The University of the State of New York

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

No. 24-480

Application of a STUDENT WITH A DISABILITY, by his 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:
Shehebar Law PC, attorneys for petitioners, by Y. Allan Shehebar, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, 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 denied their request that respondent (the district) fund the costs of their son's private special education services delivered by Alpha Student Support (Alpha) 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

On May 6, 2020 a CSE convened, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected

implementation dated of May 19, 2020 (Parent Ex. B).[1] At that time, the student was in second grade at a nonpublic school and cognitive testing yielded a full scale IQ in the average range (id. at p. 1). The student's academic skills were generally in the average to below average range, and he presented with receptive and expressive language delays that negatively affected his academic and social performance in school (id. at pp. 3-5). According to the IESP, the student did not initiate peer interactions or join a play group (id. at pp. 5-6). The student also exhibited deficits in sensory processing, upper body and hand strength, fine motor, graphomotor, and visual perceptual skills (id. at p. 6). The May 2020 CSE recommended that the student receive seven periods per week of special education teacher support services (SETSS) in a group, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of counseling in a group (id. at p. 11).

During the 2020-21 school year, the student repeated second grade at a nonpublic school (Dist. Ex. 3 at p. 1). On May 4, 2021, a CSE convened, determined the student continued to be eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of May 19, 2021 (compare Parent Ex. B at p. 1, with Dist. Ex. 3 at p. 1). Although the IESP reflected reports that the student had made some academic progress, he continued to present with delays in receptive and expressive language skills that negatively affected his academic and social performance (compare Parent Ex. B at pp. 3-5, with Dist. Ex. 3 at pp. 1-2). According to the IESP, the student was easily frustrated when learning new information or completing complex tasks (Dist. Ex. 3 at pp. 2-3). The student also continued to exhibit delays in strength and endurance, and fine motor, motor coordination, visual perceptual, and sensory processing skills (compare Parent Ex. B at p. 6, with Dist. Ex. 3 at p. 3). For the 2021-22 school year, the CSE continued to recommend the same SETSS and related services as provided in the May 2020 IESP (compare Parent Ex. B at p. 11, with Dist. Ex. 3 at pp. 9-10).

Turning to the school year at issue, on September 5, 2023, the student's mother signed a "PARENT SERVICE CONTRACT" with Alpha, which stated that she "confirmed [her] understanding" that the student was entitled to receive "funding or reimbursement" from the district for the recommended SETSS, OT, speech-language therapy, and counseling, and that Alpha would "make every effort to implement the recommended services . . . with suitable qualified providers for the 2023-24 school year" (Parent Ex. C).[2] The document specified that the parent understood that Alpha "intend[ed] to provide" the student's SETSS at a rate of $195 per hour, and speech-language therapy at a rate of $250 per hour (id. at p. 2).

According to the Alpha program director, Alpha staff delivered seven hours per week of SETSS and two 30-minute sessions of speech-language therapy to the student during the 2023-24 school year (fifth grade) "in his mainstream school" (Parent Exs. D ¶¶ 4, 14, 16, 21; F at p. 1).

[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] Alpha has not been approved by the Commissioner of Education as an agency or school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In a due process complaint notice dated June 20, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 1-2). Specifically, the parents alleged that the district failed to implement the special education services from the May 2020 IESP, and, as a result, the parents "unilaterally secured their own providers to work with the [s]tudent at an enhanced rate" (id. at p. 2). The parents asserted that pendency was "based on the aforementioned IESP" and sought "funding for the services contained therein during the pendency of the proceeding" (id.).

As a proposed resolution, the parents requested that the IHO order "direct funding/reimbursement for the SETSS and related services mandated" in the May 2020 IESP "at an enhanced rate" (Parent Ex. A at p. 2). The parents also "reserve[d] the right to seek any compensatory educational relief for services that should have been provided or for services that were mandated to the [s]tudent but not provided due to the [district's] denial of a FAPE or failure to implement the SETSS and related services" (id. at p. 3).

B. Impartial Hearing and Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 7, 2024 and concluded that day (see Tr. p. 1).

In a September 10, 2024 email to the IHO and the district's attorney, the parents' attorney "noticed that [the IHO] ha[d] been denying matters based on [subject matter jurisdiction] despite the fact that the [district] has not even made a motion to dismiss in this case and despite the fact that [the] parents did not even have an opportunity to be heard on these matters," and included a statement regarding the parents' opposition to such dismissal (IHO Ex. I). In a September 11, 2024 email to the IHO and the parents' attorney, the district's attorney replied, acknowledging that the district had not filed a motion to dismiss, but stating that nonetheless it was the district's "position that [the IHO] does not have jurisdiction to order the relief requested by the [p]arent[s]" (IHO Ex. II at p. 1). The district's attorney requested that the IHO dismiss the parents' claims that the IHO did not have jurisdiction, citing a guidance document issued by the State Education Department (SED) (id.).

In a decision dated September 19, 2024, the IHO indicated that the matter was "heard as part of an omnibus docket, and was subject to OATH's omnibus order, which [wa]s in the record" (IHO Decision at p. 3). The IHO noted that two student IESPs were entered into the hearing record, dated May 2020 and May 2021, and that the parents' attorney indicated that the "service would be the same under that newer IESP versus the one that [the parents] originally filed under," and, therefore, the IHO "focus[ed] on the May 4, 2021 IESP" (id. at p. 4).

The IHO determined that the parties did not directly address pendency on the record at the hearing; however, she noted that "these proceedings solely addressed the question of the appropriate rate for the [s]tudent's SETSS and [speech-language therapy], and very briefly addressed compensatory hours of OT and counseling, not the identification, evaluation, or placement of the [s]tudent" and accordingly, found that the student "was not entitled to pendency" (IHO Decision at p. 7).

The IHO determined that there was no dispute that the student was entitled to services pursuant to an IESP and that the hearing record lacked evidence showing that the district implemented the services mandated by the May 2021 IESP; accordingly, she found that the district failed to sustain its burden to demonstrate that it provided the student a FAPE for the 2023-24 school year (IHO Decision at pp. 4, 8-9).

Next, the IHO determined that the parent "entered into an enforceable contract with [Alpha] and ha[d] an obligation to pay for the [s]tudent's special education services" (IHO Decision at p. 5). The IHO reviewed the Alpha program director's testimony and the SETSS and speech-language therapy progress reports, finding that the latter was "relevant and generally reliable as it [wa]s consistent with the [s]tudent's most-recent IESP and all the other evidence" (id. at pp. 5-6). Given the SETSS progress report used an incorrect name for the student twice, the IHO found that it was "less reliable" than the speech-language therapy progress report (id. at p. 6). After reviewing the parents' evidence, the IHO determined that the SETSS the student received "consist[ed] of special education instruction by a qualified special education teacher consistent with the services recommended in the [s]tudent's most-recent IESP" (id. at pp. 5-7). However, the IHO found that it was "clear that [the IHO] do[es] not have jurisdiction to order the financial relief requested by the [p]arent" based upon the "unambiguous language" in an SED guidance document, and ,on that basis, dismissed the parents' request for financial relief (id. at pp. 10-11).[3]

As for the parents' request for "banks of hours of compensatory OT and counseling," the IHO declined to order such relief "given that the most recent IESP provided for this [s]tudent [wa]s from 2021 and no evidence was presented regarding the [s]tudent's current needs for counseling and OT" (IHO Decision at p. 12). The IHO ordered the district to "convene a new IESP meeting for the [s]tudent within 30 days of this order if one ha[d] not been convened since the filing of the due process complaint in this case" (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in determining that she did not have jurisdiction to order the parents' requested relief and asserting that the IHO erroneously relied on August 2024 SED guidance rather than an emergency regulation that established a specific date for cases that would be subject to dismissal.[4] The parents argue that, because the due process

[3] The IHO identified that the parents should direct their request for enhanced rates for SETSS and speech-language therapy to the district's "ERES Unit" (IHO Decision at p. 11).

[4] The request for review does not conform to practice regulations governing appeals before the Office of State Review. In particular, the request for review is single-spaced whereas State regulation requires the request for review to be double-spaced (8 NYCRR 279.8[a][2]). In addition, the parent's attorney endorsed the request for review only with a conformed signature, and he did not set forth his law firm, mailing address, or telephone number as required by State regulation (8 NYCRR 279.7[a]). In addition, the proof of service filed with the request for review does not include language conforming to the requirements of an affirmation (see CPLR 2106). The parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a party's pleading (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements (see, e.g., Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal

complaint notice was filed on July 11, 2024, the IHO had jurisdiction to hear this matter as outlined in the emergency regulation.

Next, the parents argue that the IHO erred in denying the requested relief, because there was a full hearing on the merits of the case and the parents demonstrated that the services were appropriate. Specifically, the parents assert that the oral and documentary evidence established the student's needs, the specific tools and methodologies used to address those needs, the providers' qualifications, the educational benefit conferred on the student as a result of those services, and that the services were specially tailored to meet the student's unique educational needs. Additionally, the parents argue that the rates the private providers requested were "reasonable and within market rate." As relief, the parents request reversal of the IHO's decision finding that she did not have jurisdiction to award funding for the seven periods of SETSS and two 30-minute sessions of speech-language therapy per week at the providers' contracted rates.

In an answer, the district generally responds to the parents' material allegations with admissions and denials and argues that the IHO's decision dismissing the parents' due process complaint notice should be upheld in its entirety.[5] In the alternative, the district asserts that this matter should be remanded to the IHO for findings regarding whether the unilaterally obtained services were appropriate and whether equitable considerations weighed in favor of the parents' request for relief.

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

No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

[5] In its answer, the district characterizes the parties' positions at the hearing as "solely address[ing] the question of appropriate rate for the [s]tudent's SETSS, [speech-language therapy], compensatory hours of OT and counseling."

services is made (Educ. Law § 3602-c[2]).[6] "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.).[7] 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—Subject Matter Jurisdiction

As a threshold matter, I will address the parents' appeal of the IHO's finding that she lacked subject matter jurisdiction to address the parents' requested relief.

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 implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-501; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability,

[6] 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]).

[7] 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.

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 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]).[8] 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, 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]).[9] State Review Officers have in the past, taking into account the legislative history of Education

[8] 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]).

[9] The district argues in its answer that the student's educational placement is not the "CSE's prerogative when the student is parentally placed"; however, it has long been held that "placement" means, not the specific school or classroom, but "the general type of educational program in which the child is placed" including the "general level and type of services" (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 [2d Cir. 2014]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]).

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).[10] In addition, the New York Court of Appeals has explained that students authorized to received 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 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 amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[11] 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 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

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

[11] The due process complaint notice in this matter was filed with the district on June 20, 2024 (Parent Ex. A), prior to the July 16, 2024 effective date of the emergency regulation, which regulation has since lapsed.

> 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).[12]

The IHO did not rely on the regulatory amendment to find that she did not have jurisdiction over the matter but instead agreed with the district's position based on State guidance issued in August 2024, which noted that SED 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]).[13]

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 effective 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 emergency amendment to the regulation may not be deemed to apply to the present matter. Further, the SED memorandum, 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.

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed. Regarding the merits of the parents' requested relief, I note that the district has not challenged the IHO's findings that that it failed to offer the student a FAPE for the 2023-24 school year and the parent has not appealed the IHO's finding that relief in the form of compensatory OT or counseling was not warranted based on the evidence presented (IHO Decision

[12] 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]).

[13] 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, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; thus a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

at pp. 9-10, 12). Therefore, these determinations and awards have become final and binding on the parties and need not be revisited on remand (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[14] However, while the IHO made some preliminary findings of fact regarding the evidence presented, she did not determine whether the parents met their burden to demonstrate that the services provided by Alpha were appropriate or whether equitable considerations supported the parents' requested relief (see IHO Decision at pp. 5-7).

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]).

Therefore, the matter will be remanded so that the IHO may consider the merits of the parents' requested relief in the first instance. The IHO should consider the parents' requested relief using the Burlington-Carter standard. I leave it to the IHO's sound discretion to determine whether additional evidence or argument from the parties should be permitted.

VII. Conclusion

For the reasons described above, this matter is remanded for the IHO to make a determination as to whether the services the parents unilaterally obtained from Alpha were appropriate to address the student's needs and, if so, whether equitable considerations weigh in favor of an award of district funding for the services.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 19, 2024, dismissing the parents' due process complaint notice for lack of subject matter jurisdiction is reversed; and

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

Dated: **Albany, New York**
December 27, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[14] The district also argues that the IHO's determination regarding pendency is final and binding; however, to the extent the IHO's determination regarding pendency related to her finding that she lacked subject matter jurisdiction, the IHO is not precluded from revisiting the issue on remand.