The University of the State of New York

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

No. 25-223

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 Frank J. Lamonica, 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 dismissed her due process complaint notice with prejudice for lack of subject matter jurisdiction, denying her request that respondent (the district) fund the costs of her daughter's private services for the 2024-25 school year. The appeal must be sustained in part, and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

Given the procedural posture of the matter—namely that it was dismissed with prejudice prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts is limited to the procedural history including the parent's filing of the due process complaint notice, the district's response, motion practice between the parties, and the IHO's dismissal of the due process complaint notice with prejudice.

A. Due Process Complaint Notice

In a due process complaint notice dated December 20, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Due Process Compl. Not.). According to the parent, a CSE had last convened for the student on October 10, 2018 and developed an IESP that recommended five periods per week of direct group special education teacher support services (SETSS) and one 30-minute session per week of individual occupational therapy (OT) (id. at p. 2).[1] The parent asserted that the October 2018 IESP was "outdated and expired" and that the delay in convening a CSE meeting and in recommending a "proper placement and services" was a denial of a FAPE to the student for the 2024-25 school year (id.). The parent further alleged that she had been unable to locate "a provider willing to accept the [district] contract on their own accord," and that the district failed to implement their own recommendations for the 2024-25 school year (id.). The parent also contended that "[w]ithout the supports, the parental mainstream placement [wa]s untenable" and that the failure to either implement the recommended services or provide a placement also constituted a denial of a FAPE (id.). The parent invoked pendency and claimed that the October 2018 IESP represented the student's last agreed-upon program (id.). Next, the parent "reserve[d] []he[]r right to ask for compensatory SETSS and related services for any periods not provided during the 2024-25 school year" (id.). The parent attached a proposed pendency implementation form to the due process complaint notice requesting the services set forth in the October 2018 IESP as pendency (id. at pp. 4-5). As relief, the parent sought funding for the program recommendations in the October 2018 IESP for the 2024-25 school year "at the provider's contracted rate," and that the district fund a bank of compensatory "periods of all services which [the student wa]s entitled to for the entire 2024-25 school year – or the parts of which were not serviced, including such services that the entitlement stems from [p]endency," to be funded at the prospective provider's contracted rate (id. at p. 3).

In a due process response dated December 30, 2024, the district generally denied the allegations contained in the due process complaint notice, asserted certain affirmative defenses, and attached a supplemental notice (Dist. Response to Due Process Compl. Not.). The supplemental notice indicated that a CSE convened on January 5, 2024, found the student eligible for special education as a student with a speech of language impairment, and developed an IESP that recommended that the student receive three periods per week of SETSS (id. at pp. 3-5).

[1] 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.

B. Motion to Dismiss and Impartial Hearing Officer Decision

An IHO with the Office of Administrative Trials and Hearings (OATH) was appointed to preside over the matter. In an undated motion to dismiss, the district requested that the IHO dismiss the parent's due process complaint notice on the ground that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims (see Dist. Mot. to Dismiss). In opposition thereto, the parent submitted a memorandum of law dated January 30, 2025 (see Parent Mem. of Law in Opp'n to Mot. to Dismiss).

By decision dated March 6, 2025, the IHO granted the district's motion to dismiss for lack of subject matter jurisdiction (IHO Decision at pp. 1-2, 15).[2] The IHO determined that she lacked subject matter jurisdiction to hear the parent's claim seeking implementation of equitable services brought under Education Law § 3602-c (id. at pp. 1-2). The IHO noted a previously adopted emergency amendment to the Commissioner's regulations and explained that her determination was not based on the emergency amendment in light of a subsequent New York State Court's issuance of a temporary restraining order staying implementation or enforcement of the emergency regulation (id.).

The IHO reasoned that parents who seek equitable services for their children under Education Law § 3602-c have opted out of public schools and are not entitled to a FAPE and do not have the same due process protections as public school students (IHO Decision at pp. 2-5). The IHO interpreted Education Law § 3602-c to allow only two types of disputes that could be brought under IDEA due process complaint procedures: those related to "review" of CSE recommendations and those related to child find activities (id. at pp. 4-7). According to the IHO, the plain meaning of the word "review" in Education Law § 3602-c precludes an IHO from hearing a "failure to implement" claim and cannot mean "full due process" (id. at pp. 6-8). The IHO further reasoned that IHOs appointed pursuant to the IDEA and Education Law § 4404 were "trained primarily to decide IDEA-based issues" and "lack[ed] the expertise to decide" disagreements about rates (id.).

The IHO also reviewed the legislative history of Education Law § 3602-c and determined the New York State legislature did not intend to grant parents the right to a due process hearing before an IHO for a rate dispute or "failure to implement" claim under § 3602-c (IHO Decision at pp. 8-12). The IHO noted the lack of binding, judicial authority addressing "whether an [IHO] has jurisdiction to hear a claim that a school district failed to implement an IESP," stating that decisions from SROs and guidance from the New York State Education Department were not "binding precedent" (id. at pp. 10-11). The IHO distinguished Gabel v. Board of Education of Hyde Park Central School District, 368 F. Supp. 2d 313 (S.D.N.Y. 2005), explaining that Gabel did not

[2] The hearing record includes a March 6, 2025 IHO decision and a March 6, 2025 "corrected" IHO decision. A comparison of the two IHO decisions reflects no substantive changes (compare IHO Decision at pp. 1-16, with Amended IHO Decision at pp. 1-16). For purposes of this decision, the "corrected" decision will be cited simply as "IHO Decision."

involve the district's failure to implement services but, rather, the "district's failure to recommend related services after having conducted evaluations" (id. at p. 11 & n.41).[3]

According to the IHO, the purpose of Education Law § 3602-c is to "increase private school students' access to [educational] programs" for students with disabilities without conferring jurisdiction or entitlement to a FAPE (IHO Decision at p. 12). The IHO rejected State-level review decisions holding that dually enrolled students (i.e., private school students who receive public school services) are considered part-time public school students who are entitled to the same legal protections as public school students (id. at pp. 12-13).

The IHO also determined that she had no "authority to consider pendency in this case," as Education Law "§3602-c does not grant parents of parentally placed students any right to pendency" (IHO Decision at p. 14). According to the IHO, "pendency under [Education Law] §4404 cannot be 'bootstrapped' onto a §3602-c claim because" the pendency provisions of § 4404 "mirror the IDEA's language and protect the right to a FAPE, which is not at issue in an IESP implementation case" (id.). The IHO also found that the parent's requests for compensatory education services "rested on the 'failure to implement claim,'" and was therefore dismissed (id.). Additionally, the IHO determined that the parent's claims with respect to the October 2018 IESP being "outdated and 'expired'" was a " 'failure to implement' claim," even if not explicitly stated as such, because the relief sought was funding for independently sourced services (id. at pp. 14-15). The IHO dismissed that claim, as well (id.).

Finally, the IHO found "no unfairness in dismissing th[e] case," as parents have "other forums to pursue disputes of this kind" (IHO Decision at p. 15). The IHO noted, specifically, that the parent can bring suit in state court; file a complaint pursuant to Education Law § 310; and/or resolve the dispute "directly with the CSE" (id.).

Accordingly, the IHO dismissed the parent's due process complaint notice in its entirety "with prejudice with respect to this forum, but without prejudice to refile in an appropriate forum" (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing the due process complaint notice and the parent's claims for lack of subject matter jurisdiction. The parent contends that an impartial hearing is the appropriate venue to resolve disputes over an alleged failure to implement special education recommendations for parentally placed students, and the parent points to numerous State-level review decisions that all stand for the proposition that IHOs have subject matter jurisdiction over implementation claims. The parent further contends that the IHO's decision cited to a federal court's report and recommendation, but that a decision was not issued in the matter cited by the IHO. The parent also contends that she was denied due process by the

[3] The IHO noted that, in Gabel, the parents "wanted related services for their parentally placed, private school child, but the [local educational agency (LEA)] did not recommend any (or possibly did not recommend what the parents wanted)" (IHO Decision at p. 11).

IHO's failure to consider her pendency request.[4] The parent additionally contends that the IHO is biased and should be prohibited from ruling on any case involving claims that the district failed to implement services mandated in an IESP. The parent requests that the IHO's dismissal be reversed, and that the matter be assigned to a different IHO on remand.[5]

In an answer, the district contends that the IHO's dismissal should be affirmed, as she correctly ruled that she did not have subject matter jurisdiction, and that relevant laws and legislative history support the IHO's findings. The district also contends that the parent's pendency claims should be dismissed, as the dismissal of claims related to an IESP involve rights granted entirely under State law, presenting no federal question. The district further contends that, without a factual hearing or agreement with the district, there is no evidence regarding the identity of the student's then-current placement. The district also contends that the parent's bias claim should be dismissed, as it is not based on law or fact, but rather based on a disagreement with the IHO's determinations of the law. The district further notes that the parent failed to serve an exhibit that was referenced in the request for review. The district asks that the request for review be dismissed, and the IHO's decision be upheld.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]).

[4] The parent contends on appeal that pendency is based upon an August 8, 2024 unappealed IHO decision, which serves as the last agreed upon program, and I note that this is in contrast to the parent's pendency request in the due process complaint notice, which indicated that the October 2018 IESP was the last agreed upon educational program (compare Req. for Rev. at p. 5, with Due Process Compl. Not. at pp. 2, 4-5).

[5] The parent's requests for review includes citations and references to proposed exhibits, but no such exhibits were filed with the request for review (see Req. for Rev. at p. 1).

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

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

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

VI. Discussion

A. Subject Matter Jurisdiction

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]). The IHO determined, in accord with the district's position, 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 and the IHO, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Initially, the district and the IHO have treated the parent's claims as related to implementation of the student's IESP; however, as set forth above, in addition to alleging that the district did not arrange for delivery of services to the student, the due process complaint notice also alleged that the district failed to convene a CSE to develop an IESP for the student for the

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

2024-25 school year (Due Process Compl. Not. at pp. 1-2). An allegation that the district failed to convene the CSE to engage in educational planning or developed an inappropriate IEP would mean that this matter was not a pure implementation case. The IHO dismissed any characterization of the parent's claim as relating to anything but implementation of an IESP, citing the relief sought by the parent, but offers no explanation as to why the type of relief sought should be relied upon to define the underlying claim (IHO Decision at p. 15).

In any event, even if this matter did solely involve implementation of the student's IESP for the 2024-25 school year, such a claim is subject to due process. In numerous recent decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No.25-510; Application of a Student with a Disability, Appeal No. 25-297; Application of a Student with a Disability, Appeal No. 25-295; Application of a Student with a Disability, Appeal No. 25-220; Application of a Student with a Disability, Appeal No. 25-218; Application of a Student with a Disability, Appeal No. 25-106; Application of a Student with a Disability, Appeal No. 25-218; Application of a Student with a Disability, Appeal No. 25-106; Application of a Student with a Disability, Appeal No. 25-077; Application of a Student with a Disability, Appeal No. 25-076; Application of a Student with a Disability, Appeal No. 25-075; Application of a Student with a Disability, Appeal No. 25-074; Application of a Student with a Disability, Appeal No. 25-071; Application of a Student with a Disability, Appeal No. 25-067; Application of a Student with a Disability, Appeal No. 24-620; Application of a Student with a Disability, Appeal No. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR

300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent 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]).

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities, provides that a due process complaint notice may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a [FAPE]" (Educ. Law § 4404[1][a]; see 20 U.S.C. § 1415[b][6]). SROs have in the past, taking into account the text and legislative history of Education Law § 3602-c, concluded that the legislature has not eliminated a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals

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

[9] In 2004, the State Legislature amended subdivision two of the Education Law § 3602-c, effective June 1, 2005 (see L. 2004, ch. 474 § 2 [Sept. 21, 2004]). Prior to such date, the subdivision read, in part, as follows:

> Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall

has explained that students authorized to receive dual enrollment 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]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), 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.[10]

> contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 [June 6, 1990] [emphasis added]). The amendments that took effect on June 1, 2005, removed the last sentence of subdivision two relating to the review of a board of education's failure or refusal to provide equitable services by the Commissioner (L. 2004, ch. 474 § 2). A review of the statute's history and the New York State Assembly Memorandum in Support of Legislation shows that the Legislature intended to remove the language that an appeal to the Commissioner of Education under Education Law § 310 was the exclusive vehicle for review of the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c, as the earlier sentence in subdivision two of such section authorized review by an SRO from a district CSE's determination in accordance with Education Law § 4404 (Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). The Memorandum further explained:

> The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.

(Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). Thus, the legislative amendments were intended to clarify the forum where disputes could be brought, not 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.

[10] The State Education Department treated dually enrolled students as attending other nonpublic institutions but also enrolled in the public school, provided parents requested services each year prior to June 1. For example,

> Questions and Answers
>
> 1. What does "dual enrollment" mean?
>
> Dual enrollment means that pupils enrolled in nonpublic schools may also be considered as enrolled in the public school in occupational education programs, gifted education programs, and programs for students with disabilities.

("Dual Enrollment Programs," available at https://www.p12.nysed.gov/nonpub/handbookonservices/dualenrollment.html).

After legislative amendments took effect, in 2007, the State Education Department issued guidance further interpreting Education Law § 3602-c to provide that "[a] parent of a student who is a [New York State] resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or the provision of special education services may submit a Due Process Complaint Notice to the school district of location" ("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 3206-c," Attachment 1 at p. 5, VESID Mem. [Sept. 2007] [emphasis added], https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

The number of disputes involving the dual enrollment statute statewide remained very small until only a handful of years ago. In the last several years, the number of due process filings dramatically increased to tens of thousands per year within certain regions of this school district. As a result, public agencies and parents began to grapple with addressing these circumstances within the district.[11]

In its answer, the district contends that State guidance from 2007 contradicts the "plain language" of the Education Law, under which parents have never had a right to bring a due process complaint for the implementation of either IESP claims or "enhanced rate" services. Consistent only in part with the district's position in its answer, 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.

[11] In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. 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]); however enforcement was barred under a temporary restraining order (see Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24, Order to Show Cause [Sup. Ct., Albany County, Oct. 4, 2024]) and the regulation has since lapsed.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[12] However, the guidance was issued in conjunction with a regulation that was adopted on an emergency basis that has since lapsed as further described below.

Case law has not addressed the issue of whether Education Law § 3602-c imposes limitations on the right to an impartial hearing under Education Law § 4404 such as precluding due process complaints on the implementation of an IESP or if certain types of relief available under § 4404 are repudiated by the due process provisions of § 3602-c. Instead, case law has carved out a narrow exception that provides that exhaustion is not required if the "plaintiff's claim is limited to the allegation that 'a school has failed to implement services that were specified or otherwise clearly stated in an IEP.'" (Levine v. Greece Cent. Sch. Dist., 353 F. App'x 461, 465 (2d Cir. 2009); quoting Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 489 [2d Cir. 2002] see Intravaia v. Rocky Point Union Free Sch. Dist., 919 F. Supp. 2d 285, 294 [E.D.N.Y. 2013]).

More recently, the New York State Supreme Court has also signaled that administrative exhaustion is not required, indicating that, if the district fails to implement the services listed on their child's IESP, the parents seeking an enhanced rate apply to the district's Enhanced Rate Equitable Services (ERES) unit, and the requested rates are denied, the parents could seek judicial review (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24, slip op. at 7 [Sup. Ct., Albany, County, July 11, 2025]). However, the Court did not address whether parents must use the ERES procedure or whether they may also utilize the administrative due process procedures. Instead, the Court denied petitioners' request for a preliminary injunction as moot because they sought to enjoin a State regulation that had lapsed (Agudath Israel of America, No. 909589-24, slip op. at p. 6). The Court further denied their request for a permanent injunction because the ERES procedure and subsequent opportunity for judicial review provided "an adequate remedy at law" (id. at pp. 6-7). The Court acknowledged that all parties believed the backlog in resolving the large number of "enhanced rate" cases in due process proceedings is "a significant problem" (id. at p. 7).[13] However, the Court did not resolve the parties' disagreement as to whether rate disputes could be resolved under the text of Education Law § 3602-c (id.). Although petitioners contended that the ERES unit was not equipped to address enhanced rate requests, the Court also declined to address that issue because the district was not a party to the litigation (id.).

[12] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations that the district's CSEs had not been convening and services were not being delivered began to mount, the district then began to respond with unsuccessful jurisdictional arguments to SROs resulting in decisions which were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, Appeal No. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). The guidance document is no longer available on the State's website; however, it is included in the hearing record as an attachment to the district's motion to dismiss.

[13] There is no definition of an "enhanced rate" much less an enhanced rate dispute, and many cases brought before the Office of State Review that one or both of the parties and/or the IHO characterize as an enhanced rate dispute involve a variety of alleged infractions by the district beyond the district's failure to implement services on an IESP, such as allegations that the district failed to convene a CSE to develop an IESP or that the IESP developed was not appropriate for the student.

Thus, case law has established that within the district, parents may use the ERES procedures and seek judicial review regarding the lack of implementation of the services in a child's IESP, particularly where the due process complaint is limited to that issue and the cost of such services; however, the Court declined to hold that the dual enrollment statute precludes parents from using the due process procedures in Education Law § 4404 to resolve the dispute set forth in this case. Accordingly, the IHO's decision dismissing the parent's claims due to a lack of subject matter jurisdiction must be reversed.

As the IHO's jurisdictional reasoning is without merit, the IHO's related contention that she lacked "authority to consider pendency in this case" is also without merit (IHO Decision at p. 14; see, e.g., Application of a Student with a Disability, Appeal No. 25-035 [rejecting "the district's argument that the student [wa]s not entitled to pendency because she sought equitable services pursuant to Education Law § 3602-c"]; Application of a Student with a Disability, Appeal No. 24-579 [rejecting the district's argument "that the student was not entitled to pendency services because the IHO . . . lacked subject matter jurisdiction to order the district to maintain the student's pendency services"]). However, as the hearing record is not developed, I decline to reach the issue on appeal.

When an IHO has not addressed the issues raised in a due process proceeding, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims or arguments 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, I find the case must be remanded to allow an evidentiary hearing and the issuance of a written decision on the merits of the parent's claims asserted in her due process complaint notice.

B. IHO Bias

With respect to the parent's allegations of IHO bias, to the extent that the parent disagrees with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is

involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, the parent points to the IHO's deviation from precedent to support her claim of IHO bias. Specifically, the parent contends that the IHO's deviation from precedent presents a pattern of attempts to "strip dually-enrolled students of due process," which "reveals a clear bias that makes clear the IHO's inability to act as a neutral arbiter," and that the IHO has shown in her analyses a belief that "dually enrolled students unfairly hog resources" (Req. for Rev. at pp. 4-7, 9). For this reason, the parent seeks to have this case remanded to a different IHO. However, as noted above, there have been many conflicting viewpoints regarding the dual enrollment statute, case law has continued to evolve while this matter was pending and may still evolve further.[14] The parent cannot point to anything in the record beyond the IHO's decision to support her claim of bias. Such speculative claims without any further information are insufficient to support a finding that the IHO exhibited bias in this matter (see, e.g., Application of a Student with a Disability, Appeal No. 25-287 [denying the parent's request to remand the case to a different IHO where the parent alleged prejudice based on that the "'IHO's continued refusal to adhere to the SRO's guidelines"']; Application of a Student with a Disability, Appeal No. 25-131 [rejecting the parent's claim of IHO bias where "the parent did not identify any conduct of the IHO's that was related to the instant matter beyond unfavorable rulings"). Therefore, the parent's request that this matter be remanded to a different IHO is denied.

VII. Conclusion

Having found no evidence of IHO bias and having determined that the IHO erred in dismissing this matter for lack of subject matter jurisdiction, the matter is remanded to the IHO for evidentiary proceedings to determine the student's pendency, unless the parties otherwise agree, and to issue determinations on the merits of the parent's claims in the due process complaint notice, including whether the district offered or provided the student appropriate dual enrollment services for 2024-25 school year. If the IHO finds that the district failed to offer or provide the student appropriate dual enrollment services, then the IHO must determine whether the student's unilaterally obtained services were appropriate and, if so, whether equitable considerations weigh in favor the parent's requested relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 6, 2025, is modified by reversing that portion which dismissed the parent's claims, including the parent's pendency request, for lack of subject matter jurisdiction;

[14] A Notice of Appeal has been filed Agudath Israel of America, and at some point, given the volume of disputes, a party may challenge an SRO decision on this topic, or the Legislature may find the need to further clarify the dual enrollment statute.

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 the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
October 24, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER