The University of the State of New York

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

**No. 14-022**

**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:**
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

## 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 determined that the educational services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2013-14 school year were not implemented and granted a portion of the parent's requested relief. The district cross-appeals from that portion of the IHO's decision which found that the district did not offer the student an appropriate related services provider. The appeal must be sustained in part. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, 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]-[B], [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 279.4[b], 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

The hearing record reflects that, at the time of the April 2013 CSE meeting, the student was parentally placed at a nonpublic high school and was mandated to receive special education services pursuant to an individualized educational services plan [IESP] (see Parent Exs. F at pp. 3-4; I at pp. 1, 4).[1] On April 16, 2013, the CSE convened to develop an IESP for the student to be implemented commencing on April 16, 2013 (Parent Ex. K at pp. 1, 6). Finding the student eligible for special education services as a student with a speech or language impairment, the April 2013 CSE recommended ten periods per week of special education teacher support services (SETSS) in

[1] On May 31, 2013, in a separate administrative proceeding, an IHO issued a decision finding that the district failed to implement the student's SETSS and speech-language therapy mandates as set forth on the student's June 2012 IESP (see generally Parent Exs. F; I).

a group and four 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 4).

By letter to the district dated July 4, 2013, the parent requested "compensation/reimbursement" for the related services on the IESP "that [were] in excess of those provided" at the student's high school for the 2013-2014 school year (Parent Ex. A). The parent indicated that it was not possible to meet the student's IESP mandate during the school day and that home services were necessary to meet the IESP's requirements (id.). The parent indicated that she desired reimbursement following the submission of "proper documentation of service invoices and payments" to the district (id.). The parent followed up on her request by phone messages and an August 6, 2013 e-mail to the district (Parent Ex. M at p. 1).

**A. Due Process Complaint Notice**

In a due process complaint notice dated August 18, 2013, the parent requested reimbursement for the SETSS and speech-language therapy services mandated by the April 2013 IESP (Parent Ex. B). Specifically, the parent contended that the SETSS and speech-language therapy mandates could not "[b]e fulfilled entirely in the academic school day" (id.). Therefore, the parent requested reimbursement for "outside services" to be provided at the student's home (id.). The parent further requested reimbursement at an enhanced rate, which had been "previously granted" by the district (id.).[2] The parent additionally contended that such home-based services "benefitted" the student and had "proven successful" (id.).

**B. Facts Post-Dating the Due Process Complaint Notice**

Upon commencement of the 2013-14 school year, the student only received up to four out of the ten periods per week of SETSS called for by the IESP at her nonpublic school placement (see Tr. pp. 7-8, 128-30; Parent Ex. H; see also Parent Ex. K at p. 4). Additionally, the student did not receive any speech-language therapy at her nonpublic school placement as required by the IESP (see Tr. p. 8; Parent Ex. H). The parent procured SETSS for the student from two private providers, which were delivered in the student's home after school hours (see Tr. pp. 33-36, 51-54). One of the providers charged $100 per hour and the other charged $80 per hour (see Tr. pp. 36, 44).

**C. Impartial Hearing Officer Decision**

An impartial hearing convened on November 14, 2013 and concluded on December 4, 2013, after two days of proceedings (Tr. pp. 1-153). In a decision dated January 10, 2014, the IHO ordered the district to reimburse the parent for SETSS the parent obtained from two private providers at enhanced rates (IHO Decision at p. 13). The IHO further ordered the district to issue related services authorizations (RSAs) to satisfy the April 2013 IESP's speech-language therapy mandate but denied the parent's request to receive these services at the enhanced rate (id. at pp. 12-13).[3]

[2] The hearing record contains references to an "extended" or "enhanced" rate. For consistency, all references in this decision utilize the phrase "enhanced rate."

[3] Although undefined in the hearing record, RSAs appear to be district-generated forms that, upon issuance entitle parents to obtain related services from certain private providers at district expense. The State Education

Initially, the IHO determined that she could not address allegations the parent raised at the impartial hearing regarding improper phone calls made by district employees, as well as employees from a private company, because this conduct predated the impartial hearing and the parent did not amend her due process complaint notice to include allegations related to this claim (IHO Decision at p. 13 n.4). The IHO indicated that the parent could pursue such claims at "another impartial hearing or . . . in another forum" (id.).

The IHO indicated that "[t]he IESP developed by the [district] for the 2013-14 school year [was] not in dispute" (IHO Decision at p. 10). As to the district's implementation of the SETSS mandate on the April 2013 IESP, the IHO first determined that, although the student had an IESP since kindergarten or first grade, the district had never provided the student with SETSS in accordance therewith (id.). Relative to the 2013-14 school year, the IHO held that "[i]t was not until the first day of the hearing that the [district] offered to provide a SETSS teacher" for the student (id.). The IHO found that the SETSS provider, who the district represented would be able to implement the student's SETSS mandate in the home and who testified at the impartial hearing, would not "be able to provide the [student] with the six periods of SETSS a week that [she] [wa]s not receiving in school." (id. at p. 11). The IHO declined to determine whether the SETSS provider's "educational and teaching background" rendered him a suitable provider or whether the district must offer a provider with a "sufficiently 'flexible'" schedule to accommodate the student (id. at p. 11 n.2).

Next, regarding the disputed length of the mandated SETSS sessions, the IHO observed that the April 2013 IESP provided for the delivery of ten weekly SETSS sessions, each lasting a "[p]eriod" (IHO Decision at p. 11). According to the IHO, the "evidence show[ed] that a 'period' in the [student's] school . . . [was] 40 minutes in duration" (id. at p. 12). The IHO further reasoned that, had the April 2013 CSE intended to recommend hourly sessions, the CSE would have specified as much on the IESP, since the duration of the student's speech-language services explicitly indicated a duration of 30 minutes (id.).

Turning to the parent's request for reimbursement of the costs of SETSS, the IHO found that the two current providers selected by the parent delivered "appropriate instruction" to the student (IHO Decision at p. 11). The IHO found that the providers' "educational backgrounds, . . . experience[,] and their work with the student" rendered them suitable instructors (id.).

Finally, the IHO addressed the parent's request for RSAs to satisfy the student's speech-language therapy mandate pursuant to the April 2013 IESP (IHO Decision at pp. 12-13). The IHO noted that the student did not receive any of the speech-language services prescribed in the April 2013 IESP and, further, that the district did not contest the parent's request for RSAs (id. at p. 12).[4] Accordingly, the IHO found that the student was entitled to the requested RSAs (id.). However, because the parent did not "provide any evidence or testimony indicating that the student was

Department has issued guidance indicating that it is permissible for districts to contract with private entities to provide related services to students with disabilities ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

[4] The IHO noted that the parent initially waived this portion of her sought relief, but later retracted this waiver (IHO Decision at p. 12; see Tr. pp. 12, 60).

receiving speech[-]language therapy at the time of the hearing," the IHO denied the parent's request for district reimbursement of the cost of such services at the enhanced rate (id. at p. 13).

Based on these findings, the IHO ordered the district to reimburse the parent for services delivered up to six times per week by her two private providers "as calculated by 40-minute sessions" and at rates of $100.00 and $80.00, respectively, upon receipt of invoices from the parent (IHO Decision at pp. 12, 13). The IHO specified that the order was "retroactive to the first day of the 2013-2014 school year" (id. at p. 13). The IHO additionally ordered the district to issue RSAs for "four 30-minute sessions of speech[-]language therapy each week" (id.). The IHO further ordered the district to "provide the parent with additional RSAs for the . . . sessions . . . that the [student] ha[d] not received from the beginning of the 2013-2014 school year until the RSAs [were] implemented" (id.).

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

The parent appeals, arguing that the IHO erred in limiting the scope of the ordered relief and, further, that certain aspects of the impartial hearing were inconsistent with due process.

Regarding the conduct of the impartial hearing, the parent alleges that the IHO improperly granted extensions during the course of the hearing and that the district's historical negligence in responding to her various communications caused a violation of "compliance periods." Additionally, the parent alleges that the IHO required her to issue subpoenas to her private providers to secure their testimony at the impartial hearing, while the district was spared this formality.

Next, the parent contends that district employees and employees of a private company that provided related services for the district improperly contacted her on multiple occasions. The parent contends that the district improperly provided employees of the private company with personal information about her daughter and, further, that the dissemination of this information violated her privacy and rights pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

The parent also alleges for the first time on appeal that the April 2013 CSE improperly deemed the student eligible for special education as a student with a speech or language impairment, rather than as a student with an other health-impairment.

The parent additionally argues that the IHO erred by determining that the SETSS "periods" in the student's April 2013 IESP were 40-minutes in length. The parent argues that the district and prior IHOs have consistently interpreted the student's SETSS sessions in hourly increments. The parent also contends that private educational providers customarily offer services in hourly increments. Further, the parent argues that the practice of the student's nonpublic high school of dividing the school day into 40-minute segments should have no bearing on the meaning of "period" contained on the student's IESP. Finally, the parent indicates that she has "parted" with one of the named providers in the IHO's order and requests that the IHO's order be interpreted to encompass reimbursement to a provider who has, since the departure of the prior provider, delivered home-based services to the student. Thus, the parent requests that the IHO's order be modified to indicate that the SETSS sessions are one-hour long and may be provided by a private provider chosen by the parent.

Additionally, the parent further argues that the IHO erred in rejecting her claim for reimbursement of the costs of speech-language therapy at the enhanced rate. The parent asserts that, because the district has failed to provide the student with an appropriate speech-language therapist in the past, she would not like to be restricted to a provider at the district's approved rate. For relief, the parent seeks an RSA for four 30-minute speech-language therapy sessions or, in the event that it may become necessary, an order requiring the district to reimburse the parent for the costs of a private speech-language therapist at an enhanced rate not to exceed $100 per hour.

The district answers, denying the parent's material assertions and requesting that the IHO's decision be upheld for the reasons stated by the IHO. First, the district objects to the submission of additional evidence attached to the parent's petition for review. Next, the district asserts that the IHO scheduled and conducted the impartial hearing in a proper manner consistent with State and federal regulations. As for the parent's claims that her privacy or rights under HIPPA were violated, the district asserts that the IHO correctly found that the parent failed to raise such issues in her due process complaint notice and, further, that neither the IHO nor the SRO has jurisdiction over such claims. Turning to the merits, the district argues that the IHO correctly determined the duration of the SETSS sessions mandated on the April 2013 IESP and appropriately denied the parent's request for speech-language reimbursement at the enhanced rate. The district also interposes a cross-appeal arguing that the IHO erred by determining that the SETSS provider offered by the district at the impartial hearing could not implement the remaining sessions of SETSS to which the student was entitled pursuant to the April 2013 IESP.

The parent answers the cross-appeal, arguing that the IHO's decision regarding the district's proposed SETSS provider's inability to implement the April 2013 IESP was well-reasoned and should be upheld. The parent also contests the district's characterization of relevant facts and reiterates the arguments made in her petition.[5] The parent further contends that a prior CSE convened in 2012 without her knowledge or participation and improperly changed the student's classification from a student with an other health-impairment to a student with a speech or language impairment. Finally, the parent withdraws her claim relating to the April 2013 IESP's speech-language therapy mandate.[6]

[5] Additionally, the parent contends that the district's conduct underlying the alleged violations of HIPAA also violated the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g).

[6] The parent withdrew her request related to the student's speech-language therapy mandate at the impartial hearing but then subsequently retracted her waiver (Tr. pp. 12, 60; see Parent Ex. B). In her petition, the parent appealed the IHO's refusal to order the district to reimburse the parent for the cost of these services at the enhanced rate (Pet. at pp. 6-7, 13; see IHO Decision at p. 12). However, in her answer to the district's cross-appeal, the parent has again withdrawn her request for relief (Answer to Cross-Appeal at p. 12). Although the answer to the cross-appeal incongruously contains a request, to the extent that the district fails to provide a speech-language therapist to implement the services, for reimbursement of the costs of private speech-language therapy providers at the enhanced rate, it is apparent from the context of the entire pleading that the parent is withdrawing her request for this relief (Answer to Cross-Appeal at pp. 15-16). Accordingly, the IHO's order requiring the district to provide RSAs for speech-language therapy shall be deemed final and binding on the parties and the parent's appeal requesting the enhanced rate shall not be considered (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

## 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, no such students are 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]).

Pursuant to New York State law, "[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, 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 individualized educational services plan [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. [emphasis added]). Additionally, unlike the provisions of the IDEA, Section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).

Under State law, 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., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. Preliminary Matters

#### 1. Conduct of Impartial Hearing

Contrary to the parent's allegations, a review of the entire hearing record confirms that the procedures at the impartial hearing were consistent with the requirements of due process (34 CFR 300.514[b][2]).

First, the hearing record reveals that the IHO issued two extensions to the decision timeline (IHO Decision at p. 3; see Tr. pp. 4, 151).[7] The hearing record shows that the original decision deadline, November 11, 2013, was extended following a request made by the district prior to the impartial hearing (Tr. p. 4; IHO Decision at p. 3).[8] At the end of the first day of the impartial hearing, the hearing record reflects that the parties discussed witness availability and scheduling and that the IHO indicated her preference to schedule the next hearing date prior to the expiration of the then-effective due date of December 12, 2013; however, it does not appear that the due date was further extended at this point (Tr. pp. 62, 64-69; see IHO Decision at p. 3). On the second day of the impartial hearing, the district requested another extension (Tr. p. 151; IHO Decision at p. 3). The IHO granted the extension requested by the district, noting on the record that "no harm will come because the [student] is continuing to receive her services with her private SETSS providers at this time" and indicating that she aspired to render a decision without further extension of the deadline (Tr. p. 151). To that end, the IHO requested an expedited a copy of the transcript (Tr. pp. 141, 151). In her decision, the IHO recited that these extensions were granted "after considering the cumulative impact of the factors" set forth in State regulations and, further, were based upon the IHO's "determination that there w[ere] . . . compelling reason[s] for each of the extensions" but such factors and reasons were not specified (IHO Decision at p. 3; see 8 NYCRR 200.5[j][5][ii]). Furthermore, the IHO failed to respond in writing to each extension request, and to make these written responses "part of the record" (34 CFR 300.515; 8 NYCRR 200.5[j][5][iv]). Nonetheless, the hearing record shows the IHO's sensitivity to the deadlines and her intent to comply therewith (see Tr. pp. 65, 67-68, 151). Therefore, while it is understandable that the parent desired a faster resolution of this matter, there is no reason to reverse the IHO's decision on this basis.

Moreover, there is insufficient evidence in the hearing record to substantiate the parent's claims regarding the issuance of subpoenas in this matter. No subpoenas were included in the administrative record or discussed during the impartial hearing. However, even assuming that the parent's allegations were true, IHOs have discretion in determining whether to issue subpoenas, and the parent has not asserted any prejudice to warrant reversal on the basis that the IHO abused her discretion in this regard (20 U.S.C. § 1415[h][2]; 8 NYCRR 200.5[j][3][iv]; see Letter to Stadler, 24 IDELR 973 [OSEP 1996]).

**2. Additional Evidence**

On appeal, the district objects to the parent's submission of additional evidence, attached to her petition for review, and asserts that the proffered exhibits should be rejected. 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

[7] Although the IHO's Decision references three extensions, the hearing record reveals only two (compare IHO Decision at p. 13, with Tr. pp. 4, 151).

[8] The hearing record shows that the due process complaint notice, although dated August 18, 2013, was actually filed on August 26, 2013 (see Tr. p. 3; Parent Ex. C at p. 1), and the decision due date would be 45 days after the resolution period following the filing of the due process complaint notice and after an adjustment when the date fell on a weekend followed by a holiday (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). Although it appears that the parent requested mediation, rather than a resolution meeting (see Parent Ex. D at p. 1), nothing in the hearing record establishes that another time frame applied pursuant to 8 NYCRR 200.5[j][5].

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. Northeast 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]).

The parent attached multiple exhibits to her petition, as well as a copy of the IHO's January 10, 2014 decision (see Pet Exs. 1-10). Initially, the IHO's decision is already included in the hearing record and its further submission with the parent's petition is not necessary. Additionally, two e-mails submitted with the petition were previously introduced as exhibits at the impartial hearing and, as such, have been considered (compare Parent Exs. E; M at p. 2, with Pet. Ex. 9).

Of the remaining exhibits, I accept and consider the following: information outlining the qualifications and State certification of a private provider the parent seeks to utilize to satisfy the April 2013 IESP's SETSS mandate (Pet. Ex. 7). As to the remaining evidence submitted on appeal, the proffered exhibits were available at the time of the impartial hearing and, in any event, are unnecessary to a disposition of the parent's claims (Pet. Exs. 1-6, 8, 10). The parents assertions to the contrary in her answer to the district's cross-appeal are without merit and, in fact, highlight that the parent is attempting to raise new issues for the first time on appeal. Therefore, this evidence will not be considered.[9]

### 3. Scope of Impartial Hearing and Review

Next, a determination must be made regarding which claims are properly before me on appeal. The parent argues that the IHO refused to consider her claims relating to allegedly harassing phone calls made by district personnel and employees of a private company that provided related services for the district regarding the provision of SETSS to the student (Tr. p. 78; see Tr. pp. 76-84). The parent additionally alleges that a CSE convened in June 2012 without her knowledge or participation and improperly changed the student's classification from a student with an other-health impairment to a student with a speech or language impairment and that the April 2013 IESP improperly deemed the student eligible for special education as a student with a speech or language impairment. The parent's due process complaint notice cannot be reasonably read to include such claims. Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issue or request permission to amend her due process complaint notice, these issue are not properly subject to review (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [S.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to" by the opposing

[9] One piece of evidence deserves further mention. The parent submitted an e-mail between the parent and an individual who the parent had not met but described as a "liaison" employed by the student's high school (Pet. Ex. 6; see Tr. pp. 120, 127). The IHO did not introduce this e-mail into evidence at the impartial hearing because the substantive discussion contained therein was inaccurate (Tr. p. 135; see IHO Decision at p. 9, n.1). Therefore, because this information was available to the parties at the time of the impartial hearing and rejected by the IHO as not probative, I decline to accept it as additional evidence.

party]). In addition, an independent review of the hearing record does not provide any indication that the district "opened the door" regarding the issue of the complained about phone calls so as to expand the scope of the impartial hearing (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]). Therefore, the IHO correctly determined that the alleged conduct by the district was beyond her jurisdiction and this claim will not be considered on appeal. Furthermore, the parent's challenges from the previous school year regarding the development of the June 2012 IESP as well as the student's classification on both the June 2012 and April 2013 IESPs, raised for the first time on appeal, must be dismissed.

At the outset, it is also necessary to address the mismatch between the issues addressed at the impartial hearing and the nature of the parent's claims. The IHO interpreted the parent's due process complaint notice as alleging that the district failed to implement the April 2013 IESP. Although the SETSS services mandated on the April 2013 IESP were to be implemented commencing on April 16, 2013, such implementation during the 2012-13 school year necessarily overlapped with the scope of the May 31, 2013 IHO decision and it is not possible to tell from the evidence in the hearing record whether or not the parent was claiming that the student was entitled to SETSS beyond that received pursuant to the IHO's order during the 2012-13 school year (see Parent Ex. F at pp. 3-4). On the contrary, the parent focused on the SETSS which the student would be entitled to receive during the 2013-14 school year in particular. However, the time to implement the student's April 2013 IESP during the 2013-14 school year had not yet arrived at the time the parent filed her due process complaint notice on August 18, 2013 (see Parent Ex. K). Therefore, an implementation claim from the 2013-14 school year was, under these circumstances, premature (R.E., 694 F.3d at 186-88; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014] [noting that "the appropriate forum for [an implementation] claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. Jul. 24, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]).

A review of the parent's due process complaint notice, as well as the evidence in the hearing record, reveals, instead, that the parent's due process complaint notice presented, from the parents point of view, the practical problems with the April 2013 IESP that the student had already experienced and a solution that the parent had identified: home-based services. As a preliminary matter, it appears that the April 2013 IESP contemplated that the recommended SETSS and speech-language therapy would be delivered during the school day (see generally Parent Ex. K). Seeking to change this arrangement, by correspondence dated July 4, 2013, the parent requested that the district deliver at least part of the IESP's services at the student's home (Parent Ex. A; see also Tr. pp. 7-8, 11-13. 60; Parent Ex. M). Further, in her due process complaint notice dated August 18, 2013, the parent asked the district to provide SETSS and speech-language therapy as "outside services" at the student's home (Parent Ex. B). As discussed further below, the district, in a very unclear fashion, essentially deviated from the written plan it developed and conceded that the student should receive home-based services, arguing at the impartial hearing only that the home-based services should be delivered by a district-approved provider. Therefore, the parent's challenges in the proceeding are properly viewed as substantive challenges to the delivery of services in the manner listed in the April 2013 IESP. In addition, the district's cross-appeal asserting that it could have implemented the April 2013 IESP with a provider of its choice is not relevant to the issues in this case and is, therefore, dismissed.

**B. April 2013 IESP**

As explained above, the parent challenged the delivery of services in the manner listed in the April 2013 IESP and sought that a portion of the listed related services be provided in the student's home.[10] With respect to home-based or extended day services, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17 [E.D.N.Y. Oct. 30, 2008]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]). However, in the present case, it was the district's burden at the impartial hearing to demonstrate that the April 2013 IESP was appropriate as written (Educ. Law 4404[1][c]) and a review of the hearing record demonstrates that the district failed to do so. The district failed to demonstrate how it ascertained the student's present levels of performance and academic achievement, social development, and physical development. It is unclear how the district could have done so without input from the student's teachers from the nonpublic school, none of whom attended the April 2013 CSE meeting.[11] Without this information, it is impossible to determine whether the CSE accurately assessed the student's needs, designed appropriate annual goals based upon the student's present levels of performance, or prescribed appropriate related services. The available evidence suggests that, in fact, the manner of the delivery of these services may not have been appropriate: the CSE recommended SETSS as a group service, but the student's present levels of performance section indicates that the student requires "direct 1:1 teaching for learning abstract concepts" (compare Parent Ex. K at p. 1, with id. at p. 4). In this way, the IESP contains an internal inconsistency with regard to the delivery of SETTS as a service, which contributes considerably to the confusion in this case, and I disagree with the IHO that the IESP is not at issue in that, although not always referenced explicitly, the manner of the delivery of services is designed into the IESP itself and has been implicated as the root problem causing the continuing disputes between the parties from year to year.

I also note that although the IESP's delivery of SETSS services formed the basis of the instant proceeding, the district did not actually offer an explanation at the impartial hearing as to

[10] Although neither party raises on appeal the IHO's determination that "[t]he IESP developed by the [district] for the 2013-14 school year [was] not in dispute" (IHO Decision at p. 10), the challenges to the relief ordered by the IHO, argued by both parties, necessarily implicates the substantive issues underlying such relief. As such, I must briefly define the violation to which I consider the relief to apply.

[11] State law mandates that an IESP be developed "in the same manner" as an IEP (Educ. Law 3602-c[2][b][1]). Even if the private school teachers refused to attend a CSE meeting, information and records regarding the student's progress at the private school under the previous IESP .should have been solicited by the CSE and considered along with any available evaluative information in the district's records, but there is no such evidence in this hearing record.

what "SETSS" entails. Such evidence would be especially useful because the term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6 et. seq; see also 8 NYCRR 200.6[d], [f]). Moreover, the district failed to introduce evidence at the impartial hearing and called only two witnesses on the limited issue of whether the district could implement the April 2013 IESP with personnel of its choice.

Given these deficiencies, the district will be directed to convene a CSE to develop an IESP for the student in accordance with the student's present levels of performance and invite appropriate personnel from the student's current nonpublic school. In so doing, the CSE shall consider the extent to which recommended services may be provided during the school day at the student's nonpublic school. To the extent the nonpublic school is unable to accommodate the delivery of such services during the day, the CSE is directed to recommend a level of services consistent with the nonpublic school's existing ability and to consider whether or not the student requires an extended school day or home-based services in addition thereto, or whether other service delivery options should be considered. When considering home-based services, the CSE shall also be mindful of the parent's position that the student would not be able to utilize all of the related services listed in the April 2013 IESP (see, e.g., Tr. pp. 7-8, 11-13. 60); thus, the CSE should discuss and attempt to reach consensus with the parent upon an appropriate duration of home-based related services (if any) that can be delivered within the student's schedule and on a consistent basis.

**C. Compensatory Additional Services--SETSS**

Having more clearly defined the violation underlying the parent's requested relief, I now turn to the crux of the parent's appeal, which relates to the scope of the remedy awarded by the IHO. Initially, I note that neither party disputes that equitable compensatory additional services is warranted in this circumstance, nor do I. Accordingly, the analysis shall be further limited to those issues particularly raised by the parent—to wit, the duration of the SETSS sessions awarded and the particular private providers for which the parent was entitled to reimbursement from the district.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X., 2008 WL 4890440, at *23 [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No.

09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Ordinarily, the proper remedy under circumstances such as those existing in the present case would be to order that the district implement the student's SETSS mandate, as it is the district's statutory obligation to do so and the responsibility to procure the recommended services for the student should not be shifted to the parent (see Educ. Law 3602-c[2][a]). However, as it appears that the SETSS delivery mechanism set forth in the April 2013 IESP was flawed, furthermore, that the April 2013 IESP, as written, was not implemented at the student's nonpublic school, of which fact the April 2013 CSE should have been well aware given the circumstances of (at least) the preceding 2012-13 school year, the IHO's remedy of additional services was generally appropriate (see Parent Exs. F at pp. 3-4; K at pp. 1, 4).

On appeal, the parent requests that the April 2013 IESP's SETSS services be provided in one-hour increments. The parties agree only that the April 2013 IESP provides for 10 SETSS sessions per week in the duration of a "[p]eriod" (Parent Ex. K at p. 4), but not the length of a "period." In support of her contention that a period should be deemed an hour in length, the parent argues that a prior IESP dated June 12, 2012, which was the subject of a prior impartial hearing, contained identical language and was interpreted by another IHO as meaning an hour (Parent Exs. I at p. 4; F at p. 3; J).[12]

The IHO disagreed with the parent and found that a "period" constituted a 40-minute session (IHO Decision at p. 12). A review of the evidence in the hearing record supports the IHO's conclusion. As a preliminary matter, the April 2013 IESP contemplates delivery of the SETSS services at the student's school. Delivery of the IESP's SETSS mandate as a "group" and "direct" service would be practical only if the services were delivered during the school day at the student's nonpublic school (Parent Ex. K at p. 4). This interpretation is reinforced by the annual goals in the April 2013 IESP, which indicate that the student's progress would be measured by "[t]eacher observations, class assignments, homework, [and] tests" (id. at pp. 2-3). Thus, delivery of the services at the nonpublic school would necessarily require consideration of the nonpublic school's schedule. The parties agree that a period in the student's private high school is 40-minutes in duration (Tr. pp. 121, 128-30). Therefore, the IHO's conclusion on this point was well-reasoned and supported by the evidence in the hearing record.

[12] The copy of the June 2012 IESP introduced at the impartial hearing is undated; however, a signed copy of the June 2012 IESP attendance page, introduced as a separate exhibit, includes the date of the CSE meeting (compare Parent Ex. I, with Parent Ex. J).

The parties appear to agree that the student regularly received four weekly periods of SETSS at the student's nonpublic school.[13] Relative to the recommendation set forth in the April 2013 IESP, this results in a six-period deficiency for every week of the 2013-14 school year. Because the student was eligible to receive related services on approximately a 36-week basis, the district shall reimburse the parent for 144 hours of 1:1 SETSS services (36 weeks multiplied by 6 periods multiplied by 40 minutes) to be delivered to the student by December 31, 2014.[14] To the extent that the district has already reimbursed the parent for any SETSS delivered to the student after school during the 2013-14 school year, such hours shall be subtracted from this award.

The parent also requests on appeal that she be permitted to use a different SETSS provider other than the two individuals named in the IHO's decision. I agree with the parent that the IHO's decision should be read so as to encompass the additional private provider identified by the parent on appeal. At the impartial hearing, the parent identified two specific providers who provided SETSS to the student (Tr. pp. 29, 47-48). These providers testified at the impartial hearing and the IHO fashioned her relief to provide for reimbursement relative to services rendered by these two individuals (IHO Decision at p. 13). However, it appears that one of these providers is no longer able to provide services to the student (see Pet. at pp. 5-6). Under these circumstances, it is an appropriate interpretation of the IHO's decision to substitute one of the named providers for another appropriate provider. Therefore, the parent was justified in locating a similar, experienced provider who charges a comparable rate (see Pet Ex. 7), and the district shall be obligated to reimburse this provider under the terms of the IHO's decision. With regard to the 216 hours of additional services, consistent with this decision and with the district's consent, the parent may procure services from any similarly experienced provider at a rate not to exceed $100 per hour.

## VII. Conclusion

In summary, having determined that the district failed to demonstrate that the April 2013 CSE designed an appropriate IESP that met the student's individual needs, the parent is entitled to an award of additional services as set forth above. In light of the foregoing, I need not address the parties' remaining contentions.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated January 10, 2014 is modified to the extent that, upon proof of payment thereof, the district is ordered to reimburse the parent for the costs of SETSS, which shall be provided as a bank of 144 hours of 1:1 SETSS to be used by the student before December 31, 2014, and which shall be delivered by the provider identified by the parent or another provider with similar qualifications upon consent of the district, at a rate not to exceed $100 per hour; and

[13] The district's responsibility to ensure delivery of those four sessions of SETSS per week in the nonpublic school during the 2013-14 school year shall not be disturbed by this decision.

[14] This relief allows the parent to schedule the services in hourly sessions if she chooses.

**IT IS FURTHER ORDERED** that the CSE shall reconvene within 30 days to develop an IESP for the student in accordance with the student's present levels of performance and in consultation with personnel from the student's nonpublic school.

**Dated:** **Albany, New York**
**March 31, 2014**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**