



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-562

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, 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 granted respondent's (the district's) motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction. 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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law

§ 4404],” which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

Given the procedural posture of the matter—namely that it was dismissed with prejudice prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts in this matter 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.

In a due process complaint notice dated July 15, 2024, the parent, through her lay advocate, alleged that the district failed to offer the student a free appropriate public education (FAPE) and denied the student equitable services for the 2022-23 school year (Due Process Compl. Not. at p. 1). According to the parent, the CSE convened on October 15, 2020, and developed an IESP for the student recommending three periods of special education teacher support services (SETSS) per week (id. at p. 2). The parent asserted that the district failed to convene a CSE to engage in educational planning for the student in advance of the 2022-23 school year and failed to implement the services mandated in the student's October 2020 IESP (id.).

For relief, the parent requested, among other things, direct funding/reimbursement for the SETSS delivered to the student during the 2022-23 school by a private provider of the parent's choosing at the providers' stated enhanced rate (Due Process Compl. Not. at pp. 2-3).<sup>1</sup>

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH). In a September 5, 2024 written motion, the district requested the IHO dismiss the parent's due process complaint notice on the grounds that IHO lacked subject matter jurisdiction to adjudicate the parent's claims, and further, the parent's claims were not ripe (see Dist. Mot. to Dismiss). In a written response, the parent's advocate argued that the district's assertions were incorrect and that the IHO should deny the district's motion (see Parent Ans. to Mot. to Dismiss).<sup>2</sup>

In a decision dated October 22, 2024, the IHO dismissed the parent's claims on the ground that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (see IHO Decision at pp. 1-7).<sup>3</sup> The IHO noted a recently adopted emergency amendment to the Commissioner's regulations and a subsequent New York State Court's issuance of a temporary restraining order staying implementation or enforcement of the emergency regulation (id. at pp. 1-2). 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).

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<sup>1</sup> The district submitted a due process response, dated September 11, 2024, generally denying the allegations contained in the due process complaint notice (Dist. Resp. to Due Process Compl. Not at pp. 1-2). In an attached "Supplemental Notice," the district referenced that a CSE meeting took place on January 13, 2022, which determined that the student was eligible for special education as a student with a learning disability and developed an IESP that recommended speech-language therapy (id. at p. 3). The notice stated that in January 2022 the student had been parentally placed in a nonpublic school with an IESP (id.).

<sup>2</sup> As related to ripeness, both the parent and the district appear to misunderstand or erroneously reference the school year at issue in this matter (see Dist. Mot. to Dismiss at p. 5; Parent Ans. to Mot. to Dismiss at p. 11). The due process complaint notice clearly specified that the parent's claims related to the 2022-23 school year, which had elapsed by the time the due process complaint notice in this matter was filed (Due Process Compl. Not.).

<sup>3</sup> The IHO's decision was not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pages with the first page as page one (see IHO Decision at pp. 1-9).

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 were "better characterized as rate disputes" because the parent had placed the student in a private school at her own expense and was 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" or indicates that an IHO "should not dismiss rate dispute claims for lack of subject matter jurisdiction, whether or not the parties have raised the issue" (id.).<sup>4</sup> 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 noted that decisions from SROs and the New York State Education Department were 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 she 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 "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, but without prejudice to refile in an appropriate forum" (IHO Decision at p. 7).

#### **IV. Appeal for State-Level Review**

The parent appeals and argues that the IHO erred in dismissing her due process complaint notice with prejudice for lack of subject matter jurisdiction. The parent asserts, among other things, that the implementation of the student's IESP is the district's responsibility and that the failure to do so resulted in the current "rate dispute," which cannot be "divorced" from the implementation claim.<sup>5</sup> As relief, the parent requests reversal of the IHO's decision, and remand to an IHO for a full hearing on the merits.

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<sup>4</sup> The IHO further noted that even if neither party raised the issue of subject matter jurisdiction, an IHO had the authority to address a jurisdictional defect sua sponte (IHO Decision at p. 4, n.18).

<sup>5</sup> The request for review does not conform to practice regulations governing appeals before the Office of State Review because a lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by

In an answer, the district asserts among other things, that the IHO correctly determined that she lacked subject matter jurisdiction to review the parent's claims and properly granted the district's motion to dismiss. According to the district, there is no federal right to file a claim for due process regarding services recommended in an IESP, and further the parent's claim is an implementation claim which neither the IHO nor an SRO have jurisdiction to adjudicate under State law. The district also asserts that the IHO correctly found that the parent could seek other forums for relief, indicating that the IHO was alluding to the district's enhanced rate equitable services (ERES) unit when the IHO referred to the district's "dedicated forum specially for rate disputes." The district requests that, should an SRO sustain the parent's request for review, the matter be remanded back to an IHO for a hearing on the merits.

## 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]).<sup>6</sup> "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

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an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

<sup>6</sup> 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.*).<sup>7</sup> 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**

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2022-23 school year (Due Process Compl. Not.). While the due process complaint notice also alleges that the district did not implement services from the October 2020 IESP during the 2022-23 school year (*id.* at p. 2), this is not an instance where there is a timely and current IESP with which both parties agree that the district just failed to implement.

As the parent's claims also related to the failure to develop an IESP for the student for the 2022-23 school year, this is not an instance where the parent's claim was solely related to the implementation of an IESP. Accordingly, there can be no dispute that the IHO had jurisdiction to address the parent's claim.

In addition, even if this matter did solely involve implementation of the student's IESP during the 2022-23 school year, such a claim is subject to due process. 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. 24-615; 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;

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<sup>7</sup> 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.

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. 24-544; Application of a Student with a Disability, Appeal No. 24-542; 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 parent 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 parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

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

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<sup>8</sup> 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]).

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]).<sup>9</sup> 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]).

Education Law § 4404, concerning appeal procedures for students with disabilities, consistent with the IDEA, 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 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).<sup>10</sup> In addition, the New York Court of Appeals has explained that students authorized to receive 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]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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. 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 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

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<sup>9</sup> The IHO opined that this section of the law only granted parents the "right to a review, not the right to file a due process complaint," which she interpreted to mean that a remedy would consist of ordering a CSE to convene and review an IESP (IHO Decision at p. 3 n.11). However, the review that may be obtained is "pursuant to the provisions of [Education Law § 4404]," which, in turn, provides for the filing of a due process complaint notice and, in one subdivision, explicitly references the filing of a due process complaint notice in accordance with Education Law 3602-c (Educ. Law §§ 3602-c[2][b][1]; 4404; see Educ. Law § 4404[1-a]).

<sup>10</sup> The district did not seek judicial review of these decisions.



<https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf>).<sup>11</sup> 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.*).<sup>12</sup> 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).<sup>13</sup>

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, 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

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<sup>11</sup> In this case, the district continues to press the point that the parent has 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 amendment adopted by emergency rulemaking by the Board of Regents.

<sup>12</sup> 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 submitted to the district on July 15, 2024 (Due Process Compl. Not. at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

<sup>13</sup> On November 1, 2024, the Albany County 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]).

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]).<sup>14</sup>

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.

In her analysis, the IHO relied heavily on the idea that a "rate dispute" was distinguishable from an implementation dispute, characterizing the parent's self-help actions in arranging for private services without the consent of the school district as implementation of the district's recommendations with the rate to be paid for the private services being the only issue to be decided (see IHO Decision at pp. 4-6). However, characterization of the matter as a "rate dispute" divorced from the context of the Burlington/Carter legal standard is not an appropriate approach particularly where there is no indication in the matter that the district conceded that it failed to engage in educational planning or provide the student with equitable services for the school year at issue or that the private services obtained by the parent were appropriate (see Application of a Student with a Disability, Appeal No. 24-097; Application of a Student with a Disability, Appeal No. 20-087).

Finally, the district's argument that the parent failed to exhaust administrative remedies by seeking relief from the district's ERES unit prior to filing a due process complaint notice is without merit. 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

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<sup>14</sup> 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, Appeal No. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). The guidance document is no longer available on the State's website; however, a copy of the August 2024 rate dispute guidance is included in the administrative hearing record as an attachment to the district's motion to dismiss.

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 for lack of subject matter jurisdiction must be reversed and the case remanded to allow the parties to have the opportunity to proceed to an evidentiary hearing on the merits of the parent's claims. The parties are to address their dispute, including rate issues, during an impartial hearing using the Burlington-Carter standard for services that have been privately obtained by the parent without the consent of school district officials.

## **VII. Further Clarification Upon Remand**

Lastly, it bears mentioning that the parties, in the motion to dismiss before the IHO and the response thereto, have largely treated this matter as a dispute related to the dual enrollment statute and have continued the same arguments on appeal. However, parent's due process complaint notice indicates that the student has been enrolled in a public school. Because no hearing was convened, there were no appearances before the IHO, and the parties did not provide any relevant facts in their briefing, there is no information regarding where the student attended school during the 2022-23 school year. There are only documents indicating that the student had an October 2020 IESP, a January 2022 IESP was developed by the CSE, and the parent listed the student's school as a district elementary school rather than a nonpublic school in the due process complaint notice (Due Process Compl. Not. at p. 1; Dist. Resp. to Due Process Compl. Not at p. 3). The July 2024 due process complaint notice did not specify if the student had moved schools at some point in time and alleges only that the claims relate to the 2022-23 school year and that the student had an October 2020 IESP and makes no reference to events described by the district in the responsive documents (Due Process Compl. Not.). Upon remand, the parties and the IHO should clarify, on the record, where the student attended school during the 2022-23 school year rather than relying on assumptions regarding such basic facts.

## **VIII. Conclusion**

For the reasons described above, this matter is remanded for further proceedings, including development of the evidentiary hearing record with rulings on the admissibility of evidence sought by the parties, with respect to the parent's July 15, 2024 due process complaint notice, any defenses to the parent's claims, and if necessary a determination of whether the services the parent obtained were appropriate to address the student's needs and, if so, whether equitable considerations favor the parent including any defense raised by the district.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO decision, dated October 22, 2024, dismissing the parent's 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**  
                         **March 19, 2025**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**