THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234
OFFICE OF SPECIAL EDUCATION
ASSOCIATE COMMISSIONER

August 2024

TO: BOCES District Superintendents
School District Superintendents
Public School Administrators
Special Education Directors
Chairpersons of Committees on Special Education
Administrators of Religious and Independent Schools
Organizations, Parents, and Individuals Interested in Special Education

FROM: Christopher Suriano

SUBJECT: Special Education Due Process Hearings - Rate Disputes

At their July 2024 meeting, the Board of Regents adopted as an emergency rule the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education relating to special education due process hearings. The regulatory language was amended to clarify the types of disputes that fall outside the scope of the State entitlement to an impartial due process hearing. The Frequently Asked Questions are provided as guidance and will continue to be updated as needed.

Public comment on the proposed amendment can be submitted to Christopher Suriano, Associate Commissioner, New York State Education Department (NYSED), Office of Special Education, Room 301M, Education Building, 89 Washington Avenue, Albany, NY 12234 and/or email to REGCOMMENTS@nysed.gov. Comments must be received by NYSED on or before October 21, 2024.

Resources for Further Information

For further information, parents residing in New York City may direct questions regarding requests for an enhanced rate or rate dispute for equitable services to the New York City Department of Education's (NYCDOE) Enhanced Rate Equitable Services Unit (ERES Unit) at EquitableServicesAssistance@schools.nyc.gov.

Other questions regarding this memorandum may be directed to the Office of Special Education at RateDisputeQuestions@nysed.gov.

Attachment

Special Education Due Process Hearings: Rate Disputes

Frequently Asked Questions

August 2024

The University of the State of New York
The State Education Department
Office of Special Education

Introduction

At their July 2024 meeting, the Board of Regents adopted as an emergency rule the proposed amendment of section 200.5 of the Regulations of the Commissioner of Education relating to special education due process hearings. The regulatory language was amended to clarify the types of disputes that fall outside the scope of the State entitlement to an impartial due process hearing. The Frequently Asked Questions are provided as guidance and will continue to be updated as needed.

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Table of Contents	Page
Application of the Amendment	1
Processing Requests for an Enhanced Rate for Equitable Services or Rate Disputes	2
Due Process Jurisdiction	4
Parent and School District Responsibilities Re: IESP Services (generally)	5

Frequently Asked Questions

August 2024

A) Application of the Amendment

A-1) What is the purpose of this amendment?

The amendment discussed at the New York State Education Department's (NYSED) July 2024 Board of Regents meeting clarifies that a parent does not have 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 Individualized Education Services Plan (IESP) or aligned with the current market rate for such services.

A-2) To whom does the amendment apply?

The amendment applies to parents seeking payment for services in an IESP that a school district has not delivered. Although the amendment technically applies statewide, as discussed at NYSED's July 2024 Board of Regents meeting, it is unlikely this amendment would affect parents and students who reside outside of New York City.

A-3) Does the recent amendment apply to a student receiving services pursuant to an Individualized Education Program (IEP)?

No. The amendment only applies to students who have been parentally placed at nonpublic schools and who are only eligible for services in an IESP as described in Education Law § 3602-c. It does not apply to students who are receiving services via an IEP at a public school, Boards of Cooperative Educational Services (BOCES), or at the following State approved special education programs:

- State-operated and State-supported schools (Articles 85, 87, and 88 of the Education Law)
- Approved in-state and out-of-state private residential or non-residential schools for the education of students with disabilities (Article 89 or Article 81 of the Education Law)
- Approved preschool special education program (Education Law Section 4410).

The amendment also does not apply to students whose parents are dissatisfied with their child's education and unilaterally change their child's placement to a private school and seek tuition reimbursement from the district.

B) Processing Requests for an Enhanced Rate for Equitable Services or Rate Disputes

B-1) Where should requests be submitted for an enhanced rate for equitable services or disputes that concern whether the 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?

These matters are best handled at the local level. The NYCDOE has posted additional information for assistance with equitable services on its website, to include information on its new Enhanced Rate Equitable Services (ERES) Unit. NYSED urges New York City families who are making a request for enhanced rate equitable services or disputing a rate to contact the NYCDOE ERES Unit at EquitableServicesAssistance@schools.nyc.gov.

B-2) Who can parents contact with questions about the NYCDOE ERES Unit and the process to submit a request for enhanced rate equitable services or rate dispute?

Parents residing in New York City should contact the NYCDOE ERES Unit directly at EquitableServicesAssistance@schools.nyc.gov. The NYCDOE has posted additional information for assistance with equitable services on its website. The ERES Unit is under the authority of the NYCDOE, *not* NYSED. As a result, all questions regarding this process should be directed to the NYCDOE only; NYSED is unable to provide a response to such questions.

B-3) What information can the NYCDOE ERES Unit require to make a determination on a request for an enhanced rate for equitable services or rate dispute?

Generally, Education Law § 3602-c requires parents to request equitable services by June 1 of the year in which the parent seeks services. Therefore, the NYCDOE ERES Unit should first review whether the parent made such a request. The NYCDOE refers to this as the parental notice of intent (PNI). A district is entitled to impose internal controls to prevent fraud, waste, abuse, and mismanagement. Therefore, districts can require documentation, in the form of affidavits or otherwise, to ensure that requests for services were made by the student's family, that payments are only made to providers who possess appropriate certification, and that rates accurately represent the cost of the service provided (i.e., reasonable fair market value).

B-4) Is the NYCDOE ERES Unit permitted to check the certification or licensure of my provider?

Yes. Special education services are required to be provided by individuals with appropriate certification or license in each area of related service (8 NYCRR 200.6[b][3]). Additionally, special education instruction shall be provided by individuals appropriately certified or licensed (8 NYCRR 200.6[b][4]).

B-5) Once a parent submits a request for an enhanced rate for equitable services to the NYCDOE ERES Unit, when will a determination be issued?

According to the NYCDOE, determinations from its ERES Unit should be issued within approximately 60 days of receipt of required documentation. Note that because requests for enhanced rate equitable services or rate disputes related to an IESP are not entitled to due process, the timelines required by 8 NYCRR 200.5 or the timelines stipulated to in *L.V. v. NYCDOE,* No. 03 Civ. 9917 do not apply.

B-6) Is a parent entitled to payment of the last agreed upon or Impartial Hearing Officer (IHO) ordered rate during the pendency of the NYCDOE ERES Unit's determination consistent with 8 NYCRR 200.5[m]?

No. Requests for an enhanced rate for equitable services or rate disputes are not entitled to due process, so parents are not entitled to a specific rate while awaiting a determination from the NYCDOE ERES Unit.

B-7) If the NYCDOE ERES Unit denies a request for payment of an enhanced rate for equitable services is the NYCDOE required to request a due process hearing?

No. The amendment states that the "school district may file such a complaint to challenge the propriety of a provider's rate that exceeds the current market rate or to challenge the licensure status of a provider." This language is permissive.

B-8) What if the NYCDOE ERES Unit denies a parent's request for a specific rate for equitable services?

A parent has the right to challenge the denial of a request for an enhanced rate for equitable services in a court of competent jurisdiction. If a school district refuses to pay a particular rate, the refusal should be memorialized in a decision or letter to the parents that explicitly states the reasons for refusing to pay a particular rate.

B-9) If a parent submits a State complaint, can NYSED require a school district to pay a specific rate?

Yes. NYSED's Special Education Quality Assurance Unit (SEQA Unit) investigates State complaints. The SEQA Unit has broad flexibility to determine appropriate remedies, including awarding monetary reimbursement or payment and requiring corrective action (8 NYCRR 200.5[l][2][v][e]). However, as explained in the July 2024 Board of Regents item, school districts that provide payment for IESP services obtained by parents are entitled to impose internal controls to ensure that requests for services were requested by the student's family, that payments are only made to providers who possess appropriate certification, and that rates accurately represent the cost of the service provided (i.e., reasonable fair market value).

Therefore, with respect to claims arising from New York City, NYSED will only investigate a State complaint based on requests for an enhanced rate for equitable services or rate disputes if a parent has submitted documentation demonstrating that a good faith effort was made to resolve the matter with the NYCDOE ERES Unit and there are remaining allegations that meet the requirements outlined in section 300.153 of the Code of Federal Regulations and section 200.5(l) of the Regulations of the Commissioner of Education. State complaints concerning rate disputes must include supporting documentation that attempts were made to first resolve the dispute with the NYCDOE ERES Unit. NYSED will not investigate a State complaint that does not include this documentation; such complainants will be redirected to the NYCDOE ERES Unit.

C) Due Process Jurisdiction

C-1) Should a parent still file a due process complaint about a dispute over a request for an enhanced rate for equitable services?

No. As clarified in the July 2024 Board of Regents regulatory amendment, Education Law § 3602-c does not grant a parent 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, an IHO assigned to such a complaint does not have jurisdiction to address this allegation, and the matter must be dismissed.

C-2) What if a dispute over an enhanced rate is only one of the allegations raised in the due process complaint (i.e., the complaint also includes other allegations that are unrelated to enhanced rates)?

As clarified in the July 2024 Board of Regents regulatory amendment, Education Law § 3602-c does not grant a parent 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. Where the due process complaint includes other unrelated allegations that are within the jurisdiction of the IHO, the IHO may continue to hear such complaints while dismissing the rate dispute.

C-3) If a parent filed a due process complaint before the recent regulatory amendment went into effect will the complaint be decided, or will they have to go through the NYCDOE ERES Unit?

The recent regulatory amendment clarifies what due process rights are granted by Education Law § 3602-c. Thus, NYSED's position, which it has conveyed to the NYCDOE years before the regulatory amendment, is 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. While IHOs retain discretion to interpret federal and State law, NYSED has unequivocally stated that the regulatory amendment is merely a clarification of the applicability of Education Law § 3602-c.

D) Parent and School District Responsibilities Re: IESP Services (generally)

D-1) If a child is parentally placed in a private school, but a parent wants their child to receive special education services, when must the parent request services to ensure they are received for the school year?

According to Education Law § 3602-c(2), parents must request special education services in writing to the school district where the private school is located (school district of location) by June 1 of the year preceding the school year for which r services are requested, except that when a student is first identified as a student with a disability after the first day of June preceding the school year for which the request is made (and prior to the first day of April of such current school year) the parent must submit a written request for services within 30 days after identification. School districts have no obligation to provide services to students when a parent has failed to request services by the June 1 deadline.

D-2) The NYCDOE has offered service provider(s) to provide the services listed on a student's IESP. If a parent does not approve of these providers, can the parent object to the providers and choose a different provider themselves?

No. A parent has the right to implementation of the services identified on their child's IESP. Generally, a parent does not have a right to request or demand specific providers. However, if a parent believes their child because of extraordinary circumstances is entitled to a specific provider, they may raise these issues with the Committee on Preschool Special Education or the Committee on Special Education for consideration.

D-3) What if a student attending a nonpublic school does not have an IESP, but a parent independently arranged for special education services?

An eligibility determination as a student with a disability and development of an IESP are prerequisites for students to receive special education services at a nonpublic school at public expense. Without an eligibility determination as a student with a disability and development of an IESP, a school district is not responsible for reimbursing parents for such services.

Note, that this does not include when a student with a disability has been found eligible for equitable services but does not have a current IESP in place. For example, the student has an IESP for the 2023-2024 school year and the district has not held an annual review Committee on Special Education (CSE) meeting for the 2024-2025 school year.

D-4) What is the process for filing a State complaint?

The State complaint procedures are outlined in 8 NYCRR 200.5[l]. For additional assistance in filing a State complaint, see the New York State Complaint Procedures Question and Answer guidance. Any further questions regarding this process may be directed to the NYSED SEQA Unit's regional offices. See question B-9 for more information about State complaints involving requests for enhanced rates for equitable services or rate disputes.

D-5) Can a parent resolve a request for an enhanced rate for equitable services through special education mediation?

Mediation offers parents and school districts an opportunity to resolve disagreements about any matter relating to the education of a student with a disability or who is suspected of having a disability. However, mediation may only be requested for an enhanced rate for equitable services or rate disputes after a parent has made a good faith effort to resolve the matter with the NYCDOE ERES Unit. Therefore, any request for mediation regarding a request for an enhanced rate for equitable services or rate dispute must include supporting documentation that a parent first attempted to resolve the dispute with the NYCDOE ERES Unit. Failure to provide this documentation with a request for mediation will result in the mediation request being set aside and the parent being redirected to the NYCDOE ERES Unit.