The University of the State of New York

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

No. 24-515

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 dismissed her claim with prejudice. Respondent (the district) cross-appeals, alleging that IHOs do not have subject matter jurisdiction to address the parent's allegations. The appeal must be sustained and the matter remanded to the IHO for further proceedings. The cross-appeal must be dismissed.

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

Due to the procedural posture of this appeal a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened on December 21, 2022 and, finding the student eligible for special education as a student with a learning disability, developed an IESP for the student with a recommendation for four periods per week of special education teacher support

services (SETSS) (IHO Ex. V at pp. 9, 13). The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 16).

In a due process complaint notice dated July 15, 2024, the parent, through an individual with Prime Advocacy, LLC, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (IHO Ex. V at pp. 3-8). For the 2023-24 school year, the parent alleged that the district failed to develop and implement a program of services for the student (id. at p. 3). The parent further alleged that the district failed to supply providers for the services it recommended in the student's last IESP, dated December 21, 2021, and that the district failed to inform the parent how the services would be implemented (id. at p. 4). The parent alleged that the district impermissibly shifted its responsibly to find providers onto the parent and the parent was unable to find a provider for the school year at the district's rates (id.). Additionally, the parent alleged that the district did not develop an updated program of services for the student for the 2024-25 school year (id.).

As relief, the parent requested funding for four periods per week of SETSS at an enhanced rate set by the provider for the 2023-24 school year; a bank of compensatory education services to be provided to the student to make up for any services missed; and an order directing the district to provide the services included in the student's last recommended educational program for the 2024-25 school year (id at p. 5).[1]

A prehearing conference was held on August 21, 2024, at which time the advocate for the parent indicated that the matter concerned "reimbursement in terms of the student's last IESP for the school year 2023 to 2024, as well as for the entirety of the school year '24 to '25" and the IHO set a date for a hearing (Tr. pp. 1-6).[2]

The district submitted a motion, dated September 12, 2024, asserting that the IHO lacked jurisdiction over claims involving implementation of IESP services and that some of the parent's claims were not ripe for adjudication as the school year for which services were being sought had not yet started (IHO Ex. III).

The parties convened for a hearing before the Office of Administrative Trials and Hearings (OATH) on September 24, 2024 (Tr. pp. 7-34). Before the hearing proceeded on the merits, the IHO asked the attorney for the district to elaborate on the district's motion to dismiss (Tr. p. 9).

The district's attorney noted, as an initial matter, that the parent's due process complaint notice did not have a notarized authorization for representation form submitted with it (Tr. p. 9). In response, the parent's advocate stated that she had a long-standing retainer agreement with the parent and that OATH had asked for Prime Advocacy to have their agreements notarized and gave them until October 1, 2024 to submit them (id. at p. 10). Both the IHO and district's attorney stated

[1] The parent requested both that the district "provide the student" with services for the 2024-25 school year and that the services be provided "at enhanced provider rates, to ensure that the parent has the capacity to implement" the requested services (IHO Ex. V at p. 5). Accordingly, it is unclear if the parent was requesting district provided services for the 2024-25 school year or district funding for services to be obtained by the parent.

[2] The district did not appear for the August 21, 2024 prehearing conference (Tr. p. 2).

that this deadline allegedly given to the parent's advocate by OATH had never been communicated to them (id. at pp. 10-11).[3]

The advocate for the parent noted that both parents were "fully in the know and ready and waiting to appear as witnesses" (Tr. p. 12). At that point, the IHO decided to "hold off on the authorization" noting that there was no authorization on file but "you can elicit that information from the parents during their testimony" (Tr. pp. 12-13).

Moving to the district's motion to dismiss, the district attorney argued that there was no jurisdiction over claims related to implementation of IESP services (Tr. pp. 13-15). In response, the advocate for the parent indicated that the district has taken the position that any due process complaint notice filed on or after July 16, 2024 should be dismissed on jurisdictional grounds and that, as this case was filed before that date, it should not be dismissed on that basis (Tr. p. 15). In response, the district's attorney asserted that the parent's advocate did a mass filing of due process complaint notices "without proper notarized authorization forms" so that the advocate could "beat the clock" and submit them before July 16, 2024; however, according to the district, the due process complaint notice was incomplete without a proper authorization form (id. at pp. 16-17). The advocate for the parent then noted that there was no legal requirement for her to provide an authorization or a retainer agreement (Tr. p. 18).

The IHO gave the parent's advocate time to look for the authorization form, during the due process hearing, and addressed the district's motions (Tr. p. 24). The IHO then granted the district's motion to dismiss the parent's claims for the 2024-25 school year based on the claims being unripe and denied the motion to dismiss based on subject matter jurisdiction (Tr. p. 24).

Turning back to the authorization form, the parent's advocate was unable to locate it (Tr. p. 25). However, the attorney for the district forwarded an email from Prime Advocacy regarding another student, in which Prime Advocacy notified the parent of that student that Prime Advocacy had filed a due process complaint notice for that student "without some necessary documentation" and that the district would contact the parent directly (Tr. pp. 26-28; IHO Ex. IV). The parties then argued over the impact of this email, with the attorney for the district asserting that it showed that Prime Advocacy "knew about the authorization requirement prior to filing and filed anyway" and that the matter should be "dismissed for lack of standing" and the advocate for the parent indicating that it did not prove that there was a requirement to file a due process complaint notice with a notarized retainer (Tr. pp. 28-29).

The IHO went on to state "it was important to at least have the authorization prior to the hearing" (Tr. p. 29). The IHO then dismissed the parent's claims for the 2023-24 school year "based on standing" (Tr. p. 30). The IHO further found that there was no evidence that the parent had authorized Prime Advocacy to represent her in this matter, and that OATH, in other proceedings, had advised non-attorneys to provide authorization to represent parents prior to the

[3] During the hearing the advocate for the parent indicated that she would email a copy of the correspondence; however, it was not clear if the advocate was referring to the purported communication of the October 1 deadline or the retainer agreement between the parent and Prime Advocacy (Tr. pp. 10-11). No evidence of the alleged October 1, 2024 deadline was submitted to the hearing record, nor is there evidence of the deadline in the parent's proposed exhibits submitted on appeal.

date of the hearings (Tr. p. 30). The advocate for the parent then noted again that both parents were present at the hearing and asked if it would be sufficient for the parents "to testify under oath that they retained [Prime Advocacy] to represent them" to which the IHO states she already ruled on the motion and was "not going to go back and change [her] mind" (Tr. pp. 30-31).

In a decision dated September 26, 2024, the IHO found that since there was no evidence at the time of the hearing that Prime Advocacy was authorized by the parent to represent the parent in this matter, the parent's advocate lacked standing to maintain the action (IHO Decision at p. 3). The IHO continued, stating that the parent's advocate had adequate time from the date of filing the due process complain notice to the date of the hearing to produce authorization from the parent, which would have allowed them to continue the action, but the parent's advocate failed to do so (id.). The IHO dismissed the proceeding with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy and alleges that the IHO erred in dismissing the case with prejudice on the basis that the authorization of representation was not provided at the time of the hearing.[4] The parent also asks that two proposed exhibits be considered.[5]

The district in its answer, argues that the IHO properly dismissed the parent's claims for the 2023-24 school year for a lack of standing and that the proposed exhibits should not be

[4] The request for review does not conform to practice regulations governing appeals before the Office of State Review. The request for review was not accompanied by a notice of request for review as required by State regulation (see 8 NYCRR 279.3). Additionally, the lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). Further, the parent's affidavit of service is likely inaccurate in that it states that the lay advocate served the district by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or to consent to service by an alternate delivery method, both the method of service used as well as the identification of what papers were served must be accurately set forth in the affidavit of service. Overall, while in an exercise of my discretion, I do not dismiss the request for review on theses bases, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

[5] The parent submits with her request for review two proposed exhibits and request that they be considered. The proposed exhibits consist of an authorization and retainer agreement between Prime Advocacy and the parent, and text messages between the parent and the parent's advocate, discussing the hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As the proposed exhibits are not necessary to render a decision in this matter, the parent's proposed exhibits will not be considered.

considered. The district cross-appeals, arguing that the IHO erred in not dismissing the matter due to a lack of subject matter jurisdiction.

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]).[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

[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.

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 raised by the district in its cross-appeal appeal. Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). The district raised the argument at the IHO hearing in a motion to dismiss, and the IHO denied the district's motion on subject matter jurisdiction (Tr. p. 24). However, the district is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (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).

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. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-574 Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; 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. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; 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 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]).[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]).

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities 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.,

[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]).

Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] 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. 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.).[10] 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

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

[10] The due process complaint in this matter was filed with the district on July 15, 2024 (IHO Ex. V at p. 3), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed. To the extent that the district asserts that the due process complaint notice was incomplete when filed, this allegation relates to the parent's authorization of Prime Advocacy to file the due process complaint notice, which is addressed below.

> 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).[11]

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]).[12]

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.

Based on the foregoing, the IHO did not err in denying the district's motion to dismiss based on subject matter jurisdiction.

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[11] On November 1, 2024, Albany County 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]).

[12] 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 SROs 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 was included as a part of the district's motion to dismiss in this matter (IHO Ex. III at pp. 19-28).

B. Authorization of Representation

The parent argues that the IHO erred in dismissing this matter for failure to present authorization of representation at the time of the hearing. According to the parent, there is no law requiring the submission of a notarized retainer agreement, neither the district nor the IHO requested a notarized retainer or authorization prior to the hearing, and the IHO did not allow the parent sufficient time to locate one. In addition, the parent asserts that the dismissal with prejudice was an unduly harsh sanction as the parent was not provided notice. In response, the district argues for upholding the IHO's decision asserting that Prime Advocacy lacked standing to bring this proceeding on behalf of the parent.

Consistent with the district's argument, a private entity lacks standing under the IDEA to maintain a claim against a school district in its own right, as the statute was intended to provide a private right of action only to disabled children and their parents (see Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371-72 [3d Cir. 2005]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]). Accordingly, the answer to whether the IHO was correct in dismissing this matter due to a lack of standing turns on whether Prime Advocacy was authorized to file the due process complaint notice in this matter.[13]

Review of the hearing record shows that the answer to the threshold question—of whether Prime Advocacy was authorized to file the due process complaint notice in this matter—was available at the time of the hearing as the parents were available to testify at the hearing and could have clarified the issue. During the due process hearing, the parent's advocate stated that the parents were prepared to testify at the hearing and could testify under oath that they had given the advocate authorization to represent them (id. at pp. 12-13). At that point, the IHO stated that "[the parents] can testify to that information" (id. at p. 12). However, later in the hearing the IHO dismissed the case with prejudice before hearing the testimony of the parents (see id. at pp. 29-33). When reminded that the parents were available to testify, the IHO refused to consider it stating she had already ruled on the motion (Tr. pp. 30-31). There is no further explanation for the IHO's refusal to allow the parents to testify, nor is there anything in the hearing record to indicate why the IHO reversed course from her earlier position. Under these circumstances, dismissal of

[13] Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parent and district (Letter to Anonymous, 23 IDELR 1073). However, it is worth noting that the IHO did not dismiss the matter for failure to comply with rules set forth by OATH or for failure to comply with an order of the IHO; the IHO limited the dismissal to finding that the parent advocate lacked standing because the advocate "failed to present an authorization of representation from Parent at the time of the hearing" (IHO Decision at p. 3). Accordingly, the issue being addressed is whether the parent's advocate had the authority to file the due process complaint notice and not whether the IHO was permitted to dismiss the due process complaint notice due to the parent advocate's failure to respond to the IHO's request for the production of either an authorization form or retainer agreement signed by the parent.

the due process complaint notice was not warranted. Any failure to have authorization at the time of the hearing was an easily correctible error, which the IHO could have clarified on the record with the testimony of the parents.

Therefore, the IHO's decision to dismiss this case with prejudice must be reversed and the case remanded for the IHO to make findings with respect to the issues raised in the parent's due process complaint notice. 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]).

VII. Conclusion

For the reasons described above, this matter is remanded to the IHO to permit the parents a sufficient opportunity to testify or submit evidence as to authorization of Prime Advocacy to file a due process complaint notice on their behalf for the 2023-24 and 2024-25 school years and, provided the parents have authorized Prime Advocacy to do so, the IHO shall schedule a hearing and issue a final decision on the merits of the issues raised in the parent's July 2024 due process complaint notice.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 26, 2024, dismissing the parent's due process complaint with prejudice is reversed;

IT IS FURTHER ORDERED that this matter is remanded to the 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**
February 21, 2025

STEVEN KROLAK
STATE REVIEW OFFICER