The University of the State of New York

The State Education Department
State Review Officer
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No. 24-362

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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) that dismissed the parent's due process complaint without first determining his daughter's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2023-24 school year. The district cross-appeals from the IHO's failure to rule on its motion to dismiss and the award of compensatory relief. The appeal must be dismissed. The cross-appeal must be sustained to the extent indicated.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

A Committee on Preschool Special Education (CPSE) convened on December 10, 2019, determined that the student was eligible for special education as a preschool student with a disability, and recommended that she receive two hours per day (10 hours weekly) of individual special education itinerant teacher (SEIT) services; two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual speech-language therapy to be provided at an early childhood setting selected by the parent (Parent Ex. B at pp. 1, 12). The student continued to receive 10 hours per week of SEIT pursuant to her December 2019

IEP under pendency until a pendency agreement ended on February 6, 2023 (Req. for Rev. ¶¶ 4-6; see SRO Exs. 1-3).[1]

A CSE convened on February 27, 2023, determined the student was eligible for special education as a student with a speech or language impairment, and recommended that the student receive one 30-minute session per week of group counseling services in English and one 30-minute session per week of group speech-language therapy in English (Dist. Ex. 4 at pp. 1, 11, 17).[2] The February 2023 IEP indicated that the student was attending a second grade integrated co-teaching class during the 2022-23 school year and that she "ha[d] been receiving Occupational Therapy and Speech-Language Therapy" (id. at p. 1). The February 2023 IEP noted that the student was exceeding grade level standards for reading and mathematics and was performing according to grade level standards in writing (id. at pp. 1-2). Notably, the February 2023 CSE did not recommend SEIT or special education teacher support services (SETSS) for the student (id. at pp. 10-11). The February 2023 CSE attendance page reflects that the parent "[p]articipated by telephone" at the meeting (id. at p. 17).

Effective on September 1, 2023, the parent and The Children's Resources entered into an agreement for the provision of 10 hours per week of SEIT services for the 2023-24 school year at a rate of $175 per hour (Parent Ex. C). The student began receiving services on September 7, 2023, which continued for the rest of the 2023-24 school year (Parent Ex. E ¶¶ 4, 5).

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent asserted that the district failed to implement the recommendations in the December 2019 IEP and requested direct funding for the unilaterally-obtained services the parent procured for the student at an enhanced rate (id. at pp. 1-2).

B. Events Post-Dating the Due Process Complaint Notice

A CSE reconvened on January 31, 2024, declassified the student, and recommended "declassification support services" because the student "ha[d] been determined to be no longer eligible for special education services" (Dist. Ex. 2 at p. 1). The January 2024 CSE recommended one 30-minute session per week of counseling support and one 30-minute session per week of speech-language support for the student starting February 14, 2024 and ending June 24, 2024 (id.). The student's parent participated at the meeting via telephone (Dist. Exs. 2 at p. 2; 3).

C. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on April 8, 2024 and concluded the same day (Tr. pp. 1-227). The IHO was inadvertently removed from the impartial hearing, which was held electronically, and

[1] It appears that the student remained in the district during the intervening school years (see Tr. p. 154).

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

during the portion of time that the IHO was attempting to reenter the impartial hearing, the parent's witness, the executive director of The Children's Resources (executive director), announced that she had to leave the hearing for childcare reasons (Tr. pp. 193-94).[3] The district's attorney requested that the executive director remain in the impartial hearing until the IHO returned, but the executive director announced that she had to leave and left the impartial hearing before the IHO returned (Tr. p. 194).

In a decision dated July 15, 2024, the IHO found that the student did not require "special education teacher services" from February 2023 forward (IHO Decision at p. 16). The IHO noted that the "[the p]arent stated that [the p]arent had no knowledge of the filing of the [due process complaint] by [the p]arent['s] [c]ounsel" and that "[a]s the hearing had already commenced, I denied [the p]arent [r]epresentative's request to withdraw without prejudice, as well as [the district's] request to dismiss with prejudice, and the hearing continued" (id. at pp. 4-5). The IHO held that the unilateral services obtained by the parent were not appropriate for the student for the 2023-24 school year (id. at p. 17). The IHO drew a negative inference from the executive director leaving the impartial hearing without permission (id.). The IHO determined that the district offered the student a FAPE for the 2023-24 school year (id. at p. 24). The IHO held that the parent failed to establish that they incurred a financial obligation for the services provided by The Children's Resources (id. at p. 21). The IHO denied the parent's request for funding for the services provided by The Children's Resources for the 2023-24 school year (id. at p. 24). The IHO awarded the parent compensatory education for the speech-language services and counseling services that were not provided to the student for the 2023-24 school year (id. at p. 25).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's claims for funding for The Children's Resources for the 2023-24 school year. The parent argues that the December 2019 IEP was the last program agreed-upon by the parent and that the student was receiving 10 hours per week of special education services under pendency until February 6, 2023. The parent attached a pendency agreement dated January 3, 2023 to his request for review along with a June 29, 2022 decision issued by a different IHO in a prior matter (see SRO Exs. 1; 2). The parent argues that he is entitled to full funding for the student's 10 hours per week of special education services under pendency.

The district cross-appeals, arguing that the IHO erred in failing to grant the district's motion to dismiss with prejudice based on the parent's testimony that he was unaware that he had filed a due process complaint in the underlying matter. The district further argues that the parent failed to effectively assert a pendency claim, as it was uncontested that the student received special education services for the 2023-24 school year pursuant to the February 2023 IEP and that the parent's attorney failed to raise the issue of pendency until her closing statement. The district asserts that the parent lacks standing to assert pendency. The district argues that the IHO correctly applied the Burlington-Carter analysis because the student was attending a public school and receiving related services pursuant to her most recent IEP. The district alleges that the parent

[3] The executive director of The Children's Resources testified during the hearing that she was the executive director of "the Children's Circle," but for clarity, this decision will identify her as the executive director of The Children's Resources (Tr. p. 169).

failed to sufficiently appeal the IHO's findings that the district offered the student a FAPE for the 2023-24 school year, that the parent failed to meet his burden to show that The Children's Resources constituted an appropriate unilateral placement for the student and that equitable considerations favored the district, and also argues that those findings have become final and binding upon the parties. The district asserts that the IHO erred in awarding compensatory relief in this matter because the parent failed to allege that the student was not receiving her related services pursuant to the February 2023 IEP, nor did the parent request an award of compensatory relief for counseling or speech-language therapy.

The parent submitted an answer to the cross-appeal dated November 15, 2024, which was more than five business days after the date the district served its answer with cross-appeal.[4, 5] Consequently, the parent's answer to the cross-appeal was untimely served and will not be considered.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an

[4] Although the answer to cross-appeal is erroneously dated "November 15, 2023," the affidavit of verification and the affidavit of service both reflect the date of November 15, 2024 (Answer to Cross-Appeal at pp. 5-7).

[5] An answer to cross-appeal must be served five business after the date of service of an answer and cross-appeal (see 8 NYCRR 279.6[a]).

IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately

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., 694 F.3d at 184-85).

VI. Discussion

The threshold issue to be addressed is the district's contention in its cross-appeal that the IHO erred by declining to dismiss the parent's due process complaint notice because evidence in the hearing record supported a finding that he had no knowledge that a due process complaint had been filed in the matter and there was no conclusive proof that the parent had authorized an attorney to file the due process complaint on his behalf (see 8 NYCRR 2005[i][1]).[7] The district argues that the parent gave "unambiguous testimony at [the] hearing that [the p]arent was unaware and uninvolved with the filing of a complaint on their behalf" and without the requisite authorization of the parent, counsel lacked standing to file the complaint (Answer and Cross-Appeal ¶¶ 9-11).

Notably, the parent's appeal only challenges the IHO's failure to address the student's automatic pendency entitlement and does not appeal the IHO's findings that the district provided the student with a FAPE for the 2023-24 school year, that the parent failed to prove that The Children's Resources was an appropriate unilateral placement, or that equitable considerations favored the district (see Req. for Rev.). The parent's appeal also does not address the fact that the parent's attorney requested to withdraw the proceeding without prejudice (see Req. for Rev.; Tr. pp. 35, 100, 115).

Under the IDEA and State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 [2007]). The IDEA defines parent to include a "natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)," a guardian, a person acting in place of a parent with whom the child lives or an individual legally responsible for the child's welfare, or a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 300.519[a]; see 8 NYCRR 200.1[ii]). Pursuant to regulation, where more than one individual is qualified to act as the parent, the biological or adoptive parent of the student is presumed to be the parent unless they do not have legal authority to make educational decisions on behalf of the student or a judicial decree identifies a specific person to act as the parent or make educational decisions (34 CFR 300.30[b][1]-[2]; 8 NYCRR 200.1[ii][3]). In contrast, a private entity lacks standing under the IDEA to maintain a claim against a school district in its own right, as the statute was intended to provide a private right of action only to disabled children and their parents (see Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371-72 [3d Cir. 2005]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th

ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[7] The parent testified at the impartial hearing because the district "requested that parent appear as [a] witness" and "[t]here was no objection to that request" (SRO Ex. 4 at p. 3).

Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]).

The parent testified that he was unaware that an attorney had filed a due process complaint notice on his behalf (Tr. pp. 92, 96-97, 102-03, 121).[8] The parent testified that he believed that he had an attorney who had been appointed by either the district or the private school to represent him (Tr. pp. 103-04).[9] When the IHO asked the parent if he was aware that this attorney had filed a due process complaint notice on his behalf on or about September 11, 2023, the parent testified that he was not aware of his attorney having done so and that "I know that we had a meeting back in January, and I try to stay on – on top. We had an IEP meeting" (Tr. p. 91).[10] When the IHO asked "[a]re you aware of this due process complaint that was filed on your behalf, September 11th, 2023?", the parent answered "[n]o, I'm not" (Tr. p. 92). The IHO again asked "[y]ou're not aware of this?" to which the parent testified "[n]o" (id.).

The IHO then asked the district's attorney "how do you want to proceed" to which the district replied "I would request . . . a dismissal with prejudice due to the parent not filing [the] due process complaint or being aware that it was filed on his behalf . . ." (Tr. p. 92). The IHO asked the parent's attorney for her perspective and she stated that she did not agree to a dismissal of the case with prejudice but asked that "time be provided to the parent to understand what the proceeding is and come back" or that the parent be allowed to withdraw without prejudice and refile (Tr. pp. 92-93, 100). The district argued that dismissal was warranted because the parent testified that he was unaware of the filing of the due process complaint which initiated the hearing (Tr. pp. 94-95). The IHO went off the record and when she returned, she stated that she would not dismiss the case despite concerns with the filing of the due process complaint notice (Tr. pp. 95-96). The IHO again asked the parent how he wished to proceed that the parent requested that he be allowed to withdraw and refile and that "to be honest, I've always been confused with legal proceedings and I've always just had representation or I've just kind of – to be honest, I just kind of go along with things . . ." (Tr. pp. 119-20). The parent confirmed that he did not want to continue the hearing (Tr. pp. 122-23). The IHO afforded the parties an opportunity to provide their written positions on the district's motion to dismiss, but the district's attorney expressed his concerns with the parent discussing his testimony with his attorney and repeated that the district preferred to either continue the hearing or that a dismissal with prejudice be issued (Tr. pp. 124-26). Ultimately, the IHO decided to continue with the hearing (Tr. p. 132).

The parent testified that he participated in the February 2023 CSE meeting and that he was aware that the student "[wa]s exceeding or performing at level for [reading, writing, and mathematics]" (Tr. p. 137). The parent testified that he knew that the February 2023 CSE removed

[8] The parent testified that he suffered a traumatic brain injury when he was a teenager and that "sometimes [his] memory [wa]s really bad" (Tr. p. 148).

[9] When the IHO asked the parent if the parent had retained his attorney to represent him, the parent testified that his attorney of record was "always in IEP meetings, and with the [district] he's always been the person to represent me" and that his attorney of record "is, as far as I'm aware, a representative that was appointed to me through – through either the [district] or – or the school" (Tr. pp. 103-04).

[10] It appears that the January 2024 CSE meeting referenced by the parent was the meeting that ultimately resulted in the student being declassified for special education services (Tr. p. 91; Dist. Ex. 2 at p. 1).

its recommendation for "the special education program" or "SETSS" from the February 2023 IEP because the student was performing at or above grade level academically (Tr. p. 138). The parent explained that he wanted the student to continue to receive after-school online SETSS classes because he believed that the student benefitted from them, wanted the student "to do really well in school" and did not want the student to regress (Tr. pp. 138-40). As mentioned briefly above, in January 2024 the CSE determined that the student was no longer eligible for special education services and recommended that the student be declassified (Dist. Ex. 2 at p. 1). The parent was present at the January 2024 declassification CSE meeting (Tr. p. 91; Dist. Ex. 3).

In reaching her decision to deny the district's motion to dismiss for lack of standing, the IHO took judicial notice of the notice of appearance filed by the parent's attorney which affirmed that the parent's attorney's law firm was retained by the parent (IHO Decision at p. 5; see Parent Ex. A at p. 3). The IHO noted in her decision that when she asked the parent if he had retained his attorney's law office to represent himself and his family in a proceeding the parent answered "Yes" (IHO Decision at p. 5; Tr. p. 103). However, immediately following the parent's affirmative response, when the IHO asked the parent "what was the purpose of retaining the firm?" the parent replied that "[his attorney] [wa]s always in IEP meetings, and with the [district] he's always been the person to represent me" and that he believed his attorney was appointed to represent him either through the district or the school (Tr. pp. 103-04). As such, I find the IHO's rationale for denying the district's motion to dismiss to be in opposition to the testimony provided by the parent and the evidence in the hearing record. The IHO's judicial notice of a notice of appearance filed by the attorney who also appears on this appeal and who the parent testified had previously represented him at IEP meetings does not address the question of whether the parent had actual knowledge that the due process complaint notice at issue here had been filed on his behalf by the same attorney.

Rather, he evidence in the hearing record supports a finding that the parent was unaware that he had filed the due process complaint notice underlying the impartial hearing. The student's parent, as defined by statute, is the only party with standing to initiate a proceeding under the IDEA by filing a due process complaint notice. A private entity such as a school or law firm does not have independent standing to file a due process complaint notice. Absent evidence that the parent was aware that a due process complaint notice had been filed on his behalf in this matter r, a notice of appearance, which does not contain an acknowledgment by the parent that he had authorized the due process complaint notice to be filed, does not suffice to establish the requisite standing, particularly where the parent testified repeatedly that he was not aware of the due process complaint notice and believed that any representation he had in the matter had been appointed to him by either "the district" or "the school." Accordingly, as the parent failed to provide unequivocal testimony or any documentation at the impartial hearing that he had knowledge of the due process complaint notice or had retained counsel to file it on his behalf, the threshold issue of standing was not established, and the IHO erred by declining to grant the district's motion to dismiss.

VII. Conclusion

The hearing record establishes that the parent did not file the due process complaint the September 11, 2023 due process complaint and was unaware that his attorney had done so. The parent's attorney lacks standing to file a due process complaint on behalf of the student without the parent's knowledge or consent. As such, it was in error for the IHO to deny the district's motion to dismiss for lack of standing. Because lack of standing is a threshold issue and I have determined

that the due process complaint was not filed by a person with standing all other issues regarding this matter are hereby dismissed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 15, 2024 is modified by reversing those portions which denied the district's motion to dismiss for lack of standing; and

IT IS FURTHER ORDERED that the IHO's decision dated July 15, 2024 is modified by reversing the IHO's award of compensatory relief.

Dated: **Albany, New York**
December 30, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER