The University of the State of New York

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

No. 24-399

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 Thomas W. MacLeod, 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 Yeled v'Yalda for the 2023-24 school year. The district cross-appeals asserting that the IHO lacks subject matter jurisdiction to adjudicate the parent's claims. The appeal must be sustained to the extent indicated. The cross-appeal must be denied.

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 parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, during the 2022-23 school year, the student attended a religious nonpublic preschool at her parent's expense (Dist. Ex. 1 at pp. 1,10). On May 8, 2023, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student for the 2023-24 school year (kindergarten), with an implementation date of September 7, 2023 (Dist. Ex. 1 at p. 1; see Dist. Ex. 2).[1] The CSE recommended that the student receive ten periods per week of special education teacher support services (SETSS), two 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of counseling services (id. at pp. 7-8).[2]

On May 22, 2023, the district sent the parent prior written notice indicating that the CSE developed an IESP for the student because the parent indicated that she would be placing the student in a private school at her expense and was requesting equitable services from the district (Dist. Ex. 2 at p. 1).

On July 24, 2023, the parent entered into an agreement with Yeled v'Yalda for the delivery of "Special Education and/or Related Services" at hourly rates of $198.00 for special education services and $250.00 for related services (Parent Ex. E). The agreement provided that it was valid for services starting September 1, 2023 and continuing through June 30, 2024 (id.).

By letter dated September 7, 2023, the parent, through her attorney's office, advised the district that "despite her best efforts," she had been unable to locate providers to deliver the SETSS and related service at the district's standard rate, that she had no choice but to implement the IESP on her own, and that she would seek reimbursement or direct payment from the district (Parent Ex. C at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated April 10, 2024, the parent alleged that the district failed to implement the May 2023 IESP and that the parent had been unable to locate SETSS and related services providers on her own for the 2023-24 school year (Parent Ex A. at p. 2). The parent also alleged that "[w]ithout supports, the parental mainstream placement [wa]s untenable, and the failure to implement the services or provide a placement [wa]s a denial of a FAPE for the 2023-24 school year" (id.). For relief, the parent requested, in pertinent part, that the district be ordered to fund the providers located by the parent for the 2023-24 school year at the providers' contracted rates, and to fund a bank of compensatory periods of SETSS and related services at the

[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.

prospective providers' contracted rates for the entire 2023-24 school year or parts thereof which were not serviced (id. at p. 4).

B. Impartial Hearing and Impartial Hearing Officer Decision

Following a preliminary conference held on May 13, 2024, the IHO issued a Prehearing Conference Summary and Order of the same date (Tr. pp. 1-17; May 13, 2024 Interim IHO Decision). An impartial hearing then convened before the Office of Administrative Trials and Hearings (OATH) on June 20, 2024, June 28, 2024, and July 12, 2024 (Tr. pp. 18-208). At the beginning of the June 20, 2024 hearing, the district made a motion to dismiss the due process complaint notice asserting that the IHO lacked subject matter jurisdiction to decide the issues because the parent did not have a right under Education Law § 3602 to bring a due process complaint notice for implementation of an IESP (Tr. pp. 24-25). According to counsel for the district, the State Education Department proposed, in May 2024, to amend State regulations to explicitly provide that due process is not the appropriate forum for an implementation dispute (Tr. pp. 24-25). The IHO denied the motion maintaining that she had the authority to hear and decide such matters and that until any proposed amendments were finalized, she was not divested of jurisdiction (Tr. pp. 28-29).

In a decision dated August 13, 2024, the IHO identified that the burden was on the district to establish that it provided the student with a FAPE (IHO Decision at p. 6). However, the IHO noted that the district did not present a case regarding the provision of a FAPE but instead argued that because the parent failed to submit notice to the district requesting special education services for the 2023-24 school year prior to June 1, the district was not obligated to provide equitable services (id. at pp. 6-7). The IHO held that the June 1 defense was timely raised by the district prior to the impartial hearing via a May 13, 2024 email to the IHO with a copy to the parent which was consistent with the deadlines set forth in the IHO's prehearing conference summary and order (id. at p. 6; see Tr. pp. 58-59; IHO Ex. VI).

The IHO reviewed the district's special education student information system (SESIS) logs and found that a review of the logs evidenced that the district did not receive a June 1 notice from the parent (IHO Decision at p. 8). Consequently, the IHO concluded that the district met its affirmative defense burden of proving a lack of notice (id.).

Next, the IHO concluded that the parent did not fulfill her evidentiary burden of proving that the notice requesting services was actually provided to the district prior to June 1 (IHO Decision at p. 8). As noted by the IHO, the parent testified on the issue over the course of two days of hearing; however, the IHO found that the parent provided inconsistent testimony as to whether the parent had personally mailed the notice to the district or if she had her secretary do it (id.). Moreover, the IHO identified that in direct contrast to the parent's testimony, the program director for Yeled v'Yalda testified that it was the agency that submitted the notice to the district (IHO Decision at pp. 7-8). The IHO cited to the witness's testimony indicating that the parent had completed the notice and transmitted it to the agency which then included the notice in an email link to the CSE (id. at p. 8; see Tr. pp. 146-47, 152). The IHO went on to cite to the director's testimony indicating that the district did not confirm the receipt of June 1 notices but because there was no "bounce back" or return email notification, he was comfortable saying the email was delivered (id. at pp. 152-153). Finally, the IHO noted that no further evidence was submitted to

corroborate or support the parent's testimony, specifically finding that the secretary did not appear as a witness nor was any confirmation of the transmittal of the notice, either via email or mail, submitted into evidence (id.).

In summary, the IHO concluded that the district had met its burden of proving its June 1 affirmative defense in that the district provided sufficient proof that notice was not received by the district prior to June 1 (IHO Decision at p. 8). The IHO also found that the parent failed to then meet her burden of rebutting the district's position by proving that the notice was, in fact, submitted to the district prior to June 1 (id.). Consequently, the IHO dismissed the parent's claim for reimbursement or direct funding of the student's SETSS and speech-language therapy services, and for a bank of compensatory education for the 2023-24 school year (id. at p. 9).[3]

IV. Appeal for State-Level Review

The parent appeals from the decision of the IHO, alleging that the IHO erred in dismissing her request for direct funding of SETSS and speech-language therapy services provided to the student by Yeled v'Yalda during the 2023-24 school year. First, the parent asserts that the district did not provide sufficient evidence to support its June 1 affirmative defense. According to the parent, while the district provided a copy of its SESIS logs in support of its argument that it did not receive the June 1 notice, it presented no witnesses to support or explain the logs nor the process for collecting the June 1 notices and entering them into the logs. Further, the parent contends that there was no testimony as to whether or not the district conducted a search for the parent's June 1 notice, whether the logs were monitored, or how often the logs were updated (id.). The parent further argues the June 1 notice was, in fact, sent to the district. In support of this argument, the parent attached three documents to its request for review that were not a part of the hearing record (Req. for Rev. Exs. A, B, C).[4] Finally, the parent argues that the district failed to present a FAPE case, the services provided by Yeled v'Yalda were appropriate and the balance of the equities favored the parent. The parent requests direct funding of SETSS and speech-language therapy services at the Yeled v'Yalda contracted for rates.

In an answer and cross-appeal, the district responds to the parent's allegations arguing that the IHO did not err in dismissing the parent's due process complaint notice. The district further argues that the SRO should refuse to consider the new exhibits proffered by the parent in her request for review because they could have been offered at the time of the hearing. Finally, as for its cross-appeal, the district argues that neither the IHO nor the SRO has jurisdiction to adjudicate the parent's claims. The district argues that New York law explicitly defines the individual due process rights of parents of parentally placed students and asserts that those rights do not cover the implementation of an IESP.

[3] The parent withdrew her claim for counseling services at the impartial hearing (Tr. p. 75).

[4] The parent did not provide proposed hearing exhibit designations for any of the three documents which accompanied the request for review. Accordingly, they are referred to in this decision as exhibits to the request for review (Req. for Rev. Exs. A, B, C).

The parent submits an answer to the district's cross-appeal labeled as a reply. The parent addresses the district's jurisdictional arguments.

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]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6] 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

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

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (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.

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. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district wherein it 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 with respect to implementation of "an IESP" (Tr. pp. 24-36; Answer & Cr.-Appeal at ¶ 17).

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]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department clarified the existing law by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶¶ 18-19).

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, as the number of due process cases involving the dual enrollment statute statewide have drastically increased within certain regions of this school district in the last several years, it is understood that 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. Recently 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.). Second, since its adoption, the amendment has been enjoined and suspended in an Order 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).

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice and also acknowledges the injunction but contends that parents "never had the right to file a due process complaint to request an enhanced rate for equitable services" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction (Answer & Cr.-Appeal ¶ 19; 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 cross-appeal seeking 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 must be denied.

2. Additional Evidence

The parent submitted three documents with her request for review that were not a part of the hearing record. The first is a letter dated November 20, 2023 along with an email indicating the letter was emailed to the district on the same date which, in relevant part, sets forth counsel for the parent's opinions as to deficiencies in the district's record keeping of June 1 letters (Req. for Rev. Ex A). The second document appears to be a computer screenshot of an email sent to the district on June 1, 2023 with a link to a folder identified as "June 1 Letters" and a highlighted document identified as "June_1_ letter_final508.pdf" (Req. for Rev. Ex. B). The third document purports to be a final audit report from Yeled v'Yalda evidencing that the parent electronically signed a June 1 letter created by the agency on May 11, 2023 (Req. for Rev. Ex. C).

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

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist.,

2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, each of the three additional documents were available or could have been available to the parent at the time of the hearing and were also available prior to the hearing at the time of the filing of the April 2024 due process complaint notice. In addition, the documents themselves, without explanation, would not be sufficient to prove the fact they are submitted to prove and therefore would not be relevant to this matter. Accordingly, the additional evidence will not be further considered.

B. June 1 Notice

Having dispensed with the issues of subject matter jurisdiction and additional evidence, the main issue presented on appeal by the parent is whether the IHO erred in dismissing the parent's due process complaint notice with prejudice for failing to timely file a written request for equitable services for the 2023-24 school year prior to June 1, 2023.

Generally, the State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

Here, the IHO correctly found that the district raised the June 1 affirmative defense in a timely and adequate fashion. As noted by the IHO, the district raised the defense prior to the impartial hearing via a May 13, 2024 email to the IHO with a copy to the parent, which was consistent with the deadlines set forth in the IHO's prehearing conference summary and order (Tr. p. 58; IHO Ex. VI). Notably, the parent does not challenge the timeliness of the assertion of the defense in her request for review nor in her answer to the cross-appeal.

Once the district has raised the defense, although the district would generally have the burden of proof on an affirmative defense, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] ["it is unclear how the school district could have proved such a negative"). Here, the IHO concluded that the district did, in fact, prove a negative by providing a copy of its SESIS logs which did not reflect receipt of a June 1 notice from the parent (IHO Decision at pp. 6-8). The IHO then reviewed the testimony of the parent and the agency director and concluded that the parent failed to provide credible evidence in response to the district's SESIS logs in order to prove that the notice was actually provided to the district before June 1 (id.).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520,

524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, the hearing record lacks a compelling reason to disturb the IHO's credibility findings as the IHO was in the best position to assess the testimony and neither the documentary evidence nor the hearing record in its entirety justifies a contrary conclusion.

Despite the defense being timely and adequately raised, the June 1 affirmative defense did not bar the parent's requested relief in this matter. Review of the hearing record shows that, on May 22, 2023, the district sent the parent prior written notice of the May 2023 CSE recommendations (Dist. Ex. 2). Within that notice, the district explicitly stated that the parent "indicated that [she] w[as] placing [the student] in a non-public school, at [her] own expense, and [was] seeking equitable services from the [district]" adding that the CSE "has developed an IESP because [the parent] h[as] indicated that [she] will be placing [the student] in a private school at [her] expense and [was] requesting equitable services" (id.). Accordingly, although the parent did not submit proof that she sent a June 1 notice to the district, the district's statements in the May 2023 prior written notice indicate that the district was aware that the parent requested equitable services for the 2023-24 school year and developed an IESP for the student for implementation during the 2023-24 school year (Dist. Ex. 2; see Dist Ex. 1).[7] Based on that, the IHO erred in finding that there was insufficient evidence that the requisite notice was sent to the district prior to June 1, 2023. Consequently, the IHO's determination that the student was not entitled to SETTS, speech-language therapy, and a bank of compensatory services under Education Law § 3602-c because the parent failed to show evidence of a written request for services that met the June 1 deadline must be set aside.

C. Remand

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

It is undisputed that the district failed to present any witnesses at the impartial hearing and did not dispute its failure to implement the IESP (IHO Decision at p. 4). Accordingly, the district failed to provide the student with a FAPE for the 2023-24 school year. However, because of the IHO's ruling dismissing the due process complaint notice based on a June 1 defense, the IHO did not reach the issues of the appropriateness of the SETSS and speech-language therapy services or

[7] The June 1 notice submitted by the parent was signed on May 11, 2023 (Parent Ex. D). Although the notice was signed after the May 8, 2023 CSE meeting, it was signed prior to the district's May 22, 2023 prior written notice (see Parent Ex. D; Dist. Exs. 1; 2).

whether equitable considerations would have warranted a denial or reduction of relief. As those issues should be addressed by the IHO in the first instance, they are remanded to the IHO.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS HEREBY ORDERED that the IHO decision dated August 13, 2024 is modified by vacating that portion of the decision which dismissed with prejudice the parent's claims for SETSS, speech-language therapy, and a bank of compensatory services for the 2023-24 school year;

IT IS FURTHER ORDERED that the district failed to provide the student with a FAPE for the 2023-24 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for determination on the appropriateness of the unilaterally obtained services and, if necessary, equitable considerations.

Dated: **Albany, New York**
November 14, 2024

STEVEN KROLAK
STATE REVIEW OFFICER