The University of the State of New York

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

No. 24-549

Application of a STUDENT WITH A DISABILITY, by her 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 Caitriona Carey, 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 dismissed the parents' due process complaint notice for lack of subject matter jurisdiction to review the parents' claims. 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 3, 2023 to develop an IESP for the student

with an implementation date of September 7, 2023 (Parent Ex. B at pp. 1, 10, 13).[1] The May 2023 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1).[2] The May 2023 CSE recommended that the student receive three periods per week of direct individual special education teacher support services (SETSS) delivered in a separate location, two 30-minute sessions per week of group speech-language therapy delivered in a separate location, and two 30-minute sessions per week of group occupational therapy (OT) delivered in a separate location (id. at p. 10).[3]

On June 2, 2023, the student's mother electronically signed a contract with Yes I Can Services (Yes I Can) that indicates the agency's intent had to provide the student with "special education services," speech-language therapy, and OT (Parent Ex. C 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 mother agreed that it was her "responsibility to pay any balance of any fee that [wa]s not covered by the [district] prospective payment" and that she was "aware of the schedule of fees which [we]re incorporated by reference" (id. at p. 2). The rate schedule reflected that the costs of SETSS/SEIT Services were $200 per hour and speech therapy and OT were each $245 per hour for the 2023-24 school year (id. at p. 4).

The hearing record included a June 2024 progress report prepared by the student's special education teacher from Yes I Can, a January 30, 2024 OT progress report prepared by the student's occupational therapist from Yes I Can, a January 30, 2024 speech-language therapy progress report prepared by the student's speech-language pathologist from Yes I Can, and a testimonial affidavit from the associate director of educational services at Yes I Can (Parent Exs. D at pp. 1-5; E at pp. 1-4; F at pp. 1-4; H at ¶ 24).[4]

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[1] The hearing record contains duplicative exhibits. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] 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]).

[3] According to the attendance page, the parents did not participate in the May 2023 CSE meeting (Parent Ex. B at p. 13).

[4] The affidavit from the associate director of educational services at Yes I Can indicated that the student attended a preschool for the 2023-24 school year (Parent Ex. H at ¶49). It is worth noting that equitable services under Education Law §3602-c are not intended for students continuing in preschool programs. State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Questions and Answers at ¶ 17 [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students).

A. Due Process Complaint Notice

By due process complaint notice dated June 12, 2024 and filed on June 14, 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, 5). The parents invoked the student's right to pendency and asserted that the May 2023 IESP constituted the student's last agreed-upon program (id. at p. 2). For the 2023-24 school year, the parents alleged that the district failed to fully and timely evaluate the student in all areas of suspected need, failed to implement any IEP or IESP special education services for the 2023-24 school year, and denied the parents their right to meaningfully participate in the education planning process (id. at pp. 2-3).

As relief, the parents requested direct funding for three hours per week of SETSS, two 30-minute sessions per week of group speech-language therapy, and two 30-minute sessions per week of group OT, each to be delivered by the parents' chosen providers at their stated rates (id. at p. 3).

B. Impartial Hearing Officer Decision

This matter, along with five other cases, was assigned to an omnibus docket, according to a June 25, 2024 order issued by an IHO with the Office of Administrative Trials and Hearings (OATH). The parties convened before the IHO in this matter on September 16, 2024, and conducted impartial hearings for each of the cases assigned to the omnibus docket (Tr. pp. 1-42, see Tr. pp. 4, 5). Documentary evidence and witness testimony was admitted during the impartial hearing (Tr. pp. 19, 20, 21-33). The attorney for the district made an oral motion to dismiss the parents' due process complaint notice for lack of subject matter jurisdiction, to which counsel for the parents objected (Tr. pp. 6-12).[5] [6]

In a decision dated October 22, 2024, the IHO determined that, consistent with the district's argument, she lacked subject matter jurisdiction to review the parents' "implementation[]/enhanced rate claim" (IHO Decision at pp. 1, 3-5). The IHO determined that the parents' claims in the due process complaint notice did not relate to the identification, evaluation, educational placement of the student, the provision of FAPE, a manifestation determination, or discipline of a student with a disability, and thus, she did not have subject matter jurisdiction (id. at p. 3). The IHO further found that there was "no actual dispute" related to the CSE's recommendations and that it had always been her belief that IHOs "had no jurisdiction or powers pertaining to implementation and

[5] The parents' due process complaint notice included allegations of procedural violations of the IDEA (Parent Ex. A at pp. 2-3). The IHO asked the parents' representative if the case involved implementation and rate and the representative answered in the affirmative and did not reassert the parents' alleged procedural violations (Tr. p. 6). The district did not address the parents' allegations in the due process complaint notice before making an oral motion to dismiss (Tr. pp. 6-7). The district did not provide an opening statement or call witnesses (Tr. pp. 5, 12). The district offered documentary evidence into the hearing record (Tr. pp. 14-19). In its closing argument, the district stated that it "was not challenging the [p]arent[]s' request to implement the IESP" if the IHO found that she had subject matter jurisdiction to review the parents' claims, however the district argued that it was challenging the rates charged by Yes I Can (Tr. pp. 34-35).

[6] An undated written brief from the parents in opposition to the district's oral motion to dismiss is also included in the hearing record.

that an impartial hearing [wa]s not necessary in instances, where there [wa]s no dispute or disagreement with the CSE's recommendation" (id. at pp. 3-4). The IHO then noted the existence of an emergency regulation related to rate disputes and the creation of the district's Enhanced Rate Equitable Service (ERES) unit to specifically address implementation or enhanced rate claims (id. at p. 4). The IHO indicated that her decision did

> not hinge on the emergency regulation to part 200.5, but rather hinge[d] on the creation of the ERES unit, where [the] parent c[ould] seek the enhanced rate, and if not successful there they c[ould] make a complaint to the State Education Department and from there c[ould] proceed to [S]tate court, which [wa]s the same end point [the] parent would reach through the process of appearing before an IHO. It [wa]s for th[o]se reasons that the [district's] motion to dismiss [wa]s granted, irrespective of the emergency regulation.

(IHO Decision at p. 4).

The IHO also found that she lacked an "essential element to having subject matter jurisdiction," as she was not empowered to provide the parents' requested relief (IHO Decision at p. 4). The IHO further explained that, even if an IHO issued an order, an IHO could not "force the implementation unit to do anything" (id. at pp. 4-5).[7] Next, the IHO granted, "to the extent applicable," the district's motion to dismiss the parents' claims for compensatory education "equal to missed services under an IESP," finding that the parents' requested relief was not compensatory in nature, but rather, was actually enhanced rate relief, which, as already noted, the IHO did not have subject matter jurisdiction to address (id. at p. 5). For those reasons, the IHO dismissed those portions of the parents' due process complaint notice that sought relief of "implementation/enhanced rate" with prejudice (id.). As final points, the IHO included a section in the decision entitled "Other Noteworthy Points," wherein she discussed equity, implied waiver, prejudice, the parents acting against their own self-interests, judicial economy, the legality of the emergency amendment, the parents' request for a final determination on the merits of the due process complaint notice, and the parents' argument that the amendment had not yet been passed (id. at pp. 5-8).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in dismissing their due process complaint notice for lack of subject matter jurisdiction. The parents argue that the IHO's determination is contrary to recent decisions of SROs and is in direct conflict with applicable law and with the State Education Department's interpretation of applicable law. The parents contend that the plain reading of the amendment to the regulation indicates that it does not apply to their due process

[7] With respect to the IHO's statement in the decision that an "IHO may issue an order, but the IHO cannot force the implementation unit to do anything" as a reason for dismissing the parent's claims, the IHO erred by conflating enforcement of an IHO order, which is beyond an administrative hearing officer's authority in this State (see Tobuck v. Banks, 2024 WL 1349693, at *6-*7 [S.D.N.Y. Mar. 29, 2024]), with the role of conducting a proceeding and determining whether the claims in a due process complaint notice have merit based on an evidentiary record, which is an IHO's essential function.

complaint notice, which was filed on June 14, 2024. The parents further argue that although the IHO's decision used the phrase "portions of petitioner's" due process complaint notice, the IHO dismissed the parents' due process complaint notice with prejudice, which constituted a final determination subject to appeal. As relief, the parents request that the IHO's decision be reversed and the matter remanded to the IHO for a determination on the material issues.

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 also argues that the IHO correctly determined that she lacked subject matter to review the parents' claims.

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]).[8] "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

[8] 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 (id.).[9] 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

In its oral motion to dismiss, the district asserted that the IHO lacked subject matter jurisdiction to review the parents' claims in their due process complaint notice (Tr. pp. 6-10). In its appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and New York law confers no right to file a due process complaint notice regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in a number of 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. 24-584; Application of a Student with a Disability, Appeal No. 24-572; 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. 24-512 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,

[9] 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.

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 parents would not have a right to due process under federal law; however, the student did not merely have a services plan developed pursuant to federal law, and the parents did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[10]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

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

Consistent with the IDEA, Education Law § 4404, 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[1][a]; see 20

[10] 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]).

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).[11] 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 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.[12]

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

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

[12] 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 failed to provide the public school special education services called for by the district's own IESP during 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.

colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have recently 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).[13] 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 complaint notices filed on or after July 16, 2024 (id.).[14] 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 Bd. 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).[15]

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[13] 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.

[14] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on June 14, 2024 (Parent Ex. A at p. 5), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[15] On November 1, 2024, the 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]).

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 previously "conveyed" to the district that:

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

("Special Education Due Process Hearings—Rate Disputes," Office of Special Educ. [Aug. 2024]).[16]

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, the IHO found that the creation of the ERES unit was the primary reason for granting the district's motion to dismiss. 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]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded because the IHO did not make any alternative findings with respect to the issues raised in the parents' due process complaint notice following the

[16] 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 SROs in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

IHO's determination that she lacked subject matter jurisdiction over such claims. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

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 September 16, 2024, and issue a written decision on the merits of the parents' claims.

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 14, 2024 due process complaint notice.

THE APPEAL IS SUSTAINED.

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 28, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER