The University of the State of New York

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

No. 24-587

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

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction to review the parent's claims following an impartial hearing. The district cross-appeals, alleging additional grounds for denying the parent's request for funding of unilaterally obtained services provided to the student during the 2023-24 school year. The appeal must be sustained in part. The cross-appeal must be dismissed. The matter is remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but

is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

This matter concerns the 2023-24 school year; however, given the state of the hearing record, it is not possible to recite the student's educational history.

The hearing record does reflect that, well into the 2023-24 school year, a CSE convened on March 18, 2024 and developed an IESP for the student with a projected implementation date of March 28, 2024 (Dist. Ex. 2 at p. 1). The March 2024 CSE found the student eligible for special education as a student with a speech or language impairment (id.).[1] The March 2024 CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) delivered in a separate location, one 30-minute session per week of individual counseling services delivered in a separate location, and three 30-minute sessions per week of individual speech-language therapy in a separate location (id. at p. 9).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Due Process Compl. Not. at p. 2). The parent asserted that the student was entitled to pendency based on a May 5, 2017 IESP, which the parent alleged was the last agreed upon program (id.). According to the parent, the student's pendency services consisted of five periods per week of direct group SETSS delivered in Yiddish and three 30-minute sessions per week of individual speech-language therapy delivered in Yiddish (id.).

The parent asserted that the district did not convene a CSE meeting for the 2023-24 school year, and failed to recommend a proper placement and services (Due Process Compl. Not. at pp. 2, 3). The parent further contended that the parent was unable to locate a provider for the services recommended on the May 5, 2017 IESP and that the district "ha[d] failed to implement their own recommendations for the 2023-24 school year" (id.).

For relief, the parents requested an order that the district fund the program outlined in the IESP dated May 5, 2017 for the 2023-24 school year at private providers' contracted rates and an order that the district fund a bank of compensatory periods of all services which the student was "entitled to under pendency for the entire 2023-24 school year - or the parts of which were not

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

[2] The March 2024 IESP included evaluation information from a district psychoeducational evaluation administered on January 11, 2024; the January 2024 psychoeducational evaluation is also included in the hearing record (Dist. Exs. 2 at p. 1; 3). According to the March 2024 IESP, the student's verbal responses during the district's January 2024 psychoeducational evaluation were in Yiddish and indicated that the student was able to communicate very minimally in English (Dist. Ex. 2 at p. 2). However, according to the January 2024 psychoeducational evaluation report, the student understood directives in English, provided verbal responses in English, was able to communicate in English, and could be "deemed an English-dominant learner for academic purposes" (Dist. Ex. 3 at p. 2).

serviced" with "[s]uch services to be funded at the prospective provider's contracted rate" (Due Process Compl. Not. at p. 3).

B. Motion to Dismiss, Impartial Hearing and Impartial Hearing Officer Decision

By motion to dismiss dated September 5, 2024, the district asserted that the parents' due process complaint notice should be dismissed on the grounds that the IHO lacked subject matter jurisdiction (Dist. Mot. to Dismiss at pp. 2-4). Further, the district asserted that the parent's claims were not ripe as the due process complaint notice was filed before the start of the 10-month 2024-25 school year (id. at pp. 4-6).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 6, 2024 (Tr. pp. 1-28). Before turning to the merits of the parent's claims, the IHO addressed prehearing matters (Tr. p. 4). The parent's attorney stated that, on August 29, 2024, she requested to amend the parent's due process complaint notice to "include" claims pertaining to the IESP developed on March 18, 2024 (Tr. p. 5). The parent's attorney further stated that, on August 29, 2024, the district stated that they did not consent to the amendment, but that, if the IHO granted the amendment, it would not waive the resolution period attaching to the amended due process complaint notice (id.). The parent's attorney then noted that the "[p]arent never heard back" from the IHO and "naively assumed that the amendment would be accepted" (id.). The parent "did not disclose" documentary evidence five days prior to the date of the impartial hearing and requested that, if the IHO did not accept the proposed amendment to the due process complaint notice, that the matter be adjourned (Tr. p. 6). In response to the parent's request for an adjournment, the district reasserted their objection to an amendment of the due process complaint notice and further objected to an adjournment (Tr. pp. 9-12). The IHO then stated that she was denying the adjournment and "ha[d] not submitted the proposed amendment" (Tr. p. 12). The IHO further noted that the parent "had ample chance for due process in this matter, having had almost two months between the time of filing the due process complaint to today [September 6, 2024] to review her submissions and consider what she needed to include in her due process complaint" (id.). The IHO then denied the parent's request to amend the due process complaint notice (id.). The parent's attorney declined to withdraw the July 12, 2024 due process complaint notice and reluctantly elected to proceed without documentary evidence as she had failed to disclose evidence to the district five days prior to the start of the impartial hearing (Tr. p. 13).

The district's attorney offered three exhibits into evidence and reminded the IHO that he had filed a written motion to dismiss to dismiss the parent's due process complaint notice on the grounds of lack of subject matter jurisdiction and ripeness (Tr. pp. 14-16, 17-18). The IHO stated that she was denying the district's motion and would "not be issuing a separate written order in that respect" and directed the parties to proceed with the hearing, noting that she would include any reasoning that needed to be in writing in her final decision (Tr. p. 16). Following the admission of the district's exhibits into evidence, the IHO stated "[t]hat there [we]re no disclosures from the [p]arent," and "there were also no written openings submitted in this case," and, therefore, they would "move on to the [d]istrict's case" (Tr. p. 18).

The district's attorney stated his agreement "that prior to the 2024 IESP, the 2017 IESP described by the [p]arent in their complaint, though not submitted in evidence, was the most recent program developed for the student" (Tr. p. 18). The district's attorney further stated that "the record

[wa]s absent as to whether or not the student received any services during the [2023-24] school year, or whether the services were from public or private providers" (Tr. p. 19). The parent's attorney stated she would "just rest on [her] closing" (id.).

In his closing statement, the district's attorney argued that the due process complaint notice did not challenge the program developed for the student for the 2023-24 school year, and that the district's evidence demonstrated that the recommendations in the March 2024 IESP were appropriate (Tr. p. 20). The district's attorney argued that the appropriate legal standard was a Burlington/Carter analysis, and that the parent could not meet her burden as there was no evidence of any program implemented by the parent for the 2023-24 school year (Tr. pp. 20, 22).

In her closing, the parent's attorney requested a bank of compensatory hours for unimplemented services recommended in the May 5, 2017 IESP for September 2023 through March 18, 2024 and from March 18, 2024, a bank of compensatory hours for unimplemented services recommended in the March 18, 2024 IESP, all to be delivered by the parent's chosen providers at their contracted rates (Tr. pp. 24-26).

On September 12, 2024, the parent filed a memorandum of law in opposition to the district's motion to dismiss (Parent Opp'n to Mot. to Dismiss at pp. 1-20).

In a decision dated October 22, 2024, the IHO granted the district's motion to dismiss (IHO Decision at p. 2).[3] The IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (id. at pp. 1-6). The IHO noted a recently adopted emergency amendment to the Commissioner's regulations and a subsequent New York State Court's issuance of a temporary restraining order staying implementation or enforcement of the emergency regulation (id. at p. 1). The IHO explained that her determination that she lacked subject matter jurisdiction to preside over implementation or rate disputes brought under Education Law § 3602-c was being made "irrespective of the now-enjoined regulatory amendment" (id. at p. 2).

The IHO interpreted Education Law § 3602-c to allow "two limited 'gateways'" for the type of disputes that could be brought under IDEA due process complaint procedures: those related to review of CSE recommendations and those related to child find activities (IHO Decision at p. 3). According to the IHO, the parent's claims are "better characterized as rate disputes" because the parent had placed the student in a private school and is not disputing the CSE's IESP recommendations or child find activities (id.).

The IHO noted that impartial hearing officers appointed pursuant to the IDEA and Education Law § 4404 are trained "to decide IDEA-based issues" and have no expertise in rate disputes (IHO Decision at p. 4). The IHO further found that nothing in "either the IDEA or the New York State Education law grants an IDEA IHO authority to hear a rate dispute" or indicates that an IHO "should not dismiss rate dispute claims for lack of subject matter jurisdiction, whether

[3] The IHO's decision is not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Decision at pp. 1-9).

or not the parties have raised the issue" (id. at p. 4).[4] According to the IHO, the parent had not cited any "binding precedent or legislative history" authorizing an IHO to determine "rate disputes" (id.). In addition, the IHO found no judicial authority interpreting State Education Law § 3602-c to "grant parents the right to file a due process complaint in a simple rate dispute" (id. at p. 5). The IHO noted that decisions from SROs and the New York State Education Department were not binding on IHOs (id. at pp. 5-6).

Lastly, the IHO addressed fairness (IHO Decision at p. 6). She determined that dismissing the case with prejudice would not be "fundamentally unfair" to the parent because she had an opportunity to be heard and could seek relief in an alternate forum "outside of IDEA due process hearings" for her rate dispute, such as resolving such claim directly with the CSE, commencing an action in State or federal court, filing a complaint with the Commissioner of Education pursuant to Education Law § 310, or availing herself to the district's "recently added . . . dedicated forum specially for rate disputes" (id.).

Accordingly, the IHO dismissed the parent's due process complaint notice "with prejudice with respect to this forum" (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO impermissibly ignored the parent's requested contract rate because she erroneously believed she lacked subject matter jurisdiction to consider rate. The parent argues that the IHO's dismissal must be overturned because (1) the revised regulation on which the IHO relied has been stayed and is unenforceable, (2) the stayed revised regulation is not a clarification of existing law, and (3) dually enrolled students are entitled to have their cases adjudicated in the same manner as students with IEPs including rulings on specific rates. The parent further asserts that the IHO's dismissal must be viewed in the context of the district's "systematic practice" of failing to implement services in violation of Education Law. As relief, the parent requests that the dismissal with prejudice be reversed, that the SRO state unequivocally that IHOs have jurisdiction over IESP implementation cases, including one in which the parent is seeking funding for a private provider. The parent alleges that, if the IHO had not mistakenly dismissed the matter for lack of subject matter jurisdiction, the student would have had the opportunity for the merits of her case to be heard by an impartial adjudicator. The parent requests that the SRO amend the IHO's prior order to indicate that the student's case is dismissed without prejudice, allowing for the opportunity to refile the case.[5]

In an answer and cross-appeal, the district argues that the IHO correctly determined that she lacked subject matter jurisdiction to review the parent's claims. The district also asserts that the IHO correctly found that the parent could seek other forums for relief, indicating that the IHO was alluding to the district's enhanced rate equitable services (ERES) unit when the IHO referred

[4] The IHO noted that, even if neither party raised the issue of subject matter jurisdiction, an IHO had the authority to address a jurisdictional defect sua sponte (IHO Decision at p. 4, n.18).

[5] Attached to the parent's request for review is a copy of a verified petition and memorandum of law related to an Article 78 matter filed in State court, the May 2017 IESP, and two copies of a notice of residence to the school district of location for the student.

to the district's "dedicated forum specially for rate disputes." According to the district, the parent failed to exhaust administrative remedies by failing to pursue her claim with the ERES unit prior to filing a due process complaint notice. As for a cross-appeal, the district alleges that the parent failed to provide evidence of a timely request for equitable services and failed to prove that her unilaterally obtained services were appropriate to meet the student's unique needs. As relief, the district requests that the parent's appeal be dismissed.

In a "statement of fact" that appears to be an answer to the cross-appeal, the parent asserts that the district's reliance on administrative exhaustion is without merit. According to the parent, the IHO's finding that the parent must seek relief through the ERES unit failed to recognize that under the existing statutory and regulatory scheme, the parent has a right to file a due process complaint notice. The parent further argues that the district is impermissibly delegating decision-making authority to the ERES unit and thereby undermining the parent's rights to impartial adjudication, timely resolution of disputes, and access to services. The parent further argues that the IHO's delay in ruling on the parent's request to amend the due process complaint notice denied the parent the ability to timely disclose evidence and thereby deprived the student "critical due process protections." Regarding the district's June 1 affirmative defense, the parent argues that the district did not properly raise it in accordance with the omnibus standing order, that the district failed to satisfy its burden to establish that the parent failed to provide notice prior to June 1, and that such a defense is dependent on facts that should be resolved before an IHO at an impartial hearing. The parent again attaches additional exhibits to its papers.

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

[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]).

with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

As a threshold matter, it is necessary to address the scope of the impartial hearing, as well as the issue of subject matter jurisdiction. As in the motion to dismiss, the district also argues in its cross-appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP.

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2023-24 school year and alleged that the May 2017 IESP was "outdated and expired" (Due Process Compl. Not.). While the due process complaint notice also alleges that the district did not implement services from the May 2017 IESP during the 2023-24 school year (id. at p. 2), this is not an instance where there is a timely and current IESP with which both parties agree that the district just failed to implement.

[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.

As the parent's claims related to the failure to develop an IESP for the student for the 2023-24 school year, this is not an instance where the parent's claim was solely related to the implementation of an IESP. Accordingly, there can be no dispute that the IHO had jurisdiction to address the parent's claim.

In addition, even if this matter did solely involve implementation of the student's IESP during the 2023-24 school year, such a claim is subject to due process. 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. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; 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. 24-572; 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 parent would not have a right to due process under federal law; however, the student did not merely have a services plan developed pursuant to federal law, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8] Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that State law does not grant Section 4404 due process rights for the purpose of IESP implementation and that the amendment to section 200.5 merely clarifies the application of the statute and did not change the laws.

Education Law § 4404, 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).[9] In addition, the New York Court of Appeals has explained that students 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 recently attempted to address the issue.

[8] This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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

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 Bd. 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).[11]

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "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

[10] The due process complaint in this matter was filed with the district on July 12, 2024 (Parent Ex. A at pp. 1, 5), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[11] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

> 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.

Finally, in regard to the IHO's finding that the parent could pursue alternative forums, the district's argument that the parent failed to exhaust administrative remedies by not first bringing her claims to the district's ERES unit is erroneous. While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurdles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice following the IHO's determination that she lacked subject matter jurisdiction over such claims. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the 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.

[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, Appeal No. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). 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.

22, 2013]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

To be sure, in this instance, the hearing record does not include any evidence from the parent in support of the relief sought. Moreover, the parent did not appeal the IHO's ruling precluding the parent's evidence or challenge the manner in which the impartial hearing was conducted.[13] Accordingly, the parent's request that the matter be deemed dismissed without prejudice so the parent can have a do-over and bring the case again is not appropriate. Instead, I will remand the matter. Given the parent's request in the due process complaint notice and during the impartial hearing for relief in the form of compensatory education (see Tr. pp. 24-26; Due Process Compl. Not. at p. 3), there remains the possibility that, notwithstanding the lack of evidence from the parent, that the IHO may be inclined to order the district to prospectively deliver make-up services to the student as an award of compensatory education to remedy the past deprivations of FAPE. However, I would not endorse allowing the parent to seek district funding for services privately obtained as "compensatory education," which would be an impermissible end run around the parent's burden of proof to demonstrate the appropriateness of privately obtained services. Further, I will leave it to the IHO's sound discretion to determine whether the record should be re-opened to allow the parties to present evidence regarding any unilaterally obtained services which would be analyzed under the three prong Burlington-Carter analysis.

[13] State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2] [emphasis added]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]). Here, the request for review includes a statement of fact without a caption and, with regard to the conduct of the impartial hearing, states "[a] full merits hearing was conducted with all parties present on the scheduled date" (Req. for Rev. at p. 1). The parent's request for review asserts one reason for challenging the IHO's decision, that she "erroneously believed she lacked Subject Matter Jurisdiction to consider rate" (id. at p. 3). The parent's appeal requests as relief that the SRO "amend the IHO's prior order to indicate that [the student]'s case [wa]s dismissed without prejudice, allowing for the opportunity to refile the case and benefit from her statutory right to due process" (id. at p. 10). However, during the impartial hearing, the IHO denied the parent's request to amend the due process complaint notice and denied the parent's request for an adjournment so that she would be able to offer documentary evidence within the five-day timeframe for disclosure (Tr. p. 12). The parent declined to withdraw her due process complaint notice and elected to proceed without any evidence, presenting only a closing argument (Tr. pp. 5-6, 12-13, 18, 24-26).

VII. Conclusion

For the reasons described above, this matter is remanded for the IHO to issue a written decision on the merits of the parent's claims asserted in her July 12, 2024 due process complaint notice, as clarified by the parties and IHO upon remand.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 22, 2024, is modified by reversing the IHO's dismissal with prejudice of the parent's due process complaint notice on the ground of subject matter jurisdiction;

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**
March 14, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER