The University of the State of New York

The State Education Department

State Review Officer

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No. 24-512

Application of a STUDENT WITH A DISABILITY, by his 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:

Bochner, PLLC, attorneys for petitioner, by David Kahane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed at a contracted rate for the costs of her son's private services delivered by Kids Further Inc. (Kids Further) for the 2024-25 school year. The 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Additionally, as the district declined to present evidence during the impartial hearing, much of the student's educational

history is derived from the parent's unrebutted allegations set forth in the due process complaint notice.

Briefly, a Committee on Preschool Special Education (CPSE) convened on May 24, 2017 for an "Annual Review" and determined that the student continued to be eligible for services as a preschool student with a disability (Parent Ex. B at p. 1). The CPSE developed an individualized education program (IEP), which provided for the student to receive five two-hour sessions of individual special education itinerant teacher (SEIT) services per week, three 30-minute sessions of individual speech-language therapy per week, and three 30-minute sessions of individual occupational therapy (OT) per week for the 12-month school year (id. at pp. 14-15).[1] The IEP indicated that the student was recommended to attend a bilingual (Yiddish) program and that services would be delivered in a "[r]egular [p]reschool program" or "[c]hildcare location" selected by the parent (id. at pp. 1, 14). By "Final Notice of Recommendation," dated May 24, 2017, the district notified the parent of the CPSE's recommendations on a form that the parent was required to return to state agreement with the CPSE's recommendations (id. at p. 28).

There is no information in the hearing record regarding the student's educational programming from May 2017 through March 2022. A CSE convened on March 24, 2022 to develop an IESP for the student (see Parent Ex. C). The CSE determined the student was eligible for services as a student with a speech or language impairment and recommended that the student receive five periods of direct special education teacher support services (SETSS) in a group, three 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual OT per week, all to be provided in Yiddish (id. at p. 9).[2, 3]

There is also no information in the hearing record regarding the student's educational program from March 2022 until the 2024-25 school year at issue. According to the parent, on May 30, 2024, she submitted a notice to the district requesting that the student be provided "his mandated services at his private school " (Parent Ex. G at ¶ 6). On July 1, 2024, the parent signed a contract with Kids Further to provide SETSS, speech-language therapy, and OT at the

[1] The hearing record indicates that as a result of the CPSE meeting the recommended speech-language therapy and OT were increased to three sessions per week from the prior IEP (Parent Ex. B at p. 27).

[2] 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]).

[3] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

frequencies set forth for services in the May 2017 IEP (see Parent Ex. D).[4] [5] During the 2024-25 school year the student attended a religious, "mainstream" nonpublic school (Parent Ex. F at ¶ 17). Kids Further began providing the student 10-hours per week of SETSS and three 30-minute session per week of speech-language therapy beginning on July 5, 2024 (id. at ¶¶ 12, 23).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated August 28, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 extended school year (Parent Ex. A).[6] The parent stated that she "agree[d] with the program recommendations in the [May 2017] IEP" but alleged that the "CSE [had] not informed the parent" how it would implement the IEP for the 2024-25 school year (id. at p. 2). The parent alleged further that the district failed to identify or assign a provider and that the parent was unsuccessful in locating a provider from the district's published list (id.). The parent requested an order declaring the student was deprived a FAPE for the 2024-25 school year (id.). The parent requested direct payment for the cost of the student's SEIT, speech-language therapy, and OT at an enhanced rate for the extended school year (id.). In addition, the parent requested a bank of compensatory education services to "make up for any mandated services not provided" to the student for the 2024-25 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 10, 2024 and concluded the same day. The district did not submit any documentary or testimonial evidence at the hearing (see Tr. pp. 1-17). After the conclusion of the hearing, the district submitted a motion to dismiss on the grounds that the IHO did not have subject matter jurisdiction over the matter because the parent did not have the right to request an enhanced rate for equitable services under Education Law § 3602-c (IHO Ex. II at pp. 2-4). More specifically, the district alleged that a recent regulatory amendment clarified the law consistent with the district's interpretation that the parent did not have a right to bring a complaint for implementation of an IESP or enhanced rate services (id. at p. 3).

In a decision dated September 25, 2024, the IHO found that the amended regulation did not warrant dismissal of the matter in its entirety as there were questions relating to the provision of FAPE, the appropriateness of the services themselves, and the equities of the case (IHO Decision p. 4). The IHO granted the district's motion only with regard to the issue of the appropriateness of the rate charged by the provider (id.).

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

[5] At times in the hearing record, the services provided by Kids Further appear to be interchangeably referred to as SEIT services or SETSS.

[6] The original due process complaint, dated July 15, 2024, was filed via email at 9:36pm (see Due Process Compl. at p. 4).

Next, the IHO summarized the facts, finding that it was uncontested that the student attended a private school during the 2024-25 school year, the parent did not challenge the content of the IESP but, instead, only disputed the implementation of the SETSS and related services (IHO Decision at pp. 4-5).[7] The IHO found the parents submitted evidence to be "relevant, detailed, and consistent" and the service provider's testimony to be relevant and reliable (id. at p. 5).[8] Further, the IHO found the district denied the student a FAPE, specifically holding that the district did not "assert nor offer any evidence" to show it implemented services mandated by the IESP and instead only challenged the appropriateness of the services provided by Kids Further and argued that the rate charged was excessive (id. at p. 7). With regard to the appropriateness of the private services, the IHO held that testimonial evidence indicated that the Kids Further was providing services consistent with those recommended by the district and therefore the appropriateness of the services were not in dispute (id. at pp. 7-8). The IHO also found that the Kids Further progress report detailed the student's "performance, deficiencies and learning style, as well as goals and recommendations for [s]tudent's continued improvement" (id. at p. 8). Finally, the IHO held that there was no evidence in the hearing record that would weigh against an award of direct funding (id. at p. 9). The IHO awarded direct funding for the 2024-25 school year for 10 periods per week of SETSS, and also awarded a bank of compensatory education consisting of 54 hours each for speech-language therapy and OT respectively (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in granting the district's motion to dismiss in awarding SETSS in lieu of SEIT services as requested in the due process complaint notice. The parent alleges further that the IHO erred in failing to award reimbursement for speech-language therapy consistent with the services provided during the 2024-25 school year instead of compensatory education.

In an answer, the district argues that the IHO's award should be affirmed in its entirety arguing that SEIT services would be inappropriate for the student as he is no longer of preschool age. Moreover, the district reiterates its argument that the IHO did not have jurisdiction over the issue of rates, however, argues in the alternative that the hearing record does not support an award for "enhanced rates" and requests that if the IHO's decision is not affirmed that the issue be remanded for further proceedings.[9]

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[7] Regarding the parent's agreement with the IESP, it appears that the IHO was referring to the May 2017 preschool IEP; indeed throughout the decision, the IHO uses the term "IEP" interchangeably with "IESP" (see IHO Decision pp. 3, 5,7).

[8] The parent presented her own testimony and the testimony of the educational director from Kids Further by affidavit in-lieu of in-hearing testimony (Parent Exs. F-G; see 8 NYCRR 200.5[j][3][xii][f]).

[9] The district seeks dismissal of the parent's request for review due to the parent's failure to timely serve the notice of intention to seek review. A petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision (8 NYCRR 279.2[b]). The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision). Among other things, the "service of a notice of intention to seek review upon a school

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]).[10] "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

district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see 8 NYCRR 279.9[b]; see also Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). . In addition, whether the respondent is a school district or a parent, the notice of intention to seek review (along with the accompanying case information statement) provides a respondent with advance notice of a petitioner's imminent challenge to an IHO's determination, which may give a respondent additional time to contemplate a position to be stated in an answer—time that is particularly valuable in light of the short time frame allotted for a respondent to answer a request for review or serve a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[a]). Here, the parent served the notice of intention to seek review along with the request for review on the 40th day after the date of the IHO's decision; accordingly, the district is correct that the parent did not timely serve the notice of intention to seek review (see Parent Aff. of Serv.) While the district asserts that it is prejudiced due to its inability to serve and file a notice of intention to cross-appeal (see 8 NYCRR 279.2[d]), the district did not attempt to interpose a cross-appeal in its answer. This is notwithstanding that the district requested an extension to serve and file an answer and cross-appeal, which was granted. Therefore, I will exercise my discretion and decline to dismiss the parent's request for review for the failure to timely file the notice of intention to seek review (see 8 NCYRR 279.2[f]).

[10] 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]).

public or nonpublic schools located within the school district (id.).[11] 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

At the outset, it is necessary to address the issue of subject matter jurisdiction which was the basis for the IHO's denial of the relief sought by the parent in her due process complaint and the district's assertion that the IHO's determination should be sustained (see IHO Decision at p. 4).[12]

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. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498;

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[11] 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.

[12] On appeal, the parent asserts that the IHO should have precluded the district's motion for not being timely submitted according to the IHO's prehearing order that set forth expectations and deadlines for the impartial hearing (IHO Ex. I). However, a party is permitted to raise subject matter jurisdiction at any time in proceedings (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630). Accordingly, the IHO did not err in hearing the district's motion (see IHO Ex. II).

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 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 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]).[13] 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[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-

[13] 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]).

069; Application of a Student with a Disability, Appeal No. 23-068).[14] In addition, the New York Court of Appeals explained that student 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 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.[15] 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

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

[15] The emergency regulation was to apply only to due process complaint notices filed on or after July 16, 2024. Here, the original due process complaint notice was filed at 9:36 pm on July 15, 2024 (see Due Process Compl. at p. 4). It is unnecessary to address the parent's contention that the regulation should not be deemed to apply given the filing of the due process complaint notice on July 15, 2024 since there are other reasons set forth herein to find that the emergency regulation does not apply.

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[16]

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]).[17]

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 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.

Accordingly, the parent's appeal seeking reversal of the IHO's determination that she lacked subject matter jurisdiction to grant the relief requested by the parent must be sustained.

B. Relief

The IHO denied the parent's request for district funding of the services delivered by Kids Further at the contracted rate on the ground that he did not have subject matter jurisdiction to award relief in this form (see IHO Decision at p. 4). However, as set forth above, the IHO did have jurisdiction to make this award. While the IHO did not grant relief in the form requested, he did

[16] 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.

[17] 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; however, a copy of the August 2024 rate dispute guidance is included in the administrative hearing record as an attachment to the district's motion to dismiss.

conduct an analysis using the Burlington/Carter framework, and neither party has appealed the IHO's finding that the district denied the student a FAPE for the 2024-25 school year, that the services delivered by the provider were appropriate, and that equitable considerations did not weigh against the parent's request for relief (see IHO Decision pp. 7-9).[18] Accordingly, these determinations have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Given these final and binding determinations and the determination that the IHO had jurisdiction to award the relief sought, the district shall be required to fund up to 10 hours per week of SETSS and up to three 30-mintue sessions per week of speech-language therapy provided to the student by Kids Further for the 2024-25 school year at the contracted rates. In light of this award, the IHO's order of compensatory speech-language therapy is vacated.[19]

The only remaining issue on appeal is whether the IHO erred in awarding district funding for SETSS instead of SEIT. The parent asserts that the IHO erred in finding that their "SEIT" services were not an appropriate form of relief "since the student was receiving SEIT services" and argues the award is inaccurate because it should reflect the services the student was provided. However, as alluded to above, references in the hearing record to services provided by Kids Further describe them interchangeably as either SEIT or SETSS. The parent's due process complaint notice requires an order for the district to fund SEIT services but also requests funding for the provider's rate for "SEITS/SETSS" (Parent Ex. A at p. 3). The contract with Kids Further refers to the "Service Type" as "SETSS" and lists a rate for "SETTS/SEIT [sic]" (Parent Ex. D). The parent stated in her written testimony that she obtained SETSS for the student from Kids Further (Parent Ex. G ¶¶ 10-11, 15). The educational director from Kids Further indicated that the agency provided the student with 10 hours per week of SETSS for the 2024-25 school year (Parent Ex. F ¶¶ 12, 23). In addition, the progress report generically refers to the services delivered as "Special Education services" but then describes the provider as a "SETSS provider" (Parent Ex. E at pp. 1, 3). Finally, the September 2024 speech-language therapy progress report refers to the student's receipt of SETSS (id. at pp. 11-13). Accordingly, the parent's claim that the student was receiving SEIT services rather than SETSS is belied by the parent's own evidence.

The parent does not identify a difference in SEIT services versus SETSS or state what impact the IHO's order has on the parent's relief. It may be that the parent purports to be "implementing" the student's preschool IEP, including by providing SEIT services, perhaps in an attempt to maintain the idea that the student was being educated under an IEP instead of an IESP and avoid the policymaking that is occurring surrounding dual enrollment services under

[18] Although the district argues in its answer that equitable considerations would not support an award of district funding for the services at the rates sought because the rates were excessive, the district did not cross-appeal the IHO's determination regarding equitable considerations. Moreover, the district did not present any argument or evidence during the impartial hearing to challenge the rate sough. Accordingly, even if the district had properly raised the issue on appeal, the district would not prevail, and remand would not be appropriate where the district already abandoned its opportunity to argue equitable considerations.

[19] Neither party appeals the IHO's award of compensatory OT; accordingly, that portion of the IHO's award shall not be disturbed.

Education Law § 3602-c.[20] However, according to the hearing record, the operative plan in place at the time of the parent's decision to unilaterally obtain services from Kids Further was the March 2022 IESP (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). As of the 2024-25 school year, the district had no continuing obligation to implement the preschool IEP.[21] The parent disagreed with the district's failure to engage in educational planning for the student for the 2024-25 school year or arrange for the delivery of services to the student and, therefore, unilaterally obtained services from Kids Further at a frequency similar to the preschool IEP. This, however, did not act to revive the preschool IEP, nor am I of the view that that relief on the merits in this context should include returning the student to a preschool childcare setting to receive a preschool service from an IEP that is approximately eight years old (8 NYCRR 200.16[i][3][ii]).

As the evidence in the hearing record shows that student received SETSS, there is no basis to conclude that the IHO should have awarded district funding of SEIT services.

VII. Conclusion

Having determined that the IHO had jurisdiction to award the relief sought and that the IHO's determinations that the district failed to offer the student a FAPE for the 2024-25 school year, that the unilaterally-obtained services provided by Kids Further were appropriate, and that equitable considerations weighed in the parent's favor are final and binding, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[20] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-teacher-seit-services-and-related-services-preschool; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at https://www.nysed.gov/special-education/approved-special-education-programs-preschool-and-school-age). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

[21] Pursuant to pendency, a district may under some circumstances be required to continue to provide services under a preschool IEP after a student is school-age, but that would not form the basis for an implementation claim in the due process complaint notice. Further, even if the services were owed pursuant to pendency, the delivery of SETSS instead of SEIT would likely be an appropriate substitute given that SEIT services are itinerant instruction designed for preschool students who do not attend school age programming and are often educated in child care settings or their homes. In any event, pendency is not an issue on appeal in this matter.

IT IS ORDERED that, the IHO's decision, dated September 25, 2024, is modified by reversing those portions which found that the IHO did not have jurisdiction to order district funding of services from Kids Further at the contracted rate and which directed the district to fund a bank of compensatory educational services for speech-language therapy to be delivered by providers of the parent's choosing;

IT IS FURTHER ORDERED that the district shall directly fund up to 10 hours per week of SETSS and three 30-minute sessions per week of speech-language therapy provided to the student by Kids Further during the 2024-25 school year at the contracted rate, upon proof of provision of services to the student.

Dated: **Albany, New York**
January 10, 2025

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JUSTYN P. BATES
STATE REVIEW OFFICER