The University of the State of New York

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

No. 24-580

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Kashif Forbes, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that the district failed to offer an appropriate educational program to respondent (the parent's) son and ordered it to fund unilaterally-obtained special education teacher support services (SETSS) delivered by Encore Support Services (Encore) for the 2023-24 school year.[1] 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

[1] Encore 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).

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the disposition of this appeal, a recitation of the student's educational history is unnecessary. In a due process complaint notice dated July 12, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year. (see Parent Ex. A at p. 1). The parent requested pendency services, consisting of the program and related services as recommended in an individualized education program (IEP) developed in May 2018 by a Committee on Preschool Special Education (CPSE) (May 2018 CPSE IEP) and as ordered by another IHO in a previous decision, dated November 9, 2022 (November 2022 IHO decision) (id.). According to the parent, although the student was eligible to receive special education, the district had failed to develop an IESP for the student for the 2023-24 school year, and the student had been receiving "10 hours of SEIT support" as a CPSE student (id. at p. 2). The parent indicated that the student needed continued support in order to "handle mainstreaming opportunities which ha[d] proven very beneficial for him" (id.). The parent further indicated that it would be "inappropriate to place [the student] into a class without the support of a SEIT" and he required SEIT services for "support socially, academically and developmentally" (id.). Additionally, the parent noted that the student required a "bilingual Yiddish program," but she had been unable to locate a "qualified bilingual Yiddish provider" who would accept the district "rate" (id.). Without having an "appropriate IESP, the parent [indicated that she] ha[d] no choice but to continue the support provided [to the student] on his CPSE IEP," which constituted the "last agreed upon IEP, dated May 10, 2018" and which consisted of the following services: 10 hours of SEIT services, related services (speech-language therapy and occupational therapy [OT]) "at an enhanced rate," and a 12-month program "beginning July 2023" (id.). As relief, the parent sought to continuation of the student's preschool program consisting of SEIT and related services provided by Encore at an enhanced rate, pursuant to the student's May 2018 CPSE IEP and the November 2022 IHO decision (id.).

A. Impartial Hearing Officer Decision

On August 26, 2024, the parties proceeded to, and completed, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-107). At the impartial hearing, the IHO entered documentary evidence into the hearing record from both parties and the parent also proffered testimonial evidence (see generally Tr. pp. 6-7, 9-16, 28-102; Parent Exs. A-M; Dist. Exs. 1; 3-4). After presenting opening statements, the district's attorney made several motions to dismiss the parent's case, including that the parent's claims were barred by the statute of limitations, the parent's attorney had materially misrepresented that a March 2023 IESP had been developed, a recent emergency amendment of State regulations barred the parent's claims based on a lack of subject matter jurisdiction, and the parent failed to timely request equitable services for the 2023-24 school year (see Tr. pp. 24-25). The IHO denied the district's motions to dismiss and moved forward with the presentation of testimony (see Tr. p. 26).[2]

[2] At the conclusion of the impartial hearing, the IHO provided the parties with an opportunity to provide written closing statements by September 23, 2024, approximately one week prior to the September 28, 2024 compliance date for issuing a final decision (see Tr. p. 104). The IHO further noted that, if the parties did not receive the transcripts with enough time to write a closing statement, either party could request an extension, which would be granted (id.). Nevertheless, neither party submitted a closing statement to the IHO (see IHO Decision at p. 3; see generally Tr. pp. 1-107; Parent Exs. A-M; Dist. Exs. 1; 3-4).

In a decision dated October 19, 2024, the IHO noted that the district did not present an alleged March 2023 IESP into the hearing record, nor did it have someone testify to explain how it was created, before finding that, regardless of whether the student's special education services could be found in the "2018, 2021, or 2023 IESPs," the district failed to sustain its burden to establish that it implemented the student's services (see IHO Decision at pp. 5-7). As a result, the IHO concluded that the district failed to offer the student a FAPE (id. at p. 7).

With regard to the unilaterally-obtained SETSS, the IHO found that the parent sustained her burden to establish the appropriateness of the services delivered to the student by Encore, albeit for five periods per week of SETSS rather than for the 10 hours per week of SETSS sought by the parent (see IHO Decision at pp. 7-9). In contrast, the IHO found that the parent failed to sustain her burden to establish the appropriateness of the speech-language therapy delivered to the student by Encore (id. at pp. 8-9).

Finally, the IHO addressed equitable considerations, and found that the evidence in the hearing record weighed in favor of the parent's requested relief for payment of the costs of the unilaterally-obtained SETSS delivered by Encore (see IHO Decision at pp. 9-10). As a final point, the IHO determined that, given that the student's March 2018 IEP and March 2021 IESP were both outdated, a CSE must reconvene to determine the student's current needs and then implement the recommended services (id. at pp. 10-11).

Therefore, as relief, the IHO ordered the district to fund five periods per week of SETSS (Yiddish) at a rate not to exceed $198.00 per hour on a 12-month basis for the 2023-24 school year, with any unused services to expire on September 8, 2025 (see IHO Decision at p. 12). The IHO also ordered a CSE to reconvene within 30 days of the date of the decision and conduct evaluations of the student deemed appropriate and then develop an IESP or IEP for the student for the 2024-25 school year (id.).[3]

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred by ordering the district to fund five periods per week of SETSS at a rate not to exceed $198.00 per hour. Initially, the district asserts that the IHO erred by failing to dismiss the parent's claims based on a lack of subject matter jurisdiction. The district also asserts that the IHO erred by relying on a material misrepresentation made by the parent with regard to the development of a March 2023 IESP for the student. Next, the district argues that the IHO erred by failing to dismiss the parent's claims because they failed to timely

[3] The administrative hearing record submitted to the Office of State Review included an email from an attorney at OATH explaining certain discrepancies in the hearing record (see Supp. Ex. 5 at p. 1). According to this email, dated October 30, 2024, the IHO issued a "corrected" decision to address exhibits that were mistakenly dated; however, while the district submitted two IHO decisions, neither decision is identified as a "corrected" decision and both IHO decisions, which are both dated October 19, 2024, reflect the corrected exhibit dates (id.). The OATH attorney further noted that although parent exhibit "M" had been entered into the hearing record as evidence, the IHO was "still awaiting for a copy from [the p]arent" (id. at p. 2). Based on this letter, it appears that parent exhibit "M" was not submitted to the IHO at the time of the impartial. A copy of parent exhibit "M" was not produced as part of the hearing record. While an IHO is not precluded from reserving an identification letter or number during an impartial hearing in anticipation of a party's future submission of future documents (i.e. briefs, etc.), an IHO should not agree to admit documents into evidence that the IHO does not have in his or her possession.

request equitable services by June 1, 2023. The district further argues that the IHO erred by not reducing the rate awarded for SETSS and failed to consider the information within the American Institutes for Research report (AIR report) entered into the hearing record. Finally, the district contends that the IHO erred by awarding funding of the student's SETSS on a 12-month basis. As relief, the district seeks to reverse the IHO's decision and dismiss the parent's claims.[4]

The parent did not file an answer responding to the arguments raised in the district's request for review.

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]).[5] "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.).[6] Thus, under State law an eligible New

[4] The district does not challenge the IHO's specific determination that the parent's unilaterally-obtained services, i.e., five periods per week of SETSS delivered to the student by Encore during the 2023-24 school year, were appropriate to meet his needs (see generally Req. for Rev.). Accordingly, this findings has become final and binding on the parties and will not be reviewed on appeal (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]).

[5] 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]).

[6] 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

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. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset, it is necessary to address the issue of subject matter jurisdiction, which the district alleges the IHO lacked due to clarifying amendments published by the New York State Department of Education. In this case, the district raised this argument at the impartial hearing as a basis for dismissing the parent's claims, which the IHO denied. However, even if the district had not raised the argument during the impartial hearing, it 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). The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that "[n]either the SRO nor the IHO have subject matter jurisdiction over the claims" in the due process complaint notice.

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. 24-572; 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. 24-512 Application of a Student with a Disability, Appeal No. 24-507;

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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.

Application of a Student with a Disability, Appeal No. 24-501; 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 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]).[7]

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]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

[7] 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]).

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, 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. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that 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).[8] 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.).[9] 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. 909589-24).[10]

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint" for implementation of IESP claims or enhanced rate for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, 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

[8] In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

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

[10] On November 1, 2024, the 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]).

> 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]).[11]

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. Accordingly, the district's argument seeking dismissal of the parent's claims on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

2. June 1 Deadline

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the

[11] 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, 23-069; Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

As noted above, the district argues, in part, to overturn the IHO's decision awarding funding for the costs of the parent's unilaterally-obtained SETSS delivered during the 2023-24 school year because the parent allegedly failed to timely request equitable services by the June 1 deadline in accordance by section 3602-c. In support of this argument, the district asserts that it raised the June 1 defense at the impartial hearing, and the parent acknowledged that she provided written notice of her request for equitable services by letter dated June 5, 2023 (see Req. for Rev. ¶ 13; Tr. pp. 13-15; Parent Ex. K ¶ 5).[12] When initially asked at the impartial hearing about whether the parent had requested equitable services from the district for the 2023-24 school year, the parent stated that she was not sure; thereafter, the parent clarified that she did not remember if she had communicated with the district (see Tr. p. 92). When asked if she had "ever" asked the district to provide equitable services for the 2023-24 school year, the parent responded "Yes" (id.).

[12] Parent exhibit "M"—the parent's June 1 letter dated June 5, 2023—while purportedly entered into the hearing record by the IHO as evidence, was not submitted with the administrative hearing record on appeal to the Office of State Review, as required by State regulations (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]; Tr. pp. 3, 13, 16). The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that the failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). Additionally, when the district is the petitioner and fails to file a complete copy of the hearing record with the Office of State Review, State regulation provides that an SRO "may, at his or her discretion, make appropriate determinations regarding such failure, among them to dismiss an appeal by the [district] when a completed and certified hearing record is not filed with the request for review" (8 NYCRR 279.9[c]). However, as noted above, in this instance, when the district sent the administrative hearing record to the Office of State Review, a clarification email was included as a part of the hearing record, which explained that the administrative hearing record did not include parent exhibit "M" because the parent had not provided the IHO with a copy of this exhibit. However, as counsel for the parent introduced the exhibit as a letter dated June 5, 2023, even if the exhibit had been provided to the IHO, it appears from the hearing record that it post-dated the June 1, 2023 deadline.

Here, the evidence does not show that the parent timely requested equitable services for the student for the 2023-24 school year by the mandated deadline of June 1, 2023 and the IHO's decision must be reversed.

VII. Conclusion

Having found that the parent failed to timely request equitable services from the district by June 1, 2023 for the 2023-24 school year, the IHO's finding that the district must fund the costs of the parent's unilaterally-obtained SETSS delivered to the student by Encore for the 2023-24 school year must be reversed.

I have considered the district's remaining contentions and find that I need not reach them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 19, 2024 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2023-24 school year and ordered the district to fund the costs of the student's SETSS (five periods per week) delivered by Encore during the 2023-24 school year at a rate not to exceed $198.00 per hour.

Dated: **Albany, New York**
January 21, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER