The University of the State of New York

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

No. 23-191

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO), which denied her request for an order of relief following an accelerated review process pursuant to Education Law § 4404(1-a) and 8 NYCRR 200.5(o). Respondent (the district) cross-appeals from the IHO's application of the statutory and regulatory accelerated review process. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter must be remanded for an impartial hearing.

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]).

Under ordinary circumstances, 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]). The accelerated review process used in the present matter is described further below.

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

As further described below, this due process proceeding was not conducted in accordance with the full panoply of administrative hearing procedures and therefore the administrative record is not fully developed. The administrative record indicates that a CSE convened on May 15, 2020 to develop an IESP with a projected date of implementation of May 28, 2020 (Parent Ex. B at p. 1). At the time of the May 2020 CSE meeting, the student had been parentally placed at a nonpublic school and had reportedly benefitted from receiving special education teacher support services (SETSS) and speech-language therapy (id. at p. 3). The May 2020 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that she receive five periods per week of direct, group SETSS and two 30-minute sessions per week of group speech-language therapy (id. at pp. 1, 9).[1, 2]

According to the parent, the student remained eligible to receive the program and services set forth in the May 2020 IESP as "the operative" IESP and that, leading up to the 2022-23 school year, she "received no communication from the [district]" regarding the provision of SETSS and speech-language therapy to the student (Parent Ex. E ¶ 2).

On November 25, 2022, the parent signed a contract with Urban Student Support (Urban), pursuant to which the parent authorized Urban to provide "[s]pecial [e]ducation and/or [r]elated [s]ervices" to the student for the 2022-23 school year at a specified "SETSS/SEIT" rate of $175 per hour (Parent Ex. C at p. 1). The contract further indicated that Urban would provide "SETSS/SEIT" services "as per [the student]'s last agreed upon IESP" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated December 15, 2022, the parent, through a lay advocate alleged that the district denied the student equitable services pursuant to Education Law § 3602-c by failing to implement the special education and related services it recommended for the student during the 2022-23 school year (Parent Ex. A at p. 1). The parent further asserted that the district shifted the burden of implementing the recommended SETSS and related services onto the parent (id.). The parent asserted she was unable to find providers willing to accept the district's published rates and was forced to obtain private providers at enhanced rates (id. at pp. 1-2). The parent also requested pendency based on the May 2020 IESP, which recommended that the student receive five hours per week of SETSS and two 30-minute sessions per week of speech-language therapy (id. at p. 2). For relief, the parent requested a finding that the district failed to provide the student a free appropriate public education (FAPE) and equitable services for the 2022-23 school year, an order compelling the district to implement the student's program of SETSS and related services "at enhanced market rates," and a bank of hours of compensatory educational services to remedy the period of time the student was without services during the 2022-23 school year (id.).

---

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

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

B. Impartial Hearing Officer Decision

By email to the parties, dated July 12, 2023, the IHO indicated that she had been "assigned to review and issue a determination" in accordance with the accelerated review and order of relief procedures and set forth a schedule with deadlines for the parties' submissions and the IHO's certification of the record and final determination (IHO Ex. I).

The parent submitted written documentation (see Parent Exs. A-F), and, in an undated, proposed order of relief, requested (1) a finding that the district failed to provide the student with a FAPE and equitable services for the 2022-23 school year; (2) an order compelling the district to implement the student's program of SETSS at the contracted, enhanced market rate of $175 per hour; and (3) an order compelling the district to provide a bank of 36 hours of compensatory SETSS services, which were not provided to the student during the 2022-23 school year (IHO Ex. II).[3]

The district submitted its objections to the parent's proposed order of relief and written supporting documentation to the IHO on July 28, 2023 (IHO Ex. III at p. 8). Initially, the district raised objections to the constitutionality of accelerated review by the IHO in 8 NYCRR 200.5(o) and further alleged that the regulation is violative of the IDEA and the district's right to due process under federal and State laws (id. at pp. 1-3). The district specifically objected to the admission of the parent's proposed exhibit D, a June 25, 2023 SETSS progress report (id. at p. 4). The district asserted that the parent's proposed exhibit D failed to specify the qualifications of the author and failed to provide details regarding the assessment of the student that were relied upon to form the opinions therein, including dates of assessment, and the names of individuals who conducted the assessments (id.). The district further argued that proposed exhibit D was unsupported by any "documentary/testimonial" evidence and lacked sufficient probative value as it was devoid of evidentiary facts and consisted of conclusions, speculation, and unsupported allegations (id.). Next, the district objected to the admission of the parent's proposed exhibit F,[4] which was an affidavit from the CEO of Urban (id.). The district asserted that proposed exhibit F was "self-serving testimony proffered by the CEO of the provider agency in which the provider(s) are employed, and of which [the district] has no opportunity to test the appropriateness of said services, or cost thereof through cross examination" (id.). The district further asserted that "[a]ny reliance upon adverse witness testimony by affidavit in this proceeding [wa]s a deprivation of the [district]'s due process right to confront and cross-examine adverse witnesses" (id. at pp. 4-5).

The district then set forth specific objections to the parent's proposed order of relief (IHO Ex. III at p. 5). The district initially asserted that the parent failed to timely request the equitable services recommended in the May 2020 IESP and having failed to comply with the statute was not eligible for the requested relief (id.). Next, the district argued that, if the IHO determined that the parent was entitled to seek the relief, the IHO should find that the parent failed to demonstrate the

[3] According to the district's written objections, the parent's proposed order of relief was submitted on July 26, 2023 (IHO Ex. III at p. 1).

[4] The district's submission refers to this document as the parent's proposed exhibit G; however, according to the IHO, the proposed exhibit G was a duplicate of the proposed exhibit F and was not admitted (IHO Decision at p. 9 n.31). Accordingly, the references to proposed exhibit G will be referred to as proposed exhibit F.

appropriateness of the relief and find that the relief was barred by equitable considerations (id.). The district then asserted that the parent's affidavit (proposed exhibit E) was "devoid of any evidence that the parent was unable to find a SETSS provider willing to provide services to the student at the district standard rate" and that there was "no evidence to demonstrate that the services were actually provided to the student at all" (id. at p. 6). The district further argued that the parent's proposed exhibits did not indicate any specific information as to whether the services were actually provided to the student, "the dates in which they were provided, where they were provided, the manner in which they were provided, the duration of the services, the period of the services, or the qualifications, licensing, credentials of the service providers allegedly providing said services" (id.). The district also contended that the parent failed to bring forth evidence of "invoices, attendance records, or session notes" and as a result the parent failed to meet her burden of demonstrating that the services were provided to the student (id.). The district further objected to the parent's request for an enhanced market rate of $175 per hour (id.). The district also alleged that the parent failed to provide ten-day written notice of her intention to obtain unilateral services and seek public funding (id. at p. 7). Lastly, the district objected to the parent's request for 36 hours of compensatory SETSS arguing that the award was punitive in nature and unsupported by the evidence as the affidavit attesting to services provided by Urban did not indicate the number of hours provided to the student (id. at pp. 7-8).

In a decision dated August 4, 2023, the IHO initially set forth the basis for jurisdiction and procedural history and described the parent's request for an accelerated review instead of an impartial hearing (IHO Decision at pp. 2-3). The IHO summarized the parent's exhibits and found that neither the parent nor the CEO of Urban were "fully credible" in their affidavits as the CEO was "necessarily biased" and the parent did not "provide any convincing detail in her affidavit" (id. at pp. 6-8). The IHO then addressed all of the district's objections (id. at pp. 9-14). With regard to the district's general objections to the regulation providing for accelerated review, the IHO overruled those objections, stating she lacked the authority to address the district's constitutional claims or challenges to the statute (id. at p. 9). Turning to the district's objections to the parent's proposed documents, the IHO also overruled those objections and stated that she would accord the documents the appropriate weight (id. at p. 10).

Next, the IHO addressed the district's objections to the parent's proposed order of relief, and overruled the district's first objection, which was based on the assertion that the parent made an untimely request for equitable services (IHO Decision at p. 10). The IHO found that this objection was properly interpreted as an affirmative defense and further found that the district had not presented evidence that the parent had not requested services (id.). The IHO then considered the district's assertion that the parent failed to meet her burden to demonstrate the appropriateness of her proposed relief and found that nothing in Education Law § 3602-c or case law required the application of a Burlington/Carter analysis to the parent's requested relief and she declined to do so (id. at p. 11). As the IHO placed no burden on the proof on the parent to show the appropriateness of the proposed relief, the IHO disagreed with the district's assertion that the parent failed to meet her burden (id.). However, the IHO went on to consider the district's arguments regarding the appropriateness of the parent's requested relief (id.).[5] The IHO considered the

[5] The IHO opined that, even though the parent did not have a statutory burden of proof, the "fairness and reasonableness of the parent's chosen remedy" could be considered (IHO Decision at p. 11).

parent's evidence related to the SETSS services and found that there was nothing in the record to demonstrate what the student's needs were during the 2022-23 school year (id.). The IHO stated that there was no clinical data to establish "a sound understanding of [the s]tudent's unique needs for the 2022-23 school year" and that the SETSS provider acknowledged the student had made limited progress (id. at p. 12). The IHO further found that "the record as a whole fail[ed] to convince [the IHO] that [Urban]'s services reasonably met [the s]tudent's needs" and the IHO denied the parent's request for an order compelling the district to fund the student's private SETSS for the 2022-23 school year "at market rates" (id.).[6]

The IHO then addressed the district's objections related to the parent's request for an enhanced market rate and the parent's failure to provide ten-day written notice (IHO Decision at p. 13). The IHO first noted that the CEO of Urban "d[id] not convincingly explain his conclusory assertion that the rate of $175 [wa]s [a] 'fair market rate compared to the standard rate of other agencies'" but also found that the district "did not bring any evidence of its own to demonstrate a fair market rate for independently sourced SETSS" (id.). The IHO further stated that other than the CEO's affidavit testimony, there was nothing in the record to indicate what a reasonable market rate might have been (id.). Ultimately, the IHO found that it was not necessary for her to make a determination related to the parent's request for an enhanced market rate in light of her decision to deny funding for unilaterally obtained SETSS (id.). With regard to the district's objection related to the lack of ten-day written notice, the IHO stated that, while "a notice would have reminded the [district] of its duty to implement the 2020 IESP, it [wa]s not required by statute as it is in an IDEA tuition reimbursement case" but, in any event, that in light of her decision to deny funding, it was not necessary for her to address the objection (id.).

Turning to the district's objection to the parent's request for compensatory educational services, the IHO noted that the district "ha[d] not proposed an appropriate compensatory award" and the parent "ha[d] not provided any information as to how she arrived at 36 hours" (IHO Decision at p. 14). The IHO then determined that the record did not provide "sufficient information to decide whether the request for 36 hours of compensatory education [wa]s fair and reasonable" and she therefore denied the parent's request (id.). For all of those reasons, the IHO determined that no relief was warranted based upon the written record (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals from the IHO's decision. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail.

The crux of the parent's issues presented on appeal are as follows:

[6] The IHO also noted that if she not been limited by 8 NYCRR 200.5(o) in her review of the matter, she would have asked questions regarding the student's needs and ordered an evaluation of the student (IHO Decision at p. 12).

1. whether the IHO erred in limiting the probative value of the affidavits the parent submitted in her written documentation in support of her proposed order of relief;

2. whether the IHO incorrectly applied the standard of review for unilateral placements by parents;

3. whether the IHO erred in denying the parent's request for compensatory educational services; and

4. whether the IHO erred in failing to address the parent's request for pendency.

In its cross-appeal, the district asserts that the IHO violated the district's due process rights by subjecting it to the accelerated review procedures, that it was error to overrule the district's objections and to:

1. impose an automatic irrebuttable denial of a FAPE determination;

2. deny the district the ability to procure relevant disclosure within the parent's control;

3. deprive the district of notice of the claims against it because there was a "possibility" of the IHO granting any relief requested in the parent's proposed order that had not been requested in the parent's due process complaint notice; and

4. rely exclusively on documentary evidence such as witness affidavits without providing the district the opportunity to cross-examine the witnesses.

The district argues that 8 NYCRR 200.5(o)(2) forecloses review of the FAPE determination by an SRO and is therefore contrary to provisions of federal IDEA legislation. The district also argues that the accelerated review procedures do not apply to proceedings in which a due process complaint notice alleges violations of the dual enrollment statute under State law. The district continues its argument rejected by the IHO that the student was ineligible for such dual enrollment services under Education Law § 3602-c due to the parent failing to comply with the statutory June 1 deadline for requesting the services. In response to the parent's claims on appeal, the district argues that a Burlington/Carter framework is routinely used to assess parents' claims for a unilateral placement, that the IHO's preliminary rejection of the framework was error, but that the IHO correctly held that the evidence failed to show as a factual matter that the services obtained from Urban were appropriate.

V. Applicable Standards-Accelerated Review

A threshold issue in this appeal is the use of accelerated review procedures that occur without a hearing under a State statute that became effective in March 2022 (see L. 2021, ch 812). The attendant regulations were also first promulgated on an emergency basis in March 2022 (see "Proposed Amendment of Sections 200.5(j) and 200.21(a) and Addition of Section 200.5(o) to the Regulations of the Commissioner of Education Relating to Special Education Due Process System Procedures," available at https://www.regents.nysed.gov/sites/regents/files/322p12a3.pdf). This is a case of first impression involving these procedures. Education Law § 4404(1-a) provides that "[i]f the parent or person in parental relation of a student files a due process complaint notice

seeking an impartial due process hearing with respect to the evaluation, educational placement, provision of a [FAPE] to the student or in accordance with [Education Law § 3602-c] and an [IHO] is not appointed within [196] days after filing such due process complaint notice with the local school district, . . . an [IHO] may then be immediately appointed to issue an order based upon a proposed order of relief submitted by the parent or person in parental relation of the student identifying appropriate and individualized programs and services for the student" (Educ. Law § 4404[1-a]). The State regulation implementing the amended Education Law § 4404(1-a) describes the process available for an accelerated review (8 NYCRR 200.5[o]). Pursuant to State regulation, the first step is that the district is required to the notify the parent in writing no later than five business days after the 196 days have elapsed, and, thereafter, the parent may request immediate appointment of an IHO to undertake an accelerated review when (1) the due process complaint notice does not involve a claim regarding initial identification as a student with a disability or a manifestation determination; (2) the parent requests initiation of accelerated review; and (3) the parent agrees that the review will be conducted based exclusively on the written record developed during the accelerated review (8 NYCRR 200.5[o][1][i]-[iii]).

State regulation further provides that "[w]hen accelerated review is sought, the district shall be deemed to have denied the student a [FAPE] by virtue of the delay in the appointment of an [IHO]" and that "this finding is binding and shall not be subject to appeal to a State review officer" pursuant to State regulatory due process procedures (8 NYCRR 200.5[o][2]; see 8 NYCRR 200.5[k]). The accelerated review process includes distinct timelines that are substituted for the regular hearing procedures and requires that an IHO be appointed within one business day of the receipt of the parent's request (8 NYCRR 200.5[o][3][i]; see Educ. Law § 4404[1-a] [noting that "an impartial hearing officer may then be immediately appointed"]).[7] State regulation further provides that "[w]ithin two business days after certification of the record, the [IHO] shall issue a final determination in the form of (a) the order of relief proposed by the parents; (b) the order of relief proposed by the parents as modified by the [IHO] based upon the written record; or (c) a finding that no relief is warranted based upon the written record" (8 NYCRR 200.5[o][3][vii][a]-[c]). If either party disagrees with the IHO's order of relief or finding—other than the denial of a FAPE by operation of State regulation—they retain the right to appeal to an SRO consistent with the due process procedures, except that a parent cannot appeal a final determination in the form of the order of relief proposed by the parent (8 NYCRR 200.5[o][3][viii]; see 8 NYCRR 200.5[k]).

[7] The accelerated review process further requires that "[w]ithin two business days of appointment, the [IHO] shall notify the parties via email of the schedule for the electronic submission by the parent of a proposed order of relief and supporting written documentation," which "may include affidavits, affirmations, and/or declarations as well as exhibits" (8 NYCRR 200.5[o][3][ii]). Thereafter, the parent must complete the submission to the IHO and the district's representative no later than 10 business days after the date of the IHO's email notification of the schedule (8 NYCRR 200.5[o][3][iii]). The school district may file objections to the proposed relief and any supporting written documentation submitted by the parents, together with a proffer of any documentation it wishes to be considered by the IHO within two business days after receipt of the parents' electronic submission (8 NYCRR 200.5[o][3][iv]). Within two business days after receipt of the school district's objections to the proposed relief, if any, the parent may submit a written response (8 NYCRR 200.5[o][3][v]). Finally, "[w]ithin two business days after receipt of the parent's response, if any, or two business days after receipt of the parents' proposed order and evidence, if no objections and supporting documentation are submitted, the [IHO] shall determine what documents are to be admitted, and shall certify the record that forms the basis for the order of relief or finding" (8 NYCRR 200.5[o][3][vi]).

VI. Discussion

A. Accelerated Review Process

The accelerated review procedures described above and which underlie this appeal are part of a larger scheme set forth in IDEA, Article 89 as well as federal and State regulations. In Article 89, the Legislature explicitly referenced and adopted the provisions for "an impartial hearing pursuant to subsection (k) of section fourteen hundred fifteen of title twenty of the United States code and the implementing federal regulations" when it established an impartial hearing system for this State (Education Law § 4404[1]). Thus, in exchange for accepting federal funds, states such as New York agree to comply with a number of conditions including the minimum required due process hearing procedures called for by IDEA; however, nothing in the IDEA or federal regulations bars state policymakers from adding to or enhancing the hearing procedures under state law in order to address the circumstances present in a particular state or locale. In Education Law § 4404(1-a) the Legislature merely created a procedural provision for the immediate appointment of a hearing officer to address an order of relief proposed by a parent if a district fails to appoint a hearing officer within 196 days after the parent filed a due process complaint notice. Federal regulation provides, with respect to first tier impartial hearings, "that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)— (1) A final decision is reached in the hearing; and (2) A copy of the decision is mailed to each of the parties," and, therefore, it is clear that under federal regulation the district must appoint the IHO in a manner that will facilitate the timely issuance of the IHO's decision at the conclusion of the 45-day period (34 CFR 300.515). In order to ensure appropriate compliance with the federal requirements, State regulation provides that a "district rotational selection process [to appoint the IHO] must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent" (8 NYCRR 200.5[j][3][i][a][1]). Until the provisions for accelerated review procedures were recently created by the Legislature and State regulation, there was no explicit procedure that addressed a situation in which a school district failed to appoint an IHO within the explicit State timeline or implicit federal timeline.

Initially, I note that review of the written record in this matter reflects that the IHO diligently followed the numerous procedural requirements of Education Law § 4404(1-a) and 8 NYCRR 200.5(o).[8] I further note that the Legislature and State policy makers largely left the State level review process intact in its current form as further described below, in order to provide sufficient flexibility in balancing the need to correct the problem caused when a district failed to appoint a hearing officer after a lengthy time period and the need to ensure that a due process

[8] While the IHO followed the procedural requirements, should the situation ever arise again, it would be better practice to also include as part of the written record any documentation required by the accelerated review process. Here, the written record based on the parties' submissions does not include written notice to the parent that the district was required to provide no later than five business days after the 196 days elapsed or the parent's request for appointment of an IHO to undertake an accelerated review, assuming such a notice was created by the district and such a request was made in writing by the parent (see 8 NYCRR 200.5[o][1]). However, these are not disputed issues in this appeal.

proceeding reaches a fair and reasonable outcome that aligns with the legislative objectives of Article 89 and its administrative hearing procedures.

If the school district fails in its obligation under federal and State regulations to timely appoint an IHO, State policy makers clearly established a predefined, automatic sanction against the district in the hearing process if the delay ultimately reaches a certain magnitude—196 days, which functions by barring or estopping the district from asserting its side of the case with respect to whether it offered a student with a disability a FAPE, including during a State level review of the administrative proceedings, but the measures leave intact other ways of ensuring that some defenses remain available to the district and avoid overreaching by the opposing party and a fair result under the circumstances. Thus, the State regulation implementing Education Law § 4404(1-a) provides that, if either party disagrees with the IHO's order of relief or finding, they retain the right to appeal to an SRO "consistent with paragraph two of this subdivision and with the procedures outlined in subdivision (k) of this section, except that a parent cannot appeal a final determination in the form of the order of relief proposed by the parent" (8 NYCRR 200.5[o][3][viii]). Paragraph two of the subdivision provides that, when accelerated review is sought, the district shall be deemed to have denied the student a FAPE by virtue of the delay in the appointment of an IHO and that this finding is binding and shall not be subject to appeal to an SRO "pursuant to subdivision (k) of this section" (8 NYCRR 200.5[o][2]). No further limitation is placed on the reviewing authority of an SRO beyond a finding of a denial of a FAPE by operation of law. Presumably the policymakers believed that such a sanction would in most cases be sufficient to deter school districts from serious violations of a parent's federal right to due process under the IDEA by neglecting or refusing to appoint an IHO for an extended period of time.

In Education Law § 4404 the Legislature also included other protective measures in the administrative hearing procedures at the State level review to ensure a reasonable and fair process occurs. Education Law § 4404(2) provides that an SRO "shall review and may modify, in such cases and to the extent that the [SRO] deems necessary, in order to properly effectuate the purposes of this article, any determination of the [IHO] relating to the determination of the nature of a child's disability, selection of an appropriate special education program or service and the failure to provide such program and require such board to comply with the provisions of such modification" (Educ. Law § 4404[2] [emphasis added]). The same subdivision provides that an SRO is further "empowered to make all orders which are proper or necessary to give effect to the decision of the [SRO]" (id.). The State regulation implementing the reviewing authority of the SRO states that "[a]ny party aggrieved by the findings of fact and the decisions of an [IHO] rendered in accordance with subdivision (j) of this section may appeal to [an SRO]. Such a review shall be initiated and conducted in accordance with the provisions of Part 279 of this Title" (8 NYCRR 200.5[k][1]). As indicated above, the accelerated review procedures replace the hearing procedures specified in subdivision (j) of the due process procedures; however, the accelerated review procedures only limit an SRO's authority to review the statutory and regulatory sanction with regard to the FAPE finding (8 NYCRR 200.5[o][2], [3][viii]). The accelerated review procedures do not otherwise limit an SRO's authority to properly effectuate the purposes of Article 89.

Turning to the specific arguments raised by the parties in this case, with regard to the district's specific challenges to the State's statutory and regulatory accelerated review process, like the IHO, I lack the authority to decide whether the accelerated review developed by the State violates the district's constitutional rights such as the district's State and federal rights to due

process of law and instead the jurisdiction of an SRO is more circumscribed (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]).

Further, as noted above, I do not have the authority to vacate the finding of a denial of a FAPE sanction that was imposed by policymakers by operation of law when the district failed to appoint an IHO for 196 days or more (Educ. Law § 4404[1-a]; 8 NYCRR 200.5[o][2]). However, even if I did have such authority, under the facts of this case I would not have exercised it in the district's favor. Although the IHO provided the district with the opportunity to present objections to the proposed relief or proffer any documentation it wished to be permitted into the hearing record, there was no attempt by the district to proffer any information into the written record as to why it failed in the critical, yet relatively simple ministerial matter of appointing an IHO within the 196-day period. Furthermore, upon appeal from the IHO's decision, the district did not avail itself of the opportunity to request to admit additional evidence in this State level review on this topic either. In these circumstances in which the district made no attempt to provide information with respect to its obligations to appoint a hearing officer and more than 196 days had passed with no action, I find the sanction of a denial of a FAPE entirely appropriate because the district's failure seriously impeded the parent's ability to reach the very procedural safeguards that were designed to protect the rights of the parent and the student under federal and State law in the first place and the district's silence in these circumstances is deafening.

When IHOs are appointed to a special education due process proceedings, more often than not the proceedings are able move toward disposition without a full trial-type hearing with a written decision on the merits of the parties' claims, and the IHOs, again in more cases than not, do not need to expend extraordinary amounts of time or effort on every single case. Thus it appears that the policymakers, in the circumstances of long-delayed IHO appointments, created the accelerated review process with the objective of continuing to move long-delayed matters quickly back toward compliance with an accelerated disposition since, systemically speaking, relatively fewer cases should require a full, formal hearing to effectively resolve the matter. But the Legislature appeared to also recognize the possibility that unjust results could occur with an abbreviated process and, therefore, left intact the State-level review procedures to correct the subset of accelerated proceedings that were at risk of an unjust result.

Unfortunately this is such a case and, notwithstanding the IHO's diligent efforts to follow the process exactly as outlined, the application of the accelerated review process in this particular circumstance yielded an unjust result that did not effectuate the purposes of Article 89. The IHO appeared to be fully aware of this (and powerless to prevent it) and therefore she appropriately noted her concerns in her decision that the accelerated review process limited her ability to make appropriate determinations in this matter, stating that she would have inquired about the student's needs and ordered an evaluation of the student had she been allowed under the review procedures (IHO Decision at p. 12). In denying the parent all of her requested relief, the IHO also noted that the administrative record was insufficiently developed to determine an amount of compensatory educational services and the IHO further questioned the reliability of the parent's affidavits (id. at pp. 8, 14).

State regulation provides that an SRO may remand a matter to an IHO to take additional evidence or make additional findings (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, one of the legislative purposes of Education Law § 4404(1-a) to correct a district's lengthy inaction and effectuate the rapid appointment of an IHO was achieved in this proceeding. However, I find that, while it may very well work successfully in some matters, that is not the case here because the accelerated review process did not yield a fair and reasonable outcome between the parties and left the IHO with too many unanswered questions, and as a result the process, as applied in this proceeding, did not successfully effectuate the purposes of due process procedures in Article 89. Therefore, in accordance with my authority, I find the appropriate remedy is to remand the matter to the IHO without the hearing process restrictions of the accelerated review procedures placed upon her and allow for further development of the record with an opportunity for both parties to address the evidentiary questions that have arisen. The IHO will be authorized to continue these proceedings using the full due process procedures permitted by State and federal regulation (8 NYCRR 200.5[j]; see 34 CFR 300.511-300.515).

B. Remand

As indicated above, on remand, the sanction imposed by operation of law for failing to appoint a IHO and violating the procedural safeguards provisions for an inordinately extended period of time shall stand and district is precluded from asserting that the student was offered a FAPE for the 2022-23 school year (Educ. Law § 4404[1-a]; 8 NYCRR 200.5[o][2]). As a result of that sanction, the district has also waived any affirmative defense it may have had related to the requirement that a parent provide written request for equitable services pursuant to Education Law § 3602-c by June 1.[9]

Turning next to the district's assertions that a dually enrolled student does not have a right to due process or pendency under either federal or State law, these arguments have been previously addressed (Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). As set forth in the prior State-level review decisions, State law confers a right to the due process procedures under Article 89 and to pendency for dually enrolled students. The district's argument is without merit and therefore the district is precluded from further asserting these arguments to the IHO on remand.

With regard to the legal framework to apply on remand, the IHO is reminded, as she was in Application of a Student with a Disability, Appeal No. 23-112, that, although this matter arose as a result of the district's obligations under Education Law § 3602-c rather than its obligations under the federal statute, the Burlington/Carter style framework should be applied in considering

[9] The undersigned is not aware of any recent judicial opinions, pending judicial proceedings, or legislative changes on the topic that would affect the matter upon remand, and the district has pointed to none.

the parent's requested relief. Here, the parent alleged that the district did not implement the student's services for the 2022-23 school year and as a self-help remedy she unilaterally obtained private services from Urban for the student without the consent of the school district officials and then commenced due process to obtain remuneration for the costs thereof. Generally, districts can be made to pay for special education services privately obtained for which a parent paid or became obligated to pay, a process that is essentially the same as the federal process under the IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "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."]). 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.[10] The burden of production and persuasion on the unilaterally obtained services rests on the parent, and with the full panoply of hearing procedures, I am confident that the IHO can resolve the remaining questions and concerns she had during the accelerated review process.

Thus, the IHO is directed to engage in a determination as to whether the parent's unilaterally obtained services were appropriate for the student such that they would meet the standard applicable under the Burlington/Carter framework, and if it is determined that the services were appropriate, the IHO must then determine whether equitable considerations weigh in favor of the parent's requested relief of direct funding. In addition, the IHO is not limited in ordering other relief if appropriate based on the hearing record, such as the evaluation of the student that she noted in her decision. The IHO must also address the parent's requests for pendency and compensatory educational services and to develop the hearing record sufficiently as to enable the IHO to make determinations on those requests for relief. Additionally, while the district may not revisit the FAPE determination on remand, the district is not precluded from challenging the appropriateness of the parent's unilaterally obtained services or whether equitable considerations—exclusive of the June 1 notice defense—weigh in favor of the parent's request for funding. The IHO had concerns regarding "manner in which the services were provided, the duration of the services, the period of services, or the qualifications of the providers" and appropriately declined to simply adopt the proposed order. The accelerate review process is not designed to be and should not be treated as a default judgment procedure. Furthermore, the parties and the IHO should

[10] 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/).

address—as was raised in the district's answer and cross-appeal—that the parent signed a contract with Urban which appears to be a nonprofit or charitable organization when looking at its domain, but received SETSS services from a different agency, Upgrade Resources which appears to be a commercial enterprise (compare Parent Ex. C at p. 1, with Parent Ex. D at p. 1). Neither the parent nor the lay advocate provided any explanation of the entities that are involved and their respective roles or why the CEO of Urban was testifying about the services that appear to have been provided a different agency. Because a reasonable explanation is among the possible explanations and the IHO was not permitted to further develop the record on this point, remand is appropriate in this instance.

VII. Conclusion

In summary, the accelerated review process, while correctly applied by the IHO, yielded an unjust result in this matter. Having determined that application of the accelerated review process in this particular matter did not effectuate the purpose of Article 89 of the Education Law, the case is remanded to address the relief sought by the parent in her due process complaint notice using the legal standards and hearing procedures set forth above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated August 4, 2023, is modified by vacating that portion which denied the parent's request relief; 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**
December 7, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER