The University of the State of New York

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

No. 24-603

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 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

Due to the procedural posture of this appeal a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened on April 4, 2019 and finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student with a recommendation for eight periods per week of direct, group special education

teacher support services (SETSS), one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of group counseling services, and two 30-minute sessions per week of individual occupational therapy (OT) services (Parent Ex. B at pp. 1, 6). The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 8).

A CSE convened on May 19, 2021 and finding that the student continued to be eligible for special education as a student with a speech or language impairment, developed an IESP for the student with a recommendation for five periods per week of direct, group special SETSS, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of individual counseling services, and two 30-minute sessions per week of individual OT (Dist. Ex. 2 at pp. 1, 11-12). The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 14).

By letter dated May 30, 2023, the parent indicated that she would parentally place the student at a nonpublic school at her own expense and made a request for the district to continue to provide special education services to the student for the 2023-24 school year (Parent Ex. E). In a "Ten (10) Day Notice" letter dated August 23, 2023, the parent, through her lay advocate, notified the district that it had failed to implement services for the student for the 2023-24 school year and that the parent would be compelled to unilaterally obtain the student's mandated services through a private agency at an enhanced market rate if the district failed to assign providers (Parent Ex. D).

On September 1, 2023, the parent signed an enrollment agreement with Education Optimized (EDopt) for the provision of special education and related services to the student for the 10-month period of September 2023 through June 2024 (Parent Ex. C). Schedule A of the enrollment contract listed the services, durations, and rates (id. at p. 3).

In a due process complaint notice dated July 15, 2024, the parent, through an individual with Prime Advocacy, LLC, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (Parent Ex. A). For the 2023-24 school year, the parent alleged that the district "failed to hold an annual IESP meeting, develop timely education programs, provide sufficient periods of the mandated services, and supply a provider for the [s]tudent" (id. at p. 2). When describing the services, the parent pointed to the CSE meeting conducted on April 4, 2019 (id. at p. 1). According to the parent, the CSE's

> latest program of services developed for [the student] does not meet the individualized needs of the [s]tudent. It does not address the difficulties and disabilities that the [s]tudent presents with, and it does not provide sufficient supports and services to allow the [s]tudent to make effective progress towards age-appropriate goals and objectives. The CSE failed to consider all of the [s]tudent's needs, and did not address those difficulties in a substantive manner. The [p]arent does not agree with this CSE IESP as the program mandated does not meet the unique and individualized needs of the [s]tudent, and does not allow the [s]tudent to make appropriate progress towards age- appropriate goals and objectives. It is the parent's belief that the [s]tudent requires additional extensive supports and services in order to

> make meaningful progress in the 2023-2024 extended school year and to avoid a regression from the prior school year.

(Parent Ex. A at p.1). The parent does not specifically reference the "most recent" program in the due process complaint notice to which she was referring and instead references the "prior" April 2019 programing (Parent Ex. A).

The parent further alleged that she was unable to identify and hire qualified providers for the student at the district's rates; however, the parent located providers who could provide services to the student "at a rate higher than the standard [district] rate" (Parent Ex. A at p. 2). The parent notified the district of her intent to take unilateral action to implement the necessary services for the student that the district failed to provide and seek funding from the district (id.). Additionally, the parent alleged that the district did not develop an updated program of services for the student for the 2024-25 school year (id. at p. 3).

As relief, the parent requested funding for SETSS, speech-language therapy, counseling and OT at enhanced rates set by the providers for the 2023-24 school year; a bank of compensatory education services to be provided to the student to make up for any services missed; and an order directing the district to provide the services included in the student's last recommended educational program for the 2024-25 school year (Parent Ex. A at p. 3).[1]

The district submitted a due process response dated September 6, 2024 generally denying the allegations contained in the due process complaint notice (Dist. Resp. to Due Process Compl. Not). In a "supplemental notice" attached thereto, the district pointed out services as listed in the May 2021 IESP (id. at p. 3).

B. Impartial Hearing Officer Decision

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH). In a motion to dismiss dated October 24, 2024, the district requested the IHO dismiss the parent's due process complaint notice on the ground that the parent's claims were not yet ripe (Oct. 24, 2024 Dist. Mot. to Dismiss). In a second motion to dismiss dated October 30, 2024, the district requested the IHO dismiss the parent's due process complaint notice on the ground that the IHO lacked subject matter jurisdiction (Oct. 30, 2024 Dist. Mot. to Dismiss). At the impartial hearing on October 31, 2024, the IHO determined that the district's argument that the parent's claims were not ripe for adjudication was moot (Tr. pp. 9-16). With respect to the district's motion to dismiss on the ground of lack of subject matter jurisdiction, the IHO noted that the parent had not yet responded to the district's motion regarding and the IHO wanted to allow the parent an opportunity to respond in writing (Tr. p. 16). At the October 31, 2024 impartial hearing, both parties presented oral argument on the hearing record of their respective positions with respect to subject matter jurisdiction (Tr. pp. 16-25). The IHO then orally determined that she lacked subject matter jurisdiction since the only relief the parent was seeking was an enhanced rate for unilaterally-

[1] The parent requested both that the district "provide the student" with services for the 2024-25 school year and that the services be provided "at enhanced provider rates, to ensure that the parent has the capacity to implement" the requested services (Parent Ex. A at p. 3). Accordingly, it is unclear if the parent was requesting district provided services for the 2024-25 school year or district funding for services to be obtained by the parent.

obtained services (Tr. pp. 25-31). However, because the parent had not yet had the opportunity to respond in writing to the district's motion, the IHO indicated that she would render a decision in writing on the district's motion at a later date and the parties proceeded with an evidentiary hearing (Tr. pp. 31-33, 35-40). In a written brief dated October 31, 2024, the parent opposed both of the district's motions to dismiss (Parent Memo. of Law in Opp.).

In a decision dated October 31, 2024, the IHO determined that, consistent with the district's argument, she lacked subject matter jurisdiction to review the parent's "implementation/enhanced rate claim" (IHO Decision at pp. 1, 3-5). The IHO determined that the parent's claims in the due process complaint notice did not relate to the identification, evaluation, educational placement of the student, the provision of a 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 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/enhanced rate claims (id. at p. 4). The IHO stated 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 can seek the enhanced rate, and if not successful there . . . can make a complaint to the State Education Department and from there can 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 motion to dismiss [wa]s granted, irrespective of the emergency regulation

(IHO Decision at pp. 4-5).

The IHO also found that she lacked "an essential element to having subject matter jurisdiction" as she was not empowered to provide the parent's 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.).[2] Next, the IHO granted, "to the extent applicable," the district's motion to dismiss the parent's claims for compensatory education "equal to missed services under an IESP," finding that the parent's requested relief was not compensatory in nature, but rather, was for enhanced rate relief, which she ruled she did not have subject matter jurisdiction to address (id. at pp. 4-5). For those reasons, the IHO dismissed with prejudice those portions of the parent's due process complaint notice that sought relief of "implementation/enhanced rate" (id.

[2] As for the IHO's statement 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 upon an evidentiary record, which is an IHO's essential function.

at p. 5). She declined to dismiss on the basis of ripeness (id.). The IHO also included an "appendix" to the decision, following the IHO's signature, which was a section entitled "Other Noteworthy Points," wherein the IHO discussed equity, implied waiver, equitable estoppel/prejudice, the parent acting against her own self-interest, judicial economy, the legality of the emergency amendment, the parent's request for a final determination on the merits of her due process complaint notice, and the parent's argument that a proposed amendment to State regulation had not been passed (id. at pp. 6-8).

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.[3] The parent asserts, among other things, that under the existing statutory and regulatory scheme, the parent had a right to file a due process complaint notice in order to obtain relief, that the emergency regulation has been stayed and is therefore not enforceable, and that "rate disputes are not divorced from implementation claims." As relief, the parent requests reversal of the IHO's decision and that the matter be remanded to the IHO.

In an answer, the district asserts that the IHO correctly determined that she lacked subject matter to review the parent's claims and granted the district's motion to dismiss. The district argues that the parent's arguments are meritless and requests reconsideration of recent SRO decisions that determined IHOs have subject matter jurisdiction. The district relies on State education guidance issued in August 2024 to support its position that State education law does not authorize a parent the right to file a due process complaint notice to assert a claim that a district failed to implement an IESP or request an enhanced rate for equitable services. The district further argues that in accord with the August 2024 State guidance that claims regarding implementation of IESPs or enhanced rates are "best handled at the local level," a parent can submit a claim to the district's enhanced rate equitable services (ERES) unit.

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

[3] I note that the request for review does not conform to practice regulations governing appeals before the Office of State Review. The 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 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]).

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 individualized education program" (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 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]).

[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.

VI. Discussion—Subject Matter Jurisdiction

Initially, although the IHO indicated on the hearing record that the parent was solely seeking relief in the form of an enhanced rate (Tr. p. 25) and the IHO and both parties, to some extent, 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. 2). While the due process complaint notice also alleges that the district did not implement services from the April 2019 IESP during the 2023-24 school year (id.) and the hearing record contains a May 2021 IESP (Dist. Ex. 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 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 and 2023-24 school years, 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]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

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

Consistent with the IDEA, 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).[7] In addition,

[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 district did not seek judicial review of these decisions.

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.

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 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).[8] Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment to 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.).[9] 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,

[8] 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 rule adopted by the Board of Regents.

[9] 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 July 15, 2024 (Parent Ex. A at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

> 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).[10]

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 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]).[11]

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.

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[10] 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]).

[11] 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, thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

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 to allow the parties to have the opportunity to proceed to an evidentiary hearing on the merits of the parent's 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, particularly when she held an evidentiary hearing. 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 October 31, 2024, and issue a written decision on the merits of the parent's claims.

Lastly, in the proceeding below and in this appeal, in its rush to have the case dismissed for lack of subject matter jurisdiction, the district ignores the fact that the parent also challenged the adequacy of the student's "most recent" IESP, stating that she disagreed with the plan because it provided inadequate supports to the student. The IHO determined that there was no dispute regarding the recommendation of the CSE, and I note only that the parties have included different plans in the hearing record. These matters should be clarified on remand as it would be relevant the relief sought in this proceeding.

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 July 15, 2024 due process complaint notice.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated October 31, 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