The University of the State of New York

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

No. 25-347

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

Appearances:
Shehebar Law P.C., attorneys for petitioner, by Ariel A. Bivas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared B. Arader, 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 the parent's due process complaint notice for lack of subject matter jurisdiction to review the parent's claims. 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 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 and the IHO's dismissal of the due process complaint notice with prejudice (see IHO Decision at p. 18).

A. Due Process Complaint Notice

In a due process complaint notice dated March 31, 2025, the parent alleged that the student was parentally placed at a nonpublic school and identified by respondent (the district) as a student with a disability (Due Process Compl. Not. at p. 1). According to the parent, the student's most recent IESP, created on February 11, 2025, included recommendations for 10 periods per week of special education teacher support services (SETSS); two 30-minute sessions per week of occupational therapy (OT); one 30-minute session per week of "consulting" services, and full-time daily paraprofessional services (see id. at pp. 1-2).[1] The parent further alleged that the CSE had reconvened on February 11, 2025 and removed the recommended speech-language therapy, and paraprofessional services, and that the CSE's removal of such services denied the student a free appropriate public education (FAPE) (see id.). Finally, the parent alleged that the district failed to assign providers to implement the recommended services for the 2024-25 school year (id. at p. 2). The parent invoked pendency based on the student's last agreed-upon IESP (id. at p. 3).[2] As relief, the parent requested funding of the cost of unilaterally-obtained services, at the providers' enhanced rates, along with a bank of compensatory services "for any and all services that the [district] failed to implement and which the parent[] w[as] not able to unilaterally implement" (id.).

B. Impartial Hearing Officer Decision

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH). In a decision dated April 30, 2025, the IHO dismissed the parent's due process complaint notice sua sponte, without conducting a hearing (IHO Decision at pp. 1-2, 18).[3, 4] According to the IHO, she lacked subject matter jurisdiction to hear the parent's claim seeking implementation of equitable

[1] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[2] The parent's due process complaint notice does not provide the date on which the last agreed-upon IESP was developed (Due Process Compl. Not. at p. 1).

[3] The district asserts that it filed a motion to dismiss on jurisdictional grounds (Answer ¶ 3); but the hearing record includes no such motion.

[4] On April 24, 2025, the IHO issued an interim decision on consolidation, wherein she declined to consolidate the March 31, 2025 due process complaint notice with a prior proceeding (Interim IHO Decision at pp. 1-2).

services under Education Law § 3602-c (id. at pp. 1-2, 17-18). The IHO explained that her determination was not based on a previously adopted emergency amendment to the Commissioner's regulations, given that a State court issued a restraining order to stay the implementation or enforcement of the emergency regulation (id. at pp. 1-2 & n.3).

Instead, the IHO reasoned that students who are parentally placed in nonpublic schools, and who are eligible for equitable services under Education Law § 3602-c, "are not entitled to a FAPE," and "do not have the same due process protections as public school students," because their "parents have opted out of the public education system" (IHO Decision at pp. 2-4). According to the IHO, Education Law § 3602-c allows only two types of disputes to 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). The IHO found that that the parent did not seek "review of the CSE's recommendations" and that, "[w]hile not explicitly stated," the matter was, indeed, "a failure to implement claim," as the "relief sought [wa]s funding for independently sourced services" (id. at pp. 17-18). According to the IHO, the plain meaning of the word "review" in Education Law § 3602-c cannot mean "full due process" and precludes an IHO from hearing claims for implementation of an IESP (id. at pp. 7-8). 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. at pp. 8-9).

The IHO reviewed the legislative history of Education Law § 3602-c and determined that 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. 9-11, 14). 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. 11-12). 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 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. 12 & n.43).[5]

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. 13). 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. 13-14).

The IHO also determined that she had no "authority to consider pendency" in this case (IHO Decision at pp. 15-17). In that regard, the IHO reasoned that Education Law § 3602-c "does not grant parents of parentally placed students any right to pendency" and the pendency provisions

[5] 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. 12).

of Education Law § 4404, which "mirror the IDEA's language and protect the right to a FAPE," do not apply to dually enrolled students (id. at pp. 15-16).

Finally, the IHO found "no unfairness in dismissing th[e] case," as "parents have . . . other forums to pursue their disputes" (IHO Decision at p. 18). 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. 18).

IV. Appeal for State-Level Review

The parent appeals, contending that the IHO erred in failing to issue a pendency order and in dismissing the due process complaint for lack of subject matter jurisdiction. The parent argues that Education Law § 3602-c "expressly incorporates the right to review under § 4404," thus providing parents of dually enrolled students with "due process protections for 'any matter relating to . . . the provision of a free appropriate public education'" (Req. for Rev. at p. 2). According to the parent, the IHO's "restrictive reading of § 3602-c" is "inconsistent with the plain statutory text, judicial precedent, and basic principles of statutory interpretation" (id. [internal citation omitted]). The parent also notes that the IHO ignored the numerous State-level review decisions holding that IHOs have subject matter jurisdiction over "claims involving the implementation of services mandated by an IESP" (id. at pp. 1-2). The parent requests that the IHO's decision be reversed and that the case be remanded to a different IHO. In that regard, the parent argues that the IHO's "inconsistent and unstable approach to jurisdiction" prejudices families seeking relief (id. at p. 2).

The district interposed an answer, seeking affirmation of the IHO's decision.[6] According to the district, the legislative history of Education Law § 3602-c belies the SRO's consistent position that IHOs possess subject matter jurisdiction over claims involving IESP implementation. The district further argues that dually enrolled students are not entitled to pendency and that the parent's allegation of IHO bias lacks merit, as it is based only on disagreement with the IHO's interpretation of relevant legal authority.

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

[6] The district's answer included two paragraphs numbered "10.".

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]).[7] "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 public or nonpublic schools located within the school district (id.).[8] 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]).

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[7] 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]).

[8] 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.

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 that 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 IESP implementation claims.

Prior to reaching the jurisdictional component of the IHO's decision and the district's position, examination of the parent's due process complaint notice shows that the parent asserted more than just an implementation claim or a rate dispute. Here, the IHO acknowledged the parent's allegation that the district denied the student a FAPE by reducing the recommended services in the student's most recent IESP but, nevertheless, concluded that the parent did "not seek review of the CSE's recommendations" (IHO Decision at pp. 17-18). According to the IHO, "[w]hile not explicitly stated," the matter presented was "a 'failure to implement' claim," as the relief sought was "funding for independently sourced services" (id.).[9] Contrary to the IHO's conclusion, the parent challenged the substantive adequacy of the recommended program, notwithstanding the relief sought (see Due Process Compl. Notice at pp. 1-2).[10] Thus, the IHO's decision, dismissing the proceeding without a hearing, was flawed even under the jurisdictional reasoning employed by the IHO.

With respect to implementation claims, the IHO's decision would fare no better. 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. 25-459; Application of a Student with a Disability, Appeal No. 25-300; Application of a Student with a Disability, Appeal No. 25-298; Application of a Student with a Disability, Appeal No. 25-295; Application of a Student with a Disability, Appeal No. 25-293; Application of a Student with a Disability, Appeal No. 25-242; Application of a Student with a Disability, Appeal No. 25-132; Application of a Student with a Disability, Appeal No. 25-127; Application of a Student with a Disability, Appeal No. 25-106; Application of a Student with a Disability, Appeal No. 25-098; 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

[9] The district likewise characterizes the matter as an implementation or rate dispute, ignoring the parent's substantive claim entirely (see Answer ¶¶ 2, 3-7, 9-11, 13-14 & n.2, 16).

[10] A school district may be required to reimburse a student's parents for their expenditures on private educational services obtained for the student if the services offered by the district 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]).

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 New York Education Law affords 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]).[11]

Concerning students who attend nonpublic schools, Education Law § 3602-c 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]). In the past, SROs have 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, taking into account the statutory text and legislative history (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).[12] In addition, the New York Court of Appeals has explained that students authorized to

[11] 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]).

[12] 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 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 providing 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 explains as follows:

> The language providing for review of a school district's failure or refusal 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]), further supporting 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.[13]

After legislative amendments took effect in 2007, the State Department of Education 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).

> 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.

[13] 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).

The number of disputes involving the dual enrollment statute statewide remained very small until several 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.[14]

In its answer, the district contends that the 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 IESP claims or enhanced rate services. Consistent with the district's position, State guidance, issued in August 2024, noted that the State Education Department had previously "conveyed" the following to the district:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[15] However, the guidance was issued in conjunction with a regulation that was adopted on an emergency basis and has since lapsed, as further described below.

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[14] 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.

[15] Neither the guidance nor the district indicated whether this jurisdictional viewpoint was conveyed to the district publicly or privately, when it was communicated, or to whom. There was no public expression of these points, of which the undersigned was aware, 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; but it has been added to the administrative hearing record.

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 whether 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 may 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 (id. 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 p. 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;" but 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.).[16] 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.).

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. Therefore, the IHO's decision, dismissing the parent's claims due to a lack of subject matter jurisdiction, is incorrect and 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. 17;

[16] 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.

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"]).

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]). In this case, the IHO made no alternative findings with respect to the issues raised in the parent's due process complaint notice following the determination that she lacked subject matter jurisdiction. Therefore, the case must be remanded for evidentiary proceedings. Upon remand, the parties shall be allowed the opportunity to present evidence establishing the student's educational placement during the pendency of this proceeding; the IHO shall issue an order for maintenance of the student's pendency services unless the parties enter into an agreement therefor; the parties shall be permitted to present evidence to address the issues raised in the parent's due process complaint notice, including the appropriateness of the recommendations in the IESP, implementation, and the requested relief, such as the rate for unilaterally obtained services; the evidence submitted by the parties during the impartial hearing shall be analyzed using the Burlington-Carter three-pronged test; and a written decision on the merits of the parent's claims shall be issued.[17]

B. IHO Qualifications

I now turn to the parent's contention that the case should be remanded to a different IHO. 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

[17] The pendency "inquiry focuses on identifying [the student's] then current educational placement" (Mackey v. Bd. of Educ. for the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], quoting Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982] [internal quotation marks omitted]), which has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014] [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). It is well-settled that a student's entitlement to pendency arises automatically, begins on the date of the filing of the due process complaint notice, and continues until the conclusion of the matter (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d 904, 906).

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 does not allege specific conduct by the IHO or point to anything in the hearing record, beyond the IHO's decision itself, to support her contention that the case should be remanded to a different IHO. Instead, the parent alleges that the IHO "has demonstrated an inconsistent and unstable approach to jurisdiction," thus "undermin[ing] confidence in the impartial hearing process" and prejudicing families seeking relief, by "decid[ing] that she lacks jurisdiction over new cases[] while continuing to preside over similar existing [cases]" (Req. for Rev. at p. 2).

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 the law may further evolve.[18] The parent's disagreement with the conclusions reached by the IHO does not provide a basis for finding actual or apparent bias (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]; Application of a Student with a Disability, Appeal No. 13-083).

Without additional information, the parent's request that the matter be remanded to a different IHO seeks merely to avoid potential prejudice. Such a speculative claim is insufficient to support a finding that the IHO is incapable of presiding over the matter objectively or otherwise unqualified. Therefore, the parent's request that this matter be remanded to a different IHO is denied (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"). If, upon remand, the parent continues to have concerns with the IHO's competence, impartiality, or professional conduct, the parent's attorney should address such concerns directly with the IHO on the record.

[18] A Notice of Appeal has been filed by 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.

VII. Conclusion

While I agree that the IHO erred in dismissing the parent's due process complaint notice, I find no basis for assigning the matter to a different IHO. Accordingly, I must remand the matter to the IHO for evidentiary proceedings to determine the student's pendency, unless the parties otherwise agree, and determine whether the district offered the student appropriate dual enrollment services for 2024-25 school year. If the IHO finds that the district failed to offer 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 favor awarding the relief requested by the parent.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 30, 2025, is modified by reversing that portion which dismissed the parent's claim, including the parent's pendency request, for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that this matter is remanded to the IHO for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that, in the event the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
January 23, 2026

CAROL H. HAUGE
STATE REVIEW OFFICER