The University of the State of New York

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

No. 24-570

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 Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of unilaterally obtained special education services delivered to her son by EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which denied its motion to dismiss the due process complaint notice due to a lack of subject matter jurisdiction and dismissed it's June 1st defense. The appeal must be dismissed. The cross-appeal must be sustained to the extent indicated.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. Briefly, on

August 29, 2023, the parent electronically signed an "Enrollment Agreement for the 2023-24 School Year" with EDopt (Parent Ex. C).[1] Per a schedule attached to the agreement, the student was to receive 10 months of services from September 2023-June 2024 "as per the last agreed upon IEP/IESP/FOFD" (id.). However, the hearing record does identify what such a program consisted of, at that time.

On September 4, 2023, the parent sent the district a letter indicating that the district had failed to assign a provider for mandated services during the 2023-24 school year and that the parent would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D).

A CSE then convened on September 8, 2023, found the student eligible for special education as a student with a speech or language impairment, and formulated an IESP for the student for the 2023-24 school year to be implemented on September 22, 2023 (see Parent Ex. B).[2] The CSE recommended that the student receive six periods per week of direct, group special education teacher support services (SETSS), two 30-minute sessions per week of group speech-language therapy, and one 30-minute session per week of group occupational therapy (OT) services (id. at pp. 10-12).[3]

According to session notes and time sheets, EDopt provided the student with SETSS, speech-language therapy, and OT services during the 2023-24 school year (Parent Exs. F-K).

In a due process complaint notice, dated July 12, 2024, the parent, through a lay advocate, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to supply providers for the services it recommended in the September 8, 2023 IESP (Parent Ex. A at p. 2). The parent asserted that she was unable to procure a provider for the student for the 2023-24 school year at the district's rates (id.). Consequently, the parent contends that she had no choice but to retain the services of an agency to provide the mandated services at an enhanced rate set by the provider (id.).

In addition, the parent asserted that with respect to the upcoming 2024-25 school year, the district had not developed an updated program of services for the student (Parent Ex. A at p. 2). According to the parent, the previous program of service had passed its annual review date, and, thus, the student was denied the services that she was entitled to under federal and State law (id.). As the district had failed to develop a current and appropriate program of services, the district had thereby denied the student a FAPE and equitable services for the 2024-25 school year (id.).

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

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

[3] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

As relief, with respect to the 2023-24 school year, the parent requested an order awarding direct funding for six periods per week of SETSS, two 30-minute sessions per week of group speech-language therapy, and one 30-minute session per week of group OT services at an enhanced rate set by the provider for the 2023-24 school year (Parent Ex. A at p. 3).

With respect to the 2024-25 school year, the parent sought an order requiring the district "to provide the student with the services and supports included by the CSE in the last program of services developed for the student" further requesting that all services should be ordered "at enhanced provider rates, to ensure that the parent has the capacity to implement the ordered services" (Parent Ex. A at p. 3).

A prehearing conference was held, with the presence of the parent or a parent representative, before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 14, 2024 (Tr. pp. 1-7). On the same day, the IHO issued a prehearing conference summary and order and the district filed a response to the due process complaint notice asserting, in pertinent part, that the parent's claims were barred due to the failure of the parent to provide the district with a written request for equitable services by June 1 of the 2023-24 school year as required by statute, and that it intended to pursue a motion to dismiss any and all that claims that were not ripe (IHO Exs. I; II).The district filed a motion to dismiss the parent's due process complaint notice, dated August 28, 2024, asserting that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims and that the claims were not ripe for adjudication (see IHO Ex. III). The parent filed an answer to the district's motion to dismiss, dated September 11, 2024 (see IHO Ex. IV).

An impartial hearing was held on September 24, 2024 (Tr. pp. 8-49). At the hearing, the parties presented opening and closing statements, in which, among other matters, the district asserted a lack of evidence of any parent request for equitable services for either the 2023-24 or the 2024-25 school year and the parent argued that the development of an IESP after the June 1 deadline constituted an implied waiver (Tr. pp. 24-27, 40, 44-45).

In a final decision dated October 21, 2024, the IHO denied the district's motion to dismiss the parent's claims based on a lack of subject matter jurisdiction (IHO Decision at pp. 9-10). With respect to the 2023-24 school year, the IHO found that the district's failure to provide the student SETSS, speech-language therapy, and OT "constituted a denial of FAPE on an equitable basis" (IHO Decision at pp. 6).[4] The IHO next concluded that the parent failed to meet her burden of proving the appropriateness of the unilaterally obtained services, as the testimony and documentary evidence did not show how the services were tailored to meet the student's special education needs (id. at pp. 6-7). Assuming that the services of the provider were appropriate, the IHO addressed equitable considerations and concluded that they did not favor the parent and, as such, a reduction in the requested rate would have been warranted (id. at p. 7).

As to the district's defense that the 2023-24 claims were barred because the parent failed to provide the district with a request for equitable services on or before June 1, 2023, the IHO found that the district's argument was "unproven" (IHO Decision at p. 9). In addition, the IHO

[4] The IHO mistakenly refers to the "2022 IESP"; however, the only IESP in the hearing record was dated September 8, 2023 (Parent Ex. B at p. 1).

held that the district "recreated an IESP for the [s]tudent and was aware the [p]arent was requesting services for [s]tudent" such that a complete dismissal would be inequitable (id.).

Turning to the parent's claims relating to the 2024-25 school year, the IHO, as a preliminary matter, denied the district's motion to dismiss the parent's claims as unripe (IHO Decision at p. 11). While acknowledging that the due process complaint notice was filed prior to the start of the 2024-25 school year, the IHO noted that the impartial hearing was not concluded until nearly one month after the start of the 2024-25 school year and the district did not demonstrate that it provide any services for the 2024-25 school year (id.). However, the IHO denied the parent's request for relief concluding that the district "persuasively demonstrated" ground[s] for dismissal of the parent's claims based on the June 1 defense (id. at p. 11). The IHO found that the district's records did not show any communication from the parent or her representative to request services in the 2024-25 school year and the parent failed to testify or present any notices sent to the district (id.). Alternatively, the IHO concluded that the parent failed to prove that the unilaterally obtained services provided by EDopt were appropriate and that equitable considerations did not favor an award to the parent for her requested relief (id.).

IV. Appeal for State-Level Review

The parent appeals, through her lay advocate, from the IHO's denial of her claim for funding of services for the 2023-24 school year.[5, 6] The parent primarily appeals from the IHO's findings that the unilaterally obtained services were not appropriate to meet the student's needs. The district answers and cross-appeals, asserting that the IHO had did not have jurisdiction to address the parent's claims raised in the due process complaint notice, and, that the IHO erred in denying the district's June 1 defense.[7]

[5] The parent did not appeal from the IHO's dismissal of her claims related to the 2024-25 school year. Accordingly, these findings have become final and binding on the parties and the parent's claims related to the 2024-25 school year will not be further discussed (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]).

[6] The parent's request for review is not in compliance with the form requirements for pleadings. All pleadings must be signed by an attorney, or by a party if not represented by an attorney (8 NYCRR 279.8[a][4]). However, the request for review is signed by the parent's lay advocate, who is not an attorney (Req. for Rev. at p. 8). In addition, the affidavit of service filed with the parent's appeal contains multiple procedural defects. For instance, although the affidavit of service was completed as an affidavit, the acknowledgement was left blank; the affidavit of service also contains blanks as to the month and year of service; and the affidavit does not identify what was served. As the district submitted an answer with cross-appeal in this matter, any defects in personal service or in the completion of the affidavit do not warrant dismissal of this matter. However, the lay advocate for the parent is cautioned that repeated failures to conform to the practice regulations with regard to the form requirements and the filing of pleadings can result in dismissal of an appeal by a State Review Officer.

[7] The parent submits an answer to the district's cross-appeal addressing the district's argument as to jurisdiction. The district submits a reply asserting that the answer to the cross-appeal should be disregarded as it was not in compliance with the practice regulations. On December 23, 2024, the parent's lay advocate requested an extension to serve and/or file the parent's answer to the cross appeal until January 7, 2025. The parent's lay advocate was granted the extension and according to the filing received by the Office of State Review on January 10, 2025, the answer to the cross-appeal was served on January 7, 2025. Initially, State regulation requires that a copy of the

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parents" (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.).[9] Thus, under State law an

served pleading must be filed with the Office of State Review within two days of service (8 NYCRR 279.3). Accordingly, the parent's answer to the cross appeal was not timely filed as it was received three business days after it was served. In addition, the answer to the cross-appeal that was timely served on the district was not verified as the verification of the answer was acknowledged on January 9, 2025, two days after service was made. Considering these irregularities, as well as the irregularities regarding the parent's request for review in this matter, the parent's answer to the cross-appeal is not accepted and will not be considered as part of this appeal.

[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentsally-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.).

eligible New York State resident student may be voluntarily enrolled by a parents in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Subject Matter Jurisdiction

As an initial matter, in its cross-appeal the district argues that the IHO erred by failing to grant its motion to dismiss based on subject matter jurisdiction because neither the IHO nor SRO has jurisdiction to determine implementation issues arising from an IESP developed for a dually enrolled student under 3602-c.

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]). Here, the district asserted in its motion to dismiss that there is no federal right to file a due process claim regarding services recommended in an IESP and New York law confers no right to file a due process complaint notice regarding IESP implementation. Thus, according to the district, IHOs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs 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. 24-572; 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]).[10]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation 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 confer IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

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

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

Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[11] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports 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 recently 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).[12] 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 circumstances for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[13] 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

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

[12] 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.

[13] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in this matter was filed with the district on June 16, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

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).[14]

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 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 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]).[15]

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,

[14] 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]).

[15] 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. 23-069; Application of a Student with a Disability, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website; however, a copy of the August 2024 rate dispute guidance is included in the administrative hearing record as an attachment to the district's motion to dismiss (see IHO Ex. III at pp. 17-26).

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 IHO's determination that he possessed subject matter jurisdiction to adjudicate the parent's claims was correct, and the district's cross-appeal asserting that the IHO's denial of its motion to dismiss the parent's due process complaint notice was in error must be denied.

B. June 1 Deadline

Turning to the district's cross-appeal regarding the June 1 affirmative defense, 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]).

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 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]).

Here, the district raised the June 1 affirmative defense in its response to the due process complaint notice and at the impartial hearing during its opening and closing statements (Tr. pp. 24-25, 40; IHO Ex. II). As noted above, the district asserted that the parent did not request equitable services for the 2023-24 school year (Tr. pp. 24-6, 40). In response, during both opening and closing statements, the parent, through her lay advocate, argued that the district's development of the September 2023 IESP waived the June 1 defense (Tr. pp. 26-27, 44-45).

The IHO concluded that the June 1 defense did not bar the parent's claims because the district failed to prove that the parent had not requested equitable services on or prior to June 1 of the 2023-24 school year (IHO Decision at p. 9). However, although the district would generally have the burden of proof on an affirmative defense, the district is not necessarily required to prove a negative (see Mejia v. Banks, 2024 WL 4350866, at *6 [SDNY Sept. 30, 2024] ["it is unclear how the school district could have proved such a negative"). Moreover, here the parent, through her lay advocate, introduced no evidentiary proof to counter the June 1 affirmative defense, the parent elected not to testify at the impartial hearing, and, therefore, no evidence was presented that a timely June 1 notice was provided to the district. Therefore, in this instance, relaying on the assertions made during the hearing, the district asserted that the parent did not request equitable services from the district and, in response, rather than asserting that she provided the district with the required notice, the parent asserted that the district waived the need for such a request (Tr. pp. 24-25, 26-27, 44-45).[16]

With respect to the waiver issue, the IHO's decision appears to have accepted, without explicitly finding, the parent's argument that the district waived the June 1 defense by developing an IESP for the student after the June 1 deadline (IHO Decision at p. 9). In addressing this argument, a district may, through its actions, waive the statutory requirement for the June 1 notice (Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[17] However, the Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

[16] Although the parent's answer to the cross-appeal has not been accepted for review as part of this appeal, it is worth noting that, even if it were accepted, it does not provide for any argument in response to the district's cross-appeal of the IHO's finding regarding the June 1 deadline and instead solely focuses on the district's jurisdictional arguments which were addressed above.

[17] The statute supports a policy of excluding State-resident students from receiving services under an IESP if parents miss the June 1 deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

A "clear and unmistakable waiver" of the statutory requirement of a parent request for services before June 1 has been found to exist where the CSE decided to create an IESP for the student after the deadline and then began providing services at the student's nonpublic school (see Application of the Board of Education, Appeal No. 18-088). Here, however, the district's creation of the student's IESP in June, without more, does not rise to the level of conduct that would constitute a waiver of the June 1 deadline.

While actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP, without more, constitutes a waiver. This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("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 3206-c" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services.

On the other hand, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone does not clearly or unmistakably reflect the district's waiver of the June 1 notice where it is called upon to convene and engage in special education planning for the student.

Based on the foregoing, the parent did not contest the district's assertion that she did not provide the district with a request for equitable services prior to June 1, 2023, either at the hearing or on appeal, and the hearing record lacks any evidence that the parent submitted such a request. Additionally, the convening of the September 2023 CSE to conduct an annual review for the student and development of the September 2023 IEP, on their own, do not demonstrate a waiver of the June 1 defense. Accordingly, the IHO erred in determining that the parent's claims were not barred by the June 1st notice requirement.

VII. Conclusion

Although the IHO had subject matter jurisdiction over the parent's claims, the parent did not provide the district with written notice requesting dual enrollment services prior to June 1, 2023 as required by Education Law § 3602-c[2], and the development of the September 2023 IEP for the student, in and of itself, did not constitute a waiver. Therefore, the student was not entitled to equitable services for the 2023-24 school year. As such, it is not necessary to reach the parent's

appeal of the IHO's determination that the services delivered to the student by EDopt for the 2023-24 school year were not appropriate or equitable considerations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: **Albany, New York**
April 14, 2025

STEVEN KROLAK
STATE REVIEW OFFICER