



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-611

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

### **Appearances:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by 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 dismissed her due process complaint notice for lack of subject matter jurisdiction. The appeal must be sustained, and the matter remanded to the IHO for further proceedings.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

Given the procedural posture of the matter—namely that it was dismissed with prejudice prior to 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 and the district's response to the parent's due process complaint notice.

The student has been parentally placed at a nonpublic school (Due Process Compl. Not. at p. 1). According to the parent, a CSE convened on April 25, 2023 to develop an IESP for the student and recommended that he receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual hearing education services (*id.* at p. 2). In the district's supplemental notice attached to its due process response, the district confirmed that the CSE convened on April 25, 2023, determined that the student was eligible for special education services as a student with a hearing impairment, and developed an IESP that recommended general education with related services for the student (Dist. Resp. to Due Process Compl. Not. at p. 3).<sup>1</sup>

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 13, 2024, the parent, through her attorneys, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Due Process Compl. Not. at p. 1). The parent asserted that the district failed to implement the services recommended in the April 2023 IESP (*id.* at p. 2). Further, the parent asserted that the April 2023 IESP constituted the student's pendency, and sought funding for those services through pendency (*id.*). For relief, the parent requested direct funding of the providers located by the parent at the providers' enhanced rates and reserved the right to seek compensatory education services for any services not provided to the student due to the district's failure to implement services (*id.* at pp. 2-3).

The district submitted a due process response generally denying the allegations contained in the due process complaint notice (Dist. Resp. to Due Process Compl. Not).

#### **B. Impartial Hearing Officer Decision**

In a decision dated November 7, 2024, the IHO determined that she lacked subject matter jurisdiction to review the parent's claims (IHO Decision at pp. 1, 3, 5).<sup>2</sup> The IHO determined that the parent's claims in her July 13, 2024 due process complaint notice were "[i]mplementation/enhanced rate claims," which did not relate to the identification, evaluation, educational placement of the student, the provision of FAPE, a manifestation determination or

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<sup>1</sup> The student's eligibility for special education as a student with a hearing impairment is not in dispute (*see* 34 CFR 300.8[c][5]; 8 NYCRR 200.1[zz][5]).

<sup>2</sup> Although the IHO's decision is captioned "D[ecision on] R[espondent's] M[otion to] D[ismiss]," the hearing record does not include a district motion (*see* IHO Decision at p. 1).

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 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 these reasons that the motion to dismiss [wa]s granted, irrespective of the emergency regulation

(IHO Decision at p. 4).

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.).<sup>3</sup> 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 parents' requested relief was not compensatory in nature, but rather, was actually enhanced rate relief, which, as already noted, the IHO did not have subject matter jurisdiction to address (id. at pp. 4-5). For those reasons, the IHO dismissed those portions of the parent's due process complaint notice that sought relief of "implementation/enhanced rate" with prejudice (id. at p. 5). As final points, the IHO included a section in the decision entitled "Other Noteworthy Points," wherein she discussed equity, implied waiver, prejudice, the parent acting against her own self-interests, judicial economy, the legality of the emergency amendment, the parent's request for a final determination on the merits of the due process complaint notice, and the parent's argument that the amendment had not yet been passed (id. at pp. 5-8).

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<sup>3</sup> With respect to the IHO's statement in the decision 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.

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

The parent appeals and argues 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.<sup>4</sup> The parent asserts that the IHO has authority to resolve disputes for the district's failure to implement its recommended services. Also, the parent claims that the emergency regulation was stayed and unenforceable. Next, the parent argues that dually enrolled students are entitled to due process under both Education Law § 3602-c and Education Law § 4404. Finally, the parent asserts that the IHO's finding that the parent must seek relief through the ERES unit failed to recognize that under the existing statutory and regulatory scheme, the parent has a right to file a due process complaint notice. The parent further argues that the district is impermissibly delegating decision-making authority to the ERES unit and thereby undermining the parent's rights to impartial adjudication, timely resolution of disputes, and access to services. Accordingly, the parent requests that the IHO's decision be reversed. As relief, the parent requests an order directing the district to fund the student's speech-language therapy services at an enhanced rate of \$250 per hour and requests 36 hours of compensatory services for the missed hearing education services at a "prospective enhanced rate" of \$250 per hour. Alternatively, the parent requests that the IHO's decision of a dismissal with prejudice be amended to a dismissal without prejudice.

In an answer, the district argues that the IHO correctly granted the district's motion to dismiss based upon a lack of subject matter jurisdiction to review the parent's claims. 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. Lastly, the district contends that the parent is not entitled to any relief as there was no hearing, no evidence, and no testimony to support 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]).

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

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<sup>4</sup> According to the parent, on September 10, 2024, the district "sent a motion to dismiss on subject matter jurisdiction" (Req. for Rev. at p. 1). Counsel for the parent "sent an opposition motion on September 12, 2024" (id.). Then, the IHO scheduled the hearing "as part of an Omnibus" for November 12, 2024 (id. at pp. 1-2). However, as previously stated, the hearing record does not include the district's motion to dismiss or the parent's opposition thereto.

a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>5</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).<sup>6</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

## **VI. Discussion**

Recently in a number of 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. 24-602; 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

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<sup>5</sup> State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

<sup>6</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public-school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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]).<sup>7</sup>

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

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<sup>7</sup> This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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, and provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law § 4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).<sup>8</sup> In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public-school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.<sup>9</sup>

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

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<sup>8</sup> The district did not seek judicial review of these decisions.

<sup>9</sup> Citing School Dist. of City of Grand Rapids v. Ball, (473 U.S. 378 [1985]), the district argues that the student is not a "part-time public school student." The argument falls flat. I find the fact pattern addressed in Ball – a matter involving whether a school district's shared time and community education programs violated the Establishment Clause of the First Amendment – to be inapposite to the matter at hand. Moreover, as acknowledged by the district, as it must, the Supreme Court in Agostini v. Felton, (521 U.S. 203, 222 [1997]), expressly stated that its subsequent decisions undermined the assumptions upon which Ball relied.



file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).<sup>10</sup> Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board 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).<sup>11</sup>

Consistent with the district's position that there is not and has never been a right to bring a due process complaint for implementation of IESP claims or enhanced rate for services, State guidance issued in August 2024 noted that the State Education Department had "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.

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<sup>10</sup> A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in this matter was filed with the district on July 13, 2024 (Due Process Compl. Not. at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

<sup>11</sup> 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]).

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).<sup>12</sup>

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

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.<sup>13</sup> The parties are to address their dispute, including rate issues, during an impartial hearing using the Burlington-Carter standard for services that have been privately-obtained by the parent without the consent of school district officials.

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<sup>12</sup> Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SROs in the past, which decisions were subject to judicial review but went unchallenged (*see e.g., Application of a Student with a Disability*, Appeal No. 23-121; *Application of a Student with a Disability*, Appeal No. 23-069; *Application of a Student with a Disability*, Appeal No. 23-068). The guidance document is no longer available on the State's website; thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

<sup>13</sup> 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]).

## VII. Conclusion

For the reasons described above, this matter is remanded for further evidentiary proceedings as to whether the district implemented the IESP services recommended for the 2023-24 school year, any defenses to the parent's claims, and, if necessary, a determination of whether the services the parent may have unilaterally obtained from private providers were 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's decision, dated November 7, 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 14, 2025**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**