The University of the State of New York

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

No. 24-364

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:
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Yes I Can for the 2023-24 school year. The appeal must be sustained, and the matter remanded to the IHO for further 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 IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record is sparse with regard to the student's educational history, but given the limited issues to be resolved on appeal, a complete recitation of the student's background, even if

available, is unwarranted. A CSE convened on June 15, 2023, determined the student was eligible for special education as a student with a speech or language impairment, and formulated the student's IESP for the 2023-24 school year (see generally Parent Ex. B).[1] The ISEP noted that the student was parentally placed in a nonpublic school and the CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at pp. 5, 7).

The student attended a nonpublic school for the 2023-24 school year (see Parent Ex. E at p. 1). On October 19, 2023, the parent electronically signed an "engagement letter" with Yes I Can to secure the provision of the student's "[s]peech [s]ervices" for the 2023-24 school year at enhanced rates (see Parent Ex. D).[2] According to the educational director of Yes I Can, the student began receiving speech-language therapy services from the agency on October 25, 2023 (Parent Ex. G ¶¶ 7, 13, 14).

In a letter dated December 12, 2023 that was emailed to the district on December 22, 2023, the parent's attorney notified the district that the parent consented to the services recommended in the June 2023 IESP, but that she had been unable to locate providers at the district's standard rate (Parent Ex. C). According to the letter, the parent had no choice but to implement the student's IESP on her own and seek reimbursement or direct payment from the district (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated May 17, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to implement the student's speech-language services as recommended in the June 2023 IESP (see Parent Ex. A). Among other relief, the parent sought an order that the district fund the unilaterally obtained services at the "agency's contracted rate" (id. at p. 3).[3]

B. Impartial Hearing Officer Decision

A pre-hearing conference was held before the Office of Administrative Trials and Hearings (OATH) on June 18, 2024 (Tr. pp. 1-17). During the pre-hearing conference, the district representative notified the IHO and the parent's attorney that the district would be making a motion to dismiss the case for lack of subject matter jurisdiction (Tr. p. 6). In a motion to dismiss dated June 20, 2024, the district argued that the parent did not have a right under Education Law § 3602-c to file a due process complaint disputing a district's failure to implement the services listed in a student's IESP (Dist. Mot. to Dismiss dated 6/20/2024). The parent submitted a brief in opposition to the district's motion to dismiss dated June 27, 2024, arguing that the district's motion was

[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] The Commissioner of Education has not approved Yes I Can as a school or company with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

[3] While the due process complaint notice indicated that the June 2023 CSE recommended only speech-language therapy for the student, the remainder of the complaint seeks relief for the district's failure to implement special education teacher support services (SETSS) (see Parent Ex. A).

frivolous and that the proposed State regulation cited by the district had not yet been adopted by the Board of Regents (Parent Br. In Opposition dated 6/27/2024). The impartial hearing convened on July 10, 2024 (Tr. pp. 18-49), and in a final decision granting the district's motion to dismiss dated July 26, 2024, the IHO found that she did not have subject matter jurisdiction over the parent's implementation claim related to the June 2023 IESP (IHO Decision at p. 5).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in granting the district's motion to dismiss, arguing that the legal basis for the IHO's dismissal was a proposed amendment to State regulation that was ultimately discarded (Req. for Rev. at p. 3). The parent further asserts that the IHO misread New York Education Law § 4404 (id.).

In an answer, the district argues that the IHO's decision should be upheld. The district contends that the IHO correctly found a lack of subject matter jurisdiction over the parent's implementation claim, as the law does not grant the right to file a due process complaint for IESP implementation cases. The district argues that an emergency rule adopted by the Board of Regents in July 2024 forecloses the filing of due process complaints that challenge the district's failure to implement a student's IESP. The district asserts that the parent's claims to the contrary are meritless.

In a reply, the parent argues, among other things, that the July 2024 emergency regulation was stayed by Supreme Court in accordance with a temporary restraining order (TRO) in October 2024.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "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

[4] 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]).

located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Subject Matter Jurisdiction

In this proceeding the district's motion to dismiss was based on proposed amendments issued by the State Education Department in a summary dated May 1, 2024 titled "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings" (June 20, 2024 Dist. Mot. at pp. 2, 5-10; August 20, 2024 Parent Mem. of Law Ex. A). In response to the district's motion to dismiss, the parent's attorney argued that the district's assertion that the proposal removed the IHO's jurisdiction over the parent's implementation claim was "an unripe claim" and that "[a] claim that a proposed law will have some legal effect once it is promulgated is simply not justiciable" (Parent Br. at p. 2). The IHO determined that "the proposed amendments to section 200.5 [wa]s labeled as a proposed

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

amendment, but [wa]s functionally a clarification of the law that has already been there the whole time" (IHO Decision at p. 3).

Ultimately, the proposed regulation relied on by the IHO was not adopted, a point on which the IHO should have been well aware when issuing the final decision in late July 2024 (IHO Decision at p. 2). Instead, the Board of Regents promulgated a different regulation on an emergency basis in July 2024, which clarified that it applied only to due process complaint notices filed on or after July 16, 2024 and, more specifically, to any claims contained therein which related to the rates for services that were privately obtained by a parent to remedy the district's failure to implement the special education services it had recommended for the student in an IESP (8 NYCRR 200.5[i][1][providing that that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services"]). The July 2024 emergency regulation superseded the May 2024 proposed amendment and went unaddressed by the IHO. In turn and as pointed out by the parent, the emergency regulation that was promulgated by the Regents in July has now been stayed under a ruling of the New York State Supreme Court Albany County (Agudath Israel of America v. New York State Board of Regents [Sup. Ct., Albany County, October 3, 2024, O'Connor, Index No. 909589-24]).

The district nevertheless argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP.

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, 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.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see 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). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise

> (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, has now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

As discussed above, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.). Again, as noted by the parent, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause dated October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[6]

The district acknowledges the limitation on applicability of the regulation amendments relating to the date of the due process complaint notice and also acknowledges the temporary injunction arising from the pending litigation regarding the regulation, but contends that parents "'never had the right to file a due process complaint to request an enhanced rate for equitable

[6] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided. The IHO would not have known of the actions of the litigants or actions by Supreme Court at the time of the IHO's final decision.

services'" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction (Answer & Cr.-Appeal ¶ 14 n.6; Oct. 9, 2024 Letter from Dist).

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendment to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's request to uphold the IHO's dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal is rejected.

In this case, the parent's due process complaint notice was dated May 17, 2024, well before the July 16, 2024 deadline set forth in the July 2024 emergency regulation. The IHO clearly identified in her decision that her determination to dismiss the parent's claim was based on her understanding of the May 2024 proposed amendment (IHO Decision at pp. 3, 6). Accordingly, the IHO's decision was based on a proposed regulation that was never promulgated, was ultimately supplanted with an emergency regulation. Moreover, the adopted emergency regulation has been stayed through a temporary restraining order issued by Supreme Court, Albany County, and since then the regulation has now lapsed. Therefore, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded so that the parties have the opportunity to proceed to an evidentiary hearing on the merits of the parent's claims. The parties are to address their dispute, including rate issues, during an impartial hearing using the Burlington-Carter standard.

VII. Conclusion

For the reasons described above, this matter is remanded for further evidentiary proceedings as to whether the district implemented the student's June 2023 IESP services for the 2023-24 school year, any defenses to the parent's claims, and if necessary a determination of whether the services the parent obtained from Yes I Can were appropriate to address the student's needs and, if so, whether equitable considerations favor the parent including any defense raised by the district regarding excessiveness of the costs of the private services obtained by the parent.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 26, 2024 dismissing the parent's claims in the due process complaint notice is reversed;

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

IT IS FURTHER ORDERED that in the event that the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
November 8, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER