The University of the State of New York

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

No. 24-507

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

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

Liz Vladeck, General Counsel, attorneys for respondent, by Jennifer C. Kuhn, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice for lack of subject matter jurisdiction to review the parent's claims. The appeal must be sustained, and, as explained herein, 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[a]). 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 ultimate disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened in January 2023, and developed an IESP for the student for the 2023-24 school year (January 2023 IESP), with a projected date of implementation

of January 31, 2023 and a projected annual review date of January 17, 2024 (see Parent Ex. B at p. 1). Finding the student eligible to receive special education as a student with a speech or language impairment, the January 2023 CSE recommended that the student receive one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual physical therapy (PT), one 30-minute session per week of individual counseling services, and one 30-minute session per week of counseling services in a group (id. at pp. 1, 9).[1]

Based on the evidence in the hearing record, the student began receiving speech-language therapy services on September 7, 2023 and OT services on September 12, 2023 (Parent Ex. F at p. 1; see generally Parent Exs. G-H).[2]

A CSE convened on February 16, 2024, found the student continued to be eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with an implementation date of March 1, 2024 (Dist. Ex. 3). The February 2024 IESP included recommendations for two 30-minute sessions per week of group OT, two 30-minute sessions per week of group speech-language therapy, and two 30-minute sessions per week of group counseling services (id. at p. 9). According to the February 2024 IESP, the parent indicated the student had not accessed PT services and requested removal of them from the student's educational program (id. at p. 1).

Evidence in the hearing record reflects that the parent signed a document on April 11, 15, 2024, on letterhead for "Always A Step Ahead, Inc.," (Step Ahead) indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the student's "IEP/IESP dated 01/17/2023" and that she was aware "related services" were provided to the student at a rate of $250.00 per hour (Parent Ex. C at p. 1).[3, 4]

A. Due Process Complaint Notice

By due process complaint notice dated June 5, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) "and/or equitable services" for the

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

[2] Parent exhibit F—which the parent identified as "Attendance Records"—includes information consisting of the student's name, the date and time the speech-language therapy or OT services were delivered to the student, the provider's names, and the location where the services were delivered to the student (i.e., "school") (Parent Ex. F at p. 1; see Parent Ex. E). The document also provides space for a "Note" to be written; the OT provider notes offer substantially more information about what the provider worked on with the student as compared to the notes from the speech-language provider (see, e.g., Parent Ex. F at p. 1).

[3] Step Ahead has not been approved by the Commissioner of Education as a company or a provider with which districts may contract to provide special education services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]).

[4] The director of the Step Ahead agency appears to have signed the letter as well (see Parent Ex. C at p. 1).

2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's January 2023 IESP represented the last-agreed upon program developed for the student (id.). The parent asserted the student's program included recommendations for one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling services, and one 30-minute session per week of counseling services in a group (id.).[5] The parent further indicated that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that, for the "full 2023-2024 school year," the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).[6]

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and to directly fund the costs of the student's related services (i.e., one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling services, and one 30-minute session per week of counseling services in a group) at the "enhanced rate each charge[d] for their service" for the 2023-24 school year (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

On July 9, 2024, the parties appeared for a prehearing conference and on August 28, 2024 proceeded to an impartial hearing with an IHO before the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-75). The impartial hearing concluded on August 28, 2024; however, thereafter, in a motion to dismiss, dated September 18, 2024, the district argued that the IHO lacked subject matter jurisdiction over the parent's claims and, as a result, asserted that the parent's due process complaint notice must be dismissed with prejudice (see Dist. Motion to Dismiss at pp. 1, 5). The parent submitted opposition to the district's motion to dismiss, dated September 24, 2024 (see Parent Opposition to Motion to Dismiss at pp. 1, 5).

In a decision dated September 24, 2024, the IHO determined that, consistent with the district's argument, she lacked subject matter jurisdiction to review the parent's "implementation/enhanced rate claim" (IHO Decision at pp. 1, 3-5). The IHO determined that the

[5] Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Exs. A at p. 1; B at p. 2).

[6] The parent did not identify PT as a service recommended in the January 2023 IESP and did not request PT services as part of her requested relief (compare Parent Ex. A, with Parent Ex. B at p. 9).

parent's claims in the due process complaint notice did not relate to the identification, evaluation, educational placement of the student, the provision of FAPE, a manifestation determination, or discipline of a student with a disability, and thus, she did not have subject matter jurisdiction (id. at p. 3). The IHO further found that there was "no actual dispute" related to the CSE's recommendations and that it had always been her belief that IHO's "had no jurisdiction or powers pertaining to implementation and that an impartial hearing [wa]s not necessary in instances, where there [wa]s no dispute or disagreement with the CSE's recommendation" (id. at pp. 3-4). The IHO then noted the emergency regulation and the creation of the district's Enhanced Rate Equitable Service (ERES) unit to specifically address implementation or enhanced rate claims (id. at p. 4). The IHO indicated that her decision did

> not hinge on the emergency regulation to part 200.5, but rather hinge[d] on the creation of the ERES unit, where [the] parent c[ould] seek the enhanced rate, and if not successful there they c[ould] make a complaint to the State Education Department and from there c[ould] proceed to [S]tate court, which [wa]s the same end point [the] parent would reach through the process of appearing before an IHO. It [wa]s for th[o]se reasons that the [district's] motion to dismiss [wa]s granted, irrespective of the emergency regulation.

(IHO Decision at p. 4).

The IHO also found that she lacked an "essential element to having subject matter jurisdiction," as she was not empowered to provide the parent's requested relief (IHO Decision at p. 4). The IHO further explained that, even if an IHO issued an order, an IHO could not "force the implementation unit to do anything" (id.).[7] Next, the IHO granted, "to the extent applicable," the district's motion to dismiss the parent's claims for compensatory education "equal to missed services under an IESP," finding that the parent's requested relief was not compensatory in nature, but rather, was actually enhanced rate relief, which, as already noted, the IHO did not have subject matter jurisdiction to address (id. at p. 5). For those reasons, the IHO dismissed those portions of the parent's due process complaint notice that sought relief of "implementation/enhanced rate" with prejudice (id.). As final points, the IHO included a section in the decision entitled "Other Noteworthy Points," wherein she discussed equity, implied waiver, prejudice, the parent acting against her own self-interest, judicial economy, the legality of the emergency amendment, the parent's request for a final determination on the merits of the due process complaint notice, and the parent's argument that the amendment had not yet been passed (id. at pp. 5-7).

[7] With respect to the IHO's statement in the decision that an "IHO may issue an order, but the IHO cannot force the implementation unit to do anything" as a reason for dismissing the parent's claims, the IHO erred by conflating enforcement of an IHO order, which is beyond an administrative hearing officer's authority in this State (see Tobuck v. Banks, 2024 WL 1349693, at *6-*7 [S.D.N.Y. Mar. 29, 2024]), with the role of conducting a proceeding and determining whether the claims in a due process complaint notice have merit based upon an evidentiary record, which is an IHO's essential function.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by granting the district's motion to dismiss the due process complaint notice with prejudice for lack of subject matter jurisdiction. The parent asserts that the IHO referred to and relied on evidence outside of the hearing record, including the existence of the district's ERES unit, and similarly relied on incorrect legal arguments in reaching her determination. In addition, the parent contends that she met her burden to establish the appropriateness of the unilaterally-obtained speech-language therapy and OT services delivered to the student by Step Ahead during the 2023-24 school year, and, as a result, she is entitled to reimbursement or direct funding of the costs of those services at the contracted for rates. As relief, the parent seeks reversal of the IHO's decision dismissing the due process complaint notice, and an order directing the district to fund the costs of the student's speech-language therapy services and OT services delivered by Step Ahead at a rate of $250.00 per hour during the 2023-24 school year.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the parent failed to exhaust her administrative remedies because the parent did not seek payments through the district's ERES unit. As relief, the district seeks to dismiss the parent's appeal.

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]).[8] "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

[8] 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]).

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.).[9] 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

In seeking to uphold the IHO's decision dismissing the parent's due process complaint notice based on the lack of subject matter jurisdiction, the district argues on appeal that there is no federal right to file for due process regarding services recommended in an IESP and that parent never had the right to file a due process complaint notice with respect to implementation of an IESP. 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 a Student with a Disability, Appeal No. 24-499; 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, 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

[9] 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.

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 alone, 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]).[10]

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 §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).[11] 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

[10] 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]).

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

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. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

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.).[12] 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 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).[13]

[12] The due process complaint notice in this matter was filed with the district on June 5, 2024 (see Parent Ex. A at p. 1), which was before the July 16, 2024 date set forth in the emergency regulation and which regulation has since lapsed.

[13] 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]).

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]).[14]

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 amendments to the regulation 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.

Finally, the IHO found that the creation of the ERES unit was the primary reason for granting the district's motion to dismiss. While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurtles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] [finding that "[w]hile state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice following the IHO's determination that she lacked subject matter jurisdiction over such claims. 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

[14] 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.

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]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

VII. Conclusion

For the reasons described above, this matter is remanded to the IHO to issue a final decision on the merits of the issues raised in the parent's June 2024 due process complaint notice, including rates issues, using the Burlington-Carter standard, and regarding whether the district implemented the IESP services recommended for the 2023-24 school year, any defenses to the parent's claims, and, if necessary, a determination of whether the services the parent may have unilaterally obtained from private providers were appropriate to address the student's needs and, if so, whether equitable considerations favor the parent including any defense raised by the district regarding excessiveness of the costs of the private services obtained by the parent.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that IHO's decision, dated September 24, 2024, dismissing the parent's due process complaint notice for lack of subject matter jurisdiction is reversed; and,

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

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

Dated: **Albany, New York**
January 2, 2025

STEVEN KROLAK
STATE REVIEW OFFICER