The University of the State of New York

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

No. 24-540

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Frank J. Lamonica, 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 to review the parent's claims. The appeal must be sustained, and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Given the procedural posture of the matter—namely that it was dismissed with prejudice prior to the introduction of evidence—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the only information available about the student was set forth in the parent's due process complaint notice.

The student has been parentally placed at a nonpublic religious school (Due Process Compl. Not. at p. 1). According to the parent, a CSE convened on December 11, 2023 to develop an IESP for the student and recommended that she receive three periods per week of special education teacher support services (SETSS) (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated July 12, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) and violated the student's right to equitable special education services for the 2023-24 school year (see Due Process Compl. Not.at p. 2). The parent asserted that the district created an IESP dated June 24, 2020 that called for SETSS 3 times per week (id. at p. 1). The parent then alleged that the district developed a December 11, 2023 IESP similarly calling for SETSS 3 times per week, but that for the 2023-24 school year the district "improperly and impermissibly shifted its responsibility to provide the services to the [s]tudent" to the parent "by not supplying providers for the services it recommended" (id.). The parent also claimed that in preparing for the 2023-24 school year, she was unable to find providers willing to accept the district's rates and therefore retained the services of an agency to provide the mandated services at an enhanced rate (id.).[1] Among other relief, the parent sought pendency, an order directing the district to fund the costs of the three periods per week of SETSS at an enhanced rate for the 2023-24 school year from the "student's provider," as well as compensatory educational services for any mandated services not provided by the district (id. at p. 3).

B. Motion to Dismiss and Impartial Hearing Officer Decision

In a motion to dismiss dated August 27, 2024, the district asserted that the parent's due process complaint notice should be dismissed on the grounds that the IHO lacked subject matter jurisdiction and that the parent's claims were not ripe (Dist. Mot. to Dismiss at pp. 2-6). The district argued that there was no subject matter jurisdiction to hear the claims because students enrolled in non public schools have no individual right to special education under federal law and the State Education Department clarified in a recent change to State regulations that State law does not grant parents of students with IESPs the right to file a due process complaint notice in order to implement the provisions of an IESP (id. at pp. 3-4). In particular, the district asserted that the Board of Regents adopted an emergency rule in July 2024 (id. at pp. 2-4). The district contended that State guidance issued in August 2024 indicated that parents never had the right to file a due process complaint notice in order to request an enhanced rate for equitable services (id. at p. 3). Next the district asserted that the parent's claims were not ripe as the due process complaint notice was filed on July 12, 2024, before the start of the 10-month school year (id. at pp. 4-6).[2]

The parties convened on September 9, 2024 for an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-9). At the outset, the IHO stated that this matter was the last case scheduled of six cases heard that day (Tr. p. 2). During a discussion on the record, the IHO noted that the parent's disclosure was not sent to OATH and as a result she could not proceed with the hearing (Tr. p. 3). The IHO acknowledged receipt of the

[1] The parent did not identify the "agency."

[2] The case involved the alleged failure to deliver special education services pursuant to IESPs for the 2023-24 school year, and the districts argument that such a claim was not ripe after school year at issue had concluded indicates a fundamental misreading of the parents' due process complaint notice. It appears that counsel for the district mistook the claims as asserted for the 2024-25 school year which is not the case. The parent's claims did not suffer from a lack of ripeness.

district's motion to dismiss on September 5, 2024 (Tr. p. 5). The IHO then gave the parent's advocate an opportunity to respond to the district's motion to dismiss, which the parent's advocate orally opposed (Tr. pp. 6-8).

In a decision dated October 17, 2024, the IHO granted the district's motion to dismiss (IHO Decision at pp. 1, 3, 5). The IHO found that she did not have subject matter jurisdiction over the parent's implementation/enhanced rate claim raised in her July 12, 2024 due process complaint notice, because the claim did not relate to the identification, evaluation, educational placement of the student, the provision of FAPE, a manifestation determination or discipline of a student with a disability (id. at p. 3). The IHO further found that there was no actual dispute related to the December 2023 CSE's recommendations and that it had always been her belief that IHO's "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 emergency regulation 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 they 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 p. 4).

The IHO also stated that she lacked "an essential element to having subject matter jurisdiction" in that she was not empowered to provide the parent's requested relief (IHO Decision at p. 4). The IHO further explained that although she could order the parent's requested relief, an IHO could not "force the implementation unit to do anything" (id.).[3] Next, the IHO granted the district's motion to dismiss the parent's claims for compensatory education finding that the parent's requested relief was not compensatory, it was for an enhanced rate, for which she did not have subject matter jurisdiction (id. at p. 5). For those reasons, the IHO dismissed those portions of the parent's due process complaint notice that sought relief of "implementation/enhanced rate" (id.). The IHO's decision also included a section in the decision entitled "Other Noteworthy Points," wherein she discussed equity, implied waiver, equitable estoppel/prejudice, the parent acting against her self-interest, judicial economy, the legality of the emergency amendment, the parent's

[3] 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.

request for a final determination on the merits of her due process complaint notice, and the parent's argument that the amendment had not been passed (id. at pp. 5-8).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy and alleges that the IHO erred in granting the district's motion to dismiss her due process complaint notice with prejudice for lack of subject matter jurisdiction. The parent asserts that she has a right to seek review of the recommendation of the CSE pursuant to State and federal law. The parent further argues that the emergency amendment is stayed and suspended. As relief, the parent requests reversal of the IHO's decision, and remand to an IHO for a full hearing on the merits.[4]

In an answer, the district argues that the IHO correctly granted the district's motion to dismiss. The district further asserts that the IHO correctly found that the parent failed to exhaust administrative remedies by failing to pursue her claim with the ERES unit prior to filing a due process complaint notice. The district also argues that the IHO correctly determined that she lacked subject matter to review the parent's claims.

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]).

[4] The parent also acknowledges that the notice of intention to seek review was not timely filed. The parent explained the cause for the delay and argued that the district was not prejudiced by the parent's untimely filing. State regulation provides that a petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision (8 NYCRR 279.2[b]). The petitioner must also file the "notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision). Among other things, the "service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]). Here, the district has taken no position on the parent's untimely notice of intention to seek review and was able to timely file the certified record. Under these circumstances, I will exercise my discretion and decline to dismiss the parent's request for review for the failure to timely file the notice of intention to seek review (see 8 NCYRR 279.2[f]).

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]).[5] "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.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion—Subject Matter Jurisdiction

As in the motion to dismiss, the district also argues on appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP. Recently in several decisions, the undersigned and other SROs have rejected the district's position

[5] 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]).

[6] 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.

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. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; 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 district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law alone, 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]).[7]

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]).

[7] 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 § 4404 concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). [8] In addition, the New York Court of Appeals has explained that students authorized to received 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 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 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 Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

[9] The due process complaint in this matter was filed with the district on July 12, 2024 (Due Process Compl. Not. at p. 9), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

> 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).[10]

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "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

[10] On November 1, 2024, 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 SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; however, a copy of the August 2024 rate dispute guidance is included in the administrative hearing record as an attachment to the district's motion to dismiss.

is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

Finally, the IHO found that the creation of the ERES unit was the primary reason for granting the district's motion to dismiss. While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurdles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded so that the parties have the opportunity to proceed to an evidentiary hearing on the merits of the parent's claims. The parties are to address their dispute, including rate issues, during an impartial hearing using the Burlington-Carter standard.

VII. Conclusion

For the reasons described above, the IHO erred in dismissing this matter for lack of subject matter jurisdiction and the matter must be remanded for further evidentiary proceedings to determine whether the district implemented special education services for the 2023-24 school year or if the district assert was not required to do so due to the district's assertion of any defenses to the parent's claims such as a lack of a request for dual enrollment services prior to June 1, 2023. If the district was required to provide dual enrollment services and failed to do so, the IHO shall render a determination of whether the services the parent may have unilaterally-obtained from private provider(s) were, under the totality of the circumstances, appropriate to address the student's needs and, if so, whether equitable considerations favor the parent including any defense raised by the district regarding excessiveness of the costs of the private services obtained by the parent.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated October 17, 2024, dismissing the parent's complaint 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 the body of 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**
January 2, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER