The University of the State of New York

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

No. 25-075

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 Kashif Forbes, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice for lack of subject matter jurisdiction 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 who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-

c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Given the procedural posture of the matter—namely that it was dismissed prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts is limited to the procedural history including the parent's filing of the due process complaint notice

and the IHO's dismissal of the due process complaint notice "with prejudice with respect to this forum, but without prejudice to refile in an appropriate forum" (IHO Decision at p. 11).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 16, 2024, the parent, through an advocate with Prime Advocacy, LLC, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Due Process Compl. Not. at pp. 1-2). The parent alleged that the district developed an IESP for the student on February 14, 2022 which mandated that the student receive five periods per week of special education teacher support services (SETSS) and two 30-minute sessions per week of individual speech-language therapy (id. at p. 1).[1] According the parent, the district subsequently developed an IESP on November 30, 2023 that recommended the student receive six periods per week of direct SETSS and two 30-minute periods per week of individual speech-language therapy (id. at p. 2). The parent alleged that the district did not supply providers for the services it recommended, nor did it inform the parent as to how the services would be implemented (id.). The parent further indicated she was unable "to procure a provider for the school year at the [district] rates" and was forced to obtain services from a private agency to provide the student's mandated services at an "enhanced rate" (id.). For relief, the parent requested that the district be required to fund the services set forth in "both IESPs" for the 2023-24 school year at the provider's enhanced rate (id. at p. 3).

In a due process response dated September 6, 2024, the district generally denied the parent's allegations and asserted that it intended: to challenge the appropriateness of the relief sought by the parent, including, but not limited to, costs related to the student's unilateral placement in a private school program, receipt of services, and/or private evaluations; to pursue a motion to dismiss any and all claims or requested relief regarding implementation of the student's program under New York State Education Law § 3602-c on the basis that the IHO does not have subject matter jurisdiction; to pursue a motion to dismiss any and all claims that are not ripe; and that it intended to pursue defenses of, among other things, a failure by the parent to request services by June 1 of the preceding school year under Education Law § 3602-c, and a lack of timely notice that the parent disagreed with the offered program (see Due Process Response).

B. Motion to Dismiss and Impartial Hearing Officer Decision

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH).

[1] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

By motion to dismiss dated November 13, 2024, the district asserted that the parent's due process complaint notice should be dismissed on the ground that the IHO lacked subject matter jurisdiction (Dist. Mot. to Dismiss). In a written brief dated November 4, 2024, the parent opposed the district's motion to dismiss (Parent Opp'n to Mot. to Dismiss).[2]

In a decision dated December 27, 2024, the IHO granted the district's motion to dismiss for lack of subject matter jurisdiction (IHO Decision at p. 2). The IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (id. at pp. 1-7). The IHO noted a recently adopted emergency amendment to the Commissioner's regulations and a subsequent New York State Court's issuance of a restraining order staying implementation or enforcement of the emergency regulation (id. at p. 1 n.2). The IHO explained that her determination that she lacked subject matter jurisdiction to preside over implementation or rate disputes brought under Education Law § 3602-c was made without consideration of the emergency amendment in light of the restraining order (id.).

The IHO interpreted Education Law § 3602-c to allow "two limited 'gateways'" for the type of disputes that could be brought under IDEA due process complaint procedures: those related to review of CSE recommendations and those related to child find activities (IHO Decision at p. 7). According to the IHO, the parent's claims are "better characterized as rate disputes" because the parent had placed the student in a private school and is not disputing the CSE's IESP recommendations or child find activities (id.; see id. at p. 3 n.7).

The IHO noted that IHOs appointed pursuant to the IDEA and Education Law § 4404 are trained "to decide IDEA-based issues" and have no expertise in rate disputes (IHO Decision at pp. 5, 7). The IHO further found that nothing in "federal or state law or regulations that grants an . . . IHO authority to hear a rate dispute" (id. at p. 7). The IHO noted that decisions from SROs and guidance from the New York State Education Department were not binding on IHOs (id. at p. 8). According to the IHO, there was no "binding precedent" authorizing an IHO to determine "rate disputes" (id.). In addition, the IHO noted that the parent did not address the IDEA regulations in her opposition papers and that the parent "simply ignores the fact that parents have always had the right to resolve the instant dispute in other forums" (id. at pp. 7-8).

The IHO also reviewed the legislative history of Education Law § 3602-c and determined that language included in the legislative history regarding "failure or refusal of a board of education to provide such services" referred to a failure or refusal to recommend the services that a parent wished for, or a school district's failure to provide the services in the location that a parent wanted (IHO Decision at p. 8 n.29). The IHO also addressed the parent's reliance on Gabel v. Board of Education of Hyde Park Central School District, 368 F. Supp. 2d 313 (S.D.N.Y. 2005) (id. at p. 9). The IHO noted that in Gabel, the parents wanted related services for their child who was placed in a private school, but the local educational agency (LEA) did not recommend any, or possibly

[2] In an email dated November 12, 2024, the IHO notified the parties that she was adjourning the impartial hearing "pending potential dismissal," noting that she had not received a motion to dismiss from the district but had received the parent's response to the potential dismissal (IHO Ex. I at p. 1). Further, the hearing record contains an email from the IHO to the parties dated December 11, 2024 requesting the parties to submit additional legal argument regarding a federal regulation's applicability to the parties' dispute on subject matter jurisdiction (id.). There is no indication in the hearing record that the parties' filed additional papers.

did not recommend what the parents wanted (id.). The IHO determined that the parent's lay advocate misrepresented Gabel because it was not a "failure to implement" claim or rate dispute and that, instead, the issue in Gabel was the school district's failure to recommend related services after having conducted evaluations (id. at p. 9 & n.32). The IHO determined the New York State legislature did not intend to grant parents the right to a due process hearing before an IDEA IHO for a rate dispute or "failure to implement" claim under § 3602-c (id. at p. 9).

Lastly, the IHO addressed fairness (IHO Decision at p. 10). She determined that dismissing the case with prejudice would not be "fundamentally unfair" to the parent because the parent had an opportunity to be heard and could seek relief in an alternate forum "outside of IDEA due process hearings" for her rate dispute, such as resolving such claim directly with the CSE, commencing an action in State or federal court, filing a complaint with the Commissioner of Education pursuant to Education Law § 310, or availing herself to the district's "recently added … dedicated forum specially for rate disputes" (id.).

Accordingly, the IHO dismissed the parent's due process complaint notice "with prejudice with respect to this forum" (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her due process complaint notice for lack of subject matter jurisdiction. The parent argues that the IHO's determination is contrary to recent decisions of the SROs, and is in conflict with applicable law. As relief, the parent requests that the IHO's decision be reversed and the matter be remanded to the IHO for further proceedings.

In an answer, the district argues the IHO correctly granted the district's motion to dismiss and determined that she lacked subject matter to review the parent's claims under Education Law §§ 3602-c and 4404. Additionally, the district argues the request for review should be rejected for failure to comply with the practice regulations governing appeals to the Office of State Review.[3]

[3] The district seeks dismissal of the parent's request for review due to the parent's failure to timely serve the notice of intention to seek review. 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 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 8 NYCRR 279.9[b]; see also 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). In addition, whether the respondent is a school district or a parent, the notice of intention to seek review (along with the accompanying case information statement) provides a respondent with advance notice of a petitioner's imminent challenge to an IHO's determination, which may give a respondent additional time to contemplate a position to be stated in an answer—time that is particularly valuable in light of the short time frame allotted for a respondent to answer a request for review or serve a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[a]). Here, the parent served the notice of intention to seek review along with the request for review on the 38th day after the date of the IHO's decision; accordingly, the

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus,

---

district is correct that the parent did not timely serve the notice of intention to seek review (see Parent Aff. of Serv.) While the district asserts that it is prejudiced due to its inability to serve and file a notice of intention to cross-appeal (see 8 NYCRR 279.2[d]), the district did not attempt to interpose a cross-appeal in its answer. Therefore, 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]).

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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and

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

The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and New York law confers no right to file a due process complaint notice regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their

the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

Accordingly, the parent would not have a right to due process under federal law; however, the student did not merely have a services plan developed pursuant to federal law, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[6]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

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

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ.,

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

Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[7] In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.[8]

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).[9] 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. Since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed

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

[8] 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, 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. In this case, the parent alleged in his due process complaint notice that the district failed to provide the public school special education services called for by the district's own IESP during the 2023-24 school year under the dual enrollment statute, and the parent is seeking equitable relief in the form of unilaterally-obtained services that would be available if successful under the Burlington/Carter analysis.

[9] In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

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).[10]

Consistent with the district's position that New York law has never granted due process rights for IESP implementation claims or enhanced rates for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on 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

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

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

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.

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded to allow the parties to have the opportunity to proceed to an evidentiary hearing on the merits of the parent's claims When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

The parties are to address their dispute, including rate issues, during an impartial hearing. The IHO shall then analyze the evidence submitted by the parties during the impartial hearing using the Burlington-Carter three-pronged test and issue a written decision on the merits of the parent's claim.

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 engaged in educational planning and/or implemented special education services 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, 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's decision, dated December 27, 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**
May 21, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER