The University of the State of New York

The State Education Department
State Review Officer
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No. 24-643

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's private services delivered by Strivright for the 2023-24 school year. The district cross-appeals from adverse determinations by the IHO. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, 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, given the disposition of this matter, the facts and procedural history of the case will not be recited in detail.

Briefly, a committee on preschool special education (CPSE) convened on April 26, 2022, and, finding the student eligible for special education services as a preschool student with a disability, developed an IEP for the student with a projected implementation date of September 1,

2022 (Parent Ex. B at pp. 1-3, 14).[1] The April 2022 CPSE recommended that the student receive two 30-minte sessions per week of individual speech-language therapy and two 30-minute sessions per week of occupational therapy (OT) in a group of two for the 10-month school year beginning September 1, 2022 (id. at pp. 2, 14).

On September 26, 2023, the parent signed an agreement for Strivright to provide "Special Education and/or Related Services" to the student for the 2023-24 school year (Parent Ex. C). The agreement indicated that an "IEP/IESP . . . was developed by [the district] for the Student," and that the district had not offered any suitable providers to the parent in connection with the recommended program (id. at p. 1). The agreement further reflected that the parent was requesting that Strivright implement the student's IEP or IESP "to whatever extent possible," and that the parent agreed to retain counsel and file a due process complaint notice in an attempt to obtain funding for Strivright's services (id.). The parent acknowledged that she was liable to pay the full amount for services provided by Strivright in the event that she was unable to secure funding from the district "or elsewhere" (id.). According to the agreement, Strivright would "make every effort to implement the [district recommended program] with suitable qualified providers" but also indicted Strivright "intend[ed] to provide" special education teacher support services (SETSS) or special education itinerant teacher (SEIT) services "at a rate of $200/hour depending on the provider," as well as speech-language therapy, OT, physical therapy (PT), and counseling "at a rate of $250 depending on the provider" (id.). At the top of the agreement, however, after various fields, including the student's name, student identification number, date of birth, parent's name and contact information, and the name of the school the student attended, the following fields were noted: "Service Type: SPEECH" and "Service Line: ST 2x30" (id.).

According to the hearing record, in October 2023, Strivright began providing the student with two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT for the 2023-24 school year (Tr. pp. 12-13; Parent Exs. G ¶¶ 11-12; E at p. 1; F at p. 1).

A. Due Process Complaint Notice & Due Process Response

In a due process complaint notice dated July 14, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Specifically, the parent alleged that the CSE did not timely convene and develop a special education program for the student for the 2023-24 school year, and that the April 2022 CPSE IEP was outdated and expired (id. at p. 2). The parent further contended that the district failed to implement the CPSE IEP for the 2023-24 school year, and that the parent was unable to obtain providers to implement the program at the district's rates (id.). The parent therefore sought an order directing the district to fund private providers at an enhanced rate for the student's recommended services for the 2023-24 school year (id. at p. 3). The parent further sought compensatory education services for "the entire 2023-24 school year – or the parts of which were

[1] The hearing record contains a duplicative exhibit, in that both parties submitted a copy of the April 2022 CPSE IEP. For purposes of this decision, only the parent exhibit will be cited (compare Parent Ex. B with Dist. Ex. 3). The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

not serviced, including such services that the entitlement stem[med] from Pendency," and further reserved her right to "ask for compensatory SETSS and related services for any periods not provided during the 2023-24 school year" (id.). Additionally, the parent sought pendency services based on the April 2022 CPSE IEP (id. at pp. 2-5).

On August 8, 2024, the district responded to the parent's due process complaint notice (see Due Proc. Resp.). The district indicated that it intended to pursue a motion to dismiss any and all claims regarding implementation of the student's program under Education Law § 3602-c on the basis that the IHO did not have subject matter jurisdiction (id. at p. 1). The district also indicated that it intended to pursue all applicable defenses, including a defense on the basis that the parent failed to timely send a written request for equitable services by June 1 of the preceding school year, as required by Education Law § 3602-c (id.).[2]

B. Impartial Hearing & Impartial Hearing Officer Decision

An omnibus standing order was issued in this matter "to set firm expectations of the Parties to resolve the matter fairly and efficiently" (IHO Ex. I).[3] The standing order indicated that the parties were required to articulate and communicate in writing any known or knowable affirmative defenses within 10 business days of the scheduled hearing date, and that, any defenses not articulated in such a manner could be precluded from the impartial hearing (id. at pp. 1-2). The standing order also reflected a requirement that the parties submit a written opening statement with each parties' disclosures, should they wish to present an opening statement (id. at p. 2). Additionally, the standing order required most motions or requests for orders be made in writing at least 10 business days prior to the scheduled impartial hearing, and any responses be submitted in writing within three calendar days of receipt (id. at pp. 2-3).

The district submitted a motion to dismiss for lack of subject matter jurisdiction dated October 21, 2024 (see generally IHO Ex. II). In the email transmitting the motion, dated October 21, 2024, the district included a notice that it intended to raise the affirmative defense that it was not required to provide services to the student for the 2023-24 school year because the parent failed to notify the district of her request for equitable services by June 1, 2023 (IHO Ex. III). The district submitted a written opening statement dated October 25, 2024, and raised, among other things, arguments related to subject matter jurisdiction and the June 1 notice affirmative defense (Dist. Ex. 2).

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH) on October 29, 2024 (see IHO Decision at p. 3). An impartial hearing convened and concluded on

[2] Appended to the due process response is a prior written notice dated May 9, 2024 (Due Proc. Resp. pp. 3-7). The notice indicates that, at a CSE meeting in May 2024, the student was recommended to receive individual OT and individual speech-language therapy (id.). Additionally, the prior written notice reflected that the parent indicated she was placing the student in a nonpublic school at her own expense, and was seeking equitable services from the district, and, as a result, an IESP was developed for the student (id. at pp. 3-4).

[3] The IHO, in her decision, indicated that she was appointed on October 29, 2024 and that "prior to [her] appointment, a Standing Order was issued" for this matter (see IHO Decision at p. 3). The standing order included in the hearing record is undated and unsigned (IHO Ex. I).

November 4, 2024 (Tr. pp. 1-29). The district, in its closing argument, referenced that parents were required under Education Law § 3602-c to request equitable services by June 1 of the preceding school year (Tr. p. 24). In response, during the parent's attorney's closing statement, it was contended that the June 1 notice was not applicable in this matter as the student was still a preschool student (Tr. p. 27). Additionally, the district conceded that it had failed to meet its burden in establishing that the student was offered a FAPE (id.).

In a decision dated November 22, 2024, the IHO dismissed the parent's claims with prejudice (IHO Decision). The IHO found that it was undisputed that the district failed to implement the student's recommended services (id. at p. 4). The IHO also found that the district had properly and timely raised the June 1 notice affirmative defense in an October 24, 2024 email, as well as in the district's written opening statement, and that the parent did not dispute the timeliness of the defense (id. at p. 6). The IHO further found that the parent was required to provide the district with notice of her request for equitable services by June 1, 2023, but that she failed to do so (id. at pp. 6-7). In so finding this, the IHO was not persuaded by the parent's contentions that Education Law § 3602-c and its notice requirements did not apply in this matter, as the student was allegedly a preschool student, and that the parent was therefore not seeking equitable services (id.). The IHO found that the student turned 5 years old toward the end of the 2023-24 school year, and was enrolled in kindergarten for that school year, and that, therefore, the student had "aged out" of preschool, was no longer considered a preschool student with a disability, but rather was a school-aged student initially eligible to receive equitable services under Education Law § 3602-c (id.). The IHO also denied the district's motion to dismiss based upon subject matter jurisdiction (id. at p. 5; see IHO Ex. IV).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her claims with prejudice. More specifically, the parent contends, among other things, that Education Law § 3602-c does not apply to preschool students, and that the student in this matter was classified as a preschool student with a disability until August 2024. The parent also contends that she met her burden in establishing that the services provided by Strivright were appropriate.

In an answer and cross-appeal, the district contends, among other things, that, "[n]otwithstanding the [IHO's] decision, [the] IHO . . . should have additionally dismissed [the p]arent's claim because [the p]arent failed to establish" that the services provided by Strivright were appropriate. The district also contends that equitable considerations do not favor the parent. The district asks, in the alternative, that the matter be remanded for findings on the appropriateness of Strivright's provided services, and on equitable considerations.

In an answer to the cross-appeal, the parent responds to the district's contentions.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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., 694 F.3d at 184-85).

VI. Discussion

Initially, neither party has appealed from the IHO's denial of the district's motion to dismiss for lack of subject jurisdiction or the IHO's determination that the district failed to implement the student's recommended educational program for the 2023-24 school year (see IHO Decision at pp.

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

4-5). Accordingly, these findings have become final and binding on the parties and 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]).

A. Legal Framework & June 1 Deadline

With respect to the IHO's finding about the student's eligibility for special education under the auspices of the CSE instead of the CPSE, State law defines a preschool student with a disability as a student who is eligible to receive preschool programs and services and "who will not have become five years of age on or before December first of the school year, or a later date if a board established such later date for eligibility to attend school" (Educ. Law § 4410[1][i]).[5] Additionally, State law and regulation indicate that a "child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section [3202] of this chapter" (Educ. Law § 4410[1][i]; see 8 NYCRR 200.1[mm][2]; see also Educ. Law § 3202). Pursuant to section 3202 of the Education Law, in New York a "person over five and under [21] years of age who has not received a high school diploma is entitled to attend the public schools," but a board of education is not required to admit a child who becomes five years of age after the school year commences, unless that child's birthday occurs on or before the first of December during that school year (Educ. Law § 3202[1]).

The school year at issue in this matter is the 2023-24 school year, and it is undisputed that the student turned five years old in the spring 2024, during the second half of the school year. Therefore, pursuant to State law and regulations, the student was deemed a preschool student through the month of August 2024. The only references in the hearing record to the student being in kindergarten is in the progress reports of Strivright, which refer to the student as a student in a "kindergarten class in . . . a private elementary school" or as a "Pre-K (Kindergarten) student" (see Parent Exs. E at p. 1; F at p. 1). However, these references do not change the student's eligibility as a preschool student under State law and regulation and, moreover, the hearing record is not developed regarding the "grade" naming conventions used at the student's private school and how they may differ from "grades" as understood in the public school. Thus, it was error for the IHO to have found that, for the 2023-24 school year, the student "aged out" of preschool.

Regarding the IHO's finding that the parent did not provide the district with a June 1 notice, 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]). However, the parent has maintained that she did not seek dual enrollment services but, instead, wanted an IEP from the CPSE for the student.

[5] There is no indication in the hearing record that the district in this matter has established a different eligibility date. However, review of the district's admissions guide for the 2023-24 school year indicates that it uses December 31 (i.e., the end of the calendar year) as the cutoff date (see "2023 NYC Public Schools Admissions Guide," at p. 41, available at https://pwsblobprd.schools.nyc/prd-pws/docs/default-source/default-document-library/enrollment/2023-nyc-public-schools-admissions-guide.pdf?sfvrsn=4dfda5c6_2). As the student's birthday does not fall in December, the date set by the district does not change the outcome in this matter.

Moreover, the student was not eligible for dual enrollment services. In response to a question as to whether age eligible students (five years by December 1) whose parents enroll them for an additional year in a preschool or nursery school are eligible for services pursuant to Education Law § 3602-c, State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools" and "does not apply to a child who is less than compulsory school age continuing in a preschool program" ("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," (Questions and Answers), VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). Indeed, Education Law § 3602-c(1)(d) defines "[e]ducation for students with disabilities as "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][d]). Education Law § 4401(1), in turn, defines "student with a disability" as a "person under the age of twenty-one who is entitled to attend public schools pursuant to [Education Law § 3202]," which, as set forth above, provides that students entitled to attend public school must be between five (or turn five before December first of the school year) and 21 years of age (Educ. Law § 3202[1]).

Therefore, just as it was error for the IHO to find that the student was not considered a preschool student with a disability, so too was it error for the IHO to find that Education Law § 3602-c, and its June 1 notice requirements, applied to the circumstances of this case, as Education Law § 3602-c does not apply to preschool students with a disability.

Therefore, as the student remained classified as a preschool student with a disability for the 2023-24 school year, the June 1 notice requirement under section 3602-c of the Education Law did not apply, and it was error for the IHO to dismiss the parent's claims with prejudice for a failure to provide the district with such notice.

B. Remand to IHO

Based on the foregoing, the IHO's dismissal with prejudice must be reversed, and the matter remanded because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). 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.

VII. Conclusion

For the reasons discussed above, it was error for the IHO to dismiss the parent's due process complaint notice with prejudice, and, as the IHO did not make alternative findings in the first instance on the parent's claims, this matter must be remanded. I have considered the parties' remaining contentions and find that the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated November 22, 2024, dismissing the due process complaint notice with prejudice, is vacated; and

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**
July 14, 2025

STEVEN KROLAK
STATE REVIEW OFFICER