The University of the State of New York

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

No. 24-535

Application of a STUDENT WITH A DISABILITY, by his parents, 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 Offices of Regina Skyer and Associates, L.L.P., attorneys for petitioners, by Daniel Morgenroth, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay Maione, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parents' due process complaint notice for lack of subject matter jurisdiction to review the parents' claims following an impartial hearing. The appeal must be sustained, 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 ultimate disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened on May 4, 2022 to develop an IESP for the student with an implementation date of September 1, 2022 (Parent Ex. B at pp. 1, 8, 11). The May 2022 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1).[1] The May 2022 CSE recommended that the student receive five periods per week of direct individual special education teacher support services (SETSS), three 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of group occupational therapy (OT), one 30-minute session per week of group counseling services, and one 30-minute session per week of individual counseling services with all services to be delivered in a separate location (id. at p. 8).

By email dated May 24, 2023, the parents, through their attorney, notified the district that the student was placed in a nonpublic school at the parents' expense and requested that the student's "special education services continue to be provided in the next school year" (Parent Ex. C).

On July 6, 2023, the student's father electronically signed a contract with Yes I Can to provide the student with SETSS, counseling, and speech-language therapy (Parent Ex. D at p. 3). The contract was countersigned by a representative of Yes I Can on August 22, 2023, and according to the terms, the student's father agreed that it was his "responsibility to pay any balance of any fee that [wa]s not covered by the [district] prospective payment" and that he was "aware of the schedule of fees which [we]re incorporated by reference" (id. at pp. 2, 3). The rate schedule reflected that the costs of SETSS/SEIT Services was $200 per hour and both speech therapy and counseling services were $245 per hour for the 2023-24 school year (id. at p. 4).

On September 7, 2023, the student's mother entered into an agreement for OT services with an individual provider (Parent Ex. K at pp. 1-2). The contracted for rate for OT services for the 2023-24 school year was $275 per hour (id. at p. 1).

As evidence of the services the student received during the 2023-24 school year, the hearing record included a December 4, 2023 OT progress report prepared by the student's private occupational therapist, a June 2024 progress report prepared by the student's special education teacher from Yes I Can, a January 30, 2024 progress report prepared by the student's speech therapist, a February 15, 2024 counseling progress report prepared by the student's counselor, and a testimonial affidavit from the educational director at Yes I Can (Parent Exs. E at pp. 1-5; F at pp. 1-4; G at pp. 1-4; I at ¶ 4; L).

A. Due Process Complaint Notice

By due process complaint notice dated June 20, 2024, the parents, through their attorneys, alleged that the district denied the student a free appropriate public education (FAPE) and equitable services for the 2023-24 school year (see Parent Ex. A at pp. 1, 3). The parents invoked the student's right to pendency and asserted that a May 4, 2022 IESP constituted the student's last

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

agreed-upon program (id. at p. 2). For the 2023-24 school year, the parents alleged that the district failed to convene a CSE meeting prior to the start of the school year, failed to develop an IESP for the student after the parents requested equitable services, and denied the parents their right to meaningfully participate in the education planning process (id. at p. 3). As relief, the parents requested direct funding for five hours per week of SETSS, three 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of group OT, one 30-minute session per week of group counseling, and one 30-minute session per week of individual counseling, each to be delivered by the parents' chosen providers at their stated rates (id. at p. 3).

B. Impartial Hearing, Motion to Dismiss and Impartial Hearing Officer Decision

The parties convened on August 20, 2024, before an IHO with the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-101). According to the IHO, this matter was assigned to an omnibus docket, however a copy of the order was not included with the certified hearing record (Tr. pp. 16-17). During the impartial hearing, the parents submitted a written opening statement, offered documentary evidence and witness testimony (Tr. pp. 5, 12-16, 17, 23-42, 45-47, 48-72, 86-100).[2] The district did not submit a written opening statement. The district offered documentary evidence, argued the June 1 defense, and provided a closing statement (Tr. pp. 7-11, 18-22, 73-86).

By motion to dismiss dated October 17, 2024, the district asserted that the parents' due process complaint notice should be dismissed on the grounds that the IHO lacked subject matter jurisdiction (Dist. Mot. to Dismiss at pp. 2-4). The district argued that there was no subject matter jurisdiction to hear the claims as the State Education Department clarified that State regulations do not grant parents of students with IESPs the right to file a due process complaint notice in order to implement an IESP (id. at pp. 2-4). The district contended that in guidance issued by the State Education Department following changes to the regulation, the State indicated that parents have never had the right to file a due process complaint notice in order to request an enhanced rate for equitable services (id. at p. 3).

In an undated response in opposition to the district's motion to dismiss, the parents argued that the district's contention that parents have never had the right to file a due process complaint notice to request an enhanced rate for equitable services is belied by decades of precedent and further asserts that the parents' due process complaint notice was filed before the effective date of the regulation (Parent Opp'n to Mot. to Dismiss at pp. 1-5). The parent further noted that a court had recently, on October 4, 2024, issued an injunction suspending the changes to State regulations and attached a copy to its opposition (id. at pp. 5, 7-9).

In a decision dated October 22, 2024, the IHO granted the district's motion to dismiss (IHO Decision at p. 2). The IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (IHO Decision at pp. 1-6). The IHO noted a recently adopted emergency amendment to the Commissioner's regulations and a subsequent New York State Court's issuance of a restraining order staying implementation or enforcement of

[2] The parents' June 20, 2024 due process complaint notice alleged that the parents were denied the right to meaningfully participate in the educational planning process, however the parents did not reassert this claim during the impartial hearing (Parent Ex. A at p. 3; see Tr. p. 6).

the emergency regulation (id. at p. 1). The IHO explained that her determination that she lacked subject matter jurisdiction to preside over implementation or rate disputes brought under Education Law § 3602-c was being made "irrespective of the now-enjoined regulatory amendment" (id. at p. 2).

The IHO interpreted Education Law § 3602-c to allow "two limited 'gateways'" for the type 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 (IHO Decision at p. 3). According to the IHO, the parent's claims are "better characterized as rate disputes" because the parent had parentally placed the student in a private school and is not disputing the CSE's IESP recommendations or child find activities (id.).

The IHO noted that impartial hearing officers appointed pursuant to the IDEA and Education Law § 4404 are trained "to decide IDEA-based issues" and have no expertise in rate disputes (IHO Decision at p. 4). The IHO further found that nothing in "either the IDEA or the New York State Education law grants an IDEA IHO authority to hear a rate dispute, and nothing to indicate that I should not dismiss rate dispute claims for lack of subject matter jurisdiction, whether or not the parties have raised the issue" (id. at pp. 4-5).[3] According to the IHO, the parent had not cited any "binding precedent or legislative history" authorizing an IHO to determine "rate disputes" (id.). In addition, the IHO found no judicial authority interpreting State Education Law § 3602-c to "grant parents the right to file a due process complaint in a simple rate dispute" (id. at p. 5). The IHO determined that decisions from SROs and the New York State Education Department are not binding on IHOs (id. at pp. 5-6).

Lastly, the IHO addressed fairness (IHO Decision at p. 6). She determined that dismissing the case with prejudice would not be "fundamentally unfair" to the parent because the parent had an opportunity to be heard and could seek relief in an alternate forum "outside of IDEA due process hearings" for her rate dispute, such as resolving such claim directly with the CSE, commencing an action in State or federal court, filing a complaint with the Commissioner of Education pursuant to Education Law § 310, or availing herself to the district's Enhanced Rate Equitable Services (ERES) unit, a "recently added … dedicated forum specially for rate disputes" (id.).

Accordingly, the IHO dismissed the parent's due process complaint notice "with prejudice with respect to this forum" (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in dismissing their due process complaint notice for lack of subject matter jurisdiction. The parents also argue that the IHO erred in refusing to admit a parent exhibit into evidence. The parents argue that the parent exhibit was a testimonial affidavit that was marked for identification by the IHO with the understanding that it would be admitted into evidence after it was authenticated by the witness. The parents argue that the witness appeared for cross-examination and affirmed the contents of her affidavit, however the IHO failed to admit the exhibit into evidence. As relief, the parents request remand to the IHO to issue a

[3] The IHO determined that even if neither party raised the issue of subject matter jurisdiction, an IHO had the authority to address such a jurisdictional defect sua sponte (IHO Decision at p. 4, n.18).

decision on the merits of the parents' claims. The parents also request a determination that the parent's exhibit was omitted from evidence in error. In the alternative, the parents request findings that the district denied the student a FAPE on an equitable basis, that the parents' unilaterally-obtained services were appropriate, and that equitable considerations warrant an award of funding. The parents further request that their additional evidence be considered in this appeal, if the matter is not remanded to the IHO.

In an answer, the district argues that the IHO correctly granted the district's motion to dismiss. The district further asserts that the IHO correctly found that the parents failed to exhaust administrative remedies by failing to pursue their claim with the ERES unit prior to filing a due process complaint notice. The district asserts that student's receiving equitable services should not be deemed part-time public school students such that they should be permitted due process rights. The district also argues in the alternative that, if the IHO's decision is not upheld, the matter should be remanded for consideration of prongs two and three of a Burlington/Carter tuition reimbursement analysis. The district did not take a position in its answer on the parents' additional evidence.

In a reply, the parents assert that the district's reliance on administrative exhaustion and interpretation of the meaning of part-time public school students are without merit.

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]).[4] "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

[4] 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]).

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.).[5] 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--Subject Matter Jurisdiction

As in the motion to dismiss, the district also argues on appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP.

Prior to reaching the jurisdictional component of the IHO's decision, it is worth first identifying what the IHO meant when she referred to this matter as a "rate dispute" (see IHO Decision at pp. 3-5). According to the IHO, the parents are not disputing the CSE recommendations or child find and the district is not disputing the student's "entitlement to the recommended services" (id. at pp. 3-4). The IHO explained that she believed there was "a material difference between an IDEA-based issue involving implementation or provision of IESP services and a parental 'failure to implement' claim that is really a rate dispute" (id. at pp. 4-5). However, in this instance, a simple review of the due process complaint notice and the hearing record shows that the last educational program the district developed for the student was developed at a May 2022 CSE meeting, the parents in their due process complaint notice challenged the district's failure to develop an educational program for the student for the 2023-24 school year, and the district challenged the appropriateness of the unilaterally obtained services (see Tr. pp. 76-78; Parent Exs. A; B). Accordingly, it is not clear from the IHO's decision what makes the matter, as

[5] 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.

presented before her, solely a dispute as to "how much [the district] should pay for the services."[6] And, as this matter does deal with more than just a determination as to a rate for services, the IHO's dismissal as to subject matter jurisdiction indicates that the dismissal was intended to assert a lack of subject matter jurisdiction over any and all claims regarding implementation of equitable services.

Recently in several 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. 24-572; 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. 24-512 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. 24-464; 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 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 alone, 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

[6] Additionally, it is unclear as to how, once it is decided that relief would be warranted, why a determination as to a rate for equitable services is different from a determination as to an amount to be paid for tuition at a nonpublic school.

[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]).[7]

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, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confer IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

Consistent with the IDEA, § 4404 of the Education Law, which concerns appeal procedures for students with disabilities, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see 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).[8] When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school

[7] 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]).

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

> classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.[9]

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf).[10] Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process

[9] Citing School Dist. of City of Grand Rapids v. Ball, (473 U.S. 378 [1985]), the district argues that the student is not a "part-time public school student." The argument falls flat. I find the fact pattern addressed in Ball – a matter involving whether a school district's shared time and community education programs violated the Establishment Clause of the First Amendment – to be inapposite to the matter at hand. Moreover, as acknowledged by the district, the Supreme Court in Agostini v. Felton, (521 U.S. 203, 222 [1997]), expressly stated that its subsequent decisions undermined the assumptions upon which Ball relied. In this case, the district very clearly failed to convene a CSE despite the parent's request for equitable services for the 2023-24 school year under the dual enrollment statute, and the parents are seeking equitable relief in the form of unilaterally-obtained services that would be available if successful under the Burlington/Carter analysis.

[10] In this case, the district continues to press the point that the parents have no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

complaint notices filed on or after July 16, 2024 (id.).[11] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[12]

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint" for implementation of IESP claims or enhanced rate for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[13]

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[11] The due process complaint in this matter was filed with the district on June 20, 2024 (Parent Ex. A at pp. 1, 5), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

[12] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

[13] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

Finally, in regard to the IHO's finding that the parents could pursue alternative forums, the district's argument that the parents failed to exhaust administrative remedies by not first bringing their claims to the district's ERES unit is erroneous. While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurdles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Therefore, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed. Although, the IHO conducted an impartial hearing on the merits of the parents' claims, she did not issue a written decision addressing the parents' claims in their due process complaint notice. Thus, the case must be remanded to the IHO to do so. The IHO is directed to conduct a three prong Burlington-Carter analysis of the evidence submitted by the parties during the impartial hearing held on August 20, 2024, and issue a written decision on the merits of the parents' claims. Upon remand, the parents may request that the IHO consider their additional evidence if it is not already a part of the hearing record before the IHO.[14]

VII. Conclusion

For the reasons described above, this matter is remanded for the IHO to issue a written decision on the merits of the parents' claims asserted in their June 20, 2024 due process complaint notice.

THE APPEAL IS SUSTAINED.

Disability, 23-121). The guidance document is no longer available on the State's website; thus a copy of the August 2024 guidance has been added to the administrative hearing record.

[14] Review of the hearing record supports the parents' assertion that their additional evidence was erroneously omitted from evidence. At the time the exhibit was offered into evidence, the district objected "absent the availability of the witness for cross-examination" (Tr. p. 13). The IHO stated with regard to the exhibit, "I'm not admitting it now, but once the witness has sworn to the truth of its contents, then it will be admitted after that" (Tr. p. 14). Subsequently, the witness appeared and affirmed the contents of the affidavit constituted her direct testimony, and that the contents were true (Tr. pp. 24-25). However, it does not appear that the exhibit was entered into evidence at that time (Tr. p. 25). The IHO did not annex a list of exhibits to her decision (IHO Decision at pp. 1-9).

IT IS ORDERED that the IHO's decision, dated October 22, 2024, dismissing the parents' due process complaint notice for lack of subject matter jurisdiction is reversed; and

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

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

Dated: **Albany, New York**
February 10, 2025

STEVEN KROLAK
STATE REVIEW OFFICER