The University of the State of New York

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

No. 24-541

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 those portions of a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's (the student's) private services delivered during the 2022-23 and 2023-24 school years. The appeal must be sustained.

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 here in detail. Briefly, on December 13, 2018, a Committee on Preschool Special Education (CPSE) convened, found the student eligible for special education as a preschool student with a disability, and developed an IEP for the 2018-19 school year (see Parent Ex. B). The CPSE recommended that the student

receive five hours per week of direct, individual special education itinerant teacher (SEIT) services, three 30-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of 2:1 counseling services, and one 45-minute session per week of individual counseling services (id. at p. 1).[1]

In a letter dated May 30, 2023, the parent notified the district that she intended to place the student in a nonpublic school for the 2023-24 school year and requested that the district provide the educational services recommended in the "IEP/IESP" (Parent Ex. E).

On July 9, 2023, the parent electronically signed an "Enrollment Agreement for the 2023-2024 School Year" with EDopt, LLC (EDopt) (Parent Ex. C). Per Schedule A thereto, EDopt agreed to provide services "[a]s per the last agreed upon IEP/IESP/FOFD" for the ten-month school year running from September 2023 to June 2024 (id. at p. 3). Services were to be provided at an hourly rate of $195.00 and at an hourly group rate of $145.00 (id.).

On December 13, 2023, the parent electronically signed a "Parent Service Contract" with Premier Therapy Solutions LLC (Premier Therapy) wherein Premier Therapy agreed "to make every effort to implement" the student's recommended OT during the 2023-24 school year at an hourly rate of $300.00 (Parent Ex. J).

In a due process complaint notice, dated July 15, 2024, the parent, through an individual with Prime Advocacy, LLC, alleged that the district failed to provide the student a free appropriate public education (FAPE) and equitable services for the 2022-23 school year (IHO Ex. I). The parent recited that the CSE held a December 13, 2018 meeting at which time the district developed a program of supports and services for the student and listed the recommended services set forth on the December 2018 IEP (id. at p. 2).[2] In addition, the parent asserted, in pertinent part, that the latest program developed for the student failed to provide sufficient supports and services to allow the student to make effective progress toward age-appropriate goals and objectives, and that the district did not provide qualified providers to the student nor taken any steps to provide any services to the student for the 2022-23 school year (id. at pp. 1-2). Among the requested relief, the parent sought an order directing the district to fund five hours per week of SEIT, three 30-minute sessions per week of OT, and two 45-minute sessions per week of counseling services (id.

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs.

[2] The December 2018 meeting was, in fact, held by the CPSE rather than the CSE (Parent Ex. B at pp. 1-2).

at p. 3).[3] The hearing record does not reflect any response by the district to the due process complaint notice dated July 15, 2025.[4]

In a second due process complaint notice, also dated July 15, 2024, the parent, through the same individual with Prime Advocacy, LLC , alleged that the district had failed to provide the student a FAPE and equitable services for the 2023-24 school year (Parent Ex. A). The parent recited that the CSE held a meeting on December 13, 2018 at which time the district developed a program of supports and services for the student and listed the recommended services set forth on the December 2018 IEP (id. at pp. 1-2).[5] In addition, the parent asserted, in pertinent part, that the latest program developed for the student failed to provide sufficient supports and services to allow the student to make effective progress towards age-appropriate goals and objectives, and that the district did not provide qualified providers to the student nor taken any steps to provide any services to the student for the 2023-24 school year (id.).

The parent further alleged that as 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. 5). As the previous program had passed its annual review date and the district had failed to develop a current and appropriate program of services for the student, the parent alleged that the district had thereby denied the student a FAPE for the 2024-25 school year (id.). Among the requested relief, the parent sought an order directing the district to fund five hours per week of SEIT, three 30-minute sessions per week of OT, and two 45-minute sessions per week of counseling services (id. at p. 6). The hearing record does not reflect any response by the district to the parent's second due process complaint notice dated July 15, 2025.

In an order on consolidation, dated July 23, 2023, the IHO consolidated the parent's two July 15, 2024 due process complaint notices and directed that the two matters proceed under the same timeline (IHO Ex. II).

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 21, 2024 (Tr. pp. 1-18). The district did not appear on August 21, 2024 (Tr. p. 1). At the hearing, the parent advocate advised that while she was aware that a due process complaint notice had been filed with respect to the 2022-23 school year, she was unaware of the order on consolidation and consequently was only prepared to present evidence with respect to the 2023-24 school year (Tr. pp. 7-8; IHO Ex. II). The IHO denied her request to reschedule a hearing regarding the 2022-23 school year (Tr. pp. 11-12).[6] The IHO proceeded with the impartial

[3] Under "Proposed Solutions," the parent's lay advocate mistakenly recites that the district failed to provide a FAPE during the 2023-24 school year rather than the 2022-23 school year (IHO Ex. I at p. 3).

[4] In the event that no response was, in fact, sent by the district, the district is reminded of the regulatory obligation to file a response to a due process complaint if it has not sent a prior written notice to the parent pursuant to 8 NYCRR 200.5[a] (see 8 NYCRR 200.5[i][4]).

[5] As previously noted, the December 2018 meeting was held by the CPSE (Parent Ex. B at p. 1).

[6] At the hearing, the parent advocate mistakenly referenced the 2023-24 school year as the subject of her request for a rescheduled hearing rather than the 2022-23 school year (Tr. p. 11).

hearing in the district's absence, admitting into evidence twelve of the parent's thirteen proffered exhibits and hearing the parent's oral closing argument (Tr. pp. 9-18).

In a decision dated October 16, 2024, the IHO dismissed the parent's claims with respect to the 2022-23 and 2023-24 school years with prejudice concluding the parent had failed to identify "the program with which [she] disagree[d]" and therefore failed to state a claim upon which relief could be granted (IHO Decision at p. 2). With respect to the 2022-23 school year, the IHO further concluded that even if the due process complaint notice been deemed sufficient to proceed with a Burlington/Carter analysis, he would have found that the parent failed to meet her burden of proof as to any claim of funding given the complete lack of evidence produced at the hearing with respect to that school year (id. at p. 4 n.7).[7] With respect to the parent's claims regarding the 2024-25 school year, the IHO dismissed them without prejudice citing the fact that the due process complaint notice containing the claims pre-dated the start of the 2024-25 school year and concluding that any assertion that the district may not implement an educational program is contingent on an event that might never occur, and therefore the claims were not ripe for adjudication (id. at p. 4).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate asserting that the IHO improperly dismissed her claims regarding the 2022-23 and 2023-24 school years because she was not required to identify the specific program that she disagreed with or the services that provided inadequate support.[8, 9] The parent alleges that it was sufficient that she asserted the district's failure to implement the recommended services during each of those school years. The parent further assets that the IHO incorrectly dismissed the 2022-23 claims with prejudice as the parent inadvertently missed the consolidation order and that dismissal with prejudice constitutes an extremely harsh sanction. The parent requests that the 2022-23 school year claims be remanded to the IHO for further proceedings. Finally, the parent requests a reversal of the IHO's decision and an award of direct funding of the unilaterally-obtained SEIT and OT services during the 2023-24 school year, or in the alternative, that the issue be remanded to the IHO for further proceedings (id.).[10]

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[7] Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993].

[8] The parent did not appeal the IHO's dismissal without prejudice of her 2024-25 school year claims.

[9] I note that the request for review does not conform to practice regulations governing appeals before the Office of State Review. The lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

[10] The parent did not seek relief relating to the counseling services recommended in the December 2018 IEP.

In an answer, the district denies the material allegations contained in the request for review and seeks to uphold the IHO's dismissal of the parent's due process complaint notices. The district asserts that in the event the dismissal of the 2023-24 school year claims is not upheld, the parent did not meet her burden of proving the appropriateness of the unilaterally-obtained services under a Burlington/Carter analysis and that equitable considerations do not favor the parent. The district references a "cross-appeal" in several instances in its own pleading, attempting to "cross-appeal" from the favorable aspects of the IHO's decision; however, the district was not aggrieved by the IHO's decision and, for that matter, did not allege any error by the IHO. Accordingly, the undersigned has treated the pleading as an answer with defenses; however, the district is also cautioned to review the practice regulations in Part 279 and should not expect excusal for future failures to comply with the practice regulations in Part 279.

The parent filed a reply, denying the material allegations contained in the answer and asserts that the ten-day notice served by the parent on the district provided sufficient notice of the parent's concerns and therefore would not warrant a reduction of relief pursuant to equitable considerations.

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]).[11] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending

[11] 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]).

public or nonpublic schools located within the school district (id.).[12] 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

Initially, the parent has not appealed the IHO's dismissal without prejudice of her 2024-25 school year claims, therefore that determination has 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]).

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2022-2023 and 2023-24 school years and, as a self-help remedy, she unilaterally obtained private services for the student from Special Edge Inc. (Special Edge) during the 2022-23 school year, and EDopt and Premier Therapy during the 2023-24 school year without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (Tr. p. 13; Parent Exs. F; J; L). Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and

[12] 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.

can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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 (Carter, 510 U.S. 7; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[13] 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

1. Sufficiency of the Due Process Complaint Notices

Turning to the IHO's determinations regarding the sufficiency of the allegations of the due process complaints, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In his discussion of the parent's due process complaint notices, the IHO concluded that neither contained "any specific allegations regarding the operative program at the start of the 2022-

[13] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Special Edge, EDopt and Premier Therapy (Educ. Law § 4404[1][c]).

23 or 2023-24 school years," and consequently the parent did not put the district on notice of what issues she had regarding the program (IHO Decision at p. 4). I do not agree with this conclusion as each of the due process complaint notices specifically referenced the program of supports and services developed by the district at the meeting held on December 13, 2018, set forth the specific services recommended therein, and further stated that, "[i]t is the parent's belief that the student continues to require this mandate of services in order to be able to make appropriate progress" (IHO Ex. I at p. 2; Parent Ex. A at p. 4). Moreover, in both notices, the parent specifically asserted a claim that the district "has not provided qualified providers to the [s]tudent, nor has it taken any steps to provide any services for the [respective school years]" (id.). The parent further asserted in both due process complaint notices that the district failed to develop timely education programs for the student and asserted in the second due process complaint notice that the district failed to convene an annual CSE meeting (id.). Thus, I find that each of the due process complaint notices sufficiently placed the district on notice of "the nature of the problem of the child relating to such proposed initiation or change" (34 CFR 300.508[b][5]; see 20 U.S.C. § 1415[b][7][A][ii][III]).[14] While the parties or IHO could have engaged in additional hearing management practices to further clarify or narrow the issues if there was confusion, the due process complaint notices may be reasonably read as alleging that the district did not convene a CPSE or CSE meeting after December 2018 and, more specifically, the district failed to provide any special education services to the student during the 2022-23 and 2023-24 school years (IHO Ex. I; Parent Ex. A). The district may have had evidence of facts that contradicted the parent's allegations, but due to its failure to appear at the impartial hearing, it is not possible to reach a determination of that issue.

Based on the foregoing, I find that the parent sufficiently challenged the district's failure to implement services for the 2022-23 and 2023-24 school years and, therefore, the IHO erred by dismissing both due process complaint notices with prejudice.

2. The 2022-23 School Year

The IHO concluded that even if he had found that the due process complaint notices were deemed sufficient, he would have found that the parent failed to meet her burden under the Burlington/Carter analysis with respect to the claim for funding of the unilaterally-obtained services for the 2022-23 school year given the complete lack of evidence presented at the impartial hearing relating to that school year (IHO Decision at p. 4 n.7). The parent, through her advocate, asserts that the dismissal of those claims with prejudice constituted "an extremely harsh sanction" as the parent advocate inadvertently missed the email from the IHO which contained the order on consolidation of the two due process complaint notices, and had she known of the consolidation, she would have provided disclosure relative to the 2022-23 school year before the commencement of the impartial hearing.. The appropriate remedy, argues the parent, would be a remand of the

[14] In addition, 8 NYCRR 200.5[i][3] provides that a "due process complaint notice shall be deemed to be sufficient unless the party receiving notice notifies the impartial hearing officer . . . and the other party in writing within 15 days of the receipt of the due process complaint notice, that the receiving party believes the notice has not met the requirements of paragraph (1) of this subdivision." Paragraph (1) sets forth the due process complaint notification requirements. No evidence of a notification by the district as to the insufficiency of either due process complaint notice appears in the record and the district did not appear at the August 21, 2024 hearing date to assert any objections.

2022-23 matter for further proceedings to permit the parent to submit evidence in support to the claims for that school year (id.).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Moreover, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). In upholding a dismissal with prejudice, SROs have considered whether there was adequate notice to the party at risk for dismissal and whether the party engaged in a pattern of conduct or in conduct so egregious as to warrant the maximum sanction of dismissal of the due process complaint notice with prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 20-137; Application of a Student with a Disability, Appeal No. 20-009; Application of a Student with a Disability, Appeal No. 20-008; Application of a Student with a Disability, Appeal No. 18-111).

Here, other than the order of consolidation itself, no orders, directives, or scheduling notices relating to the management of the impartial hearing process were made part of the administrative hearing record by the IHO, much less orders or directives that warned the parties that the sanction of dismissal with prejudice was a potential outcome for failure to comply with the IHO's procedures. Given the circumstances, including the reason for the parent's request for an adjournment of the hearing with respect to the 2022-23 school year and the district's failure to appear at the August 21, 2024 hearing, I will vacate the IHO's orders dismissing the parent's claims with prejudice with respect to both the 2022-23 and 2023-24 school years. The parent shall have an opportunity to be heard with respect to the 2022-23 school year and the matter must be remanded for further evidentiary proceedings to allow the parties to present evidence and fully develop the hearing record on the merits of the parent's claims asserted in the consolidated due process complaint notices with respect to both the 2022-23 and 2023-24 school years.

VII. Conclusion

Having reached the decision to remand this matter, the IHO is directed to hold further evidentiary proceedings and conduct a three-prong Burlington/Carter analysis of the evidence submitted by the parties during the impartial hearing to determine whether the district implemented special education services for both the 2023-23 and 2023-24 school years. If the district was required to provide dual enrollment services and failed to do so, the IHO shall render a determination of whether the services the parent may have unilaterally-obtained from private providers were, under the totality of the circumstances, appropriate to address the student's needs

and, if so, whether equitable considerations favor the parent including any defenses raised by the district.

THE APPEAL IS SUSTAINED.

IT IS ODERED that the IHO's decision dated October 16, 2024 is modified by vacating those portions of the decision which dismissed with prejudice the parent's claims for direct funding of unilateral services provided in the 2022-23 and 2023-24 school years; 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**
March 20, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER