The University of the State of New York

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

No. 24-459

Application of a STUDENT WITH A DISABILITY, by her parents, 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 Firm of Tamara Roff, PC, attorneys for petitioners, by Tuneria R. Taylor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied, in part, funding for certain private services delivered to the student during summer 2024 and denied funding for private services arranged for by the parents for the student for the 10-month portion of the 2024-25 school year. The district cross-appeals from the IHO's decision, contending that the IHO lacked subject matter jurisdiction to adjudicate the parents' claims and, alternatively, that the IHO erred in granting the parents any relief. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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]). In addition, when a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73

of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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], [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

A CSE convened on June 27, 2023, determined the student to be eligible for special education as a student with autism, and developed an IESP with a projected implementation date of September 7, 2023 (Dist. Ex. 2 at p. 1).[1] According to the parent, another CSE meeting took place on June 30, 2023, at which the CSE developed an IEP for the extended (i.e., summer) portion of the 2023-24 school year (Parent Ex. M ¶ 7).[2] For the IESP, the June 27, 2023 CSE recommended that the student receive the following services: 10 periods of group special education teacher support services (SETSS) per week, delivered in Yiddish; two 30-minute sessions of individual speech-language therapy per week, delivered in Yiddish; three 30-minute sessions of individual occupational therapy (OT) per week; and two 30-minute individual counseling sessions per week, delivered in Yiddish, as well as testing accommodations (Dist. Ex. 2 at pp. 7-8). According to the parent, the June 30, 2023 IEP recommended that, for summer 2023, the student receive the same frequency and duration of SETSS as recommended in the June 27, 2023 IESP and the same types of related services, as well as a full-time 1:1 health paraprofessional (compare Parent Ex. M ¶ 7, with Dist. Ex. 2 at p. 7). The district's failure to provide the student's special education services during the 2023-24 school year was the subject of a prior impartial hearing, which resulted in an IHO decision dated October 18, 2023 that ordered the district to fund the student's services at a "reasonable market rate" (Parent Ex. B).

On May 15, 2024, the student's mother completed a district form on which she requested that the district provide the student with equitable services for the 2024-25 school year (Parent Ex. D at p. 2). In a letter dated May 23, 2024, the parents, through their attorney, again, requested that the district develop an IESP and provide the student with equitable services for the 2024-25 school year and expressed their intent to secure services privately if the district failed to implement the student's last agreed upon program (Parent Ex. C at pp. 1-2).

On May 28, 2024, the student's mother signed a contract with Yes I Can Services Inc. (Yes I Can), a private educational agency, under which the agency would provide the student with SETSS, delivered 10 times per week in 60-minute periods, and paraprofessional services, delivered 40 times per week in 60-minute periods, during the 12-month 2024-25 school year (Parent Ex. I at pp. 1-4). Under their contract with Yes I Can, the parents agreed to be responsible for any fees not covered by the district (id. at pp. 2-3). In July 2024, Yes I Can began providing SETSS and paraprofessional services to the student in accordance with the above-described contract (Tr. p. 17; Parent Ex. Q ¶¶ 13-18).

On July 1, 2024, the student's mother signed a contract with SpeechLearn, P.C. (SpeechLearn), under which the company would provide the student with two 60-minute sessions of speech-language therapy per week (Parent Ex. J at pp. 1-2). Under the contract's terms, the

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The hearing record does not include a copy of the June 30, 2023 IEP.

parents agreed to be responsible for any fees not covered by the district at specified rate (id. at p. 2).

At the time of the impartial hearing, the student was also receiving three 30-minute sessions of individual OT per week from a private provider and, according to the parent, counseling from a private provider (Parent Exs. M ¶¶ 12-13; N ¶¶ 6-7).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parents, through their attorney, alleged that the district failed to provide the student with a procedurally valid and substantively appropriate program of services for the 2024-25 school year (see Due Process Compl. Not. at p. 1).[3] Among other violations of IDEA and the New York Education Law, the parents alleged that the district failed to convene a CSE to develop an updated IEP and IESP for the 2024-25 school year and failed to implement the student's last agreed upon program of services for the 2024-25 school year (id. at pp. 1, 3). The parents requested pendency based on a prior IHO's decision dated October 18, 2023 (id. at p. 3). As relief, the parents sought funding of the cost of the student's unilaterally obtained services for the entire 12-month school year at the providers' enhanced rates (id.). Alternatively, the parents sought compensatory education services, funded at the rate charged by the parents' chosen providers, for the district's failure to implement the student's educational program in a timely manner (id.).

B. Impartial Hearing Officer Decision

On August 7, 2024, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) and concluded the same day (see Tr. pp. 1-28). The parents presented various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 19-21; Parent Exs. A-R). Among the parents' exhibits were affidavits of the student's speech-language therapist, the student's occupational therapist, an educational supervisor at Yes I Can, the owner of SpeechLearn, and the student's mother (see Tr. pp. 11-13; Parent Exs. M-Q).[4] The educational supervisor at Yes I Can and the owner of SpeechLearn also gave live testimony during the hearing (Tr. pp. 15-23). The district presented no testimony but did offer several documents, each of which the IHO admitted into evidence (see Tr. pp. 6, 13-14; Dist. Exs. 1-4).

In a decision dated September 11, 2024, the IHO found that the district denied the student a free appropriate public education (FAPE) for the summer 2024 session, as the student's entitlement to services for this time period, and the district's failure to implement services, was undisputed (IHO Decision at p. 13). As for the 10-month school year, however, the IHO found that, while the district did not dispute the alleged failure to develop an IESP for the 2024-25 school

[3] Parent exhibit A appears to be an incomplete or different version of the due process complaint notice in this matter (see Parent Ex. A). For purposes of this decision, the copy of the parents' due process complaint notice that the district submitted with the hearing record on appeal as a document required by State regulation will be cited (see Due Process Compl. Not.; see also 8 NYCRR 200.5[j][5][vi]; 279[a]).

[4] The student's mother affirmed the content of her affidavit, which is unnotarized, during the hearing (Tr. pp. 10-11; Parent Ex. M at p. 4).

year, any procedural failure to develop an IESP did not amount to a substantive denial of a FAPE because the district still had time to develop a program for the student before the start of the 10-month school year (id. at p. 14). Moreover, according to the IHO, the parents' claim that that the district failed to implement services for the 10-month school year was not ripe for adjudication, as the 10-month school year had not yet started (id.). Consequently, the IHO dismissed the parents' claim regarding implementation of services for the 10-month school year without prejudice (id. at pp. 13, 15).

Having found that the district denied the student a FAPE for summer 2024 only, the IHO then addressed whether the parents were entitled to relief under the Burlington/Carter framework (IHO Decision at pp. 13-14). The IHO noted that the district did not challenge the appropriateness of the unilaterally obtained services but indicated that, had the district done so, the IHO would not have found the private counseling or paraprofessional services appropriate due to the lack of any evidence of the provider's qualifications or the way in which services were specially designed to meet the student's unique needs (id. at p. 14). The IHO found that the parents did not qualify for funding of the cost of the private counseling and OT because, apart from testimony regarding the providers' rates and the parents' out of pocket expenses for counseling, the hearing record lacked evidence, such as contracts, session logs, or invoices, establishing the parent's financial obligation to the providers (id.). However, the IHO found no reason to reduce the contracted rates for SETSS, paraprofessional services, and speech-language therapy, as the district did not argue that the contracted rates were excessive or raise other equitable concerns (id.).

The IHO ordered the district to fund pendency services from July 1, 2024 through the date of the IHO's decision and immediately convene a CSE and develop an IESP for the 2024-25 school year (IHO Decision at p. 15). The IHO further ordered that the district fund, to the extent not already funded through pendency, the cost of unilaterally obtained services provided to the student between July 1, 2024 and September 11, 2024, by direct payment to the agency, as follows: up to 10 hours of SETSS per week at an hourly rate of $200.00; up to two hours of speech-language therapy per week at an hourly rate of $320.00; and full-time paraprofessional services at a rate of $70.00 per hour (id.). Finally, the IHO ordered that, upon receipt of corresponding invoices and proof of payment, the district reimburse the parents for counseling services provided to the student during the summer of 2024 in the amount of $275.00 (id.).

IV. Appeal for State-Level Review

The parents appeal and the district cross-appeals. The parties' familiarity with the issues raised in the parents' request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parents' appeal is that the IHO erred in denying funding of the cost of the unilaterally obtained counseling and OT and in limiting the award of funding for the other unilaterally obtained services to sessions provided between July 1, 2024 and September 11, 2024. The district seeks dismissal of the parents' appeal and underlying claim related to implementation of an IESP on grounds that the IHO and SRO lack subject matter jurisdiction. Alternatively, the district contends that the unilaterally obtained services were not appropriate for the student and that equitable considerations warrant denial or, at least, reduction of the requested award.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

The IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]). However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "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

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[6] 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]).

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.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

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).

VI. Discussion

A. Subject Matter Jurisdiction

As a threshold matter, it is necessary to address the issue of subject matter jurisdiction which was raised in the district's cross-appeal. The district argues that federal law confers no right

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

to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims. Here, as discussed further below, the parents' claims included allegations other than those related to implementation, including allegations about the district's failure to convene the CSE to engage in educational planning for the student for the 2024-25 school year. There can be no dispute that the IHO and SRO have jurisdiction to address these claims.

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

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

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an

[IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8]

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

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

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process

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

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

Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[10] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[11]

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

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

[10] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 1, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

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

> jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[12]

Given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Acknowledging that this matter has received new attention from State policymakers and appears to be an evolving situation, I nevertheless must deny the district's request for dismissal of the parent's appeal and underlying claim relating to implementation of the IESP on jurisdictional grounds.

Finally, the district argues that, even if the IHO and SRO have jurisdiction, the parents would first be required to pursue their relief through the Enhanced Rate Equitable Service (ERES). While a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurdles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]). Accordingly, the district's argument in this regard is without merit.

B. Equitable Services

Regarding the 10-month portion of the 2024-25 school year, the following disputed issues remain to be addressed: whether the IHO erred in determining that the district's failure to convene a CSE to develop an updated IESP for the 10-month school year did not amount to a denial of a FAPE; and whether the IHO erred in dismissing the parents' claim pertaining to implementation of the recommended services for the 10-month school year as unripe for adjudication.[13] The

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

[13] Neither party has appealed the IHO's determination that the district denied the student a FAPE for the 2024 summer session. That unappealed determination has, therefore, become final and binding on the parties and will not be reviewed on appeal (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 (S.D.N.Y. March 21, 2013).

parents contend that the IHO erred in "bifurcating" the 2024-25 school year between the summer session (i.e., July and August 2024) and the 10-month school year and concluding that the district denied the student a FAPE for the summer session only. The parents argue that the district's failure to convene a CSE to review the student's program prior to the school year's July 2024 start date forced them to unilaterally arrange for the student's services and indebt themselves for the cost of those services for the full school year. At the time of the impartial hearing, only three weeks remained in the month of August 2024, and the district presented no evidence that it had scheduled or was in the process of scheduling an annual review. Thus, according to the parents, one may not reasonably expect that the district would convene, develop an updated IESP, and then implement the student's recommended services in the remaining weeks of August 2024, given the district's history of failing to implement the student's recommended services.[14] The district contends that the IHO's determinations with respect to the 10-month school year should be upheld. The district argues that the student's entitlement to summer services has no bearing on the ripeness of the IESP claims because, as a nonpublic school student, the student was subject to a separate IEP for the summer and IESP for the 10-month school. Moreover, according to the district, the parents filed their due process complaint notice on July 1, 2024, and the hearing took place on August 7, 2024, both before the deadline for developing an IESP for the 2024-25 school year.

State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "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 3206-c," at p. 14, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 38-39, Office of Special Ed. [updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf).

The district's failure to convene a CSE to develop the student's IEP for summer 2024 is not in dispute given the IHO's final and binding determination that the district failed to offer the student a FAPE for that time period. However, the district's failure to convene the CSE to develop the IESP remains at issue.

[14] Additionally, the parent contends that the IHO erred in raising the issue of ripeness sua sponte. Contrary to the parents' contention, the ripeness doctrine can be raised sua sponte because it "'is drawn from [constitutional] limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction'" (Thomas v. City of New York, 143 F.3d 31, 34 [2d Cir. 1998], quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 58 n.18 [1993]).

Under the IDEA and State regulations, a CSE must meet "at least annually" to review and, if necessary, revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IDEA and State regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations do require that a district have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]).[15, 16]

State Education Law does not specify the timing of a CSE meeting to develop an IESP but provides that a CSE shall develop an IESP "in the same manner" as an IEP (see Educ. Law § 3602-c[2][b][1]). In instances such as the present case, where the district of residence and the district of location are the same, the reasonable expectations are that 1) a CSE will comply with its obligation to conduct a review of the student's special education programming at least annually, and 2) would have an IESP in place at the beginning of the 10-month portion of the school year when the child begins attending school, assuming that a timely parental request for equitable services was made (see Educ. Law § 3602-c[2][a]).[17]

In either event, failure to provide a finalized IEP or in this case IESP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE or equitable services (see Y.S. v. New York City Dep't of Educ., 2024 WL 4355049, at *18 [S.D.N.Y. Sept. 30, 2024] [rejecting the argument that a failure to have an IEP in place was a per se denial of a FAPE]; Application of a Student with a Disability, Appeal No. 15-099 [finding that the district's failure to finalize an IEP until after the start of the school year contributed to the denial of a FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

In this case, it is undisputed that, on May 15 and May 23, 2024, the parents directly, and then later through their attorney, requested that the district develop an IESP and provide the student with special education services thereunder for the 2024-25 school year (Parent Exs. C at pp. 1-2; D at p. 2) and that, in or around June 2024, the CSE should have conducted an annual review of

[15] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

[16] Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

[17] It would not be uncommon for a CSE to develop the IESP at the same time as the IEP during an annual review.

the student's programming (see Parent Ex. M ¶ 7; Dist. Ex. 2 at p. 1). However, it is also undisputed that, as of August 7, 2024, the date of the impartial hearing, the district had not convened a CSE to review and, if necessary, revise the student's IESP (see Tr. pp. 23-24). In theory, the district could have convened the CSE in the remaining weeks before the start of the 10-month school year. However, the district did not argue during the impartial hearing, let alone present evidence, that it had scheduled or was in the process of scheduling an annual review (see id.).[18]

Notably, in its answer and cross-appeal dated November 8, 2024, filed well after the start of the 10-month school year, the district does not so much as allege that it convened a CSE to develop an IESP or had it in place for the student at the beginning of the 10-month 2024-25 school year, despite acknowledging that the IHO had ordered the district to do so (Answer ¶ 8; see IHO Decision at p. 15). Therefore, at this juncture there is no reason to conclude that the district develop an IESP for the student in compliance with its obligations. Further, there are no mitigating factors in this matter that would indicate that the procedural violation did not impede the student's right to equitable services, impede the parents' opportunity to participate in the decision-making process, or deprive the student educational benefits (see Y.S., 2024 WL 4355049, at *18 [finding that, despite the lack of an IEP, the student was "incontrovertibly receiving special education services"]). Accordingly, the evidence in the hearing record supports a finding that the district denied the student equitable services for the 10-month portion of the 2024-25 school year (see Application of a Student with Disability, Appeal No. 23-093 [finding that the district denied the student a FAPE where, despite the parties' efforts to conduct a meeting prior to the start of the 2022-23 school year, the district did not have an IEP in place prior to the start of said school year]).

Considering this determination, I find it unnecessary to address the parties' remaining dispute pertaining to the ripeness of the parents' implementation claims for the 10-month school year.

C. Unilaterally Obtained Services

Next, I must address the parties' dispute as to whether the unilaterally obtained services were appropriate for the student.

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents alleged that the district failed to engage in educational planning or implement the student's mandated public special education services under the State's dual enrollment statute for the 2024-25 school year and, as a self-help remedy, they unilaterally obtained private services from various providers for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services.

[18] The timing of the impartial hearing was unfortunate in that there was still time to inquire and/or remediate the issue while the evidentiary hearing was ongoing, but the beginning of the 10-month school year had already elapsed when the IHO issued her determination and the proceeding concluded.

"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 Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [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."]). The parent's request for district funding of privately-obtained services must be assessed under this framework.[19]

In light of the IHO's finding that there was no denial of equitable services for the 10-month portion of the school year, it is unclear the extent to which the IHO's findings regarding the student's unilaterally obtained services were specific to those services delivered during summer 2024. As for the determinations made by the IHO, the parents contend that the IHO erred in denying funding for the student's unilaterally obtained OT and in limiting the award of funding for the student's unilaterally obtained counseling to the parents' out of pocket expense of $275.00 based on lack of proof of the parents' financial obligation. More specifically, the parents argue that the IHO erred in framing proof of the parent's financial obligation as an issue of appropriateness but, in any event, the record evidence established that they were responsible for the cost of the private counseling and OT. The district contends that the parents failed to prove that any of the unilaterally obtained services were specially designed to meet the student's individual needs and, thus, the IHO erred in awarding any funding at all.

As for a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain

[19] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from various providers including the SETSS provider and paraprofessional from Yes I Can, the speech-language therapist from SpeechLearn, and the OT and counseling providers (Educ. Law § 4404[1][c]).

limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The IHO declined to determine whether the unilaterally obtained services were educationally appropriate for the student, reasoning that the district did not challenge the appropriateness of said private services (IHO Decision at p. 14). However, the district did not concede the services were appropriate and was not required to explicitly challenge the appropriateness of the unilaterally obtained services as the parents unilaterally engaged in self-help and carried the burden of production and persuasion on the issue (Educ. Law § 4404[1][c]).[20] The IHO made an alternative determination that, had the district challenged the appropriateness of the unilaterally obtained services, the IHO would not have found the private counseling or paraprofessional services appropriate due to lack of evidence of the provider's qualifications or the way in which services were specially designed to meet the student's unique needs (id.). However,

[20] In the future, if the IHO intends to make determinations on the appropriateness of a unilateral placement or services or on equitable considerations based on the presentation of arguments or the lack thereof, a better approach is to utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before her so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]).

that alternative determination, which isolated specific services, did not reflect consideration of the totality of the circumstances. Indeed, the unilaterally obtained SETSS, speech-language therapy, and OT were not considered in the analysis (see id.). As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist., 557 U.S. at 246-47).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Therefore, I will remand the case to the IHO to reopen the record and receive additional evidence, consider the services the student has received and the progress the student has made during the 2024-25 school year, and render a determination as to whether the unilaterally obtained services were appropriate for the student based on the totality of the circumstances. Upon remand, I leave it to the IHO's sounds discretion as to whether additional argument or evidence should be permitted on the issue of the parents' financial obligation for counseling and OT services.[21]

D. Equitable Considerations

Under the Burlington/Carter framework, the final criterion for an award of funding is that the parents' claim must be supported by equitable considerations. Here, the district contests the IHO's determination that there was no reason to reduce the contracted rates for SETSS, speech-language therapy, and paraprofessional services because the district did not argue that the contracted rates were excessive or otherwise raise any equitable concerns.

[21] Proof of an actual financial risk incurred by the parents is indeed a prerequisite to obtaining funding of the cost of unilaterally obtained services under the Burlington/Carter framework (see Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. at 374 [stating that "financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district]; see also Forest Grove Sch. Dist., 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]).

With respect to equitable considerations, the IDEA provides that funding may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). Among the factors that may warrant a reduction in funding under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Review of the hearing record reveals that the district did raise the issue of excessiveness of the contracted rates through its cross-examination of the parents' witnesses and its presentation of documentary evidence. Indeed, the district representative questioned the educational supervisor at Yes I Can, as well as the owner of SpeechLearn, concerning the respective agency's rates and presented an American Institutes for Research ("AIR") report, as well as data from the U.S. Bureau of Labor Statistics, as evidence of market rates for services (see Tr. pp. 15-18, 20, 22-23; Dist. Exs. 1, 4.). The IHO should reconsider the equitable considerations upon remand.

E. Pendency

Finally, both parties contest the IHO's pendency order. The parents contend that the IHO erred in limiting pendency services to the period from July 1, 2024, the date of the parent's due process complaint notice, through September 11, 2024, the date of the IHO's decision, because the law requires the district to fund pendency services for the duration of the proceedings, including any appeals. The district contends that, as a nonpublic school student, the student is not entitled to pendency because nonpublic school students are not automatically entitled to the continuation of equitable services from year to year.

Under the IDEA and New York Education Law § 4404, a student must remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F.

Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).22 The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]).

The district's position on pendency lacks merit. As more fully discussed above, it stands to reason that disabled students attending nonpublic schools, who are considered "part-time public school students[] for the purpose of receiving special education services," are entitled to the same legal protections found in Education Law § 4404 (Wieder, 72 N.Y.2d at 184). Indeed, the State's dual enrollment "statute was . . . designed to increase benefits afforded to [disabled] students in private schools—not to limit them" (id.). It is well-settled that a student's entitlement to pendency arises automatically, begins on the date of the filing of the due process complaint notice, and continues until the conclusion of the matter (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d 904, 906). During the hearing, the district acceded to the parents' position that pendency lies in the prior, unappealed IHO decision dated October 18, 2023 (see Tr. p. 14). Therefore, I will order that the district fund pendency services, pursuant to the October 2023 order, from July 1, 2024, the date of the due process complaint notice, until the conclusion of the current proceedings (see Application of the Dep't of Educ., Appeal No. 23-139 [declining to disturb the IHO's award of funding under pendency to the private school which the parties agreed was the student's pendency placement]).

VII. Conclusion

In summary, the district's request for dismissal of the parents' appeal and underlying claims for lack of subject matter jurisdiction is denied. As explained above, I find that the district denied the student equitable services for the 10-month portion of the 2024-25 school year by its failure to convene a CSE to develop an IESP prior to the start of said 10-month school year. However, I must remand the matter to the IHO for a determination as to whether the unilaterally obtained services were appropriate for the student for the full 12-month 2024-25 school year based on the totality of the circumstances. Upon remand, the IHO may consider additional evidence; revisit whether the parents established their financial responsibility for the cost of the student's private services; and revisit whether the equities support the parents' request for relief. Finally, as explained above, the student is entitled to pendency services, pursuant to the unappealed IHO decision dated October 18, 2023, from July 2024 until the conclusion of these proceedings.

[22] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, for purposes of pendency, the district shall fund 10 periods of individual SETSS per week, delivered in Yiddish, two 30-minute individual counseling sessions per week, delivered in Yiddish, three 30-minute sessions of individual OT per week, two 60-minute sessions of individual speech-language therapy, and full-time paraprofessional services on a 12-month basis from July 1, 2024 until the conclusion of the administrative proceedings;

IT IS FURTHER ORDERED that the IHO's decision dated September 11, 2024 is modified by reversing those portions which determined that the district's failure to convene a CSE to develop an updated IESP prior to the start of the 10-month portion of the 2024-25 school year did not amount to a denial of a FAPE and that the appropriateness of the private services and equitable considerations were not in dispute for the full 12-month 2024-25 school year;

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

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

Dated: **Albany, New York**
January 24, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER