The University of the State of New York

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

No. 24-598

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, Esq

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice for lack of subject matter jurisdiction. Respondent (the district) cross-appeals, asserting that the parent failed to prove that any unilaterally-obtained services were appropriate to meet the student's unique needs. The appeal must be sustained, the cross-appeal dismissed, and the matter remanded to the IHO for further proceedings.

### II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

Given the ultimate disposition of this appeal, a full recitation of the student's educational history is unnecessary. The student has been parentally placed at a nonpublic school (Tr. p. 5; Parent Exs. A at p. 2; B at p. 12).[1] A CSE convened on April 20, 2023 to develop an IESP for the student, determined that the student was eligible for special education services as a student with a speech or language impairment, and recommended that she receive five periods per week of direct, group special education teacher support services (SETSS) and two 30-minute sessions per week of group speech-language therapy (Parent Ex. B at pp. 2, 11).[2]

On June 27, 2023, the parent executed a contract with Yeled v'Yalda for the provision of special education and related services to the student for the period of September 1, 2023 through June 30, 2024 (Parent Ex. E).

In a letter titled "10-Day Notice of Private Placement," dated September 27, 2023, the parent notified the district that she had consented to all the services recommended for the student in the April 2023 IESP, but was unable to locate providers at the district's standard rates and, therefore, would be implementing the April 2023 IESP on her own and seeking reimbursement or direct payment from the district (Parent Ex. C).

By due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and equitable services for the 2023-24 school year (Parent Ex. A). The parent asserted that the district failed to implement the services recommended in the April 2023 IESP and that she was unable to locate SETSS and related service providers on her own accord for the 2023-24 school year (id. at p. 3). For relief, the parent requested direct funding of any providers located by the parent at the providers' contracted for rates and compensatory education services for any services not provided to the student due to the district's failure to implement services (id. at p. 4).

The district submitted a due process response dated July 29, 2024, referencing the April 2023 IEP and generally denying the allegations contained in the due process complaint notice (Dist. Resp. to Due Process Compl. Not).

On September 6, 2024, the parties convened for a hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (Tr. p. 1). At the impartial hearing, the district made a motion to dismiss the parent's due process complaint notice on the ground that the IHO lacked subject matter jurisdiction (Tr. pp. 5-7; see Dist. Mot. to Dismiss). The parent opposed the district's motion (Tr. p. 7; see Parent Memorandum of Law in Opposition). The IHO denied the district's motion to dismiss for lack of subject matter jurisdiction and indicated that it was her

[1] The hearing record contains duplicative exhibits, as both the parent and district submitted the April 2023 IESP (compare Parent Ex. B, with Dist. Ex. 2). For purpose of this decision, only the parent exhibit will be cited when referring to the April 2023 IESP. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The student was found eligible for special education services as a student with a speech or language impairment (Parent Ex. B at p. 2; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The student's eligibility is not in dispute.

"preliminary ruling" (Tr. pp. 7-8). The IHO further indicated that if she had "any further thoughts about it and want[ed] to correct [the preliminary ruling], [she] w[ould] inform the parties after th[e] hearing" (Tr. p. 8). The parties proceeded with the impartial hearing; both parties submitted documentary evidence into the hearing record, both parties waived opening statements, the district acknowledged that the student did not receive "the benefit of public services" during the 2023-24 school year, the district cross-examined the parent's witnesses, and both parties presented closing statements (Tr. pp. 8-39).

In a decision dated October 22, 2024, the IHO granted the district's motion to dismiss for lack of subject matter jurisdiction (IHO Decision at p. 2). The IHO determined that she lacked subject matter jurisdiction over "rate disputes" brought pursuant to Education Law § 3602-c (id. at pp. 1-6). The IHO noted a recently adopted emergency amendment to the Commissioner's regulations and a subsequent New York State Court's issuance of a temporary restraining order staying implementation or enforcement of the emergency regulation (id. at p. 1). The IHO explained that her determination that she lacked subject matter jurisdiction to preside over implementation or rate disputes brought under Education Law § 3602-c was being made "irrespective of the now-enjoined regulatory amendment" (id. at p. 2).

The IHO interpreted Education Law § 3602-c to allow "two limited 'gateways'" for the type of disputes that could be brought under IDEA due process complaint procedures: those related to review of CSE recommendations and those related to child find activities (IHO Decision at p. 3). According to the IHO, the parent's claims are "better characterized as rate disputes" because the parent had placed the student in a private school, the parent was not disputing the CSE's IESP recommendations or child find activities, and the district did not dispute the student's entitlement to the recommended services (id.at pp. 3-4). According to the IHO, that left the sole disagreement as how much money the district should pay for services obtained by the parent (id. at p. 4).

The IHO noted that impartial hearing officers appointed pursuant to the IDEA and Education Law § 4404 are trained "to decide IDEA-based issues" and have no expertise in rate disputes (IHO Decision at p. 4). The IHO further found that nothing in "either the IDEA or the New York State Education law grants an IDEA IHO authority to hear a rate dispute" or indicates that an IHO "should not dismiss rate dispute claims for lack of subject matter jurisdiction, whether or not the parties have raised the issue" (id. at p. 4).[3] According to the IHO, the parent had not cited any "binding precedent or legislative history" authorizing an IHO to determine "rate disputes" (id.). In addition, the IHO found no judicial authority interpreting State Education Law § 3602-c to "grant parents the right to file a due process complaint in a simple rate dispute" (id. at p. 5). The IHO noted that decisions from SROs and the New York State Education Department were not binding on IHOs (id. at pp. 5-6).

Lastly, the IHO addressed fairness (IHO Decision at p. 6). She determined that dismissing the case with prejudice would not be "fundamentally unfair" to the parent because she had an opportunity to be heard and could seek relief in an alternate forum "outside of IDEA due process hearings" for her rate dispute, such as resolving such claim directly with the CSE, commencing an

[3] The IHO noted that even if neither party raised the issue of subject matter jurisdiction, an IHO had the authority to address a jurisdictional defect sua sponte (IHO Decision at p. 4, n.18).

action in State or federal court, filing a complaint with the Commissioner of Education pursuant to Education Law § 310, or availing herself to the district's "recently added … dedicated forum specially for rate disputes" (id.).

Accordingly, the IHO dismissed the parent's due process complaint notice "with prejudice with respect to this forum" (IHO Decision at p. 7).

**IV. Appeal for State-Level Review**

The parent appeals and asserts that the IHO erred in dismissing her due process complaint notice with prejudice for lack of subject matter jurisdiction. The parent asserts that the IHO has authority to resolve disputes for the district's failure to implement its recommended services. The parent also argues that the emergency regulation was not a clarification of law, has been stayed, and is therefore not enforceable. The parent argues that dually enrolled students are entitled to due process under both Education Law § 3602-c and Education Law § 4404. Accordingly, the parent requests that the IHO's decision be reversed, and because the parties already had an impartial hearing on the merits, that an SRO order the district to fund the providers located by the parent at the providers' contracted for rate.[4]

In an answer and cross-appeal, the district argues that the IHO correctly determined that she lacked subject matter jurisdiction to review the parent's claims and granted the district's motion to dismiss. The district asserts that the IHO correctly found that the parent could seek other forums for relief, and the IHO was alluding to the district's enhanced rate equitable services (ERES) unit when the IHO referred to the district's "dedicated forum specially for rate disputes." According to the district, the parent failed to exhaust administrative remedies by failing to pursue her claim with the ERES unit prior to filing a due process complaint notice. As for a cross-appeal, the district argues that the parent failed to prove that the unilaterally-obtained services were appropriate to meet the student's unique needs and failed to rebut the district's proffered evidence regarding reasonable market rates. The district requests that an SRO dismiss the parent's request for review.

In a "statement of fact" that appears to be an answer to the cross-appeal, the parent asserts that the district's reliance on administrative exhaustion is without merit. According to the parent, the IHO's finding that the parent must seek relief through the ERES unit failed to recognize that under the existing statutory and regulatory scheme, the parent has a right to file a due process complaint notice. The parent further argues that the district is impermissibly delegating decision-making authority to the ERES unit and thereby undermining the parent's rights to impartial adjudication, timely resolution of disputes, and access to services. In addition, the parent argues

[4] Attached to the parent's request for review is a copy of a verified petition and memorandum of law related to an Article 78 matter filed in State court. The parent attached additional documentation from that proceeding to her answer to the district's cross-appeal. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this instance, it is unnecessary to accept the evidence submitted by the parents on appeal into the hearing record and they will not be further discussed.

that she met her burden to demonstrate that the unilaterally-obtained services are appropriate to meet the student's needs.

## V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for

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

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

**VI. Discussion--Subject Matter Jurisdiction**

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

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

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[7]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]).[8] It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

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

Initially, the IHO articulated the basis for her view that she did not have subject matter jurisdiction over the parent's claims by relying heavily on her view that the matter was a "rate dispute" because the parent had placed the student in a private school and did not seek FAPE, the parent was not disputing the recommendations contained in the student's IESP or the district's child find activities, and the district did not dispute the student's entitlement to the recommended services (IHO Decision at pp. 3-4). According to the IHO, that left the sole disagreement between the parties as a dispute regarding how much money the district would pay for services obtained by the parent (id. at p. 4). However, review of the district's closing statement in this matter shows that the district raised defenses that the student was not entitled to equitable services because the parent did not make a timely request for equitable services and that the services obtained by the parent were not appropriate to meet the student's needs (Tr. pp. 31-34). Accordingly, the IHO's characterization of the matter as a "rate dispute" appears to have been divorced from the context of the parties' actual dispute. Nevertheless, even taking the IHO's characterization of the matter as solely a dispute as to rates for services, the dismissal on the basis of subject matter jurisdiction was improper.

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

[8] The IHO opined that this section of the law only granted parents the "right to a review, not the right to file a due process complaint," which she interpreted to mean that a remedy would consist of ordering a CSE to convene and review an IESP (IHO Decision at p. 3 n.11). However, the review that may be obtained is "pursuant to the provisions of [Education Law § 4404]," which, in turn, provides for the filing of a due process complaint notice and, in one subdivision, explicitly references the filing of a due process complaint notice in accordance with Education Law 3602-c (Educ. Law §§ 3602-c[2][b][1]; 4404; see Educ. Law § 4404[1-a]).

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.[10]

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have recently attempted to address the issue.

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

[10] Citing School Dist. of City of Grand Rapids v. Ball, (473 U.S. 378 [1985]), the district argues that the student is not a "part-time public school student." The argument falls flat. I find the fact pattern addressed in Ball – a matter involving whether a school district's shared time and community education programs violated the Establishment Clause of the First Amendment – to be inapposite to the matter at hand. Moreover, as acknowledged by the district, the Supreme Court in Agostini v. Felton, (521 U.S. 203, 222 [1997]), expressly stated that its subsequent decisions undermined the assumptions upon which Ball relied. The district also asserts that Wieder was limited to its facts insofar as the dually enrolled student was a part-time public-school student under Education § 3602-c, but that the student in this case is not a part-time public student under the dual enrollment statute, presumably because the location of the services to be delivered under an IESP for this student would be different. But Wieder does not make that distinction and the argument is without merit. The statute itself also does not state that students have certain rights if the location of services listed on an IESP is in one location but are divested those rights if the IESP calls for a different location (Educ Law § 3602-c). Moreover, the Wieder court carefully explained that it was rejecting Monroe-Woodbury Central School District's principle argument that dually enrolled students must be educated in "regular classes and programs of the public schools, and not elsewhere" and further explained that "the statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise" but that while the programming must be appropriate to address the student's educational needs, the school district is not compelled to deliver the service in either the public or private school (Wieder, 72 N.Y.2d 174, 183-84 [1988]; see also Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [noting the dual enrollment statute required a school district to provide student with individual aide at his nonpublic school when the purpose of the aide was to support him in his general education classroom]).

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf).[11] Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[12] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[13]

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint" for implementation of IESP claims or enhanced rate for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning

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

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

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

of § 3602-c, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

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

("Special Education Due Process Hearings—Rate Disputes," Office of Special Educ. [Aug. 2024]).[14]

However, acknowledging that the question has publicly received new attention from State policymakers, as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Finally, in regard to the IHO's finding that the parent could pursue alternative forums, the district's argument that the parent failed to exhaust administrative remedies by not first bringing her claims to the district's ERES unit is erroneous. While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurtles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed and the case remanded because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice following the IHO's determination that she lacked subject matter jurisdiction over such claims. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether

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

the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance, particularly given that she denied the district's motion to dismiss and directed the parties to proceed with an evidentiary hearing on the merits (Tr. pp. 7-39). In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

Having determined to remand this matter, it is unnecessary to address the district's cross-appeal and it will therefore be dismissed. The IHO is directed to conduct a three prong Burlington-Carter analysis of the evidence submitted by the parties during the impartial hearing held on September 6, 2024, and issue a written decision on the merits of the parent's claims.

**VII. Conclusion**

For the reasons described above, this matter is remanded for the IHO to issue a written decision on the merits of the parent's claims asserted in her July 12, 2024 due process complaint notice.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated October 22, 2024, dismissing the parent's due process complaint notice for lack of subject matter jurisdiction, is reversed; and

**IT IS FURTHER ORDERED** that this matter is remanded to the IHO for further proceedings in accordance with this decision; and

**IT IS FURTHER ORDERED** that in the event that the IHO cannot hear this matter upon remand, another IHO shall be appointed.

**Dated:** **Albany, New York**
**March 28, 2025**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**