The University of the State of New York

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

No. 25-087

**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:**
Law Offices of Philippe J. 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 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 14, 2024, the parent 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.). According to the parent leading in to the 2023-24 school year, the CSE had last convened and developed an IESP on April 12, 2021, which recommended special education teacher support services (SETSS) and speech-language therapy services (id. at p. 2). The parent further asserted that, subsequently, a CSE convened and developed an IESP on May 6, 2024 which the same recommendations as the April 2021 IESP (id.). However, the parent alleged that the district failed to implement the recommended special education and related services and that the parent was therefore obligated to secure private providers at enhanced rates (id.). As relief, the parent sought an award of compensatory special education and related services for any services not provided during the 2023-24 school year and an award directing the district to fund the special education and related services unilaterally obtained by the parent at enhanced rates (id. at p. 3).

In a response to the parent's due process complaint notice, dated October 16, 2024, the district generally denied the parent's allegations, asserted multiple affirmative defenses, and asserted its intent to pursue a motion to dismiss any and all claims based on the IHO's lack of subject matter jurisdiction and any and all claims that were not ripe (Dist. Response to Due Process Compl. Notice at pp. 1-2).

**B. Impartial Hearing Officer Decision**

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH). By email dated November 3, 2024 to the parties, the IHO advised that she was considering dismissing the matter on the ground that she lacked subject matter jurisdiction and invited the parties to submit written argument (IHO Ex. I at p. 2). The hearing record does not include any written submission by the district; however, the parent submitted a memorandum of law arguing that the IHO possessed subject matter jurisdiction to consider claims regarding a failure to implement related services for dually enrolled students pursuant to Education law § 3602-c (Parent Memo of Law).

In a decision dated December 26, 2024, the IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (IHO Decision at pp. 1-7). The IHO noted a recent 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 pp. 1-2). The IHO explained that her sua sponte determination that she lacked subject matter jurisdiction to preside over implementation or rate disputes brought under Education Law § 3602-c was not based on the emergency amendment in light of the restraining order (id.).[1]

[1] The IHO noted that even though the district did not file a motion to dismiss for lack of subject matter jurisdiction, she had the authority to address a jurisdictional defect sua sponte (IHO Decision at pp. 1-2).

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 there is nothing "in federal or state regulations that grants an IDEA 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. 9 n.30). 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 did not recommend what the parents wanted (id.). The IHO determined that the parent's counsel 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 pp. 9-10 & n.33). 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. 10).

Lastly, the IHO addressed fairness (IHO Decision at pp. 10-11). 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 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. at p. 11).

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 the IHO's dismissal of the due process complaint notice for lack of subject matter jurisdiction.[2] The parent argues that IHOs are designated by State law to resolve implementation disputes and that the IHO's distinction between FAPE and equitable services is meritless. The parent further argues that the IHO's determination is contrary to recent decisions of the SRO, contrary case law, and in direct conflict with applicable law. Moreover, the parent alleges that the IHO displayed bias, placing her impartiality into question.[3] As relief, the parent requests that the IHO's decision be reversed and the district be directed to fund the student's recommended services.

In an answer, the district argues that the IHO's decision should be affirmed and that the IHO properly dismissed the case for lack of subject matter jurisdiction. The district further argues that the parent's appeal should be dismissed for failure to comply with practice regulations.[4] Lastly, the district argues that any potential award should be denied because there was no hearing.[5]

## 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

[2] In the request for review, the parent states that the district "submitted a Motion to Dismiss based on lack of subject matter jurisdiction and ripeness" on September 13, 2024, but the IHO stated in her decision that the district did not file a motion to dismiss (compare Req. for Rev. at p. 2, with IHO Decision at p. 1). The IHO's written clarification dated January 6, 2025 states that "[t]he dismissal was raised sua sponte so there is also no [motion to dismiss]." There is no motion to dismiss included in the hearing record.

[3] Specifically, the parent argues that the IHO's decision to dismiss the parent's due process complaint notice "stems from the IHO's deep seeded personal belief[]" that claims pertaining to IESP implementation are not "'legitimate FAPE based claims"' (Req. for Rev. at pp. 8-9).

[4] I decline to reject the parent's request for review on the grounds cited by the district.

[5] The parent served and filed a reply in this matter; however, I decline to consider the reply as it was served upon the district in an untimely manner and the parent did not seek an extension of time (see 8 NYCRR 279.6[a]; 279.10[e]). The district served and filed a sur-reply; however, this is not a permitted pleading under State regulations (see 8 NYCRR 279.6). Therefore, neither the parent's reply nor the district's sur-reply will be considered.

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]).[6] "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.).[7] 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**

Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Subject matter jurisdiction can be raised at any time in the proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630). Here,

[6] 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]).

[7] 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.

the hearing record indicates that the IHO sua sponte dismissed the parent's due process complaint notice for lack of 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 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]).[8]

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

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

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] 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.[10]

[8] 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]).

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

[10] 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

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).[11] 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.).[12] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained

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 her 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.

[11] 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.

[12] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 14, 2024 (Due Process Compl. Not. at p. 6), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

> 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).[13]

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]).[14]

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, in regard to the IHO's finding that the parent could pursue alternative forums, such as bring her claim in the district's newly created enhanced rate equitable services unit, it is noted

[13] 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]).

[14] 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.

that although 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 because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice following the IHO's determination that she lacked subject matter jurisdiction over such 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 IHO is directed to conduct a three prong Burlington-Carter analysis after the parties have been given the opportunity to submit evidence and participate in an impartial hearing. Afterwards, the IHO should issue a written decision on the merits of the parent's claims.

**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 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's decision, dated December 26, 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 22, 2025**

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