The University of the State of New York

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

No. 23-033

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

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 determined that the parent failed to timely request equitable services pursuant to Education Law Section 3602-c for the 2022-23 school year and denied the parent's request for direct funding of services and compensatory education. The appeal must be sustained.

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 Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 related to

IESPs, 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 of the IDEA and the analogous State law provisions 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 limited information provided in the hearing record, a full recitation of the student's educational history is not possible.

Based on the available information, the CSE met on March 18, 2021 and developed an IESP for the student for the 2021-22 school year (Parent Ex. B). The March 2021 IESP recommended that the student receive the support of direct group special education teacher support services (SETSS) for five periods per week and individual speech-language therapy for three 30-minute sessions per week (id. at p. 7).

A prior impartial hearing concerning the 2021-22 school year resulted in an IHO decision, dated March 29, 2022, in which an IHO found that the district failed to provide the student a free appropriate public education (FAPE) for the 2021-22 school year by failing to implement the student's IESP and ordered the district to provide the student with authorization for five periods per week of SETSS at the rate of $165 per hour for the 2021-22 school year (Parent Ex. C at pp. 1, 10-14).

On August 30, 2022 the parent entered into a contract with an agency, Yeled v'Yalda, for delivery of "1:1 Special Services" to the student during the 2022-23 school year at the rate of $195 per hour (Parent Ex. H).

In a letter, dated September 8, 2022, the parent provided the district with notice that the parent had been unable to locate SETSS and related service providers at the district's "standard rate" and that the parent would therefore implement the IESP services and then seek reimbursement or direct payment from the district (Parent Ex. D at p. 2).[1] The letter also asked the district if there were any "alternative options" for implementing the IESP and informed the district that the student was attending a private school within the district (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, the parent alleged that the district denied the student a FAPE for the 2022-23 school year (Parent Ex. A). As an initial matter, the parent requested a pendency order stating that the student's pendency placement was set forth in the March 2021 IESP as confirmed by the prior IHO decision, dated March 29, 2022 (id. at p. 2). As to the substance of the parent's arguments, the parent asserted that the March 2021 IESP had expired and the delay in convening a CSE and "recommending proper placement and services" had denied the student a FAPE (id.). The parent also contended that the district failed to implement the recommendations included in the March 2021 IESP and the parent was unable to locate providers for the student using the district's "online resources" (id.). According to the parent, the parental placement of the student was untenable without supports and the failure to implement services or provide a placement resulted in a denial of FAPE to the student (id.). Further, the parent asserted that she "located appropriate service providers independently for the 2022-23 school year at their prevailing rate" (id.). For relief, the parent requested an order for the district to continue to fund the program set forth in the March 29, 2022 IHO decision at the provider's prevailing rate (id. at p. 3; see Parent Ex. C). The parent further requested an order for the district to fund a bank of compensatory education for all services that the student was "entitled to under

[1] Although the letter is dated September 8, 2022, the email showing delivery of the letter to the district was sent on September 1, 2022 (compare Parent Ex. D at p. 2, with Parent Ex. D at p. 1).

pendency for the entire 2022-2023 school year – or the parts of which were not serviced" (Parent Ex. A at p. 3).

B. Impartial Hearing and Subsequent Events

The parent and the IHO appeared for a prehearing conference on October 31, 2022; however, the district did not appear (Tr. pp. 1-6). On November 8, 2022 the IHO and counsel for the parent conducted a hearing on the student's pendency placement without the presence of the district (Tr. pp. 7-15). In an interim decision, dated November 9, 2022, the IHO determined that the student's pendency placement and services consisted of the "special education and related services set forth in the [March 29, 2022 IHO Decision] and [the March 2021] IESP" and ordered the district to provide "SETSS – 5 periods per week direct in a group. Speech Language Therapy – 3 times per week for 30 minutes individually" (IHO Ex. I at p. 6).

A status conference was held on December 15, 2022, which the district did not attend (Tr. pp. 16-22). The IHO noted that the matter was filed on September 8, 2022, over three months prior to the status conference, and that, "no one's even appeared on behalf of the district. You haven't gotten a resolution agreement. It really seems like this case is for whatever reason being ignored by the district at this point in time" (Tr. p. 17).

The parent and the IHO proceeded to an impartial hearing on the merits on January 10, 2023 without the participation of the district, during which the parent presented the testimony of three witnesses by affidavit and provided the IHO with an opportunity to question the witnesses directly (Tr. pp. 23-60; Parent Exs. E; F; G).

After the conclusion of the hearing, the IHO contacted counsel for the parent and district via emails dated January 16, 2023, January 19, 2023, and January 20, 2023, in which the IHO requested that counsel for the parent provide the IHO with "any IESP(s) for the current school year in order to avoid the possibility of a negative inference" (IHO Ex. III).

In a final decision dated January 21, 2023, the IHO denied the parent's requested relief of direct funding for five hours per week of SETSS and a bank of 60 hours of speech-language therapy services (IHO Decision at p. 9). The IHO found that the district had failed to prove that it offered the student a FAPE because it had not attended the impartial hearing to present a case or show that it had provided equitable services to the student for the 2022-23 school year (id. at pp. 4, 8). However, the IHO determined that the inquiry did not end there; the IHO recited the legal standards under Education Law Section 3602-c and the requirement that parents may seek to obtain education "services" for their child by "filing a request for such services in the 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" (IHO decision at pp. 6-8). The IHO noted that, if such a request was filed, the CSE would have been obligated to review the request and develop an IESP for the student (id. at p. 6). The IHO then found that the parent failed to introduce evidence that she made a timely written request for services for the 2022-23 school year by June 1, 2022 (id. at p. 8). The IHO determined that the parent's testimony about a possible Spring 2022 CSE meeting was inconsistent, that the parent could not be certain which of her children a CSE meeting may have been held for, and that the parent or her counsel had not provided a copy of an IESP for the student for the 2022-23 school year (id.). Accordingly, the IHO found that the hearing

record did not support an entitlement to equitable services under Education Law Section 3602-c for the 2022-23 school year (id.).

Next the IHO determined that even if she were to have found that the student was entitled to equitable services, the parent had not shown that the unilateral private SETSS that had been obtained for the student for the 2022-23 school year were appropriate because the parent's witness from the agency that provided the services had no personal knowledge of what services were delivered (IHO Decision at pp. 8-9). Lastly, with respect to equitable considerations, the IHO found that the parent had not shown the need for direct payment due to an inability to pay for SETSS by submitting a tax return or other financial information, and further found that the hourly amount charged by the agency for SETSS was excessive (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in finding that the June first deadline in Education Law Section 3602-c was a basis to deny the parent's requested relief. Initially, the parent asserts that the IHO erred in drawing a negative inference based on the parent's inability to produce an IESP for the 2022-23 school year because the last IESP at the time of filing the due process complaint notice in September 2022 was the March 2021 IESP, the parent testified that the CSE met in November or December 2022, not in the spring of 2022 as stated by the IHO, and the parent did not yet have a copy of the December 2022 IESP. The parent contends that in review of the December 2022 IESP, it recommended the same as had been recommended in the March 2021 IESP. Relatedly, the parent contends that the IHO erred in relying on the June first deadline to deny the parent relief for four reasons. First, the parent asserts that the district waived any "timing defense" by failing to raise it during the impartial hearing. Second, the parent contends the district affirmatively waived the June first deadline as a defense by developing an IESP for the student. Third, the parent alleges the district did not show that it had followed its own procedures by asking parents of students with IESPs to request services in April. Fourth, according to the parent, the due process complaint notice should not have been dismissed because it complied with State regulation used for determining if it was facially sufficient.

With respect to the IHO's rulings on equitable considerations, the parent contends that the IHO erred in finding that equities did not support the parent's request for relief because the district has the burden to assert and prove an equities argument and it raised no claim during the impartial hearing about the parent's request for direct payment and the parent's inability to pay, or the cost for the unilaterally obtained SETSS. Moreover, the parent contends that the request for direct funding of SETSS is at the market rate and is therefore not excessive.

In an Answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety. In addition, the district argues that the parent failed to appeal from the portion of the IHO decision that found that the parent had not proven that the unilaterally obtained SETSS were appropriate.

The district also argues that the IHO correctly applied the June first deadline to the parent's request for equitable services because the parent has not shown that an IESP was developed for the student for the 2022-23 school year. Further, according to the district, the parent does not assert that she complied with the deadline, rather the September 2022 due process complaint notice

is the only proof of a request for equitable services. The district asserts that it was permissible for the IHO to raise the issue of the June first deadline sua sponte because the issue goes to the IHO's jurisdiction to hear the matter. Next, the district contends that there can be no implied waiver of the June first deadline defense through the district's conduct without evidence of a CSE meeting or the development of an IESP for the student for the 2022-23 school year in the hearing record. And lastly, on this point, the district asserts that district policy or compliance thereof is not material in this matter given the parent's failure to show compliance with the June first deadline to request equitable services which is a statutory barrier.

Regarding the IHO's findings on equitable considerations the district contends that the IHO correctly determined that the parent had not shown an inability to pay for the services to support an award of direct funding and further that the IHO adequately explained why she believed that the rate charged for the privately obtained SETSS was excessive. The district requests that the parent's appeal be dismissed, and the requested relief be denied.

The parent submits a reply to the district's answer and offers as additional evidence a copy of a December 2, 2022 IESP in support of the parent's assertion that the December IESP included a recommendation of SETSS and speech-language therapy for the student during the 2022-23 school year. The parent contends that the IHO had significant concerns that the parent had not submitted a copy of the student's IESP and without it, found that the student was not entitled to equitable services for the 2022-23 school year. The parent asserts that the December 2022 IESP did not exist at the time of the filing of the September 2022 due process complaint notice, that it was not provided to the parent during the impartial hearing, and that the district did not submit it as evidence during the hearing because the district did not appear for the hearing. The parent contends that she obtained a copy of the December 2022 IESP only after the IHO rendered the decision, and that the IESP proves that the student was entitled to equitable services during the 2022-23 school year. Relatedly, the parent contends that the existence of the December 2022 IESP shows that the district has waived any defense of the June first deadline for requesting equitable services.

In the reply the parent also addresses the IHO's finding that the parent did not show that the unilateral SETSS the parent obtained were appropriate, arguing that the March 2021 and December 2022 IESPs both mandate SETSS, and that documentary and testimonial evidence in the hearing record show both a need for and the appropriateness of the provided SETSS. The parent admits that the hearing record is less clear concerning the need for and appropriateness of speech-language therapy for the student because although both IESPs mandated the related service, the student has never received any speech-language therapy, leading to the parent requesting compensatory education in the form of a bank of speech-language therapy. Lastly, the parent asserts that the parent's affidavit testimony is sufficient to show that the parent had an inability to pay for SETSS and that further, recent case law has called into question the need to show an inability to pay up front to support an award of direct funding.

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 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]).[2] "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.). [3]

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

A. Preliminary Matter—Additional Evidence

The parent has submitted an additional document with her reply and requests that it be considered as additional evidence. The parent has submitted a copy of a December 2, 2022 IESP

[2] 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]).

[3] 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 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

for the student, which recommended SETSS and speech-language therapy for the student for the 2022-23 school year (see Reply Ex. A).[4]

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, the parent's proposed exhibit was not available to the parent at the time of the filing of the September 2022 due process complaint notice and the parent asserts that she was unable to obtain a copy of the IESP until after the IHO rendered her decision in this matter, and I have found no evidence in the hearing record which contradicts this assertion. Further, I find that the parent's proposed exhibit is relevant to determining issues concerning whether or not the district denied a FAPE to the student, as well as to the issue of appropriate relief as discussed below; it is therefore necessary in order to render a decision in this matter. Accordingly, I will exercise my discretion and accept the parent's proposed exhibit.

B. Equitable Services

The main issue presented on appeal is whether the IHO erred in dismissing the parent's due process complaint notice with prejudice for failing to timely file a written request for services under Education Law Section 3602-c for the 2022-23 school year.

[4] The parent has not given an exhibit designation to the copy of the IESP included with the reply, hereinafter I will refer to it as "Reply Ex. A".

Generally, the State's dual enrollment statute requires parents of a New York State resident student with a disability who was parentally placed in a nonpublic school and for whom the parents sought to obtain educational "services" to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]). In this instance there does not appear to be any evidence satisfying this requirement under Education Law Section 3602-c, namely that the parent made a written request for equitable services by June first preceding the 2022-23 school year (see generally, Tr. pp. 31-38; Parent Exs. A-I).

However, the inquiry does not end there, because the State law also addresses how matters should be presented through an impartial hearing. In the present matter, the IHO erred in finding that the hearing record did not support an entitlement to equitable services "based upon the [p]arent's failure to present evidence of a timely request for services and/or evidence of an IESP developed for the 2022-23 school year" (IHO Decision at p. 8). That is because the district carried the burden of proof at the impartial hearing on this question. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In her due process complaint notice, the parent set forth allegations that the district was obligated to but failed to convene a CSE, develop an IESP, and deliver services to the student during the 2022-23 school year (see Parent Ex. A). The district failed to present evidence to counter such allegations. Thus, the district failed to meet its burden of production and persuasion.

Further, as the parent argues, the district waived the defense in this case. The district had several opportunities to raise the issue of the June first deadline, including at the October 31, 2022 prehearing conference, the November 8, 2022 and December 15, 2022 status conferences, and the January 10, 2023 impartial hearing; however, the district failed to do so (see generally Tr. pp. 1-60). There is also no evidence in the hearing record showing that the district responded to the parent's due process complaint notice in accordance with State regulations which require a district to respond to a due process complaint notice within 10 days of receipt if it has not yet sent the parent prior written notice regarding the subject matter of the parent's due process complaint notice (8 NYCRR 200.5[i][4]).

Based on its failure to appear at the impartial hearing, there is no dispute that the district did not raise this issue during the impartial hearing; however, the district argues instead that the IHO correctly raised the question as a matter of subject matter jurisdiction. At least one State level administrative decision, explicitly addressing waiver of the June first deadline, found that a district may through its actions waive it as a defense (Application of the Bd. of Educ., Appeal No. 18-088). Accordingly, the district's jurisdictional argument is questionable at best. The statute itself is not drafted in jurisdictional terms insofar as it creates a June first filing deadline for a request for services but it does not specify that a school district is precluded from providing equitable

services to a student with a disability if a parent misses the June first deadline (Educ. Law § 3602-c[2][a]).[5] Accordingly, there is insufficient basis to find that the June first deadline relates to subject matter jurisdiction as asserted by the district. Rather, the issue fits more with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

"By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Perhaps equally dispositive, as the parent also argues, the district waived the defense in this case by its conduct in developing an IESP for the student that recommended services be provided to the student during the 2022-23 school year (see Reply Ex. A). As the parent points out, the IHO was quite concerned that the parent had not submitted a 2022-23 IESP into the hearing record and asked for the parent to do so during the impartial hearing and in three separate emails

[5] As an SRO recently observed:

> The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1st deadline. But read as a whole, the statute does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline. For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Research by the undersigned has revealed no caselaw addressing whether a school district is barred from dually enrolling a student who has missed the June 1st deadline and the parties have pointed to none.

(Application of a Student with a Disability, Appeal No. 23-032).

on January 16, January 19, and January 20, 2023 (Tr. pp. 30, 58-59; IHO Ex. III). The IHO's interest in knowing if the student had an IESP in place for the 2022-23 school year is understandable, especially given the uncertainty in the hearing record regarding whether the CSE had developed an IESP for the student. However, I find that the parent's additional evidence in the form of a copy of the December 2022 IESP submitted with the parent's reply, puts that question to rest. Ultimately, as the district convened a CSE and developed an IESP for the student, the district is bound by the December 2022 IESP (see Application of a Bd. of Educ., Appeal No. 18-088).

Based on the above, the IHO's determination that the student was not entitled to equitable services under Education Law Section 3602-c because the parent failed to show evidence of a request for services that met the June first deadline must be set aside. Having done so, the district's failure to implement equitable services in this matter constitutes a denial of FAPE, and the remaining issues in dispute must be addressed.

C. Remedy

One form of relief available to the parent for the district's failure to offer a FAPE is tuition reimbursement, or as sought here, direct funding of SETSS. Generally, 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., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

In other words, districts can be made to pay for special education services privately obtained for which a parent paid for or has become legally obligated to pay for, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Accordingly, the parent's request for funding for five periods of SETTS per week direct in a group must be assessed in this framework; namely, having found that the district failed to

implement the student's recommended educational program, the issue is whether the SETSS delivered to the student during the 2022-23 school year constituted an appropriate unilateral placement of the student such that the cost of the SETSS are reimbursable to the parent or, alternatively, should be directly paid by the district to the provider upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so.[6]

The IHO determined that the parent had not shown that the SETSS the parent unilaterally obtained for the student in the student's private school were appropriate, reasoning that the parent's witnesses did not have direct knowledge of how the services were implemented or whether the student made progress (IHO Decision at pp. 8-9).

Both the March 2021 and December 2022 IESPs mandated that the student receive five periods of group SETSS per week and both contain a rationale for the necessity of those services (Parent Ex. B at pp. 1-3, 7; Reply Ex. A at pp. 1-3, 8, 10).[7, 8] Thus, the student's need for SETSS is not reasonably under dispute and the only question is whether the SETSS obtained by the parent in a belated attempt to implement the district's responsibility was appropriate.

The affidavit and in person testimony from the administrative director of special education services at Yeled v'Yalda establishes that the agency has been providing the student with five hours per week of direct 1:1 SETSS from a certified special education teacher during the 2022-23 school year in the student's private school, and that the student had academic and social delays but was making progress (Tr. pp. 42-43; Parent Exs. F ¶¶ 10-19; I). Regarding the question of the student receiving 1:1 SETSS rather than the group SETSS called for in the IESPs, I note that neither the March 2021 IESP nor the December 2022 IESP contained annual goals related to social interaction with peers, such that the provider would have had to have the student in a group setting in order to work on the student's goals (Reply Ex. A at pp. 5-7). Additionally, the parent may be afforded some leeway in locating services for the student, since identifying an appropriate group setting for the student to receive her unilaterally provided SETSS in the private school may not have been possible and the district could have avoided this problem by implementing the recommendation

[6] The parent is not specific as to what exact SETSS services she is requesting reimbursement for. In the request for review, she requests the district be required to "fund the SETSS services at the reasonable market rate with direct payment to the provider" (Req. for Rev. at p. 12). In the due process complaint notice the parent requested "absent an up-to-date program, an order that the [district] to continue to fund the program outlined in the [March 29, 2022 IHO Decision] at the provider's prevailing rate" (Parent Ex. A t. p. 3). Also in the due process complaint notice the parent described those services as "SETSS, direct Service, Group Service, English, 5xPeriods per week" (id. at p. 2).

[7] The December 2022 IEP is an 11-page document attached to the parent's reply, the document does not include page numbers (Reply Ex. A at pp. 1-11).

[8] There is no evidence in the hearing record describing the SETSS that the March 2021 CSE and December 2022 CSE contemplated the student was to receive as recommended in the student's IESPs. In the IESP the services are described as being provided in English as both a "direct service" and a "group service" and that they were to be provided in a "separate location" (Parent Ex. B at p. 7; Reply Ex. A at p. 8). The term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]).

for direct group SETSS. Accordingly, I do not find that the provision of individual rather than group SETSS rendered the unilateral services provided to the student inappropriate.

The December 2022 IESP was developed during the school year in question, and includes references to the student's educational progress while the student was receiving SETSS at the private school (Reply Ex. A at pp. 1-3). For example, the IESP notes that the student made progress in math readiness and reading but could not "keep up in class without help" and was not receiving the speech-language therapy that her IESPs called for (id.).

In light of the above and keeping in mind that the parent was put in the difficult position of trying to implement the recommended IESP services—services that the district recommended but was unwilling or unable to implement itself, I find that the SETSS unilaterally provided to the student during the 2022-23 school year were appropriate.

As a result, the cost of the SETSS, under the Burlington-Carter test, must be fully reimbursed or directly funded by the district unless, as a matter of equitable considerations, the costs sought to be reimbursed are excessive or otherwise should be reduced or, in the case of direct funding, the parent has not demonstrated a legal obligation to pay the costs and an inability to do so.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]; but see Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).[9]

[9] The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (769 F. Supp.2d at 430).

Here, the hearing record establishes that the parent was legally obligated to pay for the SETSS, as there is a copy of a contract in the hearing record and the parent testified that the contract obligates the parent to pay for the services in the event that the district does not fund the services (Parent Exs. E at ¶¶ 6-8; H). Further, although the hearing record does not contain a copy of the parent's tax return or other financial disclosure, the parent's sworn testimony that paying for these services "up front would pose extreme financial hardship" and she "would not be able to pay for these services without outside financial support from friends and family" is sufficient to show an inability to pay in this circumstance where the district did not raise a dispute on this question at the impartial hearing and recent caselaw calls into question the need to show inability to pay (Parent Ex. E at ¶ 9; see Ferreira, 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]).

Lastly, with respect to equitable considerations, I find that the IHO's determination that the rate charged by Yeled v'Yalda for SETSS was excessive is unsupported by the hearing record. The IHO raised questions concerning the proportion of the rate that went to pay the provider as opposed to the portion that went to overhead or other administrative costs (IHO Decision at p. 9). However, the district did not raise this concern with the rate charged for the services during the impartial hearing and there is no evidence in the hearing record concerning whether the rate itself differed from the market rate charged for such services generally. Moreover, on appeal the parent is not requesting direct funding for SETSS at a specific rate, rather the parent is requesting funding "at the reasonable market rate" (Req. for Rev. at p. 9).

In light of the above, I do not agree with the IHO's determination that equitable considerations weighed against the parent's request for direct funding of the unilaterally obtained SETSS during the 2022-23 school year, and I will reverse that portion of the decision as set forth below.

D. Compensatory Education—Missed Services Under Pendency

The parent contends that the district failed to implement the speech-language therapy called for in the student's March 2021 and December 2022 IESPs and that although she was able to remedy the district's failure to implement the student's SETSS, she was unable to locate a speech-language therapy provider. The parent requests a bank of compensatory services consisting of 60 hours of speech-language therapy corresponding to 40 weeks that she asserts the district failed to provide the services.

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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied

in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

In addition, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Here, the IHO's interim decision on pendency as well as the March 2021 and December 2022 IESPs all called for the student to receive three 30-minute sessions of individual speech-language therapy per week (IHO Ex. I at p. 6; Parent Ex. B at p. 7; Reply Ex. A at p. 8).[10]

[10] The parent's request for 40 weeks of compensatory services appears to be for more than the full 10-month school year. Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, and a 12-month school year from June through July would generally consist of 42 weeks. This is

The district does not assert that it provided the student with any speech-language therapy services during the 2022-23 school year to date, and it has not asserted that it has any plans to begin to provide speech-language therapy services to the student as mandated in the student's most-recent IESP. The parent asserts that she was not able to locate a provider to implement the speech-language therapy mandate during the school year, and that the student has not received any speech-language therapy services (see Parent Ex. E ¶¶ 11, 12). The December 2022 IESP confirms that the student was not receiving speech-language therapy services at the time that it was developed, but that the student required such services (Reply Ex. A at pp. 1-2).[11]

In consideration that the student was to be provided with speech-language therapy from the start of the impartial hearing to the present via the interim order on pendency, and given that the December 2022 IESP calls for the same service to be implemented for the duration of the 2022-23 school year, and further that there is no indication that the district has or will implement such services, the parent's request for compensatory education to remedy these failures will be granted for the full 10-month 2022-23 school year, based on a 36-week school year.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated January 21, 2023, is modified by reversing that portion of the decision which found that the student was not entitled to equitable services for the 2022-23 school year;

IT IS FURTHER ORDERED that the IHO decision, dated January 21, 2023, is modified by reversing that portion of the decision which found that the hearing record did not support finding that unilaterally obtained SETSS was appropriate for the student and that equitable considerations did not weigh in favor of direct payment;

IT IS FURTHER ORDERED that to the extent it has not already done so, the district shall be required to directly fund the costs of up to five periods per week of SETSS that have been provided to the student to the date of this decision and for the duration of the 2022-23 school year at a reasonable market rate, upon presentation of proof of delivery;

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based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six-week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]). As there is no indication in the hearing record that the student was recommended for or required 12-month services, the compensatory education awarded will be based on a 36-week school year.

[11] The IHO noted that there was testimony from Yeled v'Yalda's administrative director that the student was receiving speech-language therapy at the private school, although that testimony appears to have been mistaken and in conflict with the weight of the evidence (IHO Decision at p. 9). Nonetheless, the compensatory education order below will reflect the possibility that the student may have received some speech-language therapy during the school year.

IT IS FURTHER ORDERED that the IHO decision, dated January 21, 2023, is modified by reversing that portion of the decision which found that the student was not entitled to compensatory education;

IT IS FURTHER ORDERED that the district shall fund and provide the student with compensatory pendency services in the form of a bank of 54 hours of speech-language therapy services, minus any services the district can demonstrate it provided the student from the September 8, 2022 date of the due process complaint notice until the date of this decision;

IT IS FURTHER ORDERED that the compensatory pendency services awarded to the student shall expire two years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
May 18, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER