The University of the State of New York

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

No. 24-525

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

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, in part, the parent's request that respondent (the district) fund the costs of her son's private special education services delivered by Yeled v'Yalda ECC (Yeled), as well as to have the district provide her son's related services, for the 2023-24 school year, and dismissed her claims, in part, for lack of subject matter jurisdiction. The appeal must be sustained in part.

### 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

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a Committee on Preschool Special Education (CPSE) convened on March 16, 2022 and determined that the student was eligible for special education as a preschool student with a disability (Parent Ex. B at p. 1). The CPSE recommended that the student receive five 60-minute sessions per week of group (3:1) special education itinerant teacher (SEIT) services, two 30-minute sessions per week of group (2:1) speech-language therapy, and three 30-minute sessions per week of group (2:1) occupational therapy (OT) for the 10-month school year (id. at pp. 1, 13).

A CSE subsequently convened on May 25, 2022 to review the student's transition to school-aged services, found him eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of June 8, 2022 (Parent Ex. E at p. 1).[1] The CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (id. at p. 9). The IESP indicated that the student was parentally placed in a non-public school (id. at pp. 1, 11).

By letter to the CSE dated May 30, 2023, the parent, through her attorney, advised the district of her residence, that the student would be parentally placed in a nonpublic school in the district for the 2023-24 school year, that she wanted the student to receive all required services from the district, and that she consented to the district providing those services (Parent Ex. D at p. 2).

On July 18, 2023, the parent executed a contract with Yeled for the provision of "Special Education and/or Related Services" to the student for the 2023-24 school year (Parent Ex. H).[2] The contract provided that the parent would seek payment for the services from the district but would be responsible for any services delivered for which the provider did not receive compensation at an hourly rate of $198 per hour for special education services and $250 for related services (id.).

By letter to the CSE dated September 2, 2023, the parent, through her attorney, expressed "great concern" regarding the student's services recommended for the student for the 2023-24 school year, as the parent noted that the May 2022 IESP removed the student's SEIT services and did not replace them with an equivalent service (Parent Ex. C at p. 2). The parent believed that the student required a continuation of "the broader SEIT program or an appropriate placement in a hybrid special education/general education program" as was recommended in the March 2022 CPSE IEP (id. at pp. 2-3). She further indicated that the May 2022 IESP was "outdated and

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

[2] Yeled is an approved provider of SEIT services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]); however, the agency has not been approved by the Commissioner of Education as a school with which districts may contract to instruct school-aged students with disabilities (see 8 NYCRR 200.1[d], 200.7).

expired" (id. at p. 3).[3] The parent rejected the CSE's recommendations and stated that she had "no choice but to implement the prior recommended services" at the student's nonpublic school and that she would be seeking reimbursement or direct payment for the unilaterally-obtained "special education program and related services" (id.).

For the 2023-24 school year, the student received five 60-minute sessions per week of "Special Education" from providers with Yeled (see Parent Ex. F).[4]

A CSE then convened on February 1, 2024 and developed an IESP for the student with a projected implementation date of February 29, 2024 (see Dist. Ex. 4 at p. 1). The CSE continued to find the student eligible for special education as a student with a speech or language impairment (id.). In preparation for the February 2024 CSE meeting, a reevaluation was conducted of the student that included a psychoeducational assessment, a physical therapy (PT) assessment, and a teacher report (Dist. Exs. 6, 7 at p. 1; see Dist. Ex. 5 at p. 1). The IESP reflected that the student was not receiving his recommended speech-language therapy and OT related services at that time (Dist. Ex. 4 at p. 2). The February 2024 CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (id. at pp. 6-7). The district sent the parent a prior written notice dated February 16, 2024, reflecting much of the above information, and informing the parent that the student's recommended services would be put into effect on March 8, 2024 (Dist. Ex. 5 at p. 1).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 12, 2024, the parent, through her attorney, alleged that the May 2022 CSE "failed to recommend an appropriate placement or sufficient services" for the student for the 2023-24 school year in that the May 2022 CSE failed to recommended SEIT services as the March 2022 CPSE had or equivalent support (Parent Ex. A at pp. 2-3). The parent also alleged that the May 2022 IESP was "outdated and expired," and a CSE failed to timely convene to engage in educational planning for the student for the 2023-24 school year (id. at p. 3). The parent requested, among other things, that the IHO order the district to fund the program set forth in the March 2022 CPSE IEP for the 2023-24 school year, and to directly fund or reimburse the private service providers arranged for by the parent at their contracted rates (id.). The parent further indicated that she reserved the right to seek compensatory education if she was unable to find a SEIT or related service providers (id. at pp. 3-4).

[3] The letter reads that the "IESP dated 5/25/2022 is not outdated and expired and does not provide enough support for [the student] to make meaningful academic progress" (Parent Ex. C at p. 3). However, based on the context in which this statement was asserted, coupled with the later assertion in the due process complaint notice that the May 2022 IESP was "now outdated and expired," I find it likely that the original statement that it was "not outdated and expired" was a typographic error (compare Parent Ex. A at p. 2, with Parent Ex. C at p. 3).

[4] At times in the hearing record, the special education services provided appear to be interchangeably referred to either broadly as "special education services" or as SEIT services or special education teacher support services (SETSS). As to the lattermost term, SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

**B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 29, 2024 (Tr. pp. 1-90). The district orally made a motion to dismiss, alleging that the IHO lacked subject matter jurisdiction over the parent's claims, and the IHO did not make a ruling on the motion at the time, instead choosing to proceed with the impartial hearing (Tr. pp. 8-11). The parent, testified by affidavit that she was unable to locate related services providers for the student's speech-language therapy and OT, and requested that the IHO order the provision of those services "even after the 2023-24 school year . . . [with] no expiration date," and specifically requested a "bank" of 40 hours of speech-language therapy and 60 hours of OT, which was based on a period of 40 weeks (Parent Ex. K ¶¶ 16-17). The parent also requested reimbursement for the student's privately obtained special education services, and that all providers of the services set forth in the March 2022 CPSE IEP be funded at contracted rates (id.).

In a decision dated October 10, 2024, the IHO granted the district's motion to dismiss only with respect to any "enhanced rate claim[s]" by the parent, but denied the district's motion to dismiss in part because the IHO found that she retained subject matter jurisdiction over the parent's claim that the May 2022 CSE inappropriately failed to recommend "SEIT/SETSS" (IHO Decision at p. 13). In so finding, the IHO cited to an appendix to the decision (id. at pp. 13, 17-18). Despite the findings in the decision, the IHO indicated in the appendix that the due process complaint notice had "no actual dispute or disagreement as to the CSE's recommendation that an IHO needs to preside over" (id. at p. 17). The IHO further indicated that her finding that she lacked subject matter jurisdiction hinged on the creation of the district's newly implemented Enhanced Rate Equitable Services (ERES) unit, which aimed to address implementation and enhanced rate claims, and that the granting of the motion was not based upon the recent passing of an emergency regulation (id. at p. 18).

Turning to the remaining issues, the IHO found that the district failed to meet its burden to prove that it offered or provided the student appropriate equitable services for the 2023-24 school year (id. at pp. 13, 15). More specifically, the IHO found that the district failed to adequately justify the reduction of the student's special education teacher and OT services between the March 2022 CPSE IEP and the May 2022 IESP (id. at p. 13). Further, the IHO found that the district failed to implement any services for the student for the 2023-24 school year (id.). The IHO also found that the unilaterally obtained SETSS being provided by Yeled were appropriate and that equitable considerations weighed in favor of the parent's requested relief (id.).

The IHO ordered the district to fund the unilaterally obtained SETSS consisting of five one-hour sessions per week, subject to the parent presenting proof of the student's attendance and invoices of services, as well as subject to a maximum of the equivalent of 30-weeks of services given the parent's testimony regarding the student's school schedule (IHO Decision at pp. 13, 15). The IHO further noted the parent's testimony that she was unable to find providers to deliver the student's speech-language therapy and OT and, therefore, ordered the district to "implement these services or provide [the] parent with [related] services authorizations (RSAs)" (id. at pp. 14-15). The IHO ordered that the student be provided with 30 hours of speech-language therapy and 45 hours of OT, which were calculated based upon the private school's purported schedule of 30-weeks (id.).

## IV. Appeal for State-Level Review

The parent appeals, alleging, among other things, that the IHO impermissibly reduced the relief awarded to the equivalent of 30-weeks of services, when the New York State Education Department (NYSED) mandates a 180-day school year, which equates to 36-weeks.[5] The parent further contends that the equivalent of 36-weeks of services is the amount that the student would have received, if the district provided them. In addition, the parent contends that the IHO impermissibly ignored the private provider's contracted rate of $198 because the IHO improperly believed that she lacked subject matter jurisdiction.[6] The parent seeks funding for the private SEIT/SETSS provider at a rate of $198 per hour for 36 weeks of services.

In an answer, the district contends, among other things, that the due process complaint notice was entirely an implementation claim, and that the IHO correctly dismissed the due process complaint in its entirety for lack of subject matter jurisdiction. The district contends that the section of the IHO decision ordering relief was merely dicta. The district requests that this matter be remanded if the proffered interpretation of complete dismissal is not affirmed in the district's favor, because it contends that the IHO's decision was contradictory. The district further contends remand would be appropriate due to the IHO's alleged failure to consider district evidence and arguments. Regarding relief, the district contends that there was no indication in the parent's evidence as to how many weeks of services the student required or received, despite the impartial hearing taking place after the conclusion of the related school year, and that the parent likely had evidence available to them to demonstrate this. The district contends that the IHO correctly credited the parent's testimony that the student attended school for 30-weeks.

## 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

[5] I note that the request for review does not have a caption identifying to what matter the pleading pertains and does not identify the underlying IHO case number or the parties' names. For future matters, the parent's attorney should place a caption on pleadings submitted to the Office of State Review to ensure efficient and accurate processing of appeals before the Office of State Review.

[6] The parent's request for review indicates that a petition and accompanying documents related to a lawsuit proceeding in State court were attached to the request for review; however, no such documents were submitted by the parent to the Office of State Review. In any event, to the extent necessary to consider, such court documents are a matter of public record.

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]).[7] "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.).[8] 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

### A. Subject Matter Jurisdiction

At the outset, it is necessary to address the issue of subject matter jurisdiction which was the basis for the IHO declining to decide what rate was appropriate for the parent's privately obtained SETSS service provider, and the district's assertions that the IHO determination should

[7] 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]).

[8] 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.

be sustained and that the due process complaint notice was dismissed in its entirety (see IHO Decision at pp. 13, 17).

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. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of 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 New York Education Law 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]).[9]

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

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).[10] In addition, the New York Court of Appeals explained that student 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 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

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

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.).[11] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State 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).[12]

Consistent with the district's position, 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]).[13]

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[11] 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 12, 2024 (Parent Ex. A at p. 7), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

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

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

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

Finally, the IHO found that the creation of the ERES unit was the primary reason for granting the district's motion to dismiss in part. 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] [finding that "[w]hile 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]).

Accordingly, the parent's appeal seeking reversal of the IHO's determination that she lacked subject matter jurisdiction to determine the proper rate of funding for the granted relief to the parent must be sustained.

As a final matter, contrary to the district's argument that the portion of the IHO's decision that granted the parent's requested relief was merely dicta and that the IHO's decision should be read to have dismissed the due process complaint in its entirety, the IHO's decision explicitly denied the district's motion in part and noted that the matter involved "a permissible subject matter - a dispute as to the services recommended by the CSE reducing the student's SEIT/SETSS services" (IHO Decision at pp. 13, 15).[14] Thus, the main body of the IHO decision denies the motion to dismiss with respect to claims related to the parent's disagreement with the recommendations of the CSE, and the IHO goes on to order relief relating to those claims (id. at p. 15).

**B. Relief**

The IHO denied the parent's request for district funding of the privately obtained SETSS services at the contracted rate on the ground that she did not have subject matter jurisdiction to determine the rate of relief (see IHO decision at pp. 13, 15, 17). However, as set forth above, the IHO did have jurisdiction to do so. While the IHO did not grant relief in the form requested, she did conduct an analysis using the Burlington/Carter framework, and neither party has appealed the

with a Disability, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website; thus a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

[14] While there is contrary language in the appendix to the decision regarding the claims raised by the parent, the IHO's statements in the body of the decision reflect the claims raised in the due process complaint notice (IHO Decision at pp. 13, 17; see Parent Ex. A).

IHO's findings that the district did not provide the student with equitable services for the 2023-24 school year, that the services delivered by Yeled were appropriate, and that equitable considerations did not weigh against the parent's requests for relief (see id. at pp. 13, 15). In addition, neither party has appealed the IHO's order for the district to deliver or provide RSAs for the student to obtain speech-language therapy and OT services (see id. at p. 15). Accordingly, these determinations have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The only remaining issue on appeal relates to the number of weeks in the school year. As summarized above, the IHO reduced the parent's original requests for relief that were based on a calculation of 40 weeks of school attendance, to an award based on a calculation of 30 weeks of school attendance pursuant to the parent's testimony at the impartial hearing (IHO Decision at pp. 13, 15; Tr. pp. 61-65; Parent Ex. K ¶ 17). The parent's testimony by affidavit reflected her request for an award of compensatory education for speech-language therapy and OT to the student based upon "the 40 weeks during which the District failed to implement its own recommendations" (Parent Ex. K ¶ 17). The parent testified at the impartial hearing that she requested relief amounting to 40 weeks of services because she "assum[ed] it was the school year" (Tr. pp. 61-62). When questioned further on this, the parent conceded that she did not calculate holidays into the 40-week determination and indicated that she "would say maybe . . . 30 weeks . . . altogether," would reflect a more accurate calculation, but that this figure was "off [her] head" (Tr. pp. 62-64). When the IHO asked if the parent wanted to take a moment and look at a piece of evidence to confirm her calculation, the parent responded by saying "You could switch it to 25" (Tr. p. 64). The IHO then clarified that she was not implying that the parent's calculation of 30 weeks was incorrect, but that she was just trying to clarify, at which point the parent stated: "so I think 30 weeks makes sense" (Tr. pp. 64-65).

The parent's testimony on the issue of the number of weeks in the school year was equivocal at best and there is no other evidence in the hearing record as to how many weeks the student's schedule at his private school placement spanned. Accordingly, the evidence in the hearing record does not support the IHO's cap on the award based on the parent's testimony alone. On the other hand, the parent's request for services to span a 40-week school year is also without support in the hearing record. As for the services delivered by Yeled, as set forth below, the award shall be based on proof of delivery of the services during the 10-month portion of the 2023-24 school year. As for the speech-language therapy and OT services, the IHO's order will be modified to provide for services over 36-weeks.[15]

Given the final and binding determinations of the IHO, the determination that the IHO had subject matter jurisdiction to preside over all of the parent's claims, and the lack of evidence as to the student's actual school schedule, the district shall be required fund the costs of up to five hours per week of SETSS delivered to the student by Yeled during the 10-month portion of the 2023-24 school year at the contracted rate of $198 per hour upon proof of delivery, and the district shall be

[15] A 10-month school year consists of approximately 36 weeks (180 school days divided by 5 days per week) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]).

required to provide (or provide RSAs) to the student for 36 hours of speech-language therapy and 54 hours of OT, which are based on a calculation of 36 weeks (see Parent Exs. H, I).

## VII. Conclusion

Based on the foregoing, the IHO had jurisdiction to award the relief sought. Further, the IHO's determinations that the district failed to provide the student with equitable services for the 2023-24 school year, that the unilaterally-obtained services provided by Yeled were appropriate, that equitable considerations weighed in the parent's favor, and that the student was entitled to district funding for SETSS provided by Yeled and provision by the district of speech-language therapy and OT or RSAs for such services are final and binding. The evidence in the hearing record did not, however, support the IHO's limit on the relief awarded based on the parent's testimony about the number of weeks in the student's school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated October 10, 2024 is modified by reversing those portions which found that the IHO did not have jurisdiction to order district funding of services from Yeled at the contracted rate and which limited the relief of SETSS funding and provision of speech-language therapy and OT to the equivalent of 30 weeks of services, including the calculations based thereon resulting in an award of 30 hours of speech-language therapy and 45 hours of OT;

**IT IS FURTHER ORDERED** that the district shall directly fund up to five hours per week of SETSS provided to the student by Yeled at the contracted rate for the 10-month 2023-24 school year, upon submission of proof of the provision of services to the student.

**IT IS FURTHER ORDERED** that the district shall directly provide the student with, or provide the student with RSAs to obtain, not more than 36 hours of speech-language therapy and not more than 54 hours of OT.

**Dated:** **Albany, New York**
**January 27, 2025**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**