The University of the State of New York

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

No. 24-590

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

Appearances:
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice for lack of subject matter jurisdiction. Respondent (the district) cross-appeals, asserting alternative grounds to dismiss the parent's due process complaint notice. The appeal must be sustained, the cross-appeal dismissed, 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. The student has been parentally placed at a nonpublic school (Parent Ex. B at p. 11).[1] A CSE convened on August 25, 2021 to develop an IESP for the student, determined that the student was eligible for special education services as a student with a speech or language impairment, and recommended that he receive two 30-minute session per week of individual speech-language therapy (id. at pp. 2, 9).

On October 19, 2023, the parent executed a contract with Enhanced Support Services Inc. for the provision of speech language services to the student at a rate of $295 per hour for the 2023-24 school year from July 1, 2023 to June 30, 2024 (Parent Ex. E).

In a "10-Day Notice of Private Placement" letter dated April 1, 2024, the parent, through her attorney, notified the district that it had failed to implement services for the student for the 2023-24 school year, that the parent had been unsuccessful finding a provider for the mandated services at the district's standard rates, and therefore, that the parent would be compelled to unilaterally obtain the student's mandated services and seek reimbursement or direct funding from the district if it failed to assign providers (Parent Ex. C).

By due process complaint notice dated April 11, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and equitable services for the 2023-24 school year (Parent Ex. A). The parent asserted that the district failed to convene a CSE meeting for the 2023-24 school year and that the August 2021 IESP was outdated and expired (id. at p. 3). The parent further alleged that the district failed to implement the services recommended in the August 2021 IESP and that she was unable to locate a provider on her own accord who was willing to accept the district's rates (id.). For relief, the parent requested direct funding of any providers located by the parent at the provider's contracted rates and compensatory education services for any services not provided to the student due to the district's failure to implement services (id. at p. 4).

After the appointment of an IHO by the Office of Administrative Trials and Hearings (OATH), a prehearing conference was held on May 17, 2024, where the district advised that it would be asserting an affirmative defense that the parent failed to provide the district with notice of her request for equitable services by June 1 (Tr. pp. 1, 4-5).

At the impartial hearing on June 24, 2024, the district made a motion to dismiss the parent's due process complaint notice on the ground that the IHO lacked subject matter jurisdiction (Tr. pp. 13-16; see June 20, 2024 Dist. Mot. to Dismiss). The parent orally opposed the district's motion (Tr. pp. 14-15). The IHO denied the district's motion to dismiss for lack of subject matter jurisdiction, indicated that further action in September 2024 would need to be taken on a proposed

[1] The hearing record contains duplicative copies of the August 2021 IESP and April 11, 2024 due process complaint notice (see Parent Exs. A, B; Dist. Exs. 1, 2). For purposes of this decision, only the parent exhibits will be cited when both the parent and district admitted an exhibit into evidence. 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]).

regulatory change, and advised that the district could "reintroduce the motion" if it remained "alive in the future" (Tr. pp. 16-17). The parties proceeded with the impartial hearing; both parties submitted documentary evidence into the hearing record, both parties presented opening statements, a witness testified on behalf of the parent and the district cross-examined the parent's witness, and both parties presented closing statements (Tr. pp. 17-45).

After the June 24, 2024 hearing, the district submitted an updated, written motion to dismiss for lack of subject matter jurisdiction (see Sept. 16, 2024Dist. Mot. to Dismiss).

In a decision dated October 22, 2024, the IHO granted the district's motion to dismiss for lack of subject matter jurisdiction (IHO Decision at p. 2). The IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (id. 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 temporary restraining order staying implementation or enforcement of 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 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.).[2] 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

[2] The IHO 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).

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" (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in dismissing her due process complaint notice with prejudice for lack of subject matter jurisdiction. The parent asserts that the IHO has authority to resolve disputes for the district's failure to implement its recommended services. The parent also argues that the emergency regulation was not a clarification of law, has been stayed, and is therefore not enforceable. The parent argues that dually enrolled students are entitled to due process under both Education Law § 3602-c and Education Law § 4404. In addition, the parent asserts that she has been denied due process because the IHO failed to consider the student's pendency. Accordingly, the parent requests that the IHO's decision be reversed, and, because the parties already had an impartial hearing on the merits, that an SRO find the student was entitled to pendency and order the district to fund the providers located by the parent at the providers' contracted rates.[3]

In an answer and cross-appeal, the district argues that the IHO correctly determined that she lacked subject matter jurisdiction to review the parent's claims and granted the district's motion to dismiss. The district argues that the IHO correctly found that the parent could seek other forums for relief, and 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." According to the district, the parent failed to exhaust administrative remedies by failing to pursue her claim with the ERES unit prior to filing a due process complaint notice. In addition, the district asserts that the parent failed to request equitable services by June 1, 2023, that the parent abandoned pendency, that the parent failed to prove that the unilaterally-obtained services were appropriate to meet the student's unique needs, and that equitable considerations did not favor the parent. The district requests that an SRO dismiss the parent's request for review.

In a "statement of fact" that the parent might have been have intended to be an answer to the cross-appeal, the parent asserts that the district's reliance on administrative exhaustion is without merit; that the district is impermissibly delegating decision-making authority to the ERES unit, which is neither independent nor impartial from the district. In addition, the parent argues that she did not abandon pendency, that the district failed to prove that the parent did not provide June 1 notice and the district waived its ability to assert such an affirmative defense by providing related service agreements, that the parent met her burden to demonstrate that the unilaterally-obtained services were appropriate to meet the student's needs, and that equitable considerations favor the parent. The parent again attaches additional exhibits to her papers.

[3] Attached to the parent's request for review is a copy of a verified petition and memorandum of law related to an Article 78 matter filed in State court.

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 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

[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]).

[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.

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 2023-24 school year (Parent Ex. A at p. 3). While the due process complaint notice also alleges that the district did not implement services from the August 2021 IESP during the 2023-24 school year (id.), 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 2023-24 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; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the 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]).[6]

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]).[7] 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.

[6] 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]).

[7] 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]).

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 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] 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]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.[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. 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

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

[9] The district asserts that Wieder was limited to its facts insofar as the dually enrolled student was a part-time public-school student under Education § 3602-c, but that the student in this case is not a part-time public student under the dual enrollment statute, presumably because the location of the services to be delivered under an IESP for this student would be different. But Wieder does not make that distinction and the argument is without merit. The statute itself also does not state that students have certain rights if the location of services listed on an IESP is in one location but are divested those rights if the IESP calls for a different location (Educ Law § 3602-c). Moreover, the Wieder court carefully explained that it was rejecting Monroe-Woodbury Central School District's principle argument that dually enrolled students must be educated in "regular classes and programs of the public schools, and not elsewhere" and further explained that "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" but that while the programming must be appropriate to address the student's educational needs, the school district is not compelled to deliver the service in either the public or private school (Wieder, 72 N.Y.2d 174, 183-84 [1988]; see also Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [noting the dual enrollment statute required a school district to provide student with individual aide at his nonpublic school when the purpose of the aide was to support him in his general education classroom]).

Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. 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.).[10] 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).[11]

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

[10] 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 notice in this matter was filed with the district on April 11, 2024, prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[11] On November 1, 2024, the Supreme Court Albany County 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]).

> 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]).[12]

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 parent could pursue alternative forums, the district's argument that the parent failed to exhaust administrative remedies by not first bringing her 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]).

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 parent's due process complaint notice following the 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—

[12] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations 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 updated motion to dismiss dated September 16, 2024.

made determinations regarding the issues in the first instance, particularly given that she initially denied the district's motion to dismiss on the record and directed the parties to proceed with an evidentiary hearing on the merits (Tr. pp. 16-45). 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.

Having determined to remand this matter, it is unnecessary to address the district's cross-appeal and it will therefore be dismissed. 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 June 24, 2024, and issue a written decision on the merits of the parent's claims and any defenses asserted by the district, including a determination on pendency.

VII. Conclusion

For the reasons described above, this matter is remanded for the IHO to issue a written decision on the merits of the parent's claims asserted in her April 11, 2024 due process complaint notice.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's 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 26, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER