2010-2011 school year because of missing documentation:

> "Q Do you know why there were no payments applied to the 2007-2008 school year?
> A We never received any documentation.
> Q And when you say 'documentation,' what do you mean by that?
> A Invoices, parent consent forms, IEP's"

(Glotzer affirmation, exhibit P at 63).

Lanore testified that although payments were made for school years, including 2010-2011, 2013-2014, there are payments missing because the DOE does not have all of the required documentation, including parent consents, to make the payments.

The School District Invoices

According to Scott Glotzer's, Assistant Corporation Counsel, affirmation on behalf of defendants, the following invoices were sent by the School District to the DOE:

> "For SY 2007-08 through 2016-17, Plaintiff submitted bills for special education services to DOE for reimbursement. The bills are dated as follows: (i) SY 2007-08: June 23, 2008, November 6, 2008; (ii) SY 2008-09: November 25, 2009; (iii) SY 2009-10: March 22, 2011; (iv) SY 2010-11: June 19, 2012, June 28, 2012; (v) SY 2013-14: June 15, 2015; (vi) SY 2014-15: June 7, 2016; (vii) SY 2016-17: June 7, 2018"

(Glotzer affirmation, ¶ 15).

The following facts concerning the invoices are taken from the School District's memo in support, which references the attached invoices. In opposition, the DOE does not dispute the invoices.

According to DiBartolo, beginning with the school year of 2007-2008, the School District began billing the DOE directly for the special education services it was providing. Invoice No. NYC-A1-08 was sent to DOE's Christopher Edward McKay, who works in the Nonpublic

School Payables department (NPSP) at 65 Court Street, Room 1503, Brooklyn, New York 11229, with a total amount in reimbursable costs for special education services of $60,027.00 (Kwee affirmation, exhibit 8).

Invoice No. NYC-A2-08 was sent for May and June of the 2007-2008 school year. Thus, the total for the 2007-2008 school year was $63,166.00 (Kwee affirmation, exhibit 10).

Invoice No. NYC-A1-09 was delivered to the DOE, to the attention of Brenda Antoine, seeking reimbursement of $65,287.00 (Kwee affirmation, exhibit 11). An additional amount was thereafter demanded for the same school year (2008-2009), of $4,731.00. 14 (Kwee affirmation, exhibit 30).

For the 2009-2010 school year, a total of $102,376.00 remains due and owing. This amount was neither denied nor paid and was invoiced and demanded via letter, though partial payments were made in 2018 and 2019, after DOE was invoiced and billed via a letter demand and invoice dated June 13,2011 (Kwee affirmation, exhibit 12).

The 2010-2011 school year demand letter and invoice demanding $30,230.00 was sent out on or about June 20, 2012 (Kwee affirmation, exhibit 13). That invoice was coded NYC-A1-11 and had a balance due of $30,230.00. A second invoice and demand letter for NYC-A2-11, had a balance due of $1,867.00, was sent to the DOE (Kwee affirmation, exhibit 14). The total amount due for the 2010-2011 school year is $30,230.00 + $ 1,867.00 = $32,097.00. No part of these amounts claimed have been paid.

The 2011-2012 and the 2012-2013 school year special education services costs were reimbursed which is why these school years are not included in this action's Complaint.

The amount for 2013-2014 school year services were demanded via invoice no. 060DE15A. That invoice claims an amount due of $105,438.20 for that school year's special

education costs and expenses. On October 21, 2015, the DOE tendered a partial payment of $63,720.94, leaving a balance owed to the School District in the amount of $41,717.26 for the 2013-2014 school year (Kwee affirmation, Exhibit 30, row 11).

For the 2014-2015 school year, the School District sent an invoice in the amount of $324,705.72 to the DOE resident students' special education services and administration related thereto (Kwee affirmation, exhibit 16). For the 2015-2016 school year, the School District sent invoice 050-17A in the amount of $244,948.30 in special education services and costs (Kwee affirmation, exhibit 17).

Lastly, for the 2016-2017 school year, which is the final school year for which amounts are claimed to be due and owing in the within action, the School District sought an amount totaling $157,435.55 (Kwee affirmation, exhibit 18).

Shortly before commencement of this litigation, on September 26, 2015, the amount due and owing to the School District from DOE for special education costs and expenses was $368,364.20. On October 15, 2015, approximately two weeks before this action was commenced, the DOE made a partial payment in the amount of $63,720.94, reducing the total amount due at that time to $304,643.26. The School District commenced the within action for $304,643.26 on October 29, 2015, accounting for the last-minute partial payment (*see* Exhibit 35). The action, at that time, sought reimbursement for all of the services provided to, or for the benefit of the students, including but not limited to the provision of special education and related services provided to the students and any costs and expenses related to evaluations and CSE meetings and development of such IBSPs for the 2007-2008, 2008-2009, 2009-2010, 2010-2011, and 2013-2014 schoolyears. On or about February 23, 2018, the School District amended

the complaint to amend and increase the amount owed to $879,028.28, by adding special education expenses owed for the 2014-2015 and the 2015-2016 school years.

On or about December 28, 2018, the School District added the 2016-2017 special education expenses to a Second Amended Complaint. The 2016-2017 school year special education expenses came out to an additional $157,435.55. However, prior to this second amendment, the DOE had made two payments: one on May 7, 2018, reducing the $879,028.28 by the May 7, 2018 check amount of $463,051.31; and a second payment was made on September 21, 2018, reducing the amount owed by $113,745.71 (Exhibit 6, September 14, 2018 check). Thus, the (first) Amended Complaint's total amount in reimbursement sought for all of the nonresident students' services owed the School District, for the 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2013-2014, 2014-2015 and 2015-2016 school years was $879,028.28. The May 7, 2018 check totals $463,051.31 and the September 21, 2018 check was $113,745.71. As those payments were made unilaterally, the School District accepted such payments as partial payments for the amount due and demanded in the Amended Complaint, understanding that acceptance of such payment would be without prejudice.

As of the filing of the second amended complaint, the School District sought $459,666.81 after deducting both unilateral payments above, but adding the balance remaining and due on the cost and expense of services provided during the 2016-2017 school year which had become due.

However, during this time, Defendant NYC DOE made a third unilateral payment in the amount of $105,076.69, by way of a check from NYC DOE dated January 18, 2019 (see Exhibit 7). This third payment is not reflected in the second amended verified complaint, meaning that after a reduction in the amount owed by this $105,076.69 payment, the amount that the School

District seeks from the DOE is $354,590.12. This is the total amount sought by the School District in this action. The parties agree that this is the amount in dispute.

According to the Glotzer affirmation, "during the pendency of this matter, DOE made three payments to Plaintiff, as follows: $463,051.31 (May 7, 2018); $113,745.71 (September 14, 2018); $105,076.69 (January 18, 2019). Of the $1,036,463.80 claimed, DOE has paid $681,873.71, leaving $354,590.09 in dispute" (*id.*, ¶ 17).

Email responses to the School District from DOE

According to DiBartolo:

> "After years of demanding amounts due for special education costs and expenses that the [School District] had expended to the benefit of NYC DOE students, I summarized, via an email dated May 28, 2014, that amounts were owed at that time, for the 2007-2008; 2008-2009; 2009-2010; 2010-2011; and 2011-2012 school years. Despite presentment of a summary of the claims due relative to the foregoing school years, Defendants never denied or disputed any of these invoices but continued to promise that payment would be forthcoming"

(DiBartolo aff, ¶ 21).

According to Dibartolo's statements in his affidavit, and the exhibits attached thereto, the DOE sent a response on June 2, 2014, stating that the DOE:

> "is working diligently and expeditiously on reviewing invoices... As you are aware, there are several years that we need to review and it will (sic) that my office the next two weeks to complete some of the years.... Once, that is done I will email you with an update status"

(*id.*, ¶ 22).

In a July 22, 2014 email response to DiBartolo, the DOE stated that the NPSP was working "'on the protocol of payment for all future invoices from [the School District]' and that based on that an 'additional amount will be issued,' referring to an additional amount that presumably would be paid following Defendants' partial payment of $70,016.16" (*id.*, ¶ 23). In an August 14, 2014 email response to DiBartolo, Lanore, from the DOE, stated that the NPSP was waiting for required documentation (parent consent forms and IEP) for S[chool] Y[ears]

2007/2008 - 2011/2012. . . ." DiBartolo avers that around that time there were phone conferences held pursuant to these emails during which DOE first raised the parent consent form issue as being the reason for delaying payment. According to Lanore, the parent forms were not current (*id.*, ¶ 25).

According to DiBartolo: "In the August 5, 2015 email chain, Mr. Sylvain of the NYC DOE's NPSP office implies that payment is being delayed because "parental consent form[s] [are] outdated."

It is DiBartolo's position that:

> "Presumably, a consent to share information is valid until revoked by a parent since the purpose of such a consent is to allow the sharing of information. Mr. Lanore at NYC DOE never clarified what NYC DOE means when he asserted that the parent consent would not be accepted because it is, in Mr. Lanore's words, 'stale-dated'"

(*id.*, ¶ 29).

Education Law Section 3602-c

The parties agree that Education Law § 3602-c is the statute that controls who provides special education services and who should pay for them. Education Law § 3602-c(7)(b) permits a 'school district of location,' providing services to non-resident students with disabilities, to recover not just the cost of special education services, but also the costs of any evaluations and committee on special education meetings and administrative expenses associated with the provision of such special education services. The language of this provision is:

> "b. In the case of the education for students with disabilities who are residents of New York, a school district of location providing services to non-resident students shall be entitled to recover costs of services, costs of evaluation, and costs of committee on special education administration directly from the district of residence of the student if consent of the parent or person in parental relation is obtained to release of personally identifiable information concerning their child. If such consent is not obtained, the school district of location shall submit to the commissioner, in a form prescribed by the commissioner, a claim for costs of services, evaluation costs, and committee on special education administrative costs that includes the address of the students permanent

> residence, including the school district of residence, and a certification by officials of the nonpublic school attended by the student that such address is the address of record of such student. Upon certification by the commissioner of the amount of such claim, the state comptroller shall deduct such amount from any state funds which become due to such school district of residence"

(Education Law § 3602-c (7) (b)).

A memo from the State Education Department entitled: "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 Slate (NYS) Education Law Section 3602-c" explains the purpose and the meaning of the statute. Under the heading "Parent Consent," the memo explains the need for parental consent forms as follows:

> "Federal regulation (34 CFR section 300.300) establishes specific parent consent requirements for parentally placed nonpublic school students, as follows; Consent for sharing personally identifiable information regarding special education. If a student with a disability is parentally placed, or is going to be parentally placed in a nonpublic school that is not located in the school district where the student legally resides, parental consent must be obtained before any personally identifiable information about the student relating to special education is shared between officials in the public school district of location and officials in the public school district of residence. Therefore, parent consent is required before sharing individual evaluations, Individualized education programs (lEPs), lESPs or Services Plans and other special education records between the district of location and the district of residence"

(Kwee affirmation, exhibit 3 at NYC0162).

Brief Procedural History

In the original complaint, the School District alleged:

> "Upon information and belief, at all times herein mentioned, Defendants continued to arbitrarily, capriciously, and/or unreasonably insist that Plaintiff DISTRICT submit parent-signed agreement forms that predate the provision of IESP recommended special education and related services to the nonresident students.
> By virtue of the fact that on June 23, 2015, the Defendants notified that they would be closing this matter and refusing payment or reimbursement as of September 30, 2015, Plaintiff has no other remedy other than the within action for payment and reimbursement of the provision of special education and related services provided to nonresident [New York City] students"

(Complaint, ¶¶ 58-59).

The School District amended its complaint twice. The first amended complaint added reimbursement owed for school years 2014-2015 and 2015-2016. The second amended complaint added the 2016-2017 school year. Since additional payments were received during the lawsuit, these payments were also reflected in amending the ad damnum clauses of the respective amended complaints so that the second amended complaint reflects the total amount due as of on or about December 26, 2018. On that day, the DOE owed the School District $459,666.81. However, because another partial payment was sent to the School District after the filing of the motion for a second amended complaint, the actual amount owed is $354,590.12, the amount currently in controversy.

The second amended complaint contains four causes of action. The first pertains to the provisions contained in New York State Education Law § 3602 (c). The second cause of action alleges a breach of an implied agreement made by the DOE to render payment to the School District for the provision of services. The third cause of action sounds in unjust enrichment and the fourth seeks damages for an account stated. By verified answer dated February 6, 2019, DOE responded to the second amended complaint and included as affirmative defenses: (i) failure to state a cause of action; (ii) statute of limitations; and (iii) failure to exhaust administrative remedies.

DISCUSSION

The School District's Motion for Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

[1986][internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v Federal Ins. Co.,* 70 NY2d 966, 967 [1988][citation omitted]). "'[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004][citations omitted]).

Claim pursuant to Education Law § 3602-c

The School District argues that DOE has arbitrarily held up payment of the School District's invoices. Specifically, the School District argues that DOE, without any statutory authority, is requiring a "timely parental consent" to share information. It is the School District's position that this parental consent form, to share information between a public school district and another school district, need only be provided once to the DOE, and not, as the DOE argues, repeatedly for every school year.

The School District states that the narrow dispute between the parties here is not a lack of parental consent forms, but a lack of "timely" parental consent forms. According to the School District, once a consent is signed by a parent to share such information, there is no legal mandate or guidance that such parent consent form "to release of personally identifiable information concerning their child." expires or becomes stale. See Exhibit 1, page 5 (Education Law § 3602-c 7(b)). Thus, the School District argues that there is no statutory authority whatsoever for the DOE's unwritten requirement that parental consent forms must be submitted.

The School District acknowledges that under the statutes, parents must consent to the services every year. But this consent is different from the consent under 3602-c to share information. On this point, the School District believes that the DOE is confusing these two parental consent forms. The School District cites Lanore's testimony that "the parent has to consent every year services are being rendered . . . ."

The School District argues that there is no statutory authority for this requirement that parents must "timely" and annually submit consent forms. Specifically, the School District argues that there is no authority under Education Law §3602-c. On this point, the DOE agrees.

At his deposition, Lanore testified that there is no written authority whatsoever for this rule (Glotzer affirmation, exhibit P at 33-34).

Lanore further testified that the verbal "rule" itself is not fixed, that "there is no, you know, cut off where -- you know, it's a judgment call. It's our judgment. If we feel that it's within reason, the time line is within reason of the services, we would accept that" (*id.* at 33).

With respect to the authority for this requirement, Lanore further testified:

> "Q And do you know is there a rule that requires that a parent consent for the release of personally identifiable be either dated within a few months before or after the school year in question?
> A Well, we feel that if a parent consent form is dated either - way before or way after services are rendered, we feel that —the parent has to consent every year services are being rendered. That's what we require. If the child gets multiple years of services, every year, we need a parent consent form.
> Q Can the claims for cost and expenses not be processed without this parent consent, at least from your end?
> A Yes.
> Q Now, what if a parent consent is dated more than a year after the school year in question, I'll use '07-'08 as an example, what if you receive a parent consent dated July 2009 for the '07- '08 school year, would that not be useful as far as the exchange of information is concerned?
> A It's a judgment call, but I believe that that would not be acceptable for the 07-08 school year"

(id., page 34-35).

According to the School District, once court-ordered discovery began, the School District and the defendants exchanged special education records so that the DOE now has all the necessary support to issue payment for the remaining claims. The School further relies upon the authority of the Family Educational and Privacy Rights Act ("FERPA," codified at 20 U.S.C. § 1232g), to argue that personally identifiable information may be shared without parent consent so that under FERPA, the sharing of such educational records without specific written parent consent is permitted through a court-order.

Further, according to the School District, DOE's argument concerning timeliness of consents is undermined not only by Lanore's testimony, but also by the DOE's emails. Although the DOE argues that for many of the students for whom the School District claims reimbursement, the School District has provided neither contemporaneous Parental Consent Forms, Proof of Residence nor IESPs, or only provided them for the first time in the context of this litigation, several years after the services were purportedly rendered, making verification impossible, the DOE emails and Lanore's testimony establish that the DOE would accept the documentation years after the services were rendered.

On this point, the School District relies on Lanore's testimony that as long as the School District provided the required documentation, even "today," the day of his deposition on August 6, 2019, the DOE would make the requested payments:

> "Q And in fact, the [DOE] letter closes with 'as of today,' meaning April 23, 2015, 'we still have not received the required documentation in order to process payment to the Hewlett-Woodmere School District for the 2007-2008 through 2010-2011 school years,' do you see that sentence?
> A Yes.
> Q The next sentence says 'if we do not receive the required documentation by June 30, 2015, the New York City Department of Education will consider this matter closed,' do you see that?
> A Yes.

> Q And is that the first time that you had said we're denying the claim if we don't hear from you by June 30?
> A Well, it's not really saying denying the claim. I think maybe that's —what this is saying is we've been having discussions with them for over a year by this point and we weren't —they weren't fulfilling their promises to get the documentation to us, so we were getting very frustrated. So considering the matter closed, if you want to consider that —if you want to state that that means that we're not paying, you know, everyone has a different interpretation of things. But to be honest, if we received the documentation today, we would pay. So, no, it doesn't mean that we're not going to pay when I wrote this. This is just a little bit of my frustration coming out"

(Kwee affirmation, exhibit 31 at 116-117).

Further, although the DOE takes the position that this verbal rule concerning "timely" parent consents was in place for the requested payments for the school years from 2007-2008 to 2016-2017, the DOE emails seeking these consents are dated from 2014 to 2015. In an August 19, 2014 email from Lanore to DiBartolo, Lanore confirms a discussion between the DOE and the School District that the School District will provide documentation, including parental consents for school years 2007-2008 and 2011-2012, and then the DOE will process the documentation in order to make the payments:

> "Thank you for joining our conference call today. As discussed the Hewlett-Woodmere school district, will provide the DOE with the summary page of the students IEP which should include the related service recommendation along with the parent consent forms for school years 2007/2008 - 2011/2012. Upon receiving this documentation the DOE is committed to reviewing and processing payment's accordingly in a timely, fashion"

(Kwee affirmation, exhibit 25 (email from Lanore to DiBartolo).

In an additional email exchange, dated May 2014, between Brenda E. Antoine (Antoine) of the DOE and DiBartolo of the School District, the DOE again confirmed that it would review documentation for invoices for the 2007-2008 to 2011-2012 school years:

> "As, I have explained in my previous emails to you that my office is working diligently and expeditiously on reviewing your invoices... As you are aware, there are several years that we need to review and it will that my office the next two weeks to complete some of the years.... Once, that is done I will email you with an updated status"

This was sent in response to the May 28, 2014 email from DiBartolo:

> "As of today, we have yet to receive any payment or confirmation that any payment will be processed soon, I have attached copies of all of our outstanding Invoices totalling $326,037, as you will see, your department has been holding these invoices for 6 years. The summary is as follows; Past Due Invoices"

According to DiBartolo, it was around the time of an August 14, 2014 email from Lanore, which stated that the NPSP was waiting for "required documentation (parent consent forms and IEP) for S[chool] Y[ears] 2007/2008 - 2011/2012. . . ," that "DOE first raised the parent consent form issue as being the reason for delaying payment" (DiBartolo aff, ¶ 24). DiBartolo further avers that

> "[o]n September 2, 2014, I responded to this August 14, 2014 email, advising Mr. Lanore that this appeared to me to be a new requirement. NYC DOE had never previously made it known to the DISTRICT that such documents would be required in order to process the outstanding special education costs claims. To my knowledge, as confirmed by Mr. Lanore's email of September 2, 2014, neither NYC DOE, nor the DISTRICT, have any records or logs that prove that the DISTRICT had ever been notified that NYC DOE would not be paying because of parent consent forms that, according to Mr. Lanore, were not current"

(DiBartolo aff, ¶ 25).

Additionally, according to DiBartolo: "In the August 5, 2015 email chain, Mr. Sylvain of the NYC DOE's NPSP office implies that payment is being delayed because "parental consent form[s] [are] outdated."

In support of its motion, the School District relies on Lanore's testimony and the DOE emails to establish the arbitrary nature of the DOE "rule" for timely consents. Not only did Lanore testify that the DOE would accept the documentation at any time, including the date of his deposition, in order to process payments, but additionally the 2014 emails seeking documentation in order to process payment for school years 2007-2008 to 2011-2012 raise questions about the DOE's stated need to have the documentation each and every year in order to verify services. The School District argues, therefore, that the only conclusion from these

emails is that once the DOE was in possession of the documentation reflecting the services, whenever that was, it would process the payments.

DOE's opposition to the School District's motion

In its opposition, DOE argues that it required contemporaneous Parental Consent Forms, Proof of New York City residence and Individualized Education Service Plans (IESP) for those students for whom Plaintiff requests reimbursement. According to DOE, there is no language in Education Law § 3602-c barring DOE from requesting them. Allowing the School District to request reimbursement "without contemporaneous documentation permitting DOE to verify that services were actually rendered, raises the possibility that DOE will pay for services either never rendered, rendered without consent or rendered to non-resident students, which would both be inequitable and not serve the purposes of Education Law § 3602-c."

DOE maintains an agency-wide database of student information known as "Automate the Schools" (ATS). The ATS system maintains accurate student address information primarily in order to identify student eligibility for transportation. ATS is also used by DOE's Office of Non-Public School Payables for reimbursement purposes for resident students attending schools out-of-district. Since DOE has no independent means of verifying the residency status of children who attend private schools outside of New York City, DOE requires, proof of consent for services, proof of residency, and proof of the services for which reimbursement is being requested (such as copies of the Individualized Education Services Plan (IESP) for each student for which reimbursement is claimed), before it can honor a reimbursement request.

These requirements are fully within the purview of Educ. Law § 3602- c, Title 34, Sections §§ 300.130-147, 300.300, 300.9 of the Code of Federal Regulations ("CFR"); Title 8,

Section 177.2 of the New York Codes, Rules and Regulations ("NYCRR"), and Title 20, Section 1412 of the United States Code (also known as the Individuals with Disabilities Act or IDEA). The purpose of DOE's parental consent form procedure for reimbursement under Educ. Law § 3602-c is to comply with state and federal laws. See "Guidance on Reimbursement Claims for the Cost of Providing Special Education Services to Parentally-Placed Nonresident Students Pursuant to Education Law Section 3602-c" ("June 2008 Guidelines") at 2; and "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c" ("September 2007 Guidelines") at 3-4. Both the June 2008 and September 2007 Guidelines require a district of location to obtain parental consent for provision of services and for sharing personal information and the IESPs with the district of residence from whom it seeks reimbursement. Claims for reimbursement must be made by June 30 of the SY following the SY in which services were provided. (id., ¶ 13-14).

DOE argues that because the September 2007 Guidelines require parents seeking special educations services to specifically request such services by June 1, preceding the school year for which services are requested, the Guidelines must also require the submission of contemporaneous parent consents:

> "Given this requirement, [that parents must seek services each year by June 1], it strains logic to suggest that Educ. Law § 3602-c does not either require the submission of contemporaneous Parental Consent Forms and other supporting documentation or does not allow the paying district to request such documentation to enable it to verify consent, residence and actual service at the costs claimed"

(memo in opp at 12-13).

DOE argues that the School District's motion should be denied because

> "the documentary evidence shows that Plaintiff submitted neither parental consent forms nor Proof of Residence nor IESPs when seeking direct reimbursement from DOE

> under Educ. Law § 3602-c for several of the years for which reimbursement is requested. The record shows that Plaintiff did not comply with State and Federal regulations requiring it to submit those forms in support of its request for reimbursement under Educ. Law § 3602-c, and creates an issue of fact precluding summary judgment in Plaintiff's favor"

DOE argues that pursuant to its own policy, parental consents to release information must be submitted "contemporaneously," or within "any kind of timely manner" of the request for reimbursement (memo in opp at 13). Specifically, DOE states: "DOE's requirement that the Plaintiff submit contemporaneous Parental Consent Forms, Proof of Residence and IESPs with its requests for reimbursement are rational, reasonable and wholly within the law" (*id.*).

It is DOE's position that neither the applicable federal statutes, nor the applicable state statutes, prevent the DOE from setting forth its own policy requirement for contemporaneous parent consents. DOE relies upon *Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]), for the proposition that "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*see also Matter of Tommy and Tina, Inc. v Department of Consumer Affairs of City of NY*, 95 AD2d 724, 724 [1st Dept 1983]["'[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight'"][internal citation omitted]).

DOE argues that its rational is that DOE requires the contemporaneous consent forms to verify the information to confirm that the students are New York City residents and are receiving the services that have been identified for reimbursement. According to DOE, for many of the students for which the School District claims reimbursement,

> "DOE has no record that for SY 2008-09 through SY 2016-07 (the years at issue in this litigation) all Parental Consent Forms, Proof of Residence, or copies of IESPs were provided at the time of the request or in any kind of timely manner that would allow DOE to verify if the students were actually residents of New York City, and received the

> special education services with parental consent for which reimbursement was requested"

(memo in opp at 14 citing Glotzer Aff. at ¶ 16; Exhibit G).

On this point, DOE further states that:

> "[n]o documentation was received for any students for SY 2007-08 until discovery in this matter, twelve years after the purported services were rendered, which, despite Plaintiff's arguments to the contrary (Pl. Mem. at pp. 29-29) is way beyond any reasonable amount of time to enable DOE to verify the information in the manner provided for in the June 2008 Guidelines"

(*id.*).

According to DOE, because it has no independent means of verifying this information, the parent release must be submitted with the request for reimbursement.

Analysis

With respect to the School District's claim pursuant to Education Law § 3602-c, the Court finds that the School District has met its burden to establish its entitlement to judgment as a matter of law. The parties agree that pursuant to Education Law § 3602-c (7) (b), in order for the DOL to recover costs from the DOR, the DOL must obtain consent from the parent to release the personally identifiable information concerning their child.

Consistent with the parties submissions, the language of the statute does not specifically mandate multiple yearly consents, it does not require a consent for each year of services, nor does it mandate the timing of the consents. The statute does not include language pertaining to the expiration of, or stale, consents.

The statute does provide direction in the instances where the parent does not consent to the release of personally identifiable information:

> "If such consent is not obtained, the school district of location shall submit to the commissioner, in a form prescribed by the commissioner, a claim for costs of services, evaluation costs, and committee on special education administrative costs that includes the address of the students permanent residence, including the school district of residence, and a certification by officials of the nonpublic school attended by the student

> that such address is the address of record of such student. Upon certification by the commissioner of the amount of such claim, the state comptroller shall deduct such amount from any state funds which become due to such school district of residence."

Likewise, the June 2008 guidance document from the New York State Department of Education (NYSED) which clarifies the scheme by which a "school district of location"(DOL) would be entitled, under the statute, to be able to recover such costs from a "school district of residence," ("DOR") does not state that the parental consents for release of student information must be contemporaneous with the request for reimbursement. Thus, as argued by the DOE, the only possible authority for this requirement, that the parent consents be submitted simultaneous with the request for reimbursement would be an agency policy.

In support of its motion, the School District argues, and establishes, that the DOE did not articulate the existence of such a requirement until 2014. According to its submission, the School District was unaware of any DOE policy that the parent consents to release information would become stale, or that they had to be re-submitted each year. The School District establishes on its papers that it sought reimbursement consistent with Education Law § 3602-c. According to DOE, this requirement for contemporaneous consents first came up in a March 30, 2011 email from DiBartolo to the DOE, in which DiBartolo sought guidance from the DOE as to the need for the School District to submit consents for reimbursement. The 2011 DiBartolo memo asks whether the School District had a legal obligation to submit the required documentation. In the parties submissions on this motion, there is no written response to this memo from the DOE. According to the DOE, DiBartolo testified at his deposition that he was advised by Ms. Freeman to provide the documentation required by DOE. DiBartolo Tr. 42: 23-25; 43:1-7. The DOE, in its opposition papers concludes that, based upon this exchange, the School District was aware as early as Spring 2011 that it was required to submit Parental

Consent Forms, Proof of Residence and copies of the IESPs with its billing in order to request reimbursement.

However, the Court finds otherwise. First, this exchange did not include a clear mandate that for every school year, including 2007-2008 through 2010-2011, the School District was to provide contemporaneous documentation, or that the consents for those past school years, such as 2007-2008, were stale. Further, it is mysterious that this issue is raised in a March 2011 email from DiBartolo, without any written response from the DOE, and then it is not raised again in correspondence between the DOE and the School District until 2014. Based upon Lanore's testimony and the 2014-2015 emails from the DOE, the DOE was not, in practice, requiring contemporary submission of parent consents. It is clear from Lanore's testimony that there was no written policy.

It is additionally clear that the policy involved "judgment calls" made by DOE employees. When speaking of the time requirement, Lanore stated that it was a judgment call whether the DOE would accept consents dated more than one year after the services were provided. He testified that if the documents were submitted on the date of his deposition, in August 2019, that DOE would still process them. He stated, of the April 23, 2015 DOE letter, which stated that if the DOE does not receive the documentation by today, the matter would be closed, did not mean that the DOE would not accept the documentation after that date. Specifically, Lanore testified: "if we received the documentation today, we would pay."

Similarly, the 2014 DOE emails seeking documentation from school years as far back as 2007-2008 and 2008-2009 in order to process payment for those years present serious questions about the need for, and enforcement, of a policy requiring contemporaneous documentation. The DOE has set forth no other obstacles to payment of the school invoices. The Court, therefore,

finds that the School District has met its burden with respect to the DOE's obligation to reimburse the School District for the school years set forth in the second amended complaint, pursuant to Education Law § 3602-c. This is so, provided the documentation has been received by the DOE, as represented by the School District in its motion papers.

The Court finds that the DOE's opposition fails to create any question of fact with respect the School District's compliance with Education Law §3602-c and the enforceability of the DOE policy concerning contemporaneous parent consents. Pursuant to CPLR 3212, a party opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. The Court finds that this policy, as articulated by, and supported by, counsel in the opposing memorandum of law is not supported by the accompanying evidence.

In the memorandum in opposition, counsel states that the DOE needed the parent consents to release information at the time of the request for reimbursement so that the DOE would know where the student resided and the services provided. This is, according to the memorandum, the rational basis for the policy. However, the testimony of Lanore and the emails from the DOE establish the contrary, that the DOE did not require the documentation to be contemporaneous.

On these grounds, the Court grants the School District's motion for summary judgment on the claim pursuant to Education Law §3602-c only to the extent of finding that the School District is entitled to reimbursement for the school years set forth in the second amended complaint. However, the Court directs the parties appear for a hearing with respect to the documentation, and whether the DOE is now in possession of the documentation needed to ascertain the amount now due and owing. The hearing is also necessary to determine the amount

established by that documentation that is due and owing from the DOE to reimburse the School District.

The School District's claims are not time barred

DOE argues that the School District's claims for reimbursement for several of the school years at issue are barred by the applicable statute of limitations, as Education Law § 3813(2-b) provides for a one-year statute of limitations for actions against a school district or board of education.

According to DOE, the School District's claims for payment for SY 2007-08 accrued as of June 2009, when it had the legal right to claim payment. Likewise, for SY 2008-09, it accrued in June 2010; for SY 2009-10, the claim accrued in June 2011, and for SY 2010-11, it accrued in June 2012. As such, for SY 2007-08, Plaintiff had to bring suit no later than June 2010, for SY 2008-09, no later than June 2011, for SY 2009-10 no later than June 2012 and for 2010-11 no later than June 2013. Plaintiff did not even approach DOE regarding the alleged non-reimbursement until June 2014 (see Glotzer Aff. at ¶¶ 21, 25; Exhibit L; DiBartolo Tr. 30:10-18) and did not commence this lawsuit until October 29, 2015, long after the statute of limitations expired for the SY 2007-08 through SY 2010-11. See ¶ 4 supra, NYSCEF Doc. No. 1.

Educ. Law § 3813 governs the presentation of claims against DOE, including the statute of limitations within which lawsuits must be commenced. Educ. Law § 3813(2-b) provides that "no action or special proceeding shall be commenced… more than one year after the cause of action arose…[.]"

In reply, the School District argues that the claims are not untimely due to the extensive assurances from the DOE that continued well beyond the dates of the invoices, and the DOE's failure to actually deny claims reasonably delayed the School District from taking legal

action. The School District argues that its claims are timely in accordance with well-established case law under Education Law § 3813, and supports this argument with the fact that three NYC DOE payments were made during the pendency of this action; payments that were received on July 12, 2018, September 21, 2018, and January 18, 2019.

An action, such as this, against the DOE, must be commenced within a year after the accrual of the claim:

> "[A]n action against a school district must be commenced within one year after the cause of action arose (*see* Education Law § 3813 [2-b]; *Henry Boeckmann, Jr. & Assoc. v Board of Educ., Hempstead Union Free School Dist. No. 1*, 207 AD2d 773, 775 [1994]). "In the case of an action or special proceeding for monies due arising out of a contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied" (Education Law § 3813 [1])"

(*Angelo Capobianco, Inc. v Brentwood Union Free School Dist.,* 53 AD3d 634, 635 [2d Dept 2008]).

Here, the DOE continued to negotiate payment and make payments to the School District up to, and during, the pendency of this action. Thus, here, the DOE is unable to establish that the School District's requests for payment were expressly or constructively rejected prior to October 2015 when the School District filed its complaint, commencing this action.

The School District was not required to exhaust Administrative Remedies

Defendants' further argue that this action requires exhaustion of administrative remedies by way of an appeal to the Commissioner of Education within the meaning of Education Law § 310. Defendants take the position that a party objecting to a finding of an administrative agency must first exhaust all administrative remedies before challenging the decision in court.

Defendants argue that pursuant to Educ. Law § 310 and 8 NYCRR § 275.16, the School District was required to appeal from DOE's rejection of its claim to the NYSED Commissioner within thirty days of DOE's determination. Education Law § 310 provides for appeals to the

Commissioner of the New York State Education Department in cases of refusals to reimburse for special educations services (or for any other claim of money made by one district against another). This law requires appeals of DOE's alleged refusal of reimbursement to be brought within thirty days of such refusal. The pertinent language of Education Law § 310 is as follows:

"Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action: 1. By any school district meeting. 2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district. 3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district. 4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act. 5. By any trustees of any school library concerning such library, or the books therein, or the use of such books. 6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district. 6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty one hundred sixty-four of the public health law. 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

> "At times deference is accorded to an administrative agency because of its expertise in a given area . . . . 'It is for the Commissioner in the first instance and not for the courts, to establish and apply criteria to govern the selection and retention of qualified educators and staff'"

(*Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 58-59 [2004][internal citations omitted]).

For example, the Commissioner's determination of tenure of a teacher is afforded due deference (*see Matter of Madison-Oneida Bd. Of Coop. Educ. Servs.*, 4 NY3d at 59. However, where the court is faced with the interpretation of statutes and pure questions of law, no deference is accorded the agency's determination (*id.; see also Matter of Buffalo Council of Supervisors and Adm'rs, Local 10 v Cash*, 174 AD3d 1462, 1464-1465[4th Dept 2019]["the

Commissioner exercises primary jurisdiction only where the matter involves an issue requiring his or her specialized knowledge and expertise").

The controversy presented by the parties before this Court does not require the Commissioner's expertise. The parties dispute the payment of monies pursuant to the interpretation of statutes and regulations. Specifically, the parties dispute the need for yearly parental consents pursuant to Education Law § 3602-c (7) (b). Thus, the there is no need for the School District to exhaust administrative remedies under Education Law §310. This matter is properly before this Court.

The School District's Unjust Enrichment Claim

The School District argues that DOE resident students benefited from the School District's administering and providing services, in accordance with these students' respective IESPs, at the School District's expense. Specifically, the School District takes the position that by not reimbursing the School District for funding DOE resident students' education, the DOE avoided having to use its own funds to finance its own resident students' education. On this ground, the DOE is unjustly enriched at the expense of the School District.

The School District further argues that its entitlement to reimbursement from the defendants is statutory and so this case does not involve the School District having proper authority to perform on a contract with the DOE. Furthermore, the School District argues, defendants have not disputed that services have been provided to their students and that they have benefited from the School District's spending the money upfront, with the assurance that the school district of residence is always responsible for providing their residents with a public education. Accordingly, New York City students have received services they are entitled to receive through the School District.

DiBartolo testified that the School District did not have a contract with the DOE for the provision of the services (Glotzer affirmation, exhibit O at 23). Lanore testified that there was no written contract between the School District and the DOE for the services and that Education Law § 3602-c does not require a written contract between the school district of location and the school district of residence.

In opposition, the defendants argue that the DOE is entirely within its rights to require the supporting documentation before reimbursing for services rendered under Educ. Law § 3602-c both to remain in compliance with the relevant Federal and State regulations, including 34 C.F.R §§ 300.130-147; 300.300, 300.9, 8 NYCRR § 177.2, and 20 U.S.C. § 1412, but also to confirm the claimed services were actually rendered to students who are actually New York City residents, and, therefore, the DOE did not unjustifiably withhold funds from the School District. DOE further argues that an action for unjust enrichment against a public body, like DOE, is permitted only in instances where the claimant "has paid money to the public body by mistake, money has been collected for an illegal tax or assessment, or property is erroneously taken or withheld by a public official" (*see Parsa v State*, 64 NY2d 143, 148 [1984]).

The submissions raise questions as whether the DOE wrongfully withheld reimbursement from the School District for services it allegedly provided to New York City school children under Education law §§ 3602-c. As the School District is unable to characterize its claim as any of the above listed instances, the court finds that the School District has not met its burden on its motion to establish judgment in its favor on its unjust enrichment claim. The Court, therefore, denies the motion as to this claim.

The School District's claim for an Account Stated

The School District argues that it has a claim for an account stated for the allegedly unpaid reimbursement because DOE neither objected to the bills submitted by plaintiff and made partial payments. The School District takes the position that DOE received the plaintiff's invoices but did not object to the amounts. Thus, according to the School District, [the DOE] and the School District had an implicit agreement to pay inasmuch as [the DOE] was billed and never objected to any of the bills, except for asserting the parent consent form problem many years later.

In a May 28, 2014 email to Brenda Antoine (Antoine) at the DOE, DiBartolo summarized the amounts due and owing as follows:

> "1 have attached copies of all of our outstanding invoices totaling $326,037. As you will see, your department has been holding these Invoices for 6 years. The summary is as follows; Past Due Invoices
> 2011-2012 NYC 64-13A $83,111
> 2010-2011 NYC-A1-11 $30,230
> 2010-2011 NYC-A2-11 $1,867
> 2009-2010 NYC-A1-10 $102,376
> 2008-2009 NYC-A1-09 $65,267
> 2007-2008 NYC-A2-08 $3,139
> 2007-2008 NYC-A1-08 $60,027"

(Kwee affirmation, exhibit 22).

In his affidavit, DiBartolo avers that "after years of demanding amounts due for special education costs and expenses that the [School District] had expended to the benefit of NYC DOE students," he sent that email (DiBartolo aff, ¶ 21). He further avers that the DOE neither denied or disputed any of these invoices but continued to promise that payment would be forthcoming" (*id.*).

DOE argues that there is no account stated because there was no agreement, explicit, implicit or otherwise regarding the amounts claimed by the School District or owed by DOE because of the School District's failure to submit the required supporting documentation with its

requests for reimbursement. DOE relies on the email correspondence between DOE and plaintiff from June 2014 and August 2015, concerning plaintiff's reimbursement requests. According to those emails, "DOE advised, and plaintiff repeatedly acknowledged the need to provide DOE with contemporaneous Parental Consent Forms, Proofs of Residence and IESPs in order to receive payment. Plaintiff assured DOE that it was making efforts to obtain those documents" (Glotzer affirmation at ¶ 21 citing Exhibit L).

Further, according to DOE's opposition, DiBartolo testified that he was aware of DOE's requirement for supporting documentation as early as Spring 2011. He testified that he was advised, in response to an internal DOE memo asking for guidance whether the School District had a legal obligation to comply with DOE's request for supporting documentation, to provide the documentation DOE sought (Glotzer affirmation, ¶ 20, citing exhibit K and DiBartolo Tr.: 42: 23-25; 43:1-7).

In this March 30, 2011 memo from DiBartolo to Lori Freeman at DOE, he wrote, in part:

> "in order to process payments for special education services provided to parentally placed nonresident students attending non-public schools in Hewlett-Woodmere, the New York City Department of Education has requested copies of parental consent to share student specific information between the district of residence and the district of location, as well as documentation evidencing New York City residency (see attached NYSED guidance memo regarding IDEA nonresident claims).
> Pending receipt of this documentation, NYC DOE is withholding the processing payments of $60,027 for the 2007-2008 school year and $65,278 for the 2008-2009 school year. An invoice in the amount of $102,378 has been prepared for the 2009-2010 school year and will be forwarded when the parental consent and proof of residency documentation is available. DOL must forward a claim for payment for the 2009-2010 school year by June 2011"

(Glotzer affirmation, exhibit K).

According to DOE, "the record is clear that DOE never agreed with [the School District] upon any price for the services purportedly provided in the absence of supporting documentation" (memo in opp at 18).

"'An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other'" (*Shea & Gould v Burr*, 194 AD2d 369, 370[1st Dept 1993][internal citation omitted]). "In this regard, 'receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor'" (*id*. at 370-371).

As an account stated must establish a meeting of the minds with respect to the balance due. Because the School District has not established an agreed-upon account and balance due, there remain questions of fact as to these issues. As such, the Court denies the School District's motion as to this claim for an account stated.

Promissory Estoppel

The School District takes the position that it relied upon DOE promises to reimburse it for the provided special education services to its detriment. Pl. Mem. at pp. 46-49. According to the DOE, the School District is incorrect as DOE made no promise to pay in the absence of supporting documentation.

However, the School District has not established as a matter of law that the DOE made a clear or unambiguous promise to make any payments in the absence of Parental Consent Forms, Proof of Residence and IESPs. Nor could DOE have promised to pay Plaintiff's invoices, as payment was conditioned on Plaintiff submitting parental consent forms, proof of residence and IESPs as required under Educ. Law § 3602-c. Thus, the School District's motion on its claim for promissory estoppel is denied.

In accordance with the foregoing, it is

ORDERED that plaintiff Board of Education of the Hewlett-Woodmere Union Free School District's motion for summary judgment (motion sequence 003) is granted only with respect to defendants' liability as to the first cause of action set forth in the second amended complaint, pursuant to Education Law § 3602-c; and it is further

ORDERED that the issue of the amount due and owing under the first cause of action shall be determined at the trial of this action.

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4/21/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE