

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of,

AGUDATH ISRAEL OF AMERICA, and A.L., I.G.,
M.H., M.M., M.M., M.W., R.F., R.P., R.R., Y.N., as
parents of their respective minor children,

Petitioners,

For Judgment Pursuant to CPLR Article 78

-against-

NEW YORK STATE BOARD OF REGENTS, NEW
YORK STATE EDUCATION DEPARTMENT, and
BETTY A. ROSA, in her official capacity as
Commissioner of Education,

Respondents.

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Index No.

**VERIFIED
ARTICLE 78 PETITION**

ORAL ARGUMENT REQUESTED

Date: October 1, 2024

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Petitioner Agudath Israel of America, and eleven individual petitioners, A.L., I.G., M.H., M.M., M.M., M.W., R.F., R.P., R.R., Y.N., by and through their undersigned counsel, for their Verified Petition, allege as follows.

NATURE OF THE ACTION

1. An acute education crisis is presently unfolding in real time in New York City, requiring this Court's immediate intervention. The crisis was created by the adoption of a new regulation that is illegal and devastatingly harmful, and which must be enjoined and annulled.

2. On July 15, 2024, the New York State Board of Regents (the "Regents") adopted the new regulation on an emergency rulemaking basis, at the urging of the New York State Education Department ("NYSED"). This new regulation changed, on one day's notice, how thousands of children in New York City ("NYC") receive special education services. These children are among the most vulnerable in NYC, and they have already begun to lose critical education during their most important developmental years.

3. In New York State, public school districts are obligated by law to provide special education services to children who attend private school. In NYC, the NYC Department of Education ("NYCDOE"), which is the local school district, recognizes this legal duty by identifying children with disabilities, evaluating them, and creating for each one an individualized plan of special education services that the NYCDOE obligates itself to provide. But then the system breaks down. In a circumstance that is unique to NYC, the NYCDOE simply fails to ever provide these services to students in private school. Legal and education law experts have called this breakdown "an alarming level of dysfunction." It leaves many of NYC's children without their special-ed services.

4. When the NYCDOE fails to deliver the services it mandates, the only way for NYC's private school parents to obtain mandated and necessary services for their children is by finding a provider on their own, and then insisting that the NYCDOE pay for it. The law allows this "self-help," because the children are entitled to receive these services at the school district's expense, and because the law recognizes the importance of children not losing **any** time in receiving their special education services. NYCDOE does not even attempt to provide these services directly to the students, so the lost time would be endless and overwhelmingly damaging for these children.

5. A crucial and indispensable legal mechanism for parents to receive reimbursement for the services that the NYCDOE failed to provide is by the parents filing an administrative due process complaint, as provided by the New York Education Law. In these due process complaints, the parents argue before an impartial hearing officer ("IHO") that the NYCDOE identified their child as needing special education services, and mandated those services, but neglected to provide the very services it says the child needs; that on account of this neglect, the parents were forced to find their own provider; and that they are entitled to have the district pay for the private provider. For a host of reasons, the rates provided by NYCDOE are outdated and frequently do not reflect the market rates of these services, and since the parents have no choice but to pay this higher amount (or risk not obtaining services for their child at all), they also have no choice but to seek the full amount as reimbursement.

6. Over the last decade or so, more and more private school parents have availed themselves of this mechanism. (Sadly, many still do not.) The cases have been adjudicated and many children have been able to receive their services. At these due process hearings, the

NYCDOE typically does not dispute that the student needs the services and that the district has not provided them.

7. Despite this long history, the NYCDOE has recently begun arguing to IHOs that the due process option should not be available to private school parents. The NYCDOE further has begun to argue that parents are not entitled to ask the IHO for the higher market rate that providers are charging the parents. Yet in case after case, the IHOs—upon reviewing the relevant statutes and case law—have agreed with the **parents** and granted them the relief of finding their own provider at an “enhanced rate.” When the NYCDOE appealed to the State Review Office (“SRO”), state review officers have **affirmed** (three times in 2023) that a parent has a right enshrined by law to file a due process complaint when their child’s IESP is not implemented, and have **affirmed** that enhanced rates are likewise the correct remedy.

8. The IHO and SRO decisions are correct. Private school parents have a right—enshrined by **law**—to file due process complaints when the NYCDOE fails to implement their IESPs, and the parents likewise have the right to seek the remedy of having the NYCDOE pay their providers’ full rates. But on July 15, 2024, NYSED and the Regents put their thumb on the scale and adopted, through emergency rulemaking, a new **regulation** that would invalidate these legal rights. That cannot stand, nor should it, because it has immediately led to very harmful consequences.

9. There is uniform agreement, even including NYSED and the NYCDOE, that the New York Education Law—which follows the requirements of the federal Individuals with Disabilities Education Act (“IDEA”) for baseline minimum standards, and expands upon them by affording additional rights to students and their parents—mandates that children who attend private school are entitled to the same special education services as children who attend public school.

NYSED and NYCDOE do not hide that this dispute is really about the **cost** of providing special education services to students in private school. These costs have increased in the past few years as more children obtain the services they need, which is both a good thing and what the law demands. The NYCDOE could get costs under control by getting its own house in order, by fixing its systemic violation of the law, and by actually providing these mandated services to students. Other school districts in the state are able to do so.

10. Instead, NYSED proposed and the Regents adopted the new regulation, which purports to “clarify” the law, and states that when these parents file their due process complaints seeking reimbursement for the costs of services they had to privately obtain for their child, the parents may not request that the IHO order the NYCDOE to pay the full rate charged by the provider. Rather, under the new regulation, NYCDOE—which caused this problem in the first place, and has not shown any sign of an ability to bureaucratically administer a special-education program for private school students—is entitled to unilaterally decide what to pay these private providers, through the establishment of a new office that is not even yet functioning. Needless to say, the amount that NYCDOE wants to pay is lower than what the providers actually charge.

11. The result since the regulation was adopted in July has been, predictably, a complete collapse of the private market of special education providers. On the macro level, service agencies that train, supervise, schedule, and pay private providers have decided to go out of business rather than risk making payroll to the providers and then not being reimbursed. This has left thousands of students stranded without services. Many cannot attend school at all because they require a paraprofessional to shadow them during the day to ensure their safety, and they cannot attend school without one. On the micro level, the individual Petitioners have all personally experienced this harm. Numerous examples are provided below and in the supporting affirmations

filed concurrently with this Petition. On account of the new regulation, children are not receiving their mandated special education services.

12. The new regulation must also be enjoined because it was passed in the dead of night, on an emergency basis, even though no emergency existed. To the contrary, it has created an emergency because it harms vulnerable children each day that it remains in force. Moreover, it entirely lacks any reasoned analysis about, *inter alia*, the dreadful harms it is causing, or any alternative measures that could have been taken (for example, declaring NYCDOE to be in violation of the law and compelling the school district to provide special-education services to children). It therefore was adopted in violation of the State Administrative Procedure Act and must be annulled.

13. For these reasons and those that follow below, this Article 78 petition seeks relief vacating and annulling the regulation, among other related relief.

THE PARTIES

14. Petitioner Agudath Israel of America (the “Agudah”) is a national Orthodox Jewish advocacy organization based in New York, with thousands of individual and institutional constituents, including many children with special needs and their families. The Agudah’s mission includes that it “advocates for its constituents at federal, state, and local levels,” including on the topic of education. Its Yahalom division helps parents navigate obtaining Special-Ed services from the NYCDOE. Its Yeshiva Services program helps private schools in the same area. Many of its stakeholders are directly affected by the regulation being challenged in this Petition and have individual standing. The Agudah has associational standing. *See generally*, Affirmation of Ami Bazov, attached as Cohen Aff. Ex. 22 (“AIA Aff.”).

15. Petitioner A.L. is a resident of New York City, whose son T.L. is entitled to special education services under his IESP, and who is suffering harm due to the Revised Regulation. She

has submitted an affirmation describing her individual circumstances (“A.L. Aff.”), which is attached as Exhibit 1 to the Emergency Affirmation of Adam Cohen in Support of Article 78 Petition and Motion for Temporary Restraining Order and Preliminary Injunction (“Cohen Aff.”).

16. Petitioner I.G. is a resident of New York City, whose daughter is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. He has submitted an affirmation describing his individual circumstances, which is attached as Cohen Aff. Exhibit 2 (“I.G. Aff.”).

17. Petitioner M.H. is a resident of New York City, whose daughter K.H. is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 3 (“M.H. Aff.”).

18. Petitioner M.M. is a resident of New York City, whose son C.M. is entitled to special education services under his IESP, and who is suffering harm due to the Revised Regulation. He has submitted an affirmation describing his individual circumstances, which is attached as Cohen Aff. Exhibit 4 (“M.M. Aff. (parent of C.M.)”).

19. Petitioner M.M. is a resident of New York City, whose daughter L.M. is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 5 (“M.M. Aff. (parent of L.M.)”).

20. Petitioner M.W. is a resident of New York City, whose son A.W. is entitled to special education services under his IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 6 (“M.W. Aff.”).

21. Petitioner R.F. is a resident of New York City, whose daughter S.F. is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 7 (“R.F. Aff.”).

22. Petition R.P. is a resident of New York City, whose daughter D.P. and son H.P. are entitled to special education services under their IESPs, and who are suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 8 (“R.P. Aff.”).

23. Petitioner R.R. is a resident of New York City, whose daughter S.R. is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 9 (“R.R. Aff.”).

24. Petitioner Y.N. is a resident of New York City, whose daughter Y.N. is entitled to special education services under her IESP, and who is suffering harm due to the Revised Regulation. She has submitted an affirmation describing her individual circumstances, which is attached as Cohen Aff. Exhibit 10 (“Y.N. Aff.”)

25. Respondent NYSED is a department of the New York state government and is responsible for the supervision of affairs regarding schools, standardized testing, and other areas related to education in the state of New York.

26. Respondent Board of Regents is responsible for the general supervision of all educational activities within the State, presiding over the NYSED and is authorized to approve regulations proposed by the NYSED.

27. Respondent Betty A. Rosa is sued in this action in her capacity as Commissioner of Education of NYSED.

JURISDICTION AND VENUE

28. This Court has jurisdiction to decide this Petition pursuant to CPLR 7803, as the Rule was a final determination of NYSED and the Regents, and this Petition challenges that determination as arbitrary and capricious, an abuse of discretion, and as affected by error of law, and in violation of SAPA.

29. Venue is proper pursuant to CPLR 506(b) and 7804(b) because the Respondent is the Regents and NYSED.

FACTUAL ALLEGATIONS AND LEGAL BACKGROUND

A. Overview

30. The Regents has adopted a regulation that violates the law, and thus the new regulation—which is also devastatingly harmful to thousands of vulnerable children—must be enjoined and annulled.

31. Under state law (New York Education Law Articles 89 and 73), school districts are required to provide special education services to students with disabilities, at public expense and free to the student. The New York Education Law, together with the federal IDEA and case law interpreting these statutes, comprise the relevant legal authority that is at issue in this case and outlined in greater detail in the sections that follow.

32. At a high level, the relevant legal authority requires as follows for school districts in the state of New York:

- a. First, every student with disabilities is entitled to special educational (“Special-Ed”) services that is at public expense and is tailored to meet the unique needs of that child. The law calls this as a “free appropriate public education,” or “FAPE.”

- b. In order to ensure that every student receives a FAPE, every school district is required to convene a committee on special education, or “CSE.” The CSE must meet to discuss every individual student and their individual needs. This is true no matter where the child goes to school, or even if the child attends no school at all. The membership of each CSE must include, but is not limited to, teachers, a school psychologist, a school district representative, and the child’s parent(s) or guardian(s).
- c. The CSE must develop for each student attending a public school a written document that describes the child’s unique needs and sets forth the special services that will be provided to that child. This document is called an individual education program (“IEP”).
- d. When a child in New York attends a private school for general education, but needs additional Special-Ed services too, the CSE’s written document is called an individual education services plan (“IESP”) rather than an IEP. Under New York law, the IESP and the IEP are substantially similar. As explained below, New York law mandates that the IESP be developed “in the same manner and with the same contents as” an IEP.

33. Under both the IDEA and the New York Education Law, parents have a right to file a due process complaint (a “DPC”) with the district when they believe this system is breaking down and their child is not being provided the services to which they are legally entitled. For example, a common form of DPC—which is not directly at issue in this proceeding but is indirectly relevant—is when the parents believe that the CSE did not create an adequate Special-Ed program for their child. In these kinds of DPCs, the parents state that they disagree with a school district’s offered program and/or placement. When that happens, the parents can unilaterally place their child in an educational setting that they believe is more appropriate, pay the tuition privately, and file a DPC to ask that an IHO require the school district to reimburse them (or to pay tuition directly if the parents cannot afford to lay it out). In the parlance of this Petition, this is called a “Rejection DPC,” because the parents, after rejecting the CSE’s program for the child, are seeking to have their child’s private school tuition reimbursed.

34. In a Rejection DPC, the relevant legal authority instructs the IHO to apply a test known as the *Burlington-Carter* analysis. Under that test, the parents are entitled to reimbursement

if: (1) the district's offered program was inadequate; (2) the parents' unilateral placement was appropriate; and (3) the equities favor the parents. Parents who make such a showing are then presumptively entitled to **full** reimbursement of the tuition they paid to the privately placed school, even if tuition is very high (which it often is).

35. The new regulation at issue in this case is about a different scenario which ought to never occur, but in New York City, has perversely become the normal mode of operation. It occurs most frequently with students who attend private schools for general education and have an IESP for their district-provided Special-Ed, although it could also occur for students who attend public school and have an IEP. In this scenario, the parents and the district **agree** on the services that should be provided to the child. It is the district's obligation to provide these services, but in New York City, the NYCDOE does not follow through to provide them when the student attends a private school. This is totally improper, and in fact has been called "dysfunctional" by the State Review Office.

36. Over approximately the past decade or longer, more and more parents have filed DPCs stating that their children have been denied their mandated services by virtue of the fact that NYCDOE has simply not *implemented* their child's IESP, even though it is the district itself that has evaluated the child and mandated that these services are necessary. In the parlance of this Petition, this is known as an "Implementation DPC," because the parents accept their child's program but the NYCDOE has failed to *implement* it. This leaves the parents with no choice but to locate their own service provider to ensure that their child does not fall farther behind during these crucial developmental years. In an Implementation DPC, the parents ask the IHO to order the NYCDOE to pay the cost of the Special-Ed service provider for the services that the NYCDOE had agreed to provide in the first place.

37. A Rejection DPC and an Implementation DPC are thus similar, but with a few different characteristics. In a Rejection DPC, the parents **disagree** with and **reject** the school district's program and/or placement; in an Implementation DPC, the parents **agree** and **accept** it. In a Rejection DPC, the school district is **willing** to implement their program; in an Implementation DPC, the school district is **unwilling** or **unable**. And in a Rejection DPC, the parents reject the public-school program or placement, place their child in a Special-Ed private school, and seek reimbursement for the full **tuition**; but in an Implementation DPC, the student attends private school for *general* education, and the parents hire a *provider* for extra Special-Ed *services*, and seek reimbursement only for **these services** (but not necessarily full tuition).

38. As a matter of course, the NYCDOE unlawfully withholds mandated Special-Ed to students who attend private schools. By the thousands, parents are required to file an Implementation DPC just to get reimbursed for services the NYCDOE is required to provide in the first place. Despite for many years never disputing that due process complaints were the appropriate forums for parents to raise these disputes, *see* Cohen Aff. Ex. 15 (Farago Aff) ¶ 24,¹ the NYCDOE has recently changed tacks. Over the past year or two, it has argued to IHOs that when a student attends a private school (those with IESPs), they have a right under state law **only** to file Rejection DPCs (arguing the IESP is insufficient), but **not** Implementation DPCs (arguing the **implementation** of the IESP is insufficient). As explained below, this is wrong as a matter of law. The New York Education Law unequivocally gives parents the right to file a DPC for the denial of these services. In fact, that right is so unequivocal that even the Respondent NYSED said as much in guidance it published in 2007. Thus, IHOs have held in countless cases that parents **do** have the right to file Implementation DPCs, and are entitled to and receive **full** reimbursement

¹ Affirmation of John Farago ("Farago Aff."), attached as Cohen Aff. Ex. 15.

if their children received appropriate private placement. The SRO has affirmed this on appeal. Naturally, the rights of the parents who **want** to accept the school district's offer of services and are being denied them are no less than parents who **reject** the district services.

39. With NYCDOE having repeatedly lost this argument before neutral arbiters, NYSED moved in May 2024 to act on its own to enact by *regulation* that which IHOs and SROs had rejected as a matter of *law*. It submitted to the Regents a position paper presenting a proposal (the "Initial Proposal") for the Regents to adopt a new proposed regulation (the "Initial Proposed Regulation"). It is attached as Exhibit 11 to the Cohen Aff. In the Initial Proposal, NYSED's Deputy Commissioner for P12 Instructional Support repeated the NYCDOE's rebuffed position that neither federal nor state law confers the right of parents to file a DPC to seek relief when the NYCDOE fails to implement an IESP. Specifically, the Initial Proposal stated that NYSED **"proposes to clarify** [through this regulation] 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." Cohen Aff. Ex. 11 (Initial Proposal) at 3-4.²

40. The Initial Proposed Regulation was as follows (with the proposed addition to the regulation underlined in the original):

Paragraph (1) of subdivision (i) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

"(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

² Emphasis added. Throughout this Petition, all emphasis is added, and all internal quotations and citations are omitted and cleaned up, unless otherwise noted.

services plan, such as the payment of services by a school district that was obtained by the parents of a student with a disability...”

Cohen Aff. Ex. 11 (Initial Proposal) at 6.

41. Had the Initial Proposed Regulation proceeded and been adopted through the rulemaking process, it would have gone into effect on September 25, 2024. Cohen Aff. Ex. 11 (Initial Proposal) at 5. But in approximately July 2024, NYSED withdrew the Initial Proposed Regulation.

42. Then, in July 2024, which would have been the beginning of the notice and comment period for Initial Proposed Regulation, and after withdrawing the Proposed Initial Regulation, NYSED proposed an **emergency** regulation instead (the “Revised Regulation”). A copy of the Revised Regulation, along with the transmittal memorandum for why the Regents should adopt the Revised Regulation, and why the adoption should be on an emergency basis rather than through the ordinary public notice-and-comment period (the “Revised Proposal”), is attached to the Cohen Aff. as Exhibit 12.

43. The Revised Regulation narrowed the proposed regulatory amendment. In the new version, the amended regulation did not state that parents are unable to file an Implementation DPC. Rather, the Revised Regulation limits the ability for a parent who files an Implementation DPC to seek enough money in reimbursement to cover the rate of the private provider. It states (with the proposed addition to the regulation underlined in the original):

Paragraph (1) of subdivision (i) of section 200.5 of the Regulations of the Commissioner of Education is amended to read as follows:

“(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 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; any due process complaint filed on or after July 16, 2024 concerning such issues shall be subject to dismissal on jurisdictional grounds. However, a 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."

Cohen Aff. Ex. 12 (Revised Proposal) at 7.

44. As explained below, there was no emergency that necessitated adopting the Revised Regulation on an emergency basis. NYSED proposed the Revised Regulation as an emergency rule anyway, and on July 15, 2024—upon one business day of notice to the public—the Regents adopted it, effective the following day, July 16, 2024.

45. Because of the adoption of the Revised Regulation, when a child does not obtain his or her mandated Special-Ed services from the NYCDOE (as is almost always the case in New York City), the parents may still file an Implementation DPC alleging that the child has not been provided their services; but the IHO is not empowered to fashion the relief necessary to help the child obtain those mandated services privately. Accordingly, filing an Implementation DPC would still leave the child without those services. This makes no sense, and the law does not allow it, as explained below.

46. There is no viable alternative solution, either. The Revised Proposal states that NYCDOE is creating a new Enhanced Rate Equitable Services Unit (ERES Unit), which will be responsible for receiving and processing all requests for IESP-mandated services, and ostensibly will ensure that these services will be provided in this manner. But the NYCDOE has never been able to provide these services by itself, and there is no reason to think a brand-new unit within NYCDOE will suddenly find the way to provide the services. Moreover, the NYCDOE is legally **prohibited** from outsourcing its core educational functions, so the ERES Unit is not even legal. But that hardly matters, because with the first month of school almost over, the ERES Unit has

predictably accomplished nothing, and thousands of students are left without their mandated services. *See* Affirmation of Philippe Gerschel (“Gerschel Aff.”), attached as Cohen Aff. Ex. 13 at ¶¶ 20, 21; Affirmation of Juby Shapiro (“Shapiro Aff.”), attached as Cohen Aff. Ex. 14 at ¶ 8.

47. Yet because of the Revised Regulation, many of the providers and agencies who previously provided Special-Ed to these children have decided to exit the market. *See* Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶ 23. This is cause for major alarm. A big reason for this is that the agencies are required to front the payroll costs of the providers. Upon information and belief, across the entire industry this amounts to more than \$100,000,000 (one hundred million dollars) per year. Private companies cannot lay out this enormous cost if there is no mechanism for them to be paid back. Accordingly, children throughout New York City are unable to obtain special education services because the agencies that provided the services are no longer in business, on account of the Revised Regulation.

48. This cost is the true reason behind the Revised Regulation. As more and more parents have sought services for their children, the NYCDOE has become obligated to pay more to private placement providers and agencies. But rather than see this as a success (that more students who need and are entitled to Special-Ed are getting them), NYCDOE and NYSED are clamping down on the provision of special education services through the Revised Regulation. As a pretext, NYSED claimed that a review of thousands of Implementation DPC hearing transcripts revealed four examples of potential waste and fraud. Cohen Aff. Ex. 12 (Revised Proposal) at 3-4. In each of those four, NYSED acknowledges that the IHO reduced or denied relief, so NYSED cannot even claim that any public funds went to waste. In other words, in these few cherry-picked examples, the IHO system worked as designed to curtail inappropriate placement of students in private services. And even if waste or fraud were serious concerns in a small number of cases, the

Revised Regulation is a massively overbroad reaction that deprives thousands of law-abiding families of their legal rights, and harms thousands of innocent children.

49. The Named Petitioners in this action are suffering from these harms, as described in their affirmations (Cohen Aff. Exs. 1 to 10). For example:

- a. Petitioner M.M. has a thirteen-year-old son C.M., who has spina bifida and requires constant care and supervision from a paraprofessional; C.M. is immobile and also requires speech therapy and SETSS. Cohen Aff. Ex. 4 (M.M. Aff.) at ¶ 1. C.M.'s paraprofessional will not continue working with him this year at the rate the DOE is providing, and M.M. is unable to obtain an enhanced rate like past years because of the Revised Regulation. *Id.* at ¶¶ 4,5. As a result, C.M. will not be able to attend school. *Id.* at ¶ 6.
- b. Petitioner M.M. has a daughter L.M., who is wheelchair bound and suffering from cerebral palsy. Cohen Aff. Ex. 5 (M.M. Aff.) at ¶ 1. L.M. is entitled to full-time paraprofessional, physical therapy, occupational therapy, speech-language therapy, and special education teacher support services. *Id.* at ¶ 2. The agency that previously provided these services to L.M. is no longer in business due to the Revised Regulation. *Id.* at ¶ 5. M.M. is currently paying out of pocket for L.M.'s paraprofessional but will not be able to sustain for the entire school year, and L.M. is not receiving any of the other services since M.M. cannot afford it. *Id.* at ¶ 6. As a result, L.M. is deteriorating both physically and academically. *Id.*
- c. Petitioner M.W. has an eight-year-old son A.W., who has ADHD and is entitled to Occupational Therapy ("OT") under his IESP to help him overcome his ADHD in school. M.W. cannot find an OT provider for A.W. at the NYCDOE's rates. In fact, last year (2023-2024), all the students at A.W.'s school who received OT through their IESP had a single OT provider who was obtained through an agency and who provided OT to each of the students. That agency has closed its doors, and the Revised Regulation was a key factor in its decision. The individual provider who previously helped these students did not agree to return, due to NYCDOE's rates. Not only is A.W. not receiving his mandated OT, but any other student in the school who is entitled to OT is likewise not getting their mandated services. *See* Cohen Aff. Ex. 6 (M.W. Aff.).
- d. Petitioner R.F. has a twelve-year-old daughter S.F., whose reading level is several years below grade level. Cohen Aff. Ex. 7 (R.F. Aff.) at ¶¶ 1, 2. The agency that had been providing SETSS to S.F. has gone out of business because of the Revised Regulation, and S.F.'s provider from last year cannot continue to work with her this year because the NYCDOE's rates are too low. *Id.* at ¶¶ 4,5. Without SETSS, S.F.'s first test scores in

the 2024-2025 school year have already dropped to 70% from the 90% she achieved with help last year. *Id.* at ¶ 8.

B. Additional Detailed Allegations

50. To explain the unlawfulness of the Revised Regulation in a comprehensive, concise, and coherent way, this section combines the relevant legal background with the factual allegations.

1. Framework of the New York Education Law

51. The New York Education Law provides both substantive and procedural rights for students with disabilities. The state law incorporates the requirements of the federal IDEA as the minimum baseline of rights for students and their parents, and extends them additional rights beyond those afforded by the IDEA.

52. As relevant to the New York Education Law, the IDEA provides funding to states and conditions that funding on the state agreeing to (a) certain substantive requirements for the education of children with disabilities, and (b) procedural safeguards for those children and their families. 20 U.S.C. § 1400, et seq. Substantively, the IDEA provides that all children are entitled to a “free appropriate public education,” or “FAPE.” Procedurally, the states are also required to “establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.” 20 U.S.C § 1415(a). Among these are “[a]n opportunity for any party to present a complaint with respect to **any matter relating to** the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6).

53. New York receives federal funding and is obligated to comply with the IDEA. It incorporates the minimum requirements of the IDEA and extends additional rights to students and

parents. Therefore, federal cases interpreting the IDEA are binding authority for interpreting the minimum requirements of the New York Education Law.

2. State Law: *Substantive Provisions of New York State Education Law Article 89 and Article 73*

54. Pursuant to Article 89 of the New York State Education Law, and in compliance with the IDEA, all children with a disability who reside in New York State are entitled to a FAPE.

55. New York State has extended this right even to students who principally attend *non*-public schools for their general education.

56. Accordingly, N.Y. Education Law Article 73, § 3602-c—a duly enacted statute passed by both houses of the state legislature and signed by the governor—provides that all students who attend non-public schools are entitled to special education services. “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 or person in parental relation of any such student.” §3602-c (2)(a).³ *Services* is defined as “education for students with disabilities, and counseling, psychological and social work services related to such instruction provided during the regular school year for pupils enrolled in a **nonpublic** school located in a school district.” §3602-c (1)(a). *Education for students with disabilities* is defined as “special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Article 89],” § 3602-c(1)(d), which is the section relating to students enrolled in public schools.

³ Throughout this Petition, references to private school students or nonpublic school students include homeschooled students too. The relevant provisions of New York Education Law treats children who are homeschooled as if they are attending private school. *See* N.Y. Educ. Law § 3602-c (2-c) (“for the purpose of the provision of education for students with disabilities pursuant to this section...a student in a home instruction program...shall be deemed to be a student enrolled in and attending a nonpublic school eligible to receive services.”).

57. Section 3602-c continues by providing non-public school students with identical rights as students who are enrolled in public schools. The only difference is in nomenclature: Students who are enrolled in public schools are given an “individualized education program,” or IEP; students who are enrolled in non-public schools are given an “individualized education **services plan.**”

58. As examples of how the rights of non-public school students are the same as public school students, Section 3602-c provides that “for the purpose of obtaining education for students with disabilities... such request **shall** be reviewed by the committee on special education of the school district of location, which **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.** The committee on special education **shall** 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. Review 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 [*i.e.*, § 4404].” § 3602-c (2)(b)(1).

59. In fact, not only are the rights of non-public students the same as public school students, but the public school itself is required to provide the special education services to the non-public school student. “[T]he **school district** of location of a student with a disability **shall** be responsible for compliance with the requirements ... including but not limited to, **equitable provision of services**, child find and consultation requirements. The committee on special

education of the **school district** of location **shall** be responsible for evaluation and possible identification as a student with a disability of all students attending nonpublic schools located within the school district.... The **school district** of location **shall** 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... **School districts** shall obtain parental consent prior to the release of personally identifiable information concerning a student attending a nonpublic school....” § 3602-c (2)(b)(2)

60. Because of these requirements, Section 3602-c is known as the “dual enrollment statute.” As the Court of Appeals has explained, this means that although the students are enrolled in non-public schools for general education, they are simultaneously enrolled in public school for the provision of special education services. “[S]ection 3602-c authorizes services to private school handicapped children and affords them an option of **dual enrollment in public schools**, so that they may enjoy equal access to the full array of specialized public school programs.” *Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 NY.2d 174, 184 (1988). These students “become **part-time public school students**, for the purpose of receiving the special services.” *Id.* And as part-time public school students, the Court of Appeals has also weighed their rights of entitlement to services “in order for this child [in private school] to receive **a free appropriate public education.**” *Matter of Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 N.Y.3d 289, 293 (2010). Thus, the Court of Appeals has interpreted Section 3602-c as meaning that, by law, students who are enrolled in private school for general education are entitled to a FAPE, or at least to have their “equitable services” measured to a FAPE standard, just as if they were enrolled in public school—which for the purposes of Special-Ed, they are.

3. State Law: *Procedural Safeguards Afforded by New York State Education Law Article 89 and Article 73*

61. Pursuant to Article 89, and consistent with the IDEA, the parent of a student may file an administrative due process 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.” § 4404(1)(a).

62. New York State has implemented a two-tiered system of administrative review to address such disputed matters. 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). When the school district is the NYCDOE, the hearing is held by the NYC Office of Administrative Trials and Hearings (“OATH”). The IHO typically conducts a trial-type hearing regarding the matters in dispute, and renders a written decision within a prescribed time frame. 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). The SRO conducts an impartial review of the IHO’s findings, conclusions, and decision and renders an independent decision based upon the hearing record.

4. NYSED Adopts the Revised Regulation Which Contradicts the Law and Results in Students Not Receiving Their Mandated Services

63. On Friday, July 12, 2024, NYSED posted on its website that it was submitting the Revised Proposal to the Regents to adopt the Revised Regulation on the following Monday morning (the next business day), July 15, 2024, on an emergency rulemaking basis. The Revised Regulation would go into effect the day after that: Tuesday, July 16, 2024. A copy of the Revised Proposal, which includes the Revised Regulation, is attached to the Cohen Aff. as Exhibit 12 (Revised Proposal).

64. There was no emergency. NYSED claimed that the emergency was “to provide predictability for the upcoming 2024-2025 school year.” Cohen Aff. Ex. 12 (Revised Proposal) at 2; Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 21.

65. The Revised Proposal included a transmittal memorandum authored by Deputy Commissioner Angelique Johnson Dingle. Cohen Aff. Ex. 12 (Revised Proposal). This memorandum provided background material that was legal analysis, and which was almost entirely identical to the background material provided for the Initial Proposed Regulation that had been withdrawn (as discussed above at ¶ 40), even though the two proposals were very different. That Initial Proposed Regulation would have provided that Implementation DPCs could not be filed at all. The new proposed Revised Regulation allowed such Implementation DPCs to be filed but would disallow (and subject the DPC to dismissal on jurisdictional grounds) for any portion that requested reimbursement for the provider’s (or the agency’s) rate for the provision of special services.

66. Specifically, the Revised Regulation specified that parents may not file Implementation DPCs that include “disputes 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.” That language is vague and unclear. Subsequently, in a memorandum dated “August 2024,” NYSED released an advisory document with answers to “Frequently Asked Questions” (“FAQs”) that, although not formally adopted by the Regents, explained how NYSED interpreted its own vague regulation: seeking an enhanced rate is off limits. A copy of the FAQs is attached as Cohen Aff. Ex. 16 (FAQs). The FAQs further explained that parents who could not obtain Special-Ed services from the NYCDOE and could not obtain them privately at the rates offered by

NYCDOE, had no DPC avenue to obtain these services, but had to try to get the services placed through none other than the NYCDOE.⁴

67. The Revised Regulation states that “any due process complaint filed on or after July 16, 2024 concerning such issues **shall be subject to dismissal on jurisdictional grounds.**”

68. In other words, after the passage of the Revised Regulation, parents can file an Implementation DPC stating that their child was deprived of their mandated services; but an IHO cannot order relief to ensure that the child receives those mandated services. This cannot be, and is not, what the New York Education Law requires.

69. Yet NYSED’s proposal once again couched the Revised Regulation as a “clarification” of state law. And it argued to the Regents that the NYCDOE had “advised” that, despite its total failure to ever provide services to non-public school students before, and despite being told repeatedly by IHOs and the SRO that it must pay full reimbursement rates, that it would come up with its own office, located within NYCDOE, that would ensure that these students receive services. To that end, the proposal for the Revised Proposal stated:

NYCDOE has advised [NYSED] that **on or before the effective date of the rule clarification**—and well in advance of the start of the 10-month school year—NYCDOE **will provide guidance as to how the clarification will impact families’ experiences in securing services for their student.** The guidance will address how the process will work under the revised rule, and, more importantly, the steps NYCDOE is taking to ensure appropriate services are available and offered to all students who need them. The

⁴ The NYCDOE did increase the dollar amount available for *SETSS* providers, but not adequately. For decades, the DOE’s rate was capped at \$41.98 for 1:1 *SETSS* service. This rate had not changed for at least twenty years. As of July 29, 2024, the NYCDOE increased the rate to \$85.91 for 1:1 *SETSS* services. While this is a step in the right direction, it did not significantly impact the ability of parents to secure providers. There are still thousands of Parents who are unable to secure providers even with the new rate. *See generally* Gerschel Affirmation. Noteworthy is that other crucial services that disabled students rely on such as speech language therapy, occupational therapy, physical therapy, counseling and health paraprofessional services did not increase. This is precisely why parents must be permitted to file due process complaints if they are unable to secure providers.

guidance will also explain how cases that might have previously been filed as due process complaints in past years will be processed going forward. The NYCDOE Office of the General Counsel (OGC) is standing up a new unit, called the Enhanced Rate Equitable Services Unit (ERES Unit). ERES will receive and process all requests for enhanced rate equitable services where a parent or their representative has filed a parental notice of intent (PNI). More detailed information will follow in the guidance, but at this stage the public should know that it can communicate with the ERES Unit at this email address: EquitableServicesAssistance@schools.nyc.gov.

Revised Proposal at 4.

70. In other words, NYSED proposed, and the Board of Regents adopted on July 15, 2024, the Revised Regulation ostensibly “to provide predictability” for the upcoming school year. But at the time of the vote, both NYSED and the Board of Regents were effectively taking the word of a school district, NYCDOE, that had never before proved capable of meeting its obligations, making matters highly **un**predictable. Notably, NYCDOE did **not** provide such guidance before the Revised Regulation was adopted, despite NYSED telling the Regents it would be. And it is not surprising that the ERES Unit has proven to be a complete failure so far, resulting in many students being unable to obtain their mandated services. Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶¶ 20, 21; Cohen Aff. Ex. 14 (Shapiro Aff.) at ¶ 8. School opened almost a month ago and thousands of students are still stranded without access to their mandated services.

5. The Revised Regulation was adopted as a reaction to parents filing and winning Implementation DPCs to obtain Special-Ed services for their children.

71. The Revised Regulation was adopted in reaction to NYCDOE’s continual refusal to provide IESP Special-Ed services to nonpublic school children, and, when their parents sought to obtain an order that the NYCDOE pay for their privately-obtained services, the NYCDOE’s repeated defeat in front of IHOs to dismiss Implementation DPCs. *See* Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶ 8 (noting that the NYCDOE filed motions to dismiss and argued repeatedly in Implementation DPCs that parents do not have a right to bring them in the first place, and that

IHOs regularly denied such motions). When these IHO decisions were appealed to the SRO, the SRO decided persuasively that § 3602-c **does** afford parents the right to file Implementation DPCs. *See, e.g.*, SRO 23-069, attached as Cohen Aff. Ex. 17.⁵

72. Because of this context, some additional background is important.

73. As described above, NYCDOE's CSEs develop IESPs for students who attend private school. In thousands of these cases, the parents have agreed with the IESP; but the district never provides the services. The fact that New York City fails to deliver the special education services they mandate is not the exception but sadly, the rule. The New York City Comptroller confirmed this fact in a report where he concluded that New York City fails to deliver special education services to thousands of students in New York City.⁶ *See* Cohen Aff. Ex. 15 (Fargo Aff.) at ¶ 15. And this is what has happened to the individual petitioners. *See generally* Cohen Aff. Exs. 1 through 10.

74. When the NYCDOE fails to implement a child's IESP, the child's parents file an Implementation DPC and obtain services for their child from a provider or agency that they find on their own. The purpose of the Implementation DPC is to obtain an order from an IHO, known as a Findings of Fact & Decision ("FOFD"), that the district pay for the services that parents were forced to privately obtain. In these thousands of cases each year, there is agreement between the NYCDOE and the parents (a) that the student has a disability, and (b) what the services should be

⁵ Two other SRO decisions, issued by different state review officers, held the same way. *See* SRO 23-068 and SRO 23-121.

⁶ *See* NYC Comptroller Website, *NYC Comptroller Report Finds DOE Fails to Deliver Mandated Special Education Services to Thousands of Children Even As Claims Spending Surged Tenfold*, published August 28, 2023, available at: <https://tinyurl.com/bdeuhn9k>.

for that school year. In almost all cases, there is not even a disagreement that the NYCDOE failed to implement the IESP. *See* Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 46.

75. There are at least two independent sources of state law that grant the parents of students with an IESP the right to file an Implementation DPC.

76. First, Article 73 of the Education Law states that students in non-public schools are entitled to the same services as any student in public school. *See generally* § 3602-c. This is what's known as the "dual-enrollment statute," as described above. That same provision (§ 3602-c) then cross references Section 4404 of Article 89 to reinforce that the same process is followed when the parents of a student who is dually enrolled has a need to file a due process complaint. This is precisely how NYSED itself interpreted Section 3602-c in guidance it published in 2007. In *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* (the "2007 Guidance"), published in September 2007 after an amendment to § 3602-c on July 18, 2007, NYSED informed school districts that "[a] parent of a [nonpublic school] student who is a NYS resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or **the provision of special education services may submit a Due Process Complaint Notice** to the school district of location." Cohen Aff. Ex. 18 (2007 Guidance) at 5.⁷

77. Separately, every non-public school student who requests special educational services from their school district is "dually enrolled" as a public school student. They are "**part-**

⁷ And the NYCDOE likewise acceded for well more than a decade that the IHO had jurisdiction to hear Implementation DPCs. *See* Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 24. *See also* Cohen Aff. Ex. 17 (SRO 23-069) at 8-10 (SRO providing legal discussion and analysis explaining that § 3602-c includes the right to file an Implementation DPC).

time public school students for the purpose of receiving the special services,” *Wieder*, 72 NY.2d at 184, and they are entitled to a FAPE like any other student. *Thomas K.*, 14 N.Y.3d at 293. Under Article 89 of the New York Education Law, the parents of these children may file a due process 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.” § 4404(1)(a). When the NYCDOE has failed to implement its own IESP, the parents can challenge the education placement of the student (the student was not given the services to which they are entitled) and the provision of a free appropriate public education (the student was not provided one).

78. Implementation DPCs are filed with the NYCDOE, which refers each case to OATH for adjudication, and OATH appoints an IHO to preside over the case. At this point, the NYCDOE and the parents are in an adversarial posture before a neutral tribunal, who will decide what the remedy should be.

79. Importantly, part of these DPCs must include the ability to seek an enhanced rate as a remedy. Without that ability, many parents will be unable to obtain Special-Ed services for their child.

80. In an Implementation DPC, the necessity of a parent securing their child’s Special-Ed provider is a direct result of the NYCDOE’s failure to provide the services to which the district’s own IESP says the child is entitled.

81. Special education providers and agencies in the private market charge higher rates than the NYCDOE pays for its own staff and its own contracted providers. Parents who file an Implementation DPC therefore often need the relief of an “enhanced rate” of reimbursement—enhanced above what NYCDOE pays its own contractors—for two reasons.

- a. First, the providers charge this rate. The parents are required to sign a contract with the provider (or agency) promising to pay the provider (or agency) their full rate. The only remedy available to a parent is to seek an order by an IHO directing the NYDOE to pay for the privately obtained services that the NYCDOE was obligated but failed to deliver. If the NYCDOE does not reimburse the full rate, then the child will not be receiving **free** appropriate Special-Ed services, because the parents will be left to pay for the service themselves.
- b. Second, without an enhanced rate, many children will not obtain services at all. This is especially true when the parents do not have the means to pay the agencies themselves. Under those circumstances, the law says that the NYCDOE can be ordered to pay the agencies directly. In other circumstances, the agencies will provide the services at their own expense by extending credit to the parents, with the parents agreeing by contract to pay the agencies when they receive their reimbursement from the NYCDOE. Under either of these scenarios, if the NYCDOE does not pay the agency's or provider's full rate, the agency/provider will simply stop offering services to this child. In that case, the child will not receive an **appropriate public education** at all.

82. Non-public school children in New York City are from a varied and diverse background. It is no simple task to find the required number of special education providers sufficient to meet all special-education students' unique needs unique needs. Accordingly, if parents are unable to obtain reimbursement at an enhanced rate that is high enough to find a provider who is willing to provide the services, their children will not be able to obtain services, and—notwithstanding an FOFD validating that NYCDOE failed to implement the IESP—will **still** be denied the services to which the child is entitled.

83. Thus, if the parent is to obtain services privately for their child, it is crucial that they also obtain an order from the IHO stating the rate the school district is obligated to pay. If the NYCDOE is ordered to pay, but the amount is too low, the parents will be in the same position (without free appropriate services their child) as they were in before they filed the Implementation DPC.

84. It is axiomatic that if the parent has a legal right to file an Implementation DPC, the legal right they have is to **obtain relief**, not just to file a lawsuit. NYSED and the Regents denied this axiomatic truth when they proposed and adopted the Revised Regulation, because the new regulation gives parents the right to file an Implementation DPC but not to **obtain the relief** of having their child's services **implemented**. *See generally* Cohen Aff. Ex. 15 (Farago Aff.).

85. This has both individual and universal ramifications for students with disabilities. If parents do not have the ability to obtain IHO orders obligating the NYCDOE to reimburse them for the full market rate of their providers, not only will their individual child be unable to receive a free appropriate public education, but the entire market of agencies and providers will collapse, and thousands of students will be unable to get their mandated services from private providers. In fact, that is exactly what is happening. *See* Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶ 23; Cohen Aff. Ex. 14 (Shapiro Aff.) at ¶ 8; Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 72.

86. The individual Petitioners are personally experiencing this harm. For example, in the case of Petitioner M.W.'s son A.W., an agency that had been providing OT services to his school has gone out of business because of the Revised Regulation, and every eligible child at A.W.'s school is currently not receiving their mandated OT. Cohen Aff. Ex. 6 (M.W. Aff.) at ¶¶ 7, 9. The parents have been trying to find another OT provider who will accept the rate the NYCDOE pays but have been unsuccessful. *Id.* at ¶ 8. In Petitioner Y.N.'s case, her daughter is desperately in need of services because of her visual impairment and learning disability, but the providers who previously worked with her daughter are no longer willing to provide services this year because of the uncertainty created by the Revised regulation and the NYCDOE's "adamance on not paying the providers at their enhanced contracted rates." Cohen Aff. Ex. 10 (Y.N. Aff.) at ¶¶ 2,4.

87. NYSED decided to fix the NYCDOE's problem of losing in front of the IHO and SRO. It first introduced the Initial Proposed Regulation, which would have eliminated Implementation DPCs altogether. It then instead proposed the Revised Regulation, which keeps Implementation DPCs available to parents when the NYCDOE fails to implement services, but eliminates the necessary remedy of enhanced rates.

88. This was not legitimate rulemaking. Rather than to "clarify" the statute, the Regents created, by regulation, a very narrow and specific exception to that statute. And that exception is not only missing from the statute itself, it also **contradicts** the statute.

89. This was textbook arbitrary and capricious rulemaking, for at least the following reasons:

- a. *First*, an executive agency like NYSED cannot use rulemaking or regulations to "clarify" a law. Legislative statutes regulate administrative bodies and their rules.
- b. *Second*, the Revised Regulation violates the law by impermissibly limiting both the relief an IHO can fashion in an Implementation DPC, as well as the types of disputes that a parent is permitted to raise in the first place.
- c. *Third*, there was no emergency basis upon which to adopt the regulation without public notice and comment.
- d. *Fourth*, the Revised Regulation had the effect of barring many parents from filing an Implementation DPC to obtain their children's mandated services during the upcoming 2024-2025 school year. The Revised Regulation allows the parents to file an Implementation DPC challenging that they have not received their mandated services, but **not obtain those mandated services** through equitable relief. That is not only nonsensical, but also contrary to controlling law.
- e. *Fifth*, the Revised Regulation does not account for the fact that many parents obtained services for their children for the previous year (or two years) and had not yet filed a DPC seeking reimbursement. In those cases, either parents or agencies expended funds relying on the DPC system that had been in place for at least 15 years. The parents have a two-year statute of limitations to file a DPC, so many had not filed before July 16, 2024. Although they had every reason to rely on the ability to be reimbursed for the full cost of the private provision of special-educational services, they

now face being monetarily responsible for services rendered as a result of the Revised Regulation that bars them from seeking the agency's full hourly rate as reimbursement.

- f. *Sixth*, as explained in further detail in the accompanying affirmations, the Revised Regulation is resulting in significant harm to students.
- g. *Seventh*, as explained further below, state **law** precludes a school district from providing core instructional services through outside independent agencies. Accordingly, the Revised Regulation is illegal for the additional reason that it is based on the premise that NYCDOE, through its new ERES Unit, will work with independent contractors to provide these core instructional services to students. There is no provision in the law for a school district, on its own, through its own internal office, to (1) work with independent contractors, (2) determine how much the contractors will be paid, and (3) determine whether it agrees with reimbursing these contractors, and the rate at which the district will do so.
- h. *Eighth*, the Revised Regulation lacks reasoned analysis, including an incomplete impact analysis (there is no analysis of the students who will be impacted, or the cost increase to their parents), and neglects alternatives that would help the NYCDOE introduce controls without eliminating due process rights for parents.
- i. *Ninth*, the Revised Regulation is vague. It purports to limit only the types of disputes a parent can raise in a DPC, but in effect limits the relief they can seek in an Implementation DPC. NYSED later issued an FAQ guidance document purporting to clarify the regulation's vagueness, but that document does not have the force of an adopted regulation, or binding law.
- j. *Tenth*, the Revised Regulation leaves parents with no alternatives to get their children Special-Ed services.
- k. *Eleventh*, the Revised Regulation deprives students of pendency rights, as explained below.

REGULATION BEING CHALLENGED

90. Finally, the Revised Regulation was not only adopted on an emergency basis at the July 15, 2024 Regents meeting, it was also introduced for ordinary public-notice-and-comment. It was published in the State Register on July 31, 2024 (Vol. XLVI, Issue 31) ("July State Register"), attached as Cohen Aff. Ex. 19 at 9, under I.D. No. EDU-31-24-00007-EP, Filing No, 616.,

91. However, the wrong text of the rule was filed in the July State Register. Accordingly, the proposed rule was withdrawn, as published in the State Register on August 21, 2024 (Vol. XLVI, Issue 31) (“August State Register”), attached as Cohen Aff. Ex. 20 at 6, under I.D. No. EDU-31-24-00007-W. The proposed rule was re-filed that same day in the August State Register with I.D. No. EDU-34-24-00001-EP, and Filing No. 674. Cohen Ex. 20 (August State Register) at 4-6. The public notice-and-comment period will last for 60 days, through October 21, 2024 (the sixtieth day being a Sunday). It is anticipated to be presented for permanent adoption at the Regents’ meeting on November 4-5, 2024.⁸ Beforehand, the emergency rule is set to expire 90 days after adoption, on October 13, 2024. Accordingly, NYSED has announced that it plans to ask the Regents to adopt the Revised Regulation again as an emergency rule at its next meeting in early October.

92. This Petition challenges the Revised Regulation as adopted by the Regents on July 15, 2024, and as published in the State Register (to be broadly construed as the July State Register and August State Register). Should the Regents improvidently adopt the Revised Regulation again in October, November, or otherwise—even after it is put on notice of the Revised Regulation’s illegality and of the profound harm it is causing—this Petition should be construed as continuing to challenge the Revised Regulation (as re-adopted in the future) for the same reasons alleged herein, until the Petitioners amend their Petition or initiate a new one.

⁸ See NYSED Website, *Public Comment Period on Amendment to section 200.5 of the Regulations of the Commissioner*, published July 25, 2024 (revision date not listed), available at <https://tinyurl.com/54t9fbum>.

ARTICLE 78 STANDARD OF REVIEW

93. An Article 78 proceeding raises for review “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3).

94. In addition to the requirements of CPLR 7803(3), agency rulemaking must comply with the requirements of the State Administrative Procedure Act (“SAPA”).

95. “Administrative rules are not judicially reviewed *pro forma* in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context.” *N.Y. State Ass’n of Cntys. v. Axelrod*, 78 N.Y.2d 158, 166 (1991). An agency’s action is arbitrary and capricious where it lacks a “sound basis in reason” or a “rational basis” in the record. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)).

96. An administrative agency’s action may be set aside where, among other things, it is “not based on a rational, documented, empirical determination,” where it fails to consider an important aspect of the problem, or where “the calculations from which [it is] derived [are] unreasonable.” *Ass’n of Cntys.*, 78 N.Y.2d at 166, 168; *see also Motor Vehicles Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983); *O’Rourke v. City of New York*, 116 N.Y.S.3d 497 (N.Y. Sup. Ct. 2019).

ARGUMENT

97. The Revised Regulation violates certain rights of students and parents that are afforded to them by law. It was also improperly adopted as an emergency regulation. These two grounds to annul the Revised Regulation are elucidated in detail in the pages below.

I. THE REVISED REGULATION IS UNLAWFUL, ARBITRARY AND CAPRICIOUS, LACKED ANY RATIONAL BASIS, AND IS AN ABUSE OF DISCRETION

98. As an initial matter, a “nonindividualized, generally applicable quasi-legislative act such as a regulation ...can be challenged as being ‘affected by an error of law,’ ‘arbitrary and capricious’ or lacking a rational basis” when the nature of the claim requires a petitioner to “convince the court that [the agency] promulgated a rule...that represented an irrational construction of the governing statutes.” *N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994) (citing CPLR 7803(3)) (holding that the challenge of the agency’s “method for computing reimbursement rate” applicable to all similarly situated individuals (quasi-legislative and similar to a regulation) as “unlawful and arbitrary and capricious in that it had no foundation in the relevant statutes” should be decided under CPLR Article 78). This is precisely the case here, where the State Education Department proposed a generally applicable emergency regulation that has no valid basis in the New York Education Law.⁹

99. The Court of Appeals has instructed that in situations like these, “where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency ... [and] the judiciary need not accord any deference to the agency’s determination.” *Kreger v. Town of Southold*, 230 A.D.3d 781, 782 (2d Dept. 2024) (citing *Wang v. James*, 40 N.Y.3d 497, 501–02 (2023)).¹⁰ In other words, NYSED is not entitled to adopt a regulation to “clarify” a law.

⁹ The Revised Regulation also violates the IDEA.

¹⁰ The United States Supreme Court has held the same. *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2266 (2024) (“interpretive issues arising in connection with a regulatory scheme often may fall more naturally into a judge’s bailiwick than an agency.”)

A. Excluding Rate Disputes from IHOs' Jurisdiction Violates New York Education Law's Dual Enrollment Statute (Section 3602-c) and Section 4404

100. Excluding issues regarding rates of special education services provided to nonpublic student students from an IHO's jurisdiction violates the New York Education Law. The dual-enrollment statute, Section 3602-c, unequivocally affords nonpublic school students the same rights as those afforded to public school students, including the right to due process hearings, and a comprehensive overview of relevant case law and statutory interpretations demonstrates that these rights include the right to due process implementation hearings regarding disputes over rates.

1. Premise One: nonpublic school students are entitled to due process hearings regarding implementation of their IESPs.

101. Nonpublic school students are entitled to due process hearings regarding implementation of their IESPs. This is clearly prescribed by New York Education Law § 3602-c and § 4404, and supported by interpretations by the Court of Appeals and the State Education Department itself back in 2007 after the amendment of Section 3602-c.

102. In fact, in the Revised Regulation published in July, the State Education Department has recognized as much. Ex. 12 ("Revised Proposal") at 2-3, 7. Merely months ago, in another proposed amendment published in May (the Initial Proposed Regulation), the State Education Department took the position that parents of disabled students who are enrolled in nonpublic school are not entitled to file due process complaints regarding any implementation dispute. Perhaps soon realizing that this "interpretation" is plainly unlawful, the Department then revised the language in the July Revised Regulation, limiting the restriction to disputes over rates (which is not any less unlawful). *Compare* Cohen Aff. Ex. 11 (Initial Proposal) with Cohen Aff. Ex. 12 (Revised Proposal).

103. In any event, regardless of what stance the Department currently takes, it is clear that parents of nonpublic school students are entitled to due process hearings on the implementation of their IESPs, for the reasons stated below.

a. The due enrollment statute of New York Education Law (§ 3602-c) Provides Nonpublic School Students the Right to File Implementation DPCs

104. It cannot be disputed that § 3602-c mandates that special education services shall be provided to nonpublic school students on an equitable basis as compared to those provided to public school students (the “Equitable Service Standard”).

105. As an initial matter, under the IDEA, 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). The IDEA itself does not require every state to confer an individual entitlement to special education upon students who are enrolled by their parents in nonpublic schools. *See* 34 C.F.R. § 300.137(a). New York State, however, has chosen to do so, and extends the same entitlements to students who attend nonpublic schools for general education as those who attend public school.

106. Specifically, Section 3602-c mandates that “[b]oards 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...” N.Y. Educ. Law § 3602-c (2)(a). The “services” here refer to “special education programs and services [that] 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.” N.Y. Educ. Law § 3602-c (b)(1).¹¹ *See also supra* ¶ 58.

107. Section 3602-c also directly provides that parents may avail themselves of the procedural safeguards of § 4404, and may file DPCs allowed by Section 4404. The cross-reference between Section 3602-c and Section 4404 makes clear that Section 4404 is intended to provide extensive procedural safeguards to nonpublic school students governed by Section 3602-c. After setting forth that nonpublic school students “shall” receive equitable treatment to public school students, Section 3602-c goes on to provide 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,” § 3602-c(2)(b)(1), and 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.” § 3602-c(2)(c).

108. These cross references to § 4404 demonstrate that the legislature intended for private school parents to be able to file DPCs for any reason that their child does not receive services.

109. This plain language is clear, and the analysis need go no further: Parents of children with IESPs are entitled to file the same DPCs as the parents of children with IEPs, under the same §4404. But there is also legislative history to further bolster this analysis.

¹¹ §3602-c further provides that “for the purpose of obtaining education for students with disabilities... such request shall be reviewed by the committee on special education of the school district of location, which 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.” § 3602-c (2)(b)(1).

110. Section 3602-c was amended in 2004. Prior to the amendment, the statute included a provision that stated that implementation disputes were reviewable by the Commissioner of Education under a process outlined in Education Law § 310. That provision was *stricken*, as follows:

Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 (June 6, 1990) (underline added)). The amendments that became effective removed the underlined sentence (L. 2004, ch. 474 § 2).

111. A review of the statute’s history and the New York State Assembly Memorandum in Support of Legislation shows that the legislature intended to remove the language to resolve a conflict: When the statute was first enacted, IHO decisions under § 4404 were appealable to the Commissioner of Education. “At the time [§ 3602-c] 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.” *Id.* Therefore, the stricken language was in conflict with the law in effect at the time of the amendment, because by that time, § 4404 appeals went to SROs. *Id.* By striking the above language in § 3602-c, the legislature made clear that Implementation DPCs were among those contemplated that would be reviewed by IHOs, and appealable to the SRO. “[N]ow 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.” *Id.* That is because private school

parents' remedy under the law was to file an Implementation DPC pursuant to § 4404. For more analysis on the legislative history, *see* Cohen Aff. Ex. 17 (SRO 23-069), at 8-10.

112. In other words, the legislature did not intend for the parents' ability to file a Rejection DPC pursuant to Section 4404 to be to the exclusion of also having the right to file an Implementation DPC under Section 4404. The purpose of § 3602-c was to grant the parents of non-public school children the same rights all public school children, included bringing Implementation DPCs. As IHO Farago writes, private school parents have been filing Implementation DPCs for “decades.” Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 24, both predating the amendment and continuing after.

113. NYSED itself interpreted § 3602-c exactly this way after the law was amended in 2007. Specifically, the 2007 Guidance clearly states that “[a] parent of a [nonpublic school] student who is a NYS resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or the **provision of special education services may submit a Due Process Complaint Notice** [*i.e.*, an Implementation DPC] to the school district of location.” *Id.* at 5. Accordingly, Implementation DPCs for private school students proceeded after this amendment just as they always had before the amendment. Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 24.

114. Indeed, the 2007 Guidance states that the purpose of the amendment to § 3602-c was to ensure that “all students enrolled in nonpublic elementary and secondary schools by their parents...have access to those special education **services they would have received if they attended public school**,” and that “equitable basis” means “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.” Cohen Aff. Ex. 18 (2007 Guidance) at Prelim and 11. The broad language demonstrates that the State Education Department (correctly) understood back then, contemporaneously with the legislature’s passage of the amended § 3602-c, that the dual-enrollment statute’s purpose is to put nonpublic school students in the same position as public school students, including with regard to their due process rights.

115. And that is also the only reasonable interpretation of § 3602-c. It cannot be the case that the legislature intended that the NYCDOE “**shall** furnish services to students...who attend nonpublic schools;” that the CSE “**shall** develop an individualized education service program for the student...**in the same manner and with the same contents as**” public school students; and “**shall** assure that special education programs and services **are made available** to students with disabilities attending **nonpublic** schools...**on an equitable basis**, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools;” and even made clear that private school parents had the right to file DPCs pursuant to § 4404; and yet did not intend that the parents could file a DPC if the NYCDOE failed to make services available to students attending nonpublic schools. § 3602-c(2)(a), (b).

116. Rather, the ability for parents of nonpublic school children to file Implementation DPCs has remained the “universal and universally-accepted” procedure, and up until about a year or two ago, even NYCDOE itself never argued that parents did not have this right. Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 24.

117. NYSED has now taken a new position in the Revised Regulation and asserts that, notwithstanding that § 3602-c expressly places public school students and nonpublic school students on equal footing in every regard, the legislature intended to provide fewer due process rights to nonpublic school students than are provided to public school students. As IHO Farago

wrote in an affirmation in support of this petition, “there is zero precedent to support any such argument.” *Id.* Indeed, there is no such precedent or legal support.

118. The thin rationale, if any, provided by the Revised Regulation to justify its re-interpretation of the statute to carve out disputes over rate from an IHO’s jurisdiction is based entirely on an incorrect interpretation of Section 3602-c.¹² That re-interpretation is wrong. The Revised Proposal states that Section 3602-c provides non-public school parents the ability to file due process complaints only “in certain instances,” adding that “§ 3602-c (2)(b)(1) authorizes a due process hearing for the ‘[r]eview [of] the recommendation of [IESP services made by a] committee on special education’ and Education Law § 3602-c (2)(c) authorizes a due process complaint ‘relating to compliance of the school district of location with child find requirements, including evaluation requirements.’” Cohen Aff Ex. 12 (Revised Proposal) at 2-3. The Revised Proposal argues incorrectly that the language is intended to be restrictive as to what issues are reviewable by an IHO in a due process hearing, and the circumstances referenced above consist of an exclusive list.

119. That is precisely the argument that has been correctly **rejected** by IHOs and the SRO. Section 3602-c provides exactly the opposite, *to wit*: broad equality in treatment between public school students and nonpublic school students, including in their due process rights. As the SRO has noted, and as explained above, the inclusion of NYSED’s cherry-picked language

¹² It is worth repeating that this agency re-interpretation of a statute is entitled to no deference. *See Int’l Union of Painters & Allied Trades v. New York State Dep’t of Lab.*, 32 N.Y.3d 198, 208-09, (2018) (“[w]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent,” as opposed to “understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,” “there is little basis to rely on any special competence or expertise of the administrative agency,” and “[i]n such a case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent”).

regarding “review of the recommendations” in § 3602-c (2)(b)(1) was merely a byproduct of the legislature’s amendments of Section 3602-c. *See, e.g.*, Cohen Aff. Ex. 17 (SRO 23-069).

b. New York Education Law § 4404 also provides that nonpublic school students in New York are entitled to file a DPC for “any matter” in dispute.

120. There is a second source of law that independently grants parents the right to file an Implementation DPC when the NYCDOE fails to implement an IESP. The Court of Appeals has interpreted § 3602-c’s Equitable Service Standard to mean students who attend nonpublic school for general education are entitled to receive a FAPE or FAPE equivalent in the same manner as public school students. In *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 14 N.Y.3d 289 (2010), the Court observed that “Education Law § 3602-c, known as the dual enrollment statute, requires the provision of special education programs ‘on an equitable basis to students who attend nonpublic schools.’” *Id.* at 293. In reviewing a determination from an IHO and an SRO regarding a private school student’s special needs service, the Court stated that “the pertinent question is what the educational needs of this student require,” *i.e.*, what kind of services are needed “**in order for this child [in private school] to receive a free appropriate public education.**”¹³ *Id.* at 293.

121. Earlier, in *Wieder*, the Court of Appeals held that “section 3602-c authorizes services to private school handicapped children and affords them an option of **dual enrollment in public schools**, so that they may enjoy **equal access** to the full array of specialized public school

¹³ In *Bay Shore*, the Court of Appeals held that the Bay Shore school district (located in Suffolk County) was required to provide public school services at the student’s private school. “Both the IHO and the SRO essentially found that, in order for this child to receive a free appropriate public education, the services of an individual aide would have to be provided at his nonpublic school.... Under these circumstances, the courts below properly determined that the School District was required to provide the one-on-one aide at the student’s private school.” *Id.* at 293-94.

programs.” 72 N.Y.2d at 184 (1988). These students “become **part-time public school students**, for the purpose of receiving the special services.” *Id.* Thus, under New York 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 for the purpose of receiving special education programming under Education Law Section 3602-c.

122. As a child enrolled in public school and entitled by the New York Education Law to a FAPE or FAPE equivalent, their parents are entitled to file an Implementation DPC, ab initio, pursuant to their rights under § 4404, and do not need to find a specific right within the text of § 3602-c. Section 4404 provides the right to due process hearings to any “parent or person in parental relation of a student” who “presents a 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 ...” N.Y. Educ. Law § 4404. The plain and broad language (“any matter relating to the provision of a FAPE”) necessarily means that the due process hearing regarding the *implementation* of all of the free appropriate public education services that the child’s CSE mandated for the child in their IESP is within the scope of the due process hearings prescribed by § 4404.

123. Thus, in addition to the fact that Implementation DPCs are allowed under § 3602-c, New York’s private school students are entitled anyway to all the same procedural safeguards afforded to public school students by virtue of being dually enrolled in a public school.

2. Premise Two: the right to due process hearings necessarily includes the right to have rate disputes adjudicated at these hearings.

124. The Revised Regulation published in July has effectively conceded that nonpublic school students have the right to due process hearings regarding the *implementation* of their IESPs. What the Revised Regulation seeks to do now, instead, is to carve out the parents’ right to have

disputes over rates adjudicated from these due process implementation hearings. This unlawful attempt is directly contradictory to the plain meaning of the statutes and legislative intent.

125. For reasons stated below, the right to due process hearings necessarily includes the right to have an IHO adjudicate disputes over rates.

a. The plain language of § 4404 indicates that the scope of due process hearings is broad and all-encompassing.

126. The scope of due process hearings as prescribed by § 4404, consistent with the language of the IDEA, is broad and all-encompassing, giving parents the right to initiate a due process hearing “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.” N.Y. Educ. Law § 4404. *See also Fauconier v. Comm. of Special Educ.*, 2002 WL 31235786, at *4 (S.D.N.Y. Oct. 2, 2002), *adopted sub nom. by Fauconier v. Comm. on Special Educ.*, 2003 WL 21345549 (S.D.N.Y. June 10, 2003), *aff’d* 112 F. App’x 85 (2d Cir. 2004) (“The scope of the due process hearing is broad, encompassing complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child.”). Rates of the service provided are therefore necessarily within the scope of due process hearings. No “free” or “appropriate” public education can be ensured if disputes over rates of such education are off limits for due process hearings.

127. Nowhere does § 4404 indicate or imply that disputes over rates of service providers can be carved out of the board range of issues that are within the scope of due process hearings. *See Axelrod*, 165 A.D.2d 152 (“statute itself is tellingly silent... it contains no exception, create[ing] a strong presumption that none was intended...exceptions should be the product of legislative action, not administrative or judicial construction,” and holding that the agency’s

“interpretation of the [statutory] provision [to create the exception] is unlawful, arbitrary and capricious.”).

b. The IHOs have broad discretion to fashion equitable relief that ensures a student actually receives their mandated services.

128. When a parent files a due process complaint to seek full reimbursement for the services provided, the parent is seeking equitable relief so that the child can receive the services that are mandated by law. Indeed, the administrative review process mandated by the IDEA gives state hearing officers the right to fashion equitable relief to achieve this goal. *See F.C. v. New York City Dep't of Educ.*, , 2016 WL 8716232, at *7 (S.D.N.Y. Aug. 5, 2016) (“Congress in the IDEA put in place a mandatory administrative review process, including to fashion...compensatory education and equitable relief to [a student] that places him in the position that he would have been in had he not suffered FAPE deprivations.”). The discretion of fashioning equitable relief is broad. *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 521-22 (D.C. Cir. 2005) (“Under the theory of compensatory education, courts and hearing officers may award educational services...to be provided prospectively to compensate for a past deficient program,” and the power to “fashion appropriate relief...entail[s] broad discretion and implicate equitable considerations).

129. The fact that IHOs fashion **equitable** relief is important, because it illustrates that the purpose of an Implementation DPC is to obtain the mandated services for the child, not money damages to compensate the parents. Even where the parents are seeking to be reimbursed for the cost they incurred for obtaining Special-Ed services on their own, Courts still consider this to be equitable relief. *See Doe v. East Lyme Bd. Of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015) (Tribunals and “court[s] may award various forms of **retroactive** and **prospective equitable** relief, including **reimbursement** of tuition, compensatory education, and other declaratory and injunctive remedies.”). If a Court awards a parent only part of the rate charged by a Special-Ed service

provider or agency, the result will be a failure for the child to receive the equitable relief of free appropriate services to which they are entitled. Thus, the ability to seek the actual rate charged by the provider is part-and-parcel of the equitable relief to which the parents are entitled by law, and the Board cannot alter this right through regulation. To be sure, this reality does not grant a parent a blank check to pay a provider whatever rate they request. The NYCDOE is free to argue that a rate is excessive and provide evidence that a particular rate exceeds what the market commands.¹⁴

130. By depriving IHOs' jurisdiction to adjudicate disputes over rates or to fashion remedies involving enhanced rates, the Revised Regulation directly contradicts the broad discretion afforded to IHOs by the IDEA and relevant case law, as well as New York Education Law § 4404, which is consistent with the IDEA.

131. The NYCDOE was obligated to provide these services in the first place. Purely out of the NYCDOE's "dysfunction," in New York City there are thousands of students who should be provided these services by the school district but who are simply not provided with them. There is no legal basis for the NYCDOE to offload this obligation to the parents themselves. The parents, who are not professional educators, must obtain these services on their own, sometimes through agencies. It would be an absurd result, and contrary to law and legal precedent, for the new Revised Regulation to require dismissal of any requests by the parents for full reimbursement. It would result in the student not receiving a free appropriate public education from the district, and being unable to obtain a free appropriate public education through the private placement either. It would leave the child without the very services that the school district's own CSE has mandated for the

¹⁴ The SRO has a long history of analyzing claims of excessive costs. (*See* SRO 11-045, SRO 23-033, SRO 24-075, and SRO 24-276.) All these cases stand for the proposition that in order prevail in argument that the privately obtained costs are excessive, the District must present evidence to support such a claim.

child. This *cannot* be what the law requires.¹⁵ See generally Farago Aff. (describing importance of IHOs to be able to fashion equitable remedies, including rates paid to providers).

c. The agency cannot promulgate regulations to circumvent its burden of proof at due process hearings.

132. Due process hearings are adversarial proceedings between school districts and parents, where each party bears their own burden of proof. Specifically, under New York State’s administrative review process to address disputed matters between parents and school districts regarding IESPs, the parties appear at an impartial hearing conducted before an IHO, N.Y. Educ. Law § 4404(1)(a); 8 NYCRR 200.5(j), and the IHO typically conducts a trial-type hearing 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. 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).

133. Parents are presumptively entitled to **full** reimbursement once they demonstrate that the district failed to provide an appropriate program for the student, and that the parent’s private placement was appropriate. Under the *Burlington-Carter* test, the pertinent question is appropriateness, not specific rates, and it is error to apply the test by conducting reimbursement calculations within the analysis of the appropriateness of the unilateral placement. *A.P. v. New York City Dep’t of Educ.*, 2024 WL 763386 at *2 (2d Cir. Feb. 26, 2024) (holding that the IHO

¹⁵ SRO opinions accord. The “dysfunction has twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for.” SRO 20-115, attached as Cohen Aff. as Exhibit 21, at 5. “While districts cannot deliver special education services called for by their educational programming in an unauthorized manner ... they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA.” *Id.* at 8.

should have determined only whether the unilateral placement was appropriate or not, rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight-hour day); *Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519, 526–27 (2d Cir. 2020) (applying the *Burlington-Carter* analysis). Additionally, “once parents pass the first two prongs of the *Burlington-Carter* test,” the “presumption” is that the parents will receive “a **full** reimbursement of award.” *A.P.*, 2024 WL 763386 at *2 (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246-47 (2009)). That presumption can be rebutted upon an application and evidentiary showing by the district to compel a lower award. The *Burlington-Carter* test is applied by courts in Rejection DPCs, but the analysis is no different in Implementation DPCs, and that is how IHOs and SROs have been applying it: under the IDEA, as interpreted by the U.S. Supreme Court in *Forest Grove*, if the district wants to rebut the presumption that it must pay the full rates of a provider, it must demonstrate a basis and meet its evidentiary burden.

134. Here, the Revised Regulation improperly does away with the legal obligation of NYCDOE to make an application and meet an evidentiary burden to reduce the rates it is obligated to pay under the law. The Regents and NYSED cannot circumvent, by promulgating self-serving regulations, the law’s requirements that school districts must meet a burden of proof in order to seek a lower rate than the actual rate charged to the parents.

135. In a bizarre twist, the Revised Regulation expressly grants a right to school districts to file their own DPC to seek a reduced rate, which is consistent with the law. It is not clear which school district this refers to. What makes the Revised Regulation improper is that it allows the NYCDOE to effectively determine, on its own, a cap on rates it will pay to private service providers, so this part of the Revised Regulation is likely not meant to relate to the NYCDOE.

136. The Regents, however, may not promulgate by regulation blanket authority for the NYCDOE to set a rate cap. *See* Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 19 (describing Revised Regulation as allowing NYCDOE to set its own “upper limit”). The NYCDOE is just one party in an adversarial posture before a neutral arbiter. If the district wants to pay a lower rate than the one actually charged by the provider to the parents, it is required to convince the IHO, in each individual case, of the merits of its position.

3. Conclusion: parents of nonpublic school students are entitled to adjudication of disputes over rates at due process hearings, and NYSED’s Assertion to the Contrary is Meritless.

137. Having established that (1) Premise One: nonpublic school students are entitled to due process hearings regarding implementation of their IESPs; and (2) Premise Two: the right to due process hearings necessarily includes the right to have rate disputes adjudicated at these hearings, it necessarily leads to the conclusion that nonpublic school students are legally entitled to have disputes over rates adjudicated at due process hearings. The Revised Regulation’s so-called “clarification” of Education Law is therefore unlawful, arbitrary and capricious, without rational basis, and an abuse of discretion. The fact that Revised Regulation has a precise effective date of July 16, 2024, and adopted on an emergency basis proves that it is not a “clarification” of what has always been the case but rather an earth-shattering departure from the manner in which impartial hearings have been conducted for decades.

138. Accordingly, for the above reasons, the Revised Regulation impermissibly restricts the rights of parents as prescribed by the New York Education Law, and it must be annulled.

B. Establishing ERES to Process Disputes over Rates is a Further Violation of Education Law.

139. Petitioners are likely to succeed in their Article 78 challenge of the Revised Regulation for the additional reason that it not only violates the Education Law by eliminating

disputes over rates from IHO's jurisdiction, but also proposes to implement an unlawful procedure by relying on and delegating to NYCDOE's new Enhanced Rate Equitable Services Unit (the "ERES Unit").

140. NYSED wrote in the Revised Proposal that "ERES will receive and process all requests for enhanced rate equitable services." Cohen Aff. Ex. 12 (Revised Proposal) at 4. But there is no legal authority for NYSED to allow NYCDOE to take this gatekeeper authority for itself. The law provides only that if the NYCDOE does not provide the core instruction with its own employees, the sole remedy is for the parents to obtain the services on their own and for the NYCDOE to pay for it.

141. When a school district fails to provide appropriate services to a child, the child's parents may obtain those services from an independent contractor and the district is obligated to pay for it. But this is a one-way street. By law, school districts are prohibited from themselves directly providing services through independent contractors. Courts have held that state law requires that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into. *See Bd. of Co-op. Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Cty. v. Univ. of State Educ. Dep't*, 40 A.D.3d 1349, 1350 (3d Dep't 2007) (noting that the relevant provisions of the Education Law did not provide for instruction by employees of for-profit corporations such as Kelly Services Inc.); *see also Averback v. Bd. of Educ. of New Paltz Cent. Sch. Dist., New Paltz*, 147 A.D.2d 152, 154 (3d Dep't 1989) (explaining that "[a]bsent a 'plain and clear' prohibition in statute or decisional law, boards of education are empowered to agree to terms of **employment**" of a teacher).

142. As the SRO has written, “the Commissioner of Education has made it abundantly clear and has repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor and this application of State law requiring that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into has been upheld in the courts.” Cohen Aff. Ex. 21 (SRO 20-115) at 5-7. Yet this would be ERES’s purported role, and no state law authorizes ERES to do so.

143. Thus, even if ERES was not unsuccessful, it would not be legal. Accordingly, the Revised Regulation is arbitrary and capricious for the second reason that it leaves no alternative in place for parents to obtain services, except for the ERES Unit, which is itself not lawful. But in any event, the existence of the ERES Unit has done nothing to ensure that private school students obtain Special-Ed services, leaving parents and children stranded and without the Special-Ed services to which they are entitled. *See e.g.* Cohen Aff. Ex. 2 (I.G. Aff.) at ¶ 5, Cohen Aff. Ex. 10 (Y.N. Aff.) at ¶ 4, Cohen Aff. Ex. 3 (M.H. Aff.) at ¶ 4, Cohen Aff. Ex. 6 (M.W. Aff.) at ¶¶ 7-9. Cohen Aff. Ex. 13 (Gerschel Aff.) ¶ 24; Cohen Aff. Ex. 14 (Shapiro Aff.) ¶ 8.¹⁶

C. The Revised Regulation Abruptly Departs from Existing Practice and Prejudices Thousands of Families Who Relied Upon Past Practice.

144. The Revised Regulation is arbitrary and capricious and in violation of Article 78 further because eliminating an IHO’s jurisdiction over rate disputes is an abrupt departure from

¹⁶ Moreover, the whole concept of the NYCDOE setting its own **public** rates to be paid for Special-Ed services that are **privately** obtained due to the school district’s failure to provide them directly, is illegal. As the SRO has noted repeatedly in cases where a parent sought an enhanced rate for SETSS and the NYCDOE argued against it, “any notion of a public rate for independent SETSS instruction for this student that may be sanctioned in a policy of the district is flawed and cannot be reasonably relied upon by either party, because the district was not authorized to contract for the provision of an independent special education teacher.” Cohen Aff. Ex. 21 (SRO 20-115), at 7-8.

existing practice, which is patently unfair. *See Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 516–17, (1985) (“A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.”); *Williamsburg Charter High Sch. v. New York City Dep’t of Educ.*, 36 Misc. 3d 810, 832, (Sup. Ct. 2012) (holding that NYCDOE’s determination violated Article 78, in part because the “procedure for this [determination] process was inconsistent with past practice and was not corroborated by any policy, regulation or protocol established by the DOE.”)

145. Specifically, there are parents, including Petitioner MM, who have obtained private services for their children for the prior school year (2023-2024), but have not filed a due process complaint because their claims are still within the two-year statute of limitations. N.Y. Educ. Law § 4404. When they obtained these services at their own risk, they relied on many years of precedent in believing that that they would have a right to seek reimbursement from the school district within two years. By abruptly prohibiting IHOs from adjudicating disputes over rates for “any due process complaint filed on or after July 16, 2024,” Cohen Aff. Ex. 12 (Revised Proposal), the Revised Regulation (passed on an emergency basis with no public notice) has prejudiced these families who had the right to expect an opportunity to file an Implementation DPC to vindicate their equitable rights and seek reimbursement of the cost of their child’s Special-Ed services.

146. Additionally, this means that practically speaking, the abrupt departure will force IHOs to reach different results for similarly situated parents filing claims. The Revised Regulation effectively retroactively put parents who did not yet file an Implementation DPC in a different position than parents who also obtained services for the 2023-2024 school year but filed an Implementation DPC prior to July 16, 2024.

D. There is No Acceptable Alternative to the Ability to File an Implementation Due Process Complaint.

147. After disallowing Implementation DPCs as a means for non-public school parents to obtain Special-Ed providers for their children, the Revised Proposal indicates that parents will instead be able to work directly with the NYCDOE ERES Unit to obtain these services. Revised Proposal at 4. Thus far, the ERES Unit has not succeeded in placing these students with providers. *See e.g.* Cohen Aff. Ex. 13 (Gerschel Aff.) ¶ 21. The students are back to square one, except now without Implementation DPC rights.

148. NYSED's August 2024 FAQ states that in this situation, a parent may file a State complaint with NYSED's Special Education Quality Assurance Unit (SEQA Unit). Cohen Aff. Ex. 16 (FAQs) at 3-4. But being passed along from the ERES Unit to the SEQA Unit accomplishes nothing for these children, and actually introduces new harm.

149. There is a reason the IDEA and the New York Education Law created the due process system. It is meant to be fast, straightforward, and impartial, getting kids the help they need quickly. Removing due process rights and replacing it with a bureaucracy defeats that purpose. And if a child and her parents are entitled to due process by law, they are harmed when they are forced to utilize a different grievance system.

150. Here, the proposed new process by NYSED harms children, for the following reasons.

151. *First*, a parent should not be directed to a unit of the NYCDOE, the very body that has proven unwilling or incapable of providing the disabled students with the services they mandate. The legislatures intentionally created an **impartial** tribunal to preside over due process complaints. To take away parents' rights to an impartial hearing and require parents to submit requests to the same entity that has failed them is irrational. To be clear, parents already put the

NYCDOE on notice by submitting Ten Day Notices and June First Letters, and the district still did not provide the mandated services. If the NYCDOE wants to create an ERES Unit to implement IESPs, it should of course do so; but not to exclusion of parents also having due process rights when the IESP is not implemented.

152. *Second*, the timelines contemplated by the ERES unit are far slower than what is currently in place under the due process system. The ERES unit states it will issue determinations within “approximately 60 days of receipt of documentation.” Cohen Aff. Ex. 16 (FAQs) at 2. The likelihood is that a large part of the year will have passed before it does so. This is nowhere near the expedient timeframes contemplated by the regulations and the IDEA which currently govern impartial hearings. The black letter law of the regulations and the IDEA are crystal clear. School Districts must respond to due process complaints within **10 days** of filing. *See* 20 U.S.C. § 1415(c)(2)(B)(i)(I), *and* 8 NYCRR 200.5(i)(4). If impartial hearings are replaced by ERES submissions, the time frame that parents must wait will be expanded and result in significant disruption of the delivery of services. *See* Cohen Aff. Ex. 15 (Farago Aff.) at ¶ 72(a).

153. *Third*, the ERES and SEQA procedure set forth in the FAQ seem to do away with the child’s automatic entitlement to pendency or “stay-put” rights. Pendency is well-settled law that triggers automatically upon the filing of a due process complaint, and means that a student will continue to get the same Special-Ed services to which they were previously entitled while their due process complaint over their current services is pending. *See* 20 U.S.C. § 1415(j). But submitting to the ERES Unit or filing a state complaint to the SEQA unit does **not** trigger pendency. A state-mandated process that removes pendency rights runs counter to every legislative protective instinct that Congress and the New York Legislature injected into their respective education laws. “The purpose of the pendency provision is to provide stability and

consistency in the education of a student with a disability” while the parties dispute the student’s current program. *Arlington Cent. Sch. Dist. v. L.P.*, 421 F. Supp. 2d 692, 696 (S.D.N.Y. 2006). “This provision is, in effect, **an automatic preliminary injunction.**” *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982). The irreparable harm to a student for the lost educational services is so significant that the law “substitutes an absolute rule” to prevent lost learning in place of the Court’s discretionary consideration of the preliminary injunction factors. *Id.* If the right to file a due process complaint is taken away and parents are left with no option other than submitting the claims to the ERES Unit, thousands of students stand to lose pendency. In fact, the August 2024 FAQ expressly says so. *See* Cohen Aff. Ex. 16 (FAQ) at 3.¹⁷ That is a clear violation of a student’s legal rights.

154. *Fourth*, as a point in fact, neither the ERES Unit nor NYSED’s SEQA Unit is ready, willing or able to handle the influx of requests and complaints. The ERES unit is aspirational at best, and there is no indication that the ERES unit is operational in any meaningful way. *See* Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶ 21; Cohen Aff. Ex. 14 (Shapiro Aff.) ¶ 8. The August 2024 FAQ states that NYSED’s SEQA Unit will only investigate claims that an IESP was not implemented if a parent can prove that they worked in “good faith” with the ERES Unit. But the SEQA Unit is not, in fact, prepared for or willing to hear such complaints. When a special-education lawyer who represents 4,000 students communicated with NYSED about how to proceed, he received this startling and dismaying response: “Implementation of an IESP case rate dispute falls outside the confines of what can be investigated in a State [SEQA Unit] complaint

¹⁷ **Question:** “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]?” **Answer:** “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.”

because there is no allegation of a violation of law or regulation relating to the education of students with disabilities.” Cohen Aff. Ex. 13 (Gerschel Aff.) at ¶ 22.

155. There is therefore no alternative to Implementation DPCs for parents to obtain Special-Ed Services for their children. The fact that NYSED and the Regents relied on this system in adopting the Revised Regulation is yet another reason it must be vacated and annulled as arbitrary and capricious.

II. ADOPTING THE REVISED REGULATION AS AN EMERGENCY RULE IS A VIOLATION OF SAPA

156. SAPA §202(6)(a) provides that an agency can temporarily bypass the normal notice-and-comment requirement under SAPA §202(1) “if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of [the notice-and-comment requirement] would be contrary to the public interest.” N.Y. A.P.A. Law § 202. This exception to the notice-and-comment requirement “should be narrowly construed,” *Home Care Ass’n of New York State Inc. v. Dowling*, 218 A.D.2d 126, 129 (3d Dep’t 1996), because an “emergency rule” promulgated without any substantive justification for the emergency adoption ignores the “purpose and spirit of the State Administrative Procedure Act which at its very core ensures against administrative law making.” *Demetriou v. New York State Dep’t of Health*, 162 N.Y.S.3d 673, 678 (N.Y. Sup. Ct. 2022). The standard of review for challenges to regulations under the SAPA is one of “substantial compliance.” *N. Fork Distribution, Inc. v. New York State Cannabis Control Bd*, 81 Misc. 3d 952 (Sup. Ct. 2023). Determining compliance with SAPA “is not a matter where courts defer to agencies... Rather, the SAPA outlines uniform administrative procedures that State agencies must follow in their rule making,” and courts “judge the justification via traditional de novo review.” *Id.* at 959-60.

157. Adoption of the Revised Regulation as an emergency rule is a plain violation of SAPA §202(6). As detailed below, the Revised Regulation does not identify any cognizable emergency, does not provide any valid explanation regarding general welfare that necessitates the adoption of an emergency rule, and fails to specify why compliance with the notice-and-comment requirement would be contrary to the public interest. The adoption of the Revised Regulation as an emergency rule is therefore simply an ingenuine and illegal attempt by NYSED to avoid the notice-and-comment period otherwise required by SAPA.

A. The Revised Regulation Does Not Identify Any Cognizable Emergency

158. The Revised Regulation has plainly failed to meet the threshold requirement of promulgating an emergency rule because it identifies no cognizable emergency. SAPA §202(6)(d)(iv) requires the agency, upon promulgating an emergency rule, to “fully describe[] the specific reasons for such findings and the facts and circumstances on which such findings are based.” N.Y. A.P.A. Law § 202. In other words, “[t]he SAPA requires, at minimum, an agency seeking an emergency rule adoption to fully articulate in writing the circumstances which give rise to the adoption on an emergency basis.” *N. Fork Distribution, Inc.*, 81 Misc. 3d at 958 (cleaned up); *see also, In re Dry Harbor Nursing Home v. Zucker*, 2017 WL 11503658, at *6 (N.Y. Sup. Ct. Nov. 17, 2017) (emergency regulation deemed in violation of SAPA when “statement highlighted by defendants articulating the need for an emergency rule is devoid of any facts upon which to base a finding that an emergency existed.”); *Gill v. New York State Racing & Wagering Bd.*, 11 Misc. 3d 1068(A), *9 (Sup. Ct. 2006), *aff’d in part, modified in part*, 50 A.D.3d 494 (2008) (“although the proposed emergency legislation said there was an emergency, the record is devoid of any facts upon which to base a finding of immediate necessity, emergency or undue delay”). This mandate “limits emergency rule making to genuine emergencies” and can help fulfil the legislative

purpose of “stop[ping] the practice of using emergency rule making to avoid the notice and comment period otherwise required by the SAPA.” *N. Fork Distribution, Inc.*, 81 Misc. 3d at 959.

159. In Attachment B of the Revised Regulation, titled “Statement of Facts and Circumstances Which Necessitate Emergency Action,” NYSED claims that an “emergency action is necessary at the July 2024 meeting” because “the Board of Regents meets at fixed intervals” and “the earliest the proposed amendment could be adopted by regular (nonemergency) action after expiration of the 60-day public comment period...would be the November 2024 Regents meeting.” Cohen Aff. Ex 12, (Revised Proposal) at 8. This circular and confusing explanation amounts to no explanation at all. Presumably, NYSED believes that an emergency rule is necessary now because it would like to enact a permanent rule in November 2024. But that does not explain why the Revised Regulation has to be adopted immediately, rather than in November, after a notice-and-comment period whereby the public can retain all protections afforded by the usual rulemaking procedures. The reference to periodic Board of Regent meetings is even more incredible as it appears to suggest that the public’s due process right to notice and comment can be overridden by administrative inconvenience the Board of Regents would otherwise have to experience (such as holding an emergency meeting outside of the regular “fixed-interval” meetings, if there is a true emergency). Either way, “mere existence of deadlines for agency action...does not in itself constitute good cause for dispensing with the statute’s notice and comment provisions.” *Home Care Ass’n of New York State Inc.*, 218 A.D.2d at 129.

160. The lack of emergency is further evident from the fact that NYSED circulated a substantially similar proposed amendment, the Initial Proposed Regulation in May 2024, but did not take any further action for two months, until July 2024. If it were true that implementing some version of the Revised Regulation immediately was commanded by the public interest, there would

have been at least some negative consequences from the failure to do so since May, but NYSED does not identify any in the Revised Regulation, nor could it. Indeed, the implementation hearings have been in place not for months or years, but for more than a decade. The failure by NYSED to identify *any change* in the circumstances now, much less any change that would negatively affect public welfare, belies the need for a sudden emergency rule.

161. Courts in New York have enjoined emergency rules for the same failure to sufficiently demonstrate changes of circumstances leading to real emergencies. These courts found that injunctions were warranted even when they recognized that the agency had specified potential (sometimes grave) dangers to the public in the absence of such rules. *See e.g., N. Fork Distribution, Inc.*, 203 N.Y.S.3d at 504 (enjoining emergency rules regulating intoxicating products in the cannabis industry that, according to the agency, might “result in hospitalization and in very rare cases, death” for “young children accidentally consuming such products”; the court found the petitioners’ argument “compelling” that the agency “did not articulate a factual basis for evading the SAPA’s requirement or offer facts of changed circumstances between 2021 (when hemp infused products entered the marketplace) and July 2023 [when the agency promulgated the emergency regulations] that would indicate the rise of a sudden emergency so dangerous as to justify dispensing with normal rulemaking procedures”); *Demetriou*, 74 Misc. 3d at 798 (granting injunction of an emergency rule requiring all state residents to wear a mask in light of the COVID-19 virus, noting that “respondents cannot support the ‘emergency’ classification other than to say the Commissioner chose to call it an emergency,” and “the only justification the respondents offered for emergency adoption was entirely conclusory”); *Gill*, 11 Misc. 3d 1068(A) at *7, *8 (finding no emergency to deter drug abuse in horse racing when the agency “apparently knew there was a problem in 2000” but “waited until 2003 to propose even an emergency rule prohibiting its

use in horse racing,” observing that “while the Board called this an ‘emergency’, they did not treat it as one”); *New York State Ass’n of Homes & Servs. for Aging Inc. v. Perales*, 179 A.D.2d 296, 297, (3d Dep’t.,1992) (endorsing the lower court’s determination that an emergency regulation that reduced Medicaid rates at the medical facilities were improperly adopted, as “a long simmering fiscal crisis within the State budget was not an emergency contemplated by State Administrative Procedure Act § 202(6)”).

B. The Revised Regulation Is Not Necessary for the Promotion of General Welfare

162. The Revised Regulation also fails to comply with SAPA §202(6) because it is not “necessary for the preservation of...general welfare,” nor does it include any sound descriptions of the “general welfare need requiring adoption of the rule on an emergency basis.” N.Y. A.P.A. Law § 202.

163. According to the Revised Regulation, “an emergency rule...is necessary for the preservation of the general welfare to provide predictability for the upcoming 2024-2025 school year regarding the kind of disputes that fall outside the scope of the (State) entitlement to an impartial due process hearing.” Cohen Aff. Ex 12 (Revised Proposal); *see also id.* at Attachment B (same). This barebone statement does not begin to meet the requirements of SAPA §202(6).

164. **First**, there is no explanation as to why and how the purported “predictability” would promote general welfare. A rule that promotes general welfare should be a rule that at least benefits the citizens of New York. In *Gill.*, the court agreed that deterring the use of certain drug in horse racing is “reasonably related to the promotion of the public welfare” because the drug “served no legitimate purpose.” 11 Misc. 3d 1068(A), at *7. The same cannot be said for the implementation hearings and adjudication of rate disputes. Quite the opposite, the implementation hearings have been crucial and indispensable for children in need and their parents in obtaining

the education service to which they are rightfully and legally entitled. Depriving them of this forum to obtain the appropriate reimbursement would devastate thousands of disabled students by making it impossible for them to secure or receive the services.

165. To the extent that NYSED argues that the Revised Regulation serves to promote *administrative predictability* for the upcoming school year for the government in light of certain anecdotal “instances of questionable practices” cited in the Revised Regulation, it is not related to general welfare of the *public* and thus does not provide any basis for enacting an emergency rule under SAPA §202(6). *See L. Enft Officers Union Dist. Council 82, AFSCME, AFL-CIO by Engelhardt v. State*, 643 N.Y.S.2d 301, 303 (Sup. Ct. 1995) (enjoining an emergency regulation authorizing double occupancy housing units within correctional facilities, observing that “[w]hile prison overcrowding may well be a difficult challenge for respondents, there is a complete absence of showing that it must be dealt with by double ceiling prior to the period of public notice and comment allowed by SAPA.”).

166. **Second**, even if predictability is somehow a form of general welfare, the Revised Regulation still falls short of the requirements under SAPA §202(6), because it does not explain how predictability can be provided by enacting the Revised Regulation (and how this can be achieved on an emergency basis). The Revised Regulation and the accompanying Statement are devoid of any data or scientific studies, offering nothing but conclusory statements. This is far from enough. *See N. Fork Distribution, Inc.*, 81 Misc. 3d at 960–62 (enjoining an emergency rule because the emergency justification “fails to cite evidence or studies” to support the purported harm that the emergency rule set out to address, and the agency’s supplemental submissions to the court only “cite to several anecdotes about [the] harm...but offer no studies or statistics concerning present dangers”).

167. Indeed, if anything, the Revised Regulation itself makes clear that its implementation can only bring more **un**predictability. For example, NYSED states that after abruptly ending the decade-long practice of implementation hearings, “[t]he Department seeks to ensure that parents whose IESP services were not implemented receive prompt reimbursement at the local level.” Cohen Aff. Ex 12 (Revised Proposal) at 8. This vague and half-baked promise does not provide any concrete plans as to how NYSED intends to replace the implementation hearings with alternatives “at the local level” and offers no assurance whatsoever to the students that they will receive the services they need. In fact, as demonstrated above, the Revised Regulation has already caused chaos and “unpredictability” because it is the direct cause of stranding thousands of students, preventing them from seeking funding for the services that the NYCDOE has failed to provide. And it has also harmed the parents whose reimbursement claims are still within the statute of limitations but had not been filed to initial a due process hearing prior to July 16, 2024.

C. The Revised Regulation Did Not Explain Why Subjecting It to Notice and Comment Would Be Contrary to the Public Interest

168. SAPA §202(6)(d)(iv) requires a notice of emergency adoption to include “an explanation of why compliance with the requirements of [notice and comment] would be contrary to the public interest.” N.Y. A.P.A. Law § 202. This explanation is entirely absent from the Revised Regulation, and this Court should enjoin the implementation of the Revised Regulation for this additional reason. *See e.g., Gill*, 11 Misc. 3d 1068(A), at *8 (no emergency found where “the Notice of Adoption did not explain in any detail why compliance with normal rule making procedure would be contrary to the public interest”); *Brodsky v. Zagata*, 629 N.Y.S.2d 373, 377 (Sup. Ct. 1995) (finding the agency “has failed to comply with the minimal requirements of SAPA”

when “the Notice of Adoption did not explain in any detail why compliance with normal rule making procedure would be contrary to the public interest”).

III. THE REVISED REGULATION VIOLATES SAPA AND IS ARBITRARY AND CAPRICIOUS BECAUSE IT LACKS REASONED ANALYSIS

169. Finally, the Revised Regulation lacks the level of reasoned analysis required by SAPA.

170. When the Revised Regulation was published on the New York State Register to solicit public comments, NYSED recited mostly the same justifications in the Revised Proposal, and added barebone responses to other required areas of analysis under SAPA § 202-a(3). *See* Cohen Aff. Ex. _20 (August State Register) at 4-6.

171. Pursuant to SAPA §202(f)(vi), the notice of proposed rulemaking shall include “a regulatory impact statement prepared pursuant to” SAPA §202-a. SAPA § 202-a in turn requires that a regulatory impact statement must include, among other things, a statement of the statutory authority for the rule; a statement setting forth the purpose of, necessity for, and benefits derived from the rule; a statement detailing the projected costs of the rule; and a statement indicating whether any significant alternatives to the rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule.

172. The filing in the State Register includes an impact statement that demonstrates that NYSED did not give any consideration to important factors. Among the factors that must be included in the regulatory impact statement are a statement detailing the projected costs of the rule, and a statement indicating whether any significant alternatives to the rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule. SAPA § 202-a(3); *see e.g. Matter of Binghamton-Johnson City Joint Sewage Bd. v New York State Dept. of Env'tl. Conservation*, 159 AD2d 887, 888 (3d Dept 1990) (“an agency is

required to consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons directly or indirectly affected by it.”); *Med. Soc. of State of N.Y., Inc. v. Levin*, 185 Misc. 2d 536, 544, 712 N.Y.S.2d 745 (Sup. Ct. 2000), *aff'd sub nom. Med. Soc'y of State of New York, Inc. v. Levin*, 280 A.D.2d 309, 723 N.Y.S.2d 133 (2001) (overturning no fault insurance regulations for failure to consider less burdensome alternatives).

173. Here, the Regulatory Impact Statement does not address at all the impact on students with special needs. It also did not analyze the cost to parents or these children by taking away their one avenue to obtain publicly paid Special-Education services. The Regulatory Impact Statement lists no costs to parents and states there will be no costs to any “privately regulated party.” It certainly does not address the impact on the affected children. Cohen Aff. Ex. 20 (August State Register) at 5. But to the extent that parents of disabled children are “regulated parties,” this statement is plainly untrue, as parents will be paying significantly more out of pocket under the Revised Regulation.

174. Additionally, the State Register filing states “[t]here are no significant alternatives to the proposed rule available and none were considered.” Cohen Aff. Ex. 20 (August State Register) at 5. There are at least two sets of alternatives available to NYSED that they did not consider. First, as discussed above, the NYC Comptroller outlined a series of alternatives to help the NYCDOE provide services to students with IESPs in a manner that would address cost overruns and potential fraud. *See* Cohen Aff. Ex. 15 (Farago Aff.) at ¶¶ 58-62 (describing these proposals).¹⁸

¹⁸ *See* NYC Comptroller Website, *NYC Comptroller Report Finds DOE Fails to Deliver Mandated Special Education Services to Thousands of Children Even As Claims Spending Surged Tenfold*, published August 28, 2023, available at: <https://tinyurl.com/bdeuhn9k>.

175. Second, NYSED implausibly wrote in the statement of needs and benefits that the Revised Regulation would actually help parents, because “it is the Department’s position that going to a due process hearing under such circumstances unfairly imposes administrative and financial burdens on parents. The Department seeks to ensure that parents whose IESP services were not implemented receive prompt reimbursement at the local level.” The Revised Regulation was an entirely backward way of trying to help parents. Instead, if NYSED truly wanted to lift this burden, it should have issued a finding the NYCDOE is violating the law, and it should have strictly regulated the NYCDOE to ensure future compliance. That would have been a better “alternative” than blocking the parents’ lone avenue to trying to help their children.

FIRST CAUSE OF ACTION

(Arbitrary and Capricious and Contrary to Lawful Procedure –
For Judgment Pursuant to CPLR 7803(3) and 7806)

176. Petitioner repeats and realleges the allegations of the preceding paragraphs as if fully set forth herein.

177. The Revised Regulation violates the New York Education Law, including by limiting the types of due process complaints a parent can file, and by limiting the relief available in due process complaints, despite the existence of statutes that permit the filing of these due process complaints and the availability of such relief.

178. The Revised Regulation purports to “clarify” the New York Education Law, which is impermissible in the first place, but in this case is an act of impermissible legislating by NYSED.

179. The Revised Regulation, passed on an emergency basis, was not properly reasoned and is (predictably) causing significant harm to disabled students and their parents.

180. The Revised Regulation is vague, clarified by a NYSED FAQ document that explains NYSED's own interpretation of the regulation, but which is not supported in the text of the regulation.

181. The Revised Regulation violates the law, is arbitrary and capricious, and irrational for the additional reasons explained above, including by empowering the ERES Unit, by abruptly changing existing practice and precedent, and by providing parents with no true alternatives to filing due process complaints.

182. For the foregoing reasons, and or those described elsewhere in this Petition, the Revised Regulation must be vacated and annulled as arbitrary and capricious, without a rational basis, and contrary to law.

SECOND CAUSE OF ACTION

(Violations of State Administrative Procedure Act)

183. Petitioner repeats and realleges the allegations of the preceding paragraphs as if fully set forth herein.

184. The Revised Regulation violates SAPA in two ways, either one of which is a basis to vacate and annul the rule.

185. First, the Revised Regulation was adopted on an emergency basis, but the "Statement of Facts and Circumstances Which Necessitate Emergency Action" plainly failed to meet the requirement of identifying a cognizable emergency, plainly failed to meet the requirement of providing a sound description of the benefit to general welfare that is required for an emergency rule, it provided no explanation at all for why compliance with ordinary notice-and-comment would be contrary to the public interest.

186. Second, the Revised Regulation is lacking the reasoned analysis required by SAPA. There is no study of the harms and impact to students and their families, and no analysis of less-harmful alternatives, even though NYSED could have identified many such alternatives.

187. For the foregoing reasons, and or those described elsewhere in this Petition, the Revised Regulation must be vacated and annulled as a violation of SAPA.

PRIOR APPLICATION

188. No prior application has been made for the relief requested herein.

TRIAL DEMAND

189. Petitioner demands an evidentiary hearing on all causes of action so triable.

RELIEF REQUESTED

WHEREFORE, Petitioners pray that the Court enter judgment and relief as follows:

- A. Issuing a judgment vacating and annulling the Revised Regulation
- B. Permanently enjoining Respondents from implementing or enforcing the Revised Regulation;
- C. Entering a temporary restraining order and preliminary injunction enjoining and suspending the Revised Regulation, pending resolution of this proceeding on the merits
- D. Ordering Respondents to pay Petitioner its costs, fees, and disbursements incurred in connection with this proceeding;
- E. Ordering Respondents to pay restitution and damages to Petitioner as allowed by law;
- F. Ordering Respondents to pay legal fees and costs pursuant to the CPLR and all relevant state and federal statutes; and
- G. Granting such other and further relief as the Court deems just and proper.

Dated: New York, NY
October 1, 2024

Respectfully submitted,

WALDEN MACHT HARAN & WILLIAMS LLP

By: /s/ Adam P. Cohen

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Attorneys for Petitioners

STATE OF NEW YORK)
)ss.:
COUNTY OF QUEENS)

VERIFICATION

Ami Bazov hereby affirms under penalty of perjury:

I am the Associate Director of Education Affairs of Agudath Israel of America, the Petitioner in this proceeding. I make this Verification pursuant to §§ 3020 and 3021 of the CPLR. I have read the foregoing Verified Petition, brought pursuant to Article 78 of the CPLR, and I am familiar with the contents thereof. I verify that the same is true to the best of my knowledge, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true based upon the information available to me, such as statements made to me, publicly available information, and public statements of the Respondents or their representatives.

Signed by:
Ami Bazov

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Ami Bazov

DocuSigned by:
Angela Saidman
EB62C2E7DD5C4CA...
Sworn to before me this
1st Day of October, 2024

ANGELA C SAIDMAN
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01SA0014939
Qualified in New York County
Electronic Commission Expires October 26, 2027