

# Policy Memo: Analysis of Proposed Amendment to Section 200.5 of the Regulations of the Commissioner of Education

## Introduction

The proposed amendment to Section 200.5 of the Regulations of the Commissioner of Education aims to eliminate the right of parents to file due process complaints regarding the implementation of services in Individualized Education Services Plans (IESPs). This memo explains why this amendment is legally flawed, the negative impact it will have statewide, and additional policy considerations. It also offers solutions to the underlying issues prompting this amendment.

The proposed amendment, in relevant part, states:

“(1) A parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, a student suspected of having a disability, or the provision of free appropriate public education to such student. **This does not include disputes over the implementation of services in an individualized education services plan**, such as the payment of services by a school district that was obtained by the parents of a student with a disability.”

(emphasis added)

## Legal Issues

### 1. Contradiction with State Law and Legislative Intent:

- **Education Law § 3602-c:**

1. Section 3602-c mandates that for students with disabilities who attend private schools, the DOE “shall develop an individualized education service program 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)(a); (2)(B)(1). Courts have uniformly ruled that Section 3602-c was incorporated by reference into the IDEA, and that New York has elected to afford students a right to a Free Appropriate Public Education (FAPE) under the IDEA.<sup>1</sup>

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<sup>1</sup> See

*R.G. v. NYC Dep't of Educ.*, 585 F. Supp. 3d at 530 (2d Cir. 2022) (“pursuant to New York’s implementation of IDEA and the State’s parental-placement program, the process for challenging an IEP or IESP is the same.”)

*B.C. v. Colton-Pierrepont Cent. School Dist.*, 357 Fed.Appx. 366 (2d Cir. 2009) (holding that after the adoption of Section 3602-c, New York afforded children right to services under the IDEA)

*Bay Shore Union Free School Dist. v. Kain*, 485 F.3d 730 (2d Cir. 2007) (holding that for Students with an IESP the concurrent jurisdiction provision of the IDEA would apply to afford the plaintiffs an avenue in state court.)

See also *LIH ex rel. LH v. New York City Bd. of Educ.*, 103 F.Supp.2d 658 (E.D.N.Y. 2000)

2. This law, which governs IESPs, explicitly cross-references Education Law § 4404, providing due process rights for disputes involving the identification, evaluation, or educational placement of students with disabilities, including implementation disputes. Ignoring this cross-reference undermines the legal rights of parents and students, contradicting the explicit language of the law.<sup>2</sup>
2. **Legislative Intent:** Legislative history and guidance from the New York State Department of Education clearly indicate an intent to provide comprehensive due process rights for parents, including for IESP implementation disputes.<sup>3</sup> This intent is reflected in the IDEA consultation documents which outline the state's requirements for equitable services and due process.<sup>4, 5</sup> The proposed amendment directly contradicts these established rights and the intent of the legislature to protect the educational stability of students with disabilities.
3. **Recent SRO Decisions:**
  - State Review Officer (SRO) decisions, such as No. 23-068 and No. 23-069, affirm parents' rights to file due process complaints for IESP implementation disputes. The proposed amendment disregards these precedents and undermines legal protections for parents and students. By attempting to bypass established due process rights, the amendment could face significant legal challenges and be overturned, causing further confusion and instability for families.<sup>6</sup>

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<sup>2</sup> Section 4404 provides that if a parent of a “student with a disability” presents a timely “complaint 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**”

<sup>3</sup> Sponsor's Memo., Bill Jacket, L. 2004, ch. 474: “The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.”

<sup>4</sup> See page 4 here [https://drive.google.com/file/d/1FGKdgA\\_xk6xCgWxYLu1aV592NjRsSeqd/view?usp=sharing](https://drive.google.com/file/d/1FGKdgA_xk6xCgWxYLu1aV592NjRsSeqd/view?usp=sharing)

<sup>5</sup> See page 3 here [https://www.nysed.gov/sites/default/files/programs/special-education/nys-608-analysis-updated-march-2024\\_0.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/nys-608-analysis-updated-march-2024_0.pdf)

See also Due Process section on the New York State Website here: <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>

<sup>6</sup> See SRO 21-245 p11: “*Notwithstanding that the district has asserted this exact same immaterial argument in three previous appeals— Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-140; and Application of a Student with a Disability, Appeal No. 20-115—the district persists in asserting this argument again, and as found in the three previous appeals, it is equally immaterial here. It is undisputed that the district did not meet its obligations to the student for two school years; however, regarding the district's contention that the IHO erred by applying the FAPE standard—or by finding that the student was entitled to a FAPE—the district does not convincingly explain how the "equitable services standard" under the State's dual enrollment statute would result in a different outcome when analyzing the relevant facts of this matter, especially where the dual enrollment statute has been routinely treated by the New York Court of Appeals as*

## Negative Statewide Impact

In the summary section of the proposed amendment, Angelique Johnson-Dingle, the author, correctly states that "Parents can, and should, expect implementation of the services identified on their children's IESPs...parents should not be required to file a due process complaint to obtain payment for IESP services that the district did not provide directly. For example, in a May 27, 2020 letter to the NYCDOE, the Department's Senior Deputy Commissioner for P-20 Education wrote: 'In addition to the administrative burdens, a request to proceed to due process after a parent finally obtains a provider is an unnecessary burden placed on the parents of students with disabilities'... Parents deserve to be made whole if a school district did not implement IESP services through direct and timely reimbursement from their school district." However, Ms. Dingles proposed solution, wherein parents only recourse would be to "pursue administrative or judicial remedies," is deeply flawed and burdensome.

### 1. Increased Litigation and Administrative Burden:

- Without due process rights for implementation disputes, parents will be forced to seek alternative legal remedies, increasing litigation costs and delays. The suggestion that parents pursue administrative or judicial remedies is misleading and impractical.
  1. Administrative remedies lack impartiality and an appeal process, furthermore, cases are reviewed by state employees rather than independent judges or lawyers. Finally, NYSED lacks the administrative bandwidth to properly and appropriately review all cases with the due care each student rightfully deserves.
  2. Judicial remedies, on the other hand, would overwhelm the court system with thousands of cases yearly. This increased burden on the judicial system would lead to longer resolution times and higher costs for families seeking justice. It would also dissuade parents from seeking services for their special needs children and be punitive towards parents that cannot afford to pursue judicial remedies.

### 2. Harm to Students and Families:

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*providing eligible students with an individual right to special education services that must be tailored to the student's particular needs by the CSE as well as the right to seek redress through the due process hearing system called for by the IDEA (see Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [reviewing due process hearing determinations and noting that the pertinent question is what the educational needs of the particular student require]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N. Y.2d 174, 188 [1988] [noting that services under the dual enrollment statute must take into account the individual educational needs of the student in the least restrictive environment]). Accordingly, the district has pointed to a distinction without a difference in this case, and I decline to further discuss this argument."*

See also

*Application of a Student with a Disability*, Appeal No. 20-141;

*Application of a Student with a Disability*, Appeal No. 20-140;

*Application of a Student with a Disability*, Appeal No. 20-115

- Removing due process protections for implementation disputes reduces accountability for school districts, leading to more frequent failures in providing required services. This would negatively impact the education and well-being of students with disabilities, placing undue burden on their families. Evidence from NYC DOE's own documents indicates that failure to provide timely services forces parents to seek costly and time-consuming legal remedies<sup>7</sup>. The absence of due process rights would leave parents with limited options to advocate for their children, potentially resulting in inadequate or interrupted educational services.

## **Underlying Issues and Policy Considerations**

**Background:** The proposed regulation tries to address an issue which primarily originates from New York City, where numerous parents of children with disabilities enrolled in nonpublic schools file due process complaints annually. These parents seek reimbursement for Individualized Education Service Plan (IESP) services that the New York City Department of Education (NYCDOE) has failed to provide. These complaints typically involve requests for payment for services the parents have secured, often with the consent of NYCDOE. Generally, the district does not dispute that it recommended these services.

It is well-documented that the NYC DOE has failed to provide parentally placed students with the services it mandates. This systemic failure has become the norm rather than the exception. NYC Comptroller Brad Lander confirmed in his 2023 report that the NYCDOE failed to deliver mandated special education services to thousands of children.<sup>8</sup>

Currently, NYC owes millions of dollars to parents and service providers for services already rendered that the NYCDOE was unable to provide directly. This situation underscores the dysfunction within the NYC DOE. Moreover, the NYC DOE often refuses to fund services even after being ordered to do so. The situation has become so dire that a Special Master has been appointed in connection with a federal litigation pending for over two decades, centered on the district's failure to pay for services despite administrative orders.<sup>9</sup>

In a final attempt to prevent IESP students from obtaining the services they need, this proposal seeks to remove due process rights from these students, whom the NYC DOE has systematically failed. These regulations appear to be an effort to bail out NYC and cover its deficiencies by penalizing students and stripping away critical legislatively created due process rights.

### **1. Systemic Challenges in Service Provision:**

- NYC DOE has been unable to provide necessary services directly, forcing parents to file due process complaints to secure services from outside providers. These

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<sup>7</sup> See here [https://drive.google.com/file/d/1FGKdgA\\_xk6xCgWxYLu1aV592NjRsSeqd/view?usp=sharing](https://drive.google.com/file/d/1FGKdgA_xk6xCgWxYLu1aV592NjRsSeqd/view?usp=sharing) and here [https://drive.google.com/file/d/1M\\_KqG53f\\_XSOTnIXLJp3\\_XR1rmY4RyB7/view?usp=sharing](https://drive.google.com/file/d/1M_KqG53f_XSOTnIXLJp3_XR1rmY4RyB7/view?usp=sharing)

<sup>8</sup> See <https://comptroller.nyc.gov/newsroom/nyc-comptroller-report-finds-doe-fails-to-deliver-mandated-special-education-services-to-thousands-of-children-even-as-claims-spending-surged-tenfold/>

<sup>9</sup> See <https://advocatesforchildren.org/case/l-v-v-nyc-department-of-education/>

providers then bill the city at higher rates, exacerbating the problem. This systemic failure is well-documented and requires immediate attention. The current reliance on due process complaints to secure services is a symptom of a broader issue related to the mismanagement of special education resources within the city.

## **2. Inadequate Compensation for Providers:**

- NYC DOE's current compensation rate for special education service providers is \$41.98/hour, which is significantly lower than the recommended rate from an independent study by the American Institutes for Research.<sup>10</sup> The study suggests a much higher competitive market rate, indicating the need for NYC DOE to adjust its rates to attract and retain qualified providers. The gap between the current rates and the recommended rates results in a shortage of qualified providers willing to work under the existing conditions, exacerbating the problem of service provision for students with disabilities.

## **Solutions**

### **1. Increase Base Rates for Providers:**

- Raise the base rate for independently contracted special education providers to align with the competitive market rates identified in the independent study. This will incentivize more providers to contract with NYC DOE directly, reducing the need for due process hearings. By aligning compensation rates with market standards, NYC DOE can attract and retain a larger pool of qualified providers, ensuring that students receive timely and adequate services.

### **2. Implement RFPs for Agency Providers:**

- NYC DOE should issue Requests for Proposals (RFPs) for agency providers, similar to Title services, allowing immediate assignment of providers to parents seeking services. This would streamline service delivery and reduce the administrative burden on parents. Implementing a more efficient and transparent system for contracting services would help mitigate delays, allow for stronger CSE oversight and ensure that students receive the support they need without unnecessary legal battles. Furthermore, it will allow NYC DOE to negotiate pricing with the agencies at a fair rate. Instead of working against providers and agencies, NYC DOE should work more closely with them to ensure that children receive the services they need without the necessity of filing complaints. Improved communication and accountability measures will benefit students and reduce the systemic reliance on due process for service implementation. Establishing clear guidelines and accountability standards for service providers can help ensure consistency and quality in service delivery.

## **Conclusion**

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<sup>10</sup> Ibid.

The proposed amendment to Section 200.5 is legally flawed, contradicts established legal precedents and statutory provisions, and will have a negative impact on students with disabilities and their families. Addressing the underlying issues of inadequate provider compensation and service provision will mitigate the need for due process complaints, ensuring that students receive appropriate services in a timely manner. Therefore, the proposed amendment should not be adopted, and alternative solutions should be pursued to protect and support the rights of students and their families.