The University of the State of New York

The State Education Department
State Review Officer
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No. 23-101

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, 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 district) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to provide direct funding to respondent's (the parent's) chosen providers at enhanced market rates for the cost of special education teacher support services (SETSS) and related services unilaterally obtained for the student for the 2022-23 school year. The appeal must be sustained, and the matter remanded to the IHO for further administrative proceedings.

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 Individuals with Disabilities Education Act (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 related to IESPs, 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 of the IDEA and the analogous State law provisions 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

Given the limited information included in the hearing record, a full recitation of the student's educational history is not possible. Based on the information available, a CSE convened

on May 17, 2018 to develop an IESP for the student to be implemented starting on September 6, 2018, for the student's kindergarten school year (Parent Ex. B at pp. 1, 10).[1] The May 2018 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended that the student receive five periods per week of direct, group SETSS, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of individual counseling (id. at pp. 1, 10).

A. Due Process Complaint Notice

By due process complaint notice dated November 22, 2022, the parent alleged that for the 2022-23 school year, the district "failed to offer the student a program of special education services and supports to address his documented disabilities" (Parent Ex. A at p. 1). The parent further asserted that the district failed to comply with Education Law §3602-c in that it did not provide the student with service providers by the start of the 2022-23 school year (id.). The parent asserted that the district failed to implement the student's mandated SETSS and related services with certified SETSS and related service providers and that the parent was required to implement the services on her own (id.). The parent further alleged that the district shifted the burden of implementation onto her and that she was unable to find providers at the district's regular rates despite exerting extensive effort (id.). The parent contended that she had no choice but to utilize the services of an agency at an enhanced rate (id.).[2]

As relief for the district's failure to provide equitable services, the parent requested a finding that the district failed to provide the student with a FAPE and equitable services for the 2022-23 school year; an order compelling the district to implement the student's program of SETSS at enhanced market rates; an order compelling the district to implement the student's related services at enhanced market rates; and an order compelling the district to provide a bank of compensatory education services for services not provided for during the 2022-23 school year due to the failure to assign a provider (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

A hearing on pendency was held on January 20, 2023, at which the district did not appear (Tr. pp. 1-6). The parent indicated that the May 2018 IESP was the student's last agreed upon program (Tr. pp. 3-4). In an interim decision on pendency dated January 20, 2023, the IHO found that the district did not offer an alternative pendency placement to the student and did not provide the parent with a pendency agreement (IHO Ex. I at p. 5). Consistent with the parent's request for

[1] Parent exhibit B is a ten-page, May 17, 2018 IESP; however, pages two and nine—as received by the Office of State Review—were cut in half and it is unclear if the document entered into evidence during the impartial hearing contained the entire May 2018 IESP. On remand, in addition to receiving documentary evidence related to a Burlington/Carter analysis, the IHO should confirm that a complete copy of the May 2018 IESP is entered into evidence.

[2] The parent also asserted her right to pendency and alleged that the student's last agreed upon program was based on the May 2018 IESP (Parent Ex. A at p. 2).

pendency services based on the May 2018 IESP, the IHO ordered the district to pay a provider selected by the parent at a market rate for five periods per week of SETSS, two 30-minute sessions per week of individual speech-language therapy,[3] one 30-minute session per week of group speech-language therapy, three 30-minute sessions per week of individual OT, and one 30-minute session per week of individual counseling as pendency beginning with the date of the parent's November 23, 2022 due process complaint notice (id. at pp. 2, 5).

At the next scheduled impartial hearing date on February 15, 2023, the district did not appear, and the parent agreed to continue the matter to an additional hearing date (Tr. pp. 7-11). On the March 14, 2023 impartial hearing date, the district appeared; however, the parent's advocate had communicated that she was unable to appear and had been unable to find someone else to appear in her absence (Tr. pp. 12-13). The district requested an extension of the compliance date, which the IHO granted and scheduled an additional impartial hearing date (Tr. pp. 14-15). On April 18, 2023, the IHO and the district representative appeared; however, the parent's advocate had communicated to the IHO that she did not know if she would be able to make it to the hearing in this matter because she "was going to be stuck in a hearing" (Tr. pp. 17-19). The district requested an extension of the compliance date, the IHO noted there would be no harm to the student and adjourned the matter (Tr. pp. 20-21).

The parties reconvened on April 28, 2023 for an impartial hearing date (Tr. pp. 22-26). The IHO indicated that the district representative had been waiting for the impartial hearing to begin as previously scheduled, and then had to leave to attend a different impartial hearing, which the IHO stated was his fault, without further explanation (Tr. p. 23). The IHO began by stating that the matter concerned the parent's request for services pursuant to an IESP from a prior school year and indicated that the district representative had questions regarding whether the student was receiving services and had requested a subpoena (Tr. pp. 23-24). The IHO then stated that his position was that he was writing a decision which would address the student's needs, "not addressing the needs of an agency [or] directing payment towards one specific type of agency" (Tr. p. 24). He further summarized his view of the matter: "the student was supposed to get certain services," "[t]he [d]istrict was mandated to make sure those services were provided" but did not do so, and "[the p]arent was, therefore, required to obtain the services on her own and now seeks funding" (id.). The IHO then stated his intention was to issue a decision that reflected the student's entitlement to services, noting that he did not know who the provider was and that it did not matter to him who the provider was (id.). The IHO further indicated that he would "order the services to be funded at market rate contingent on the provider showing by affidavit or otherwise that the services were provided" (id.).

By decision dated April 29, 2023, the IHO found that the parent sought implementation of the May 2018 IESP, which recommended five periods per week of SETSS, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, three 30-minute sessions per week of individual OT, and one 30-minute session per week of individual counseling (IHO Decision at p. 6).[4] The IHO then determined that no

[3] Although the May 2018 IESP provided for one weekly session of individual speech-language therapy, the IHO included two sessions in his pendency order (compare Parent Ex. 1 at p. 10, with IHO Ex. I at p. 5).

[4] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their

subsequent IESP was offered into evidence by the district and, as a result, the May 2018 IESP was "held to remain [the s]tudent's operative placement for the 2022/23 school year" (id.). The IHO further found that "[n]o evidence was presented by the [district] to establish that it implemented the SETSS and related services mandated by [the] IESP" and that, pursuant to Education Law § 3602-c, the parent was "awarded funding for such services, to be administered by a provider(s) of [the p]arent's choice at the market rate for such services" (id. at pp. 6-7). As relief, the IHO ordered the district to pay the parent's providers of choice, "whether an individual or . . . an agency, upon presentation of licensure and credentials, and proof of such services provided. . . an enhanced rate equal to the market rate for such services" for five periods per week of SETSS, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, three 30-minute sessions per week of individual OT, and one 30-minute session per week of individual counseling, to the extent that related service authorizations (RSAs) had not been issued for those related services (id. at p. 7). The IHO further ordered that the district would be credited for any services paid for through the IHO's interim decision on pendency (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred by failing to apply the appropriate standards to the parent's claims and requested relief. The district asserts that the IHO erred in awarding the parent's requested services without finding that those services were appropriate. According to the district, the parent did not provide any evidence of the district's failure to provide services, the provider or agency that provided the services, whether the provider or agency was providing the services in the same frequency or duration as recommended on the IESP, whether the student was making progress, or any information on whether the provider or agency was addressing the student's identified academic needs. The district further alleges that, even without the district's appearance on the final date of the impartial hearing, the parent failed to meet her burden of establishing that the unilaterally obtained services were appropriate, noting that the only evidence in the hearing record was the due process complaint notice and the May 2018 IESP. Next, the district asserts that, if the matter is not dismissed due to the parent's failure to meet her burden, the matter should be remanded because the IHO erred by conducting the impartial hearing without the district's appearance and denied the district due process. The district argues that the IHO started the hearing late after the district's representative had communicated that she was waiting for the impartial hearing to begin and could not wait much longer. The district asserts that the IHO should have taken steps to secure the district's attendance, such as rescheduling the impartial hearing, as he had done on prior occasions. The district argues that this is not a case where the district failed to appear after receiving specific guidelines and the parties were not simultaneously present on any of the five scheduled impartial hearing dates. The district further asserts that its due process rights were violated by the IHO's failure to allow the district to be heard on the merits of the parent's claims and on the issue of a requested subpoena. In support of its claims, the district has annexed four proposed exhibits to its request for review to be considered as additional evidence in this appeal.

The district also argues that the IHO erred in referencing a FAPE analysis in the decision as the student was parentally placed. Additionally, the district asserts that the IHO erred by not

consecutive pagination with the cover page as page one (see generally IHO Decision).

finding that the parent was required to demonstrate that she requested services from the district by June 1, 2022 and requests that it be permitted to raise this issue on remand of the matter. Finally, the district alleges that the IHO erred in failing to weigh equitable considerations given that the hearing record did not establish the parent's financial obligation to the providers of her unilaterally obtained services. As relief, the district requests that the parent's due process complaint notice be dismissed as she failed to meet her burden of establishing the appropriateness of the unilaterally obtained services and further that equitable considerations did not warrant an award of relief. In the alternative, the district requests that the IHO's decision be reversed, and the matter be remanded for an impartial hearing on the merits with the participation of the district.

In an answer, the parent responds to the district's claims. Initially, the parent opposes the district's proposed additional evidence asserting that the exhibits are not necessary to render a decision in this matter. The parent next argues that the IHO did apply the proper analysis and that the IHO found that the parent's burden was met by establishing the licensure and credentials of the parent's private providers. The parent asserts that when a parent implements services recommended by the district, it is reasonable that the parent need only demonstrate the qualifications of the providers to establish that the unilaterally obtained services are appropriate. The parent further argues that the IHO found that the parent's burden would be met by ordering that funding for the parent's unilaterally obtained services was contingent on the parent presenting licensure and credentials to the district's implementation unit as well as proof of the delivery of the services. With regard to equitable considerations, the parent alleges that the district did not bring forth any equitable considerations applicable to this matter. The parent alleges that, because the IHO ordered funding at market rates, no equitable considerations apply. The parent next argues that the IHO correctly rejected the district's request for a subpoena. In response to the district's claims related to the lack of evidence of a contract and/or financial obligation of the parent to the providers, the parent asserts that the IHO must have found equitable considerations favored the parent because the district's failure to offer the student a FAPE for more than three years outweighed any lack of evidence, and that it was within the IHO's discretion to award any relief. The parent also notes that the IHO did not allow for a full hearing and, therefore, the parents did not fail to meet any burdens either regarding the appropriateness of the unilaterally obtained services or equitable considerations, which she could do by presenting provider credentials and qualifications and a copy of a contract entered into with the provider after a remand.

Concerning the district's claim that the IHO incorrectly applied a FAPE analysis, the parent asserts that the district has not convened a CSE for the student since 2018, and therefore the IHO properly considered FAPE. With regard to the district's claim that the parent failed to request services by June 1, 2022, the parent alleges that the IHO correctly ordered the district to provide services to the student without notice because the district remained obligated to convene a CSE and offer the student a FAPE. As relief, the parent requests that the IHO's decision be affirmed in its entirety, and in the alternative, that the matter be remanded to the IHO for further proceedings.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools

(see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

The district has attached proposed exhibits to its request for review, which consist of email correspondence between the parties and the IHO regarding scheduling, the district's request for a

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

subpoena, explanations by the IHO of his decision to proceed with the impartial hearing on April 28, 2023 and his then-forthcoming decision, and the district's response to the IHO's email explanation of his decision to proceed without the district's representative in attendance, and the IHO's response (SRO Exs. 1-4).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Proposed SRO Exhibit 1 consists of email correspondence between the parties and the IHO dated April 17, 2023 and April 18, 2023, which concerned scheduling of the final hearing date (SRO Ex. 1 at pp. 1-2). Specifically, by email dated April 18, 2023, the district's representative wrote that she realized she had a conflict on April 28, 2023 from 12:30 p.m. to 1:30 p.m. (id. at p. 1). The district's representative further stated that she knew "that we discussed returning for a [s]tatus [c]onference on 4/28/23 at 1:00pm but [she was] requesting that it be delayed until 1:30pm" (id.). The parent's advocate replied that the change to 1:30 p.m. was acceptable to her (id.).

Proposed SRO Exhibit 2 consists of an April 20, 2023 email exchange between the parties and the IHO, wherein the district's representative requested that the IHO sign an attached subpoena directed to one of the parent's service providers, and the parent's advocate replied to the email requesting an opportunity to be heard at the next "status hearing" (SRO Ex. 2 at p. 1).[7]

Proposed SRO Exhibit 3 consists of an April 28, 2023 email from the district's representative to both the IHO and the parent's advocate, which indicated it was sent at 1:42 p.m. and asked if the "[s]tatus [h]earing [wa]s proceeding today" (SRO Ex. 3 at p. 1). The district's representative also wrote that she was waiting on the conference call, had another hearing scheduled, and could not wait for an extended period of time (id.). On April 28, 2023 at 1:52 p.m., the IHO replied, "sorry, coming now" (id.).

Proposed SRO Exhibit 4 consists of email correspondence between the parties and the IHO on April 28, 2023 and May 3, 2023, wherein the IHO described his rationale for proceeding with the impartial hearing on April 28, 2023 without the district, the district's objection, and the IHO's response (SRO Ex. 4 at pp. 1-3).[8]

[7] The subpoena attachment was not included with the exhibit.

[8] The IHO's initial description of his rationale for proceeding with the impartial hearing appeared to be sent on April 28, 2023 at 1:06 p.m.; however, it also appears to have been sent as a reply to the district's April 28 email, which is marked as having been sent later in the day at 1:42 p.m. (SRO Ex. 4 at pp. 2-3). Review of the content

State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]). Thus, proposed SRO exhibits do not constitute additional evidence presented for the first time on appeal and will be considered herein as its contents fall within the categories required to be made part of the hearing record as per the regulation cited above.

2. Conduct of Impartial Hearing

Turning to the district's arguments about the IHO's issuance of a decision without giving the district an opportunity to present evidence and arguments on the merits of the parent's claims and requested relief, State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

During the April 18, 2023 impartial hearing date, at which only the IHO and the district's representative had appeared, they discussed the possibility of a resolution and noted that the parent's advocate was not present due to another impartial hearing (Tr. pp. 18, 19). As part of the IHO's discussion with the district's representative, the IHO noted that, if the district was not contesting the placement contained in the May 2018 IESP, the IHO could issue a decision subject to proof of services being provided at market rate and advised the district representative "if we don't have a resolution agreement in place we'll see if we can just dispose it that way through a decision" (Tr. pp. 18-19). When scheduling the next impartial hearing date, the IHO stated, "[w]hy

of the IHO's reply indicates that it was sent after the impartial hearing.

don't we check back April 28th at 1 o'clock?" (Tr. p. 19). Following the April 18, 2023 appearance, the district's representative sent an email to the IHO and the parent's advocate stating that she realized she had a conflict on April 28, 2023 from 12:30 p.m. to 1:30 p.m., and that she knew "that we discussed returning for a [s]tatus [c]onference on 4/28/23 at 1:00pm but [she was] requesting that it be delayed until 1:30pm" (SRO Ex. 1 at p. 1). The parent's advocate replied that the change to 1:30 p.m. was acceptable to her (id.).

Based on the discussion at the prior hearing date and the subsequent email exchanges, the district's representative appeared on April 28, 2023 at 1:30 p.m., for what she reasonably believed was a status conference (SRO Ex. 1 at p. 1).[9] The district's representative sent an email to the IHO and the parent's advocate at 1:42 p.m. indicating that she was waiting for the IHO and the parent's advocate and asking if the "[s]tatus [h]earing [wa]s proceeding today" (SRO Ex. 3 at p. 1). The district's representative also wrote that she was waiting on the conference call, had another hearing scheduled, and could not wait for an extended period of time (id.). On April 28, 2023 at 1:52 p.m., the IHO replied, "sorry, coming now" (id.).

The transcript of the April 28, 2023 impartial hearing date reflects that the IHO and the parent's advocate began the hearing at 1:55 p.m. (Tr. p. 22). The IHO stated that the district's representative had been "waiting for us and then she became occupied in another hearing" (Tr. p. 23). As noted above, rather than attempting to contact the district representative or adjourn the hearing, the IHO addressed what he believed the district's questions were regarding the parent's unilaterally obtained services and indicated he would "email [the district representative] and let her know this [wa]s what [he] intend[ed] to do, and [he] believe[d] that w[ould] resolve her issue and her concern as to whether or not services were provided" (Tr. pp. 23-25).

The IHO sent an email to the district's representative and parent advocate, replying to the district representative's prior email, stating that he was "sorry about that" and had "completely forgot[ten] about this case" (SRO Ex. 4 at pp. 2-3). Consistent with the April 28, 2023 transcript, the IHO stated that he intended to address the concern raised in the district's request for a subpoena as to whether services were actually provided to the student by including a directive in his decision that "funding to whichever agency [wa]s servicing the [student] shall be conditioned upon such agency's proof of services provided to the student (which would be required by the implementation office in any event)" (SRO Ex. 4 at pp. 2-3; see Tr. pp. 23-24). The IHO also noted that his concern was not towards any particular agency and he was focused on the student and the student's entitlement for the 2022-23 school year (SRO Ex. 4 at p. 3). In conclusion, the IHO stated that his decision would address the student's entitlement and the district's failure to implement its IESP and that if the agency "cannot establish that it provided the services, it will not get paid" (id.).

The district's representative responded to the IHO, by email dated May 3, 2023, objecting to the issuance of a decision without a substantive hearing and without "addressing the subpoena" (SRO Ex. 4 at pp. 1-2). The district's representative argued that "[w]e cannot rely solely on the [parent's due process complaint notice], which list[ed] the latest IESP as 5/17/18 without taking into consideration the various assessments and evaluations which have been conducted from 2019

[9] The parent's advocate had also referred to the April 28, 2023 hearing date as "our next status hearing" (SRO Ex. 2 at p. 1).

to 2023" and that the parent's service provider "was suspect[ed] [to be] involved in the federal indictment related to allegations of theft of government funds and wire fraud conspiracy" (id.).[10] The district's representative asserted that the parent was obligated to establish the appropriateness of the services obtained for the student and that "[i]f [the district] learn[ed] information to the contrary, [it] ha[d] a duty to exercise due diligence of confirming that the services were actually provided" (id.). The district's representative further argued that the district had "no obligation to offer this student a FAPE . . . , as the student was parentally placed" and "[s]ince the parent ha[d] taken the responsibility of placing a student at his/her own expense, the parent [wa]s only entitled to be seeking equitable services from the [district]" (id.). Next, the district's representative contended that the purpose of the requested subpoena was "to obtain information from the service provider that the IHO w[ould] need to make an accurate determination regarding the merits of the parent's [due process complaint notice]" (id.). The district's representative argued that the district was "entitled to review the [four] corners of the parent's [due process complaint notice] to determine whether the allegations [we]re true, and that include[d] specific information about the agency that provided the services" (id.). The district's representative also asserted that the district was entitled to review the disclosure of the parent's exhibits to determine whether there were any equitable considerations that would warrant a denial or reduction of an award to the parent (id.). In conclusion, the district's representative stated that "[i]f this IHO prevent[ed] the [district] from our entitled right to due diligence and denie[d] our right to a [d]ue [p]rocess [h]earing, it . . . also infring[ed] on our right to properly defend against the [due process complaint notice] filed by the parent" (id.).

By email dated May 3, 2023, the IHO responded to the district's representative, further explaining the rationale for his decision (SRO Ex. 4 at p. 1). The IHO wrote that the parent's due process complaint notice requested implementation of services set forth on an IESP from a prior school year and that it appeared to be the most recent IESP created for the student (id.). The IHO stated that the district had never alleged that a more recent IESP had been created or that the student was not entitled to the services recommended in the IESP (id.). Instead, the IHO indicated that the district raised the issue of whether the parent's chosen provider had actually provided the services for which the parent sought funding, and that, therefore, "the [IESP] entered into evidence remain[ed] the operative placement for the 2022[-]23 school year" (id.). The IHO further stated that the district had "a non-delegable duty to ensure implementation of its recommendations as contained in the [IESP]" and that the district had instead "failed to implement such recommendations and improperly shift[ed] the burden to the parent to find her own provider" (id.). The IHO wrote that his decision addressed "primarily the entitlement of the student to the services contained in the [IESP]; of this, there appear[ed] to be no dispute among the parties" and "with respect to funding parent's agency of choice, whose presence in this case is necessitated solely due to the [district]'s failure to implement its [IESP] mandates," the decision specifically required verification of the provision of services prior to funding (id.). The IHO further stated that "a protracted hearing, or information possibly provided by a subpoena, would still not affect the

[10] The May 3, 2023 email does not identify any specific assessments or evaluations and the district's request for review is silent as to whether or not any assessments or evaluations of the student were conducted between 2019 and 2023.

outcome of this case, as the student [wa]s entitled to what he [wa]s entitled to, as contained in the [IESP]" and "the only issue [wa]s whether parent's provider [wa]s entitled to funding" (id.).

In consideration of the above, the hearing record reflects that the parties understood the April 28, 2023 hearing date was set for a status conference (SRO Exs. 2 at p. 1; 3 at p. 1). The IHO did not disclose to the parties in advance that the April 28, 2023 hearing date was expected to be anything more than a status conference (see Tr. pp. 18-20). The IHO's reference to disposing of the matter through a decision at the April 28, 2023 hearing date appeared to be in reference to the parties' settlement discussions and was contingent on the district not making arguments related to the implementation of the May 2018 IESP for the 2022-23 school year (Tr. p. 19). Accordingly, the IHO erred in not providing the district with an opportunity to present its arguments (see 8 NYCRR 200.5[j][3][xii] [each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses]).

In addition, the IHO did not provide the district with an opportunity to respond to his April 28, 2023 email before issuing his decision on April 29, 2023. The IHO sent an email after the conclusion of the hearing indicating that he intended to write a final decision based on a discussion with the parent's advocate during the April 28, 2023 status conference and without the benefit of an impartial hearing on the merits of the parent's due process complaint notice. The IHO sent an email to the parties after the conclusion of the status conference on April 28, 2023, a Friday, stating what he intended to do and then issued his decision on April 29, 2023, a Saturday (SRO Ex. 4 at pp. 2-3; see IHO Decision at p. 8). This did not provide the district with sufficient time to respond to the IHO's intention to issue a decision without hearing the district's perspective on what happened.

To be sure, both parties' failure to appear for scheduled appearances is disruptive to the hearing process and, under other circumstances, may have warranted the IHO finding the district's nonappearance amounted to a concession of the allegation in the due process complaint notice. However, here, given the understood purpose of the last scheduled appearance, the district's arrival at the scheduled time, and the lack of notice provided that the district would be treated, essentially, as though it defaulted in the matter if it did not appear to the status conference, the IHO's actions ran contrary to the dictates of due process.[11] Overall, the hearing record supports the district's claims that the IHO's failure to conduct an impartial hearing on the merits of the parent's due process complaint notice and his decision to end the impartial hearing on April 28, 2023 without giving the district the opportunity to be heard was error. Based on the foregoing, the IHO failed to conduct the impartial hearing in a manner consistent with the requirements of due process and, as discussed further below, the matter must be remanded to the IHO for further proceedings (34 CFR 300.514[b][2][ii]).

[11] Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with procedural requirements relating to the impartial hearing process tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]).

B. Legal Standard

As this matter is being remanded, further comment on the legal standards applicable and the IHO's rationale for concluding the matter without receiving evidence is necessary.

The IHO found that there was no defense available to the district for its failure to deliver services set forth in the May 2018 IESP. However, the hearing record is not developed regarding what, if anything, had occurred for this student between the development of the May 2018 IESP and the 2022-23 school year, it is not clear from the hearing record that the district was obligated to deliver services set forth in an IESP from four years prior, and the district did not concede that it was so obligated.[12]

As noted above, generally speaking, the district's responsibility to provide equitable services to the student is triggered by the parent making the request in writing, specifically providing that districts "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 or person in parental relation of any such student" (Educ. Law § 3602-c[2][a]). It further provides that "[i]n the case of education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location on or before the first of June preceding the school year for which the request is made" (id.).[13]

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[12] To the extent the district's argument can be read to imply that the parent was required to demonstrate that the district failed to implement an IESP, that is not the parent's burden. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

[13] On the other hand, the statute itself 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 1st deadline (Educ. Law § 3602-c[2][a]). As an SRO recently observed:

> The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the Jun 1st deadline. But read as a whole, the statute does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline. 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. Research by the undersigned has revealed no caselaw addressing whether a school district is barred from dually enrolling a student who has missed the June 1st deadline and the parties have pointed to none.

The hearing record that was before the IHO contains no evidence satisfying this requirement under section 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding the 2022-23 school year, an issue which the district has raised in its appeal, or that the district was obligated to provide the services notwithstanding the lack of notice (Req. for Rev. ¶ 28; see generally Tr. pp. 1-26; Parent Exs. A-B).[14] Moreover, the district was not given the opportunity to present evidence of any IEP or IESP developed for the student after the 2018 IESP or of any actions that it took to deliver the student services.

The IHO assumed that this case was akin to the group of matters wherein the district has delegated to parents the obligation to find SETSS providers to implement student's IESPs at acceptable rates. SROs have noted that the procedure utilized frequently by the district in matters of this type is manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards 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" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).

However, the IHO made this assumption without allowing the hearing record to be fully developed and without any evidence that this was in fact a case where RSAs were issued to the parent and/or that she was tasked with locating independent contractors from a list provided by the district to implement the services recommended on an IESP (Tr. p. 23).

Moreover, even if the district had improperly delegated the obligation to implement an IESP to the parents, the parent still would have had to show the appropriateness of the privately obtained services. That is, while districts cannot deliver special education services called for by their educational programming in an unauthorized manner, due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, districts can be made to pay for a privately

(Application of a Student with a Disability, Appeal No. 23-032).

[14] If the parent did not make such a request in writing, the district remained obligated to offer the student a FAPE and should have developed an IEP for the student. However, it is worth reminding the parties and the IHO that if the parent's alleged failure to make a written request for IESP services in a manner consistent with State law was an issue in dispute, courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. For example, in E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537 (S.D.N.Y. Nov. 26, 2012), after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T., 2012 WL 5936537, at *16). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"] [emphasis added]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

obtained parental placement, a process that is essentially the same as the federal process under the IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Thus, as a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place.[15]

Here, although the IHO articulated the Burlington/Carter standard in his decision, he did not apply it. Rather, the IHO implied that the parent's burden of establishing the appropriateness of her unilaterally obtained services would be satisfied by demonstrating that the private providers were properly licensed and/or credentialed upon submission to the district for payment. As noted above, the district wished to probe the question of the delivery of services by pursuing a subpoena for the testimony of a representative from the private agency that purportedly delivered the student's services. The IHO should have held the parent to her burden and given the district an opportunity to solicit evidence calling into question the appropriateness and delivery of the services. As a result, the IHO's decision was not made on substantive grounds and must be vacated (see 20 U.S.C. § 1415[f][3][E][i]).

C. Remand

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the appropriate remedy for the IHO's denying the district its due process rights to a full and complete impartial hearing under a Burlington/Carter analysis is a remand to continue these proceedings.

Accordingly, the IHO's decision must be vacated, and the matter remanded to the IHO for further proceedings relating to the parent's claims as set forth in the November 22, 2022 due

[15] The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that have been approved by the Commissioner of Education, and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see http://www.oms.nysed.gov/rsu/).

process complaint notice, including whether the parent requested an IESP from the district prior to the June 1 deadline, thus triggering the district's obligation to develop an IESP for the student, and, if not, whether the district was otherwise required to develop an IESP absent a timely request or deliver services to the student (Educ. Law § 3602-c[2][a]; Application of a Student with a Disability, Appeal No. 21-138; see Lee-Holowka v. Emma Willard Sch., 149 N.Y.S.3d 890 [NY Sup. Ct., Rensselaer County 2021] [requesting an IESP "is a necessary prerequisite to invoking the statute's benefits"]).

Additionally, the IHO must determine whether the parent's unilaterally obtained services were appropriate for the student, and if appropriate, whether equitable considerations weigh in favor of the parent's requested relief of direct funding. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon.

VII. Conclusion

Having determined that the IHO erred by issuing a determination in this case without a full hearing on the merits, the case is remanded to address the parent's claims in their due process complaint notice to determine whether she is entitled to her requested relief and to allow both parties the opportunity to present their cases.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 29, 2023 is vacated in its entirety; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision.

Dated: **Albany, New York**
July 31, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER