The University of the State of New York

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

No. 24-453

Application of a STUDENT WITH A DISABILITY, by her parents, 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 Offices of Regina Skyer and Associates, L.L.P., attorneys for petitioners, by Daniel Morgenroth, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which dismissed their claims seeking direct funding for the costs of privately obtained services from Yes I Can for the 2023-24 school year. Respondent (the district) cross-appeals that portion of the IHO's decision which made alternative findings in the parents' favor. The appeal must be sustained in part and remanded further proceedings. The cross-appeal must be sustained in part.

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

Given the disposition of this matter on procedural grounds, a detailed recitation of the facts relating to the student's educational history is not necessary. Briefly, a CSE convened on October 13, 2021 to develop an IESP for the student, with a projected implementation date of October 27, 2021 (Dist. Ex. 2 at pp. 1, 13). The CSE found the student eligible for special education services as a student with a speech or language impairment and recommended that she receive five periods of direct, group special education teacher support services (SETSS) per week and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 9-10).

A. Due Process Complaint Notice

In a due process complaint notice dated July 19, 2024, the parents alleged, among other things, that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Due Process Comp).[1] The parents alleged that, at the time, the last CSE meeting for the student had been held in October 2021, and that the district had failed to develop an individualized education program (IEP) or IESP for the student for the 2023-24 school year (id at pp. 2-3). The parents also alleged that the district failed to adequately and timely evaluate the student in all areas of suspected need, failed to implement a special education program for the student, and denied the parents their right to meaningfully participate in the educational planning process (id.). Among other relief, the parents sought direct funding for the services set forth in the student's October 2021 IESP at the providers' enhanced rates (id. at p. 3). The district asserted defenses in a due process response dated June 27, 2024 and filed an opening statement arguing that the parent had the burden to establish that the special education services privately obtained by the parent were appropriate.

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on July 18, 2024 (Tr. pp. 1-28). The parents withdrew the claim that the district did not fully evaluate the student, while maintaining that the district failed to timely evaluate the student in all areas of suspected disability (Tr. pp. 4-5). Additionally, at the IHO's request with no objection from the district, the parents submitted an amended due process complaint notice which also corrected an error (Tr. pp. 5-10; see SRO Ex. 1).[2]

In a fully redacted decision dated September 8, 2024, the IHO dismissed with prejudice the parents' claims that were related to IESP implementation and provider rates for lack of subject

[1] The IHO failed to rule on the admissibility of the parents' proffered exhibits and did not formally admit any of the parents' exhibits into evidence during the impartial hearing, including exhibit A, a copy of the due process complaint notice, despite the IHO decision referencing the parents' exhibits as entered into the hearing record (see generally Tr. pp. 1-28; see also IHO Decision at p. 9 [appendix B]). Therefore, although the exhibits proffered by the parents were included in the hearing record submitted on appeal, they will not be considered because there is no indication that they were admitted into evidence.

[2] The IHO failed to include the parent's amended due process complaint noticed dated July 19, 2024 in the hearing record, to which the district had no objection and waived the resolution period; however, the amended due process complaint notice was offered by the parents with their request for review (SRO Exs. 1-2).

matter jurisdiction, finding that a New York State Department of Education (NYSED) memorandum from August 2024 "clarified" the applicability of Education Law § 3602-c, and that matters relating to "implementation and rate[s]" should be dismissed on jurisdictional grounds (IHO Decision at pp. 4-5; see IHO Ex. I).[3]

The IHO made alternative findings that the district "conceded that it did not timely convene a CSE meeting, develop an appropriate program or implement an IESP", and, therefore the district did not meet its burden to establish that it offered a FAPE to the student (IHO Decision at p. 4). The IHO further made alternative findings that the parents sustained their burden to prove the appropriateness of the unilaterally-obtained services, and that equitable considerations supported the parents' claims (id.). The IHO further indicated that she would have awarded the district's rates for services, rather than the provider's enhanced rates, under her interpretation of Application of a Student with a Disability, Appeal No. 24-222 (id.).

Furthermore, the IHO found that she retained jurisdiction over other issues related to identification, evaluation, and programming (IHO Decision at p. 5). She found that it was not in dispute that a CSE failed to convene to create either a new IESP or IEP, and that the district did not locate a provider for the student's services (id.). As a remedy for "these procedural errors", the IHO ordered the CSE to reconvene, specifying that, if the student's triennial evaluations were dated more than three years prior to the due process complaint notice, the district was to reevaluate the student in all areas of suspected disability (id.). The IHO also ordered the district to convene a CSE within 30 days of the decision, at which point the parents were to advise the district of a preference for an IEP or IESP (id. at pp. 5-6). The IHO further ordered the district was ordered to base its recommendations in the specified programming document upon recent evaluative data as required by law, and both the parents and district were to consider goals, programs, and placement as required by law (id. at p. 6). Finally, the IHO directed the district to issue a prior written notice that offered "a cogent explanation for the program choices made, as required by law" (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in dismissing their claims for lack of subject matter jurisdiction. The parents further contend that the IHO erred in her alternative finding that the district's rate would have been appropriate for the student's services. The parents also allege "miscellaneous issues" that include: the IHO improperly failed to provide the parties with the opportunity to be heard on the issue of subject matter jurisdiction, the IHO failed to include the parents' amended due process complaint notice in the record, the IHO failed to consider or include the parents' written closing statement in the record, the IHO failed in her duty to be impartial, and the IHO failed to formally admit into the hearing record the exhibits the parents proffered at the impartial hearing.

In an answer with cross-appeal, the district contends that the parents' claims were properly dismissed for lack of subject matter jurisdiction, and that the IHO did not err in her alternative

[3] The Appendix A attached to the IHO's decision is also fully redacted and fails contain any meaningful identifying information and accordingly, the submission of the IHO's decision fails to comply with the requirements of Part 279 to submit a true copy of the IHO's decision that is being challenged.

finding that the district rates would have been appropriate, as the record supported that the provider rates were excessive. The district also contends that the order to have the CSE reconvene and conduct evaluations should be overturned as moot, as evidence in the hearing record indicates that a CSE reconvened and created an IESP on May 15, 2024, and that a psychoeducational evaluation was conducted on April 8, 2024 (see Dist. Exs. 3-4). In the cross-appeal, the district contends that the IHO erred in her alternative findings that the parents satisfied their burden in establishing the appropriateness of the unilaterally-obtained services, and that equitable considerations favored the parents. In the alternative, the district asserts that, if its arguments are rejected, that the matter should be remanded due to the many record discrepancies of the impartial hearing, including: the failure to rule on the admissibility of the parents' exhibits or formally admit them into evidence; the failure to include the amended due process complaint notice in the hearing record; and the lack of clarity regarding whether the IHO considered the parents' written closing statement.

In an answer to the cross-appeal, the parents first indicate that they are not opposed to a remand as suggested by the district, due to the many discrepancies in the hearing record. If the undersigned were to reach the merits of the parties' dispute, the parents contend, among other things, that the district's arguments in the cross-appeal should be rejected because they met their burden establishing the appropriateness of the unilaterally-obtained services, and that equitable considerations favored them.

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 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

[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]).

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

Here, the hearing record indicates that the IHO sua sponte dismissed the parents' due process complaint for lack of subject matter jurisdiction. Although the parents argue that the IHO erred by sua sponte addressing subject matter jurisdiction and not providing them an opportunity to be heard, subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). As such, the IHO was permitted to raise subject matter jurisdiction sua sponte as a lack of jurisdiction "can never be forfeited or waived" (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]).

The district argues on appeal that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to

[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.

implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-431; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

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 parents 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 New York Education Law 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]).[6]

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]).

Education Law § 4404 concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to

[6] 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]).

"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 §4404; 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).[7] In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are 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, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. 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 recently attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, 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 emergency rule did not apply to the original due process complaint notice dated June 12, 2024 and applied only to due process complaint notices filed on or after July 16, 2024 (id.).[8] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New

[7] The district did not seek judicial review of these decisions.

[8] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in this matter was filed with the district on June 12, 2024 (Due Process Comp.), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

York State Bd. 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).[9]

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "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]; see also IHO Ex I).[10]

Given the implementation date set forth in the amendment's text, the temporary suspension of its application and its subsequent lapse, the amendment may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

[9] 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 (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

[10] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website.

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed.

B. Hearing Record Defects

Turning to the IHO's alternative findings and orders directing the CSE to reconvene and conduct a reevaluation of the student, such determinations and relief must be vacated due to defects in the hearing record. State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Here, as the parties agree and reference in their pleadings, there are multiple discrepancies in the hearing record. The IHO did not provide an opportunity to be heard and then rule on the admissibility of the parents' proffered exhibits and did not admit them into the record, despite the IHO decision referencing them as admitted into evidence (compare Tr. pp. 1-28 with IHO Decision at p. 9; see also Tr. pp. 10-13). The hearing record also does not include the parties' closing statements, although again, the parents attempt to provide some of this material on appeal (see Tr. p. 25; SRO Exs. 4-5). The IHO and the parties should, upon remand, inventory the documents they have already submitted to the IHO for consideration, ensure that they are marked, paginated, added to the administrative record.

Further review of the allegations in the parties' pleadings reveal that the parties agree that a remand is appropriate to allow the IHO to develop the hearing record, rule on the admissibility of the parents' exhibits, and consider the parents' exhibits in rendering her decision (see Answer ¶ 4; Answer to Cross-Appeal ¶ 1) Based on the parties' assertions on appeal, neither party disputes that the IHO should have ruled on the admissibility of the parents' proffered exhibits, and enter into the hearing record relevant evidence, the parents' amended due process complaint notice, and any closing briefs. With regard to equitable considerations the IHO stated "[f]inally, the equities reveal Parent cooperated with the District by providing timely notification of intent to secure those

services" (IHO Decision at p. 4); however, the IHO appears to have improperly conflated the requirement for parents to annually make a request for dual enrollment services on before June 1 of each year (Educ. Law § 3602-c[2]) with the equitable factor of whether the parents provided the district with 10-day notice of their intent to privately obtain services from Yes I Can at public expense (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). In light of these record discrepancies and the parties' agreement and, given that it is the IHO's responsibility to ensure that there is an adequate and complete hearing record (8 NYCRR 200.5[j][3][vii]), I will vacate the IHO's alternative findings and orders. In addition, given that the matter was improperly dismissed on the basis of subject matter jurisdiction, I will remand this matter to the IHO for a determination on all of the parents' claims in the amended due process complaint notice after clarifying and completing the hearing record, and if deemed appropriate, affording the parties additional opportunities to present arguments, present documentary evidence and testimony. Upon remand, and in light of the May 2024 IESP already in evidence which indicates that further psychoeducational assessment of the student was conducted and the CSE convened (Dist. Ex. 3),[11] IHO should clarify with the parties the extent to which the parents continue to challenge the adequacy of of the evaluation of the student in this proceeding, especially in light of the parents' withdrawal of certain aspects of their claims on the record and filing of an amended due process complaint notice to that effect.

VII. Conclusion

For the reasons described above, this matter is remanded to the IHO to provide both parties an opportunity to be heard, develop an adequate the hearing record and formally admit relevant evidence, and thereafter issue final decision on the merits of the issues raised in the parents' amended due process complaint notice, that discusses the evidence submitted by the parties, uses the Burlington-Carter standard , and regarding whether the district implemented the IESP services recommended for the 2023-24 school year, any defenses to the parents' claims, and, if necessary, a determination of whether the services the parents may have unilaterally obtained from Yes I Can were appropriate to address the student's needs and, if so, whether equitable considerations favor the parents including any defense raised by the district regarding 10-day notice and excessiveness of the costs of the private services obtained by the parents.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that those portions of the IHO's September 8, 2024 decision, which dismissed the parents' claims for lack of subject matter jurisdiction, made alternative findings regarding services unilaterally obtained by the parent are vacated; and

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

[11] Nothing in this decision however relieves the CSE of its continuing obligations to conduct a review at least annually or reevaluate the student as necessary in accordance with the requirements of federal law and state regulation.

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**
January 10, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER