The University of the State of New York

The State Education Department
State Review Officer
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No. 24-469

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:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tamara Roff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 their request that respondent (the district) fund the costs of their daughter's private services for the 10-month portion of the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which found no reason to reduce the requested award on equitable grounds. 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 such disputes occur, 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

According to the parents, the student previously attended public school in a 12:1+1 special class with related services, the parties have previously engaged in several due process administrative hearings, and then the student has been homeschooled since September 2019 (Parent Ex. A at p. 2). In 2024 the student continued to be homeschooled and eligible for special education, on a 12-month basis, as a student with a learning disability (see Parent Exs. A at p. 3; D at pp. 1, 4, 26-28; E at pp. 1-2).[1]

A CSE convened on April 17, 2024 for a meeting in which the student's mother participated (Parent Exs. D at pp. 1, 29; E at pp. 1, 23). During the April 2024 meeting, the CSE developed an IEP for the student for the extended (i.e., summer) portion of the 2024-25 school year and an IESP for the 10-month portion of the school year (see Parent Exs. D at pp. 1, 28; E at pp. 1, 23). The April 2024 CSE recommended that the student receive 12 periods of special education teacher support services (SETSS) per week in a group setting, five 45-minute sessions of individual speech-language therapy per week, three 45-minute sessions of individual occupational therapy (OT) per week, two 30-minute sessions of individual physical therapy (PT) per week, and various testing accommodations (Parent Exs. D at p. 23; E at pp. 19-21).[2]

In a letter dated May 21, 2024, the parents, through their attorney, requested that the district provide educational services to the student under the State's dual enrollment statute in the upcoming 2024-25 school year (Parent Ex. B at p. 1). The attorney's letter also advised that, if the district failed to implement the recommended services in a timely manner, the parents would secure appropriate services privately and seek funding/reimbursement of the cost of those services (id.). On May 28, 2024, the parents submitted a district form by email on which they, again, requested equitable services for the 2024-25 school year (Parent Ex. C at pp. 1-2).

On June 13, 2024, the student's mother signed a contract with Dyslexia Associates, Inc. (Dyslexia Associates) under which said agency agreed to provide the student with 12 hours per week of SETSS pursuant to a pendency order (Parent Ex. H at p. 1).[3] Under the contract's terms, Dyslexia Associates would submit invoices to the district, seeking funding at a rate of $175.00 per hour for services provided to the student from July 1, 2024 until the conclusion of the case (id.). The contract further provided that, in the event of a change in circumstances, such as the district's failure to pay any invoice within six months of its submission or the parent's failure to prevail at an impartial hearing, the parents would be financially responsible for any outstanding balance immediately upon receiving written notice from Dyslexia Associates (id.).

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[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] The April 2024 IEP included related service recommendations of five 45-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and three 45-minute sessions per week of individual speech-language therapy; however, the parents indicate in their due process complaint notice that the district mistakenly switched the speech-language therapy and OT frequencies (Parent Exs. A at p. 2; D at p. 23).

[3] Dyslexia Associates is a corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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 adequately assess the student and follow certain specific procedural requirements (Parent Ex. A at p. 1, 3). Among other substantive deficiencies in the recommended programming, the parents alleged that the CSE recommended group services, despite the student's need for 1:1 instruction, and failed to recommend Orton-Gillingham reading instruction on the student's IEP or IESP (id. at pp. 2-3). The parents further alleged that the district failed to implement the recommended programming (id. at pp. 1, 3). As relief, the parents requested an order that the district fund or reimburse the cost of 12 hours per week of 1:1 SETSS, at the provider's enhanced rate, and issue related service authorizations (RSAs) for speech-language therapy, OT, and PT at the recommended levels (id. at p. 3).

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. 1-20). The parents presented various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 8, 15-16; see Parent Exs. A-I). Among the parents' exhibits were affidavits of the student's mother and the educational director for Dyslexia Associates (see Tr. pp. 8, 15-16; Parent Exs. F; I). The student's mother briefly testified during the hearing, and the educational director affirmed the content of her unnotarized affidavit during the hearing (see Tr. pp. 13-16). The district presented no testimony but offered several documents, each of which the IHO admitted into evidence (see Tr. pp. 6-7, 16; see Dist. Exs. 1-8).

In a decision dated September 10, 2024, the IHO awarded relief for the extended (i.e., the summer) portion of the 2024-25 school year but dismissed the parents' claims concerning the 10-month school year (see IHO Decision at pp. 13-14). At the outset, the IHO determined that the parents abandoned any claim pertaining to the adequacy of the April 2024 program because, while they asserted a lack of implementation during the hearing, they did "did not dispute the program contained in the [April 2024] IESP" (id. at pp. 3, 13). The IHO further reasoned that the parents' counsel "specifically stated that the parties agreed about the appropriate services" and that the April 2024 IEP and IESP are the basis of the student's pendency program (id. at p. 3).[4] The IHO determined that the district failed to meet its burden of proving that it offered the student a free appropriate public education (FAPE) for the extended portion of the 2024-25 school year, as the district did not dispute having failed to implement the recommended SETSS for the 2024 summer session (id. at pp.4, 13). As for the 10-month school year, however, the IHO determined that, because the 10-month school year had not yet started, any claim regarding the district's future failure to implement the recommended program was based on an injury which may never occur and, thus, not ripe for adjudication (id. at p. 13).

[4] During the hearing, the parents' counsel stated their position that pendency lies in the April 2024 IEP and IESP, and the district did not object (Tr. p. 12). Based on the parties' agreement in that regard, the IHO found that, for purposes of pendency, the district must fund 12 periods of SETSS per week between July 1, 2024 and the date of the IHO's order (IHO Decision at p. 13).

Having determined that the district denied the student a FAPE for the extended portion of the school year, the IHO then addressed whether the unilaterally obtained SETSS were appropriate for the student (IHO Decision at p. 13). The IHO determined that the parents met their burden in that regard (id.). The IHO reasoned that the district had not disputed the appropriateness of the unilaterally obtained SETSS but, in any event, the hearing record included evidence that Dyslexia Associates provided specially designed instruction that met the student's unique needs (id.). According to the IHO, lack of evidence of the student's progress during summer 2024 was not dispositive, given the short duration of the summer session (id.).

Finally, the IHO considered whether equitable considerations weighed in favor of the parents' request for relief (see IHO Decision at p. 13). The IHO found the contracted rate for the unilaterally obtained SETSS from Dyslexia Associates to be reasonable, noting that the district raised no equitable concerns (id.). The IHO acknowledged that the district presented an American Institute for Research (AIR) report as evidence of the market value of the services at issue but found the report lacking evidentiary value for the following reasons: the report addressed no services other than SETSS; the study included the hourly rates of full-time salaried employees (versus independent contractors) in the data pool; the study used rates for group (versus individual) SETSS; and the report reflected average rates lower than what was reasonable in New York City because the study included data from New Jersey and Pennsylvania (id. at pp 5-6). Thus, the IHO found "no reason to reduce the requested award on equitable grounds" (id. at p. 13). As relief, the IHO ordered that the district provide direct funding of the cost of up to 12 hours per week of SETSS, at an hourly rate of $175.00, for all sessions provided to the student between July 1, 2024 and the date of the IHO's order, upon receipt of invoices and session logs corresponding to those dates (id. at p. 14).

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 with cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parties dispute the following issues: whether the IHO erred in determining that the parents abandoned their claims pertaining to the adequacy of the April 2024 program; whether the IHO erred in dismissing the parents' implementation claim as it pertains to the 10-month school year; whether the IHO erred in finding no equitable grounds to reduce the requested award; and whether the IHO erred in failing to issue a pendency order.

V. Applicable Standards

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

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

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

VI. Discussion

A. Equitable Services

Regarding the 10-month portion of the 2024-25 school year, the following disputed issues must be addressed: whether the IHO erred in determining that the parents abandoned their claims

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

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

concerning the substantive adequacy of the April 2024 IESP; and whether the IHO erred in dismissing the parents' implementation claim as unripe for adjudication.[7] The parents argue that they did not abandon their claims pertaining to the alleged inadequacy of the April 2024 program.[8] The parents argue that the district, the party with the burden proof, failed to rebut their allegations concerning the omission of 1:1 instruction with Orton-Gillingham methodology from the recommended program. The parents further argue that the record supports the student's need for individual (versus group) SETSS using Orton-Gillingham methodology. Regarding the alleged lack of implementation, the parents contend that the IHO erred in bifurcating the 2024-25 school year between the summer months and the 10-month school year.[9] The parents assert that the district was required to implement the student's IESP by May 1, 2024 and ensure the implementation of services for the start of the school year on July 1 2024. Thus, according to the parents, the district should not have a third opportunity to implement services in September 2024. The district contends that the IHO correctly dismissed all claims pertaining to the 10-month portion of the 2024-25 school year, as said claims were unripe for adjudication. At the time of the hearing, the 10-month school year had not yet started. Thus, according to the district, it could not have violated the student's rights with respect to the April 2024 IESP because there was still time for changes to occur before the April 2024 IESP became the student's operative educational program.

For the reasons that follow, I must reverse the IHO's decision to the extent that it dismissed the parents' claims concerning the 10-month portion of the 2024-25 school year. I will first address the IHO's determination that the parents abandoned their claims pertaining to the alleged inadequacy of the April 2024 program.

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]).[10] Under State law, however, the burden of proof has been placed on the school district

[7] 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, at *6 (S.D.N.Y. March 21, 2013).

[8] The parents cite their attorney's closing argument, in which said attorney requested funding for unilaterally obtained SETSS on an individual basis and stated that the 1:1 SETSS provided to the student by Dyslexia Associates "is an evidence-based literacy protocol and methodology" (Tr. pp. 17-18).

[9] 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]).

[10] Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

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).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). In this case, the parents' due process complaint notice alleged substantive deficiencies in the April 2024 IESP, thus, placing the district on notice of the need to defend its recommendations that it made in the IESP (see Parent Ex. A at pp. 1-3). The IHO did not conduct a prehearing conference to clarify issues or to otherwise provide the parents with the opportunity to affirmatively abandon or withdraw certain issues prior to the presentation of proof (see Tr. at pp. 1-20; see also 8 NYCRR 200.5[j][3][xi] [providing that a prehearing conference may be scheduled to, among other things, "simplify[] or clarify[] the issues"]). Nevertheless, the IHO determined that the parents abandoned their claims pertaining to the alleged inadequacy of the April 2024 program because they "did not dispute the program contained in the [April 2024] IESP at [the] hearing" (IHO Decision at pp. 13). The IHO erred in that regard by improperly shifting the burden to the parents to disprove the adequacy of the April 2024 program (see Application of a Student with a Disability, Appeal No. 20-174 [reversing the IHO's determination that the parents abandoned issues that were properly raised in their due process complaint notice, on which the district bore the burden of proof, "by not further raising those same issues at the impartial hearing"]).

The IHO further reasoned that the parents' counsel abandoned any claims pertaining to the alleged inadequacy of the April 2024 program by "stat[ing] that the parties agreed about the appropriate services" and requesting pendency services pursuant to the April 2024 IEP and IESP (see IHO Decision at p. 3). To the contrary, counsel's reference to the district's "agreement about the services that [the student] . . . require[d]" connoted agreement over the general type of services and did not amount to an affirmative abandonment of the particular issues raised in the parents' due process complaint notice (Tr. p. 17). Indeed, the parents did not contest the district's recommendation that the student receive SETSS, speech-language therapy, OT, and PT (see Parent Ex. A at pp. 2-3). Rather, the due process complaint alleged the student's need for individual (versus) group SETSS using a particular methodology (id. at pp. 2-3). Moreover, as further discussed below, the pendency inquiry, which focuses on identifying the student's then-current educational placement, is an entirely separate inquiry from the adequacy of the district's recommended program (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]; 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]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005] [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). Accordingly, the IHO improperly conflated these two separate inquiries. The fact that the parties agreed the student's stay-put placement was comprised of services that were set forth in the April 2024 IEP and IESP, without more, did not operate as a concession by the parents that the recommendations contained therein were adequate to offer the student a FAPE.

Next, I will address the ripeness of the parents' claims.

"An issue is ripe for judicial resolution only if it presents 'a real, substantial controversy, not a mere hypothetical question'" (Longway v. Jefferson Cnty. Bd. of Sup'rs, 24 F.3d 397, 400 [2d Cir. 1994], quoting AMSAT Cable Ltd. v. Cablevision of Conn., Ltd. P'ship, 6 F.3d 867, 872 [2d Cir.1993] [internal quotations and citations omitted]). In other words, "a case . . . lack[s] ripeness when it involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all" (AMSAT Cable Ltd., 6 F.3d at 872 [internal quotation marks omitted]).

In light of the above determination that the parents did not withdraw their claims regarding the appropriateness of the April 2024 IESP and contrary to the district's contention, any issue concerning the substantive adequacy of the April 2024 IESP was ripe upon creation of said IESP (see Application of a Student with a Disability, Appeal No. 24-033 [reversing the IHO's determination that the parent's claims pertaining to the 2023-24 school year were not ripe for adjudication where the parent alleged that the May 2023 CSE failed to recommend appropriate special transportation supports and accommodations]).

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]). Here, the matter will be remanded to the IHO to address the merits of the parents' claims challenging the procedural or substantive appropriateness of the April 2024 IESP. Although the IHO briefly stated in a footnote a one-sentence alternative finding regarding the student's alleged need for individual SETSS using Orton-Gillingham methodology, the IHO did not cite any record evidence or explain her rationale (see IHO Decision at p. 3). The IHO should be given the opportunity in the first instance to fully weigh the evidence and consider the parent's claims pertaining to the April 2024 IESP. Therefore, I will remand this matter to the IHO for a determination as to whether the district met its burden of proving that it offered the student appropriate equitable services for the 10-month portion of the 2024-25 school.

With respect to the parent's implementation claims, because this matter is being remanded and due to the passage of time, the issue is no longer "'a mere hypothetical question'" (Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 687 [2d Cir. 2013], quoting AMSAT Cable Ltd., 6 F.3d at 872). Therefore, I find that the parents' claims concerning the 10-month portion of the 2024-25 school year became ripe for adjudication at about the time that the IHO issued the final decision. Duplicative due process proceedings should be avoided if possible. Accordingly, on remand, the IHO must address the parents' claims that the district has not implemented the April 2024 IESP. The IHO should reopen the hearing to ensure that the parties have had an opportunity to present evidence on this issue.

B. Unilaterally Obtained Services

In this matter, the parents alleged that the district failed to offer appropriate programming and failed to implement the student's mandated public special education services under the State's

dual enrollment statute for the 2024-25 school year. As a self-help remedy, the parents unilaterally obtained private services 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. "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, 959 F.3d at 526 [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "[p]arents' 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.

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; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; 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"]). 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]). 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, 773 F.3d at 386; 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).

Here, the IHO determined that Dyslexia Associates provided appropriate services for the student during the summer 2024 (IHO Decision at p. 13).[11] However, the extent to which that determination extends to the remainder of the 2024-25 school year is unclear given the IHO's dismissal of all claims concerning the 10-month school year.[12] The IHO should provide the parties with an opportunity to be heard with regard to the 10-month potion of the school year. Therefore, upon remand, the IHO should consider whether the parents met their burden of proving that the unilaterally obtained services were appropriate for the student for the 10-month portion of the 2024-25 school year.[13] I leave it to the IHO's sound discretion on remand to consider whether any subsequent events would affect the analysis for the 10-month portion of the school year or whether additional evidence is required to make the necessary findings of fact and of law and/or fully develop the hearing record.

C. 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 finding of no equitable grounds to reduce the requested award. The district argues that the contracted rate for the unilaterally obtained SETSS should be reduced from an unreasonable $175.00 per hour to a more reasonable $125.00 per hour in accordance with the AIR report. The district further argues that the student received excessive levels of instruction, which represent segregable costs. Specifically, the district argues that, instead of the recommended group SETSS, the student received 1:1 SETSS using a reading methodology that the district had not recommended. The parents argues that the district waived any claim that the equities do not

[11] The IHO's determination that Dyslexia Associates provided appropriate services for the student during the 2024 summer session, a determination which neither party has appealed, has 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., 2013 WL 1314992 at *6).

[12] According to the IHO, the "issue [wa]s not truly in dispute" because the district did "not challenge[] the appropriateness of the unilaterally obtained SETSS (IHO Decision at p. 13). However, the district did not concede that 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]).

[13] 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 Dyslexia Associates (Educ. Law § 4404[1][c]).

support the parents' request for relief because, as the IHO correctly determined, the district raised no equitable concerns during the hearing. According to the parents, the AIR report does not specify a reasonable hourly rate, much less support assignment of a $125.00 hourly rate; and the hearing record supports the student's need for 1:1 instruction using Orton-Gillingham methodology.

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 rate through its presentation of an October 2023 AIR report (see Tr. pp. 6-7; Dist. Ex. 1; Application of the Dep't of Educ., Appeal No. 24-503 [finding the wage information contained in the AIR report relevant to the question of whether the contracted rate for SETSS was excessive]). Upon remand, the IHO should reconsider the equitable considerations in light of the analysis in Application of the Dep't of Educ., Appeal No. 24-503, wherein the SRO considered whether a contracted rate for SETSS should be reduced based upon data from the United States Bureau of Labor Statistics (USBLS) contained in an AIR report.

D. Pendency

Finally, the parents contend that the student has been left without SETSS pending appeal because, although the IHO indicated that a pendency order would be included in the final order, the IHO failed to issue a pendency order. The district contends that the parents' pendency claim is moot because the parents already received an award of funding for the cost of services delivered to the student during summer 2024, an award which represents all of the relief the parents could have obtained given the IHO's correct dismissal of the 10-month school year claims. According to the district, pendency in the summer programing extends to the following school year's summer session, not to the 10-month school year.

The IDEA and the New York State Education Law require that a student 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. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; 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]; O'Shea, 353 F. Supp. 2d at 455-56).[14] 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]).

A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

[14] 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).

The Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]). "[T]he pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). Nor does the pendency provision require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents, 629 F.2d at 753, 756; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Here, the IHO ordered the district to fund only those sessions provided to the student between July 1, 2024 and September 10, 2024, the date of the IHO's decision (IHO Decision at p. 14). However, the student's entitlement to pendency begins on the date of the filing of the due process complaint notice and continues until the conclusion of all proceedings (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d at 906). Contrary to the district's contention, the student's entitlement to pendency, which arises automatically, is independent of the merits of the underlying claims (Zvi D., 694 F.2d at 906; see C.B. v New York City Dep't of Educ., 2005 WL 1388964 at *26 [E.D.N.Y. 2005] [claims for reimbursement on a "pendency basis" are "separate and distinct" from claims for reimbursement based in the inadequacy of an IEP]; O'Shea, 353 F.Supp.2d at 459 [parents deemed entitled to tuition reimbursement on pendency basis regardless of the merit of their underlying claim because "pendency placement and appropriate placement are separate and distinct concepts"]). During the hearing, the district acceded to the parents' position that pendency lies in the April 2024 IEP and IESP (see Tr. pp. 11-12). Therefore, on the basis of the district's agreement on the record in this case, I will order that the district fund pendency services, pursuant to the April 2024 IEP and IESP, 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, I find that the IHO erred in determining that the parents abandoned their claims concerning the substantive adequacy of the April 2024 IESP and that the parents' claims pertaining to the 10-month portion of the 2024-25 school year are ripe for adjudication. As explained above, I must remand the matter to the IHO for a determination as to whether the district met its burden of proving that it offered the student a FAPE on an equitable basis for the 10-month portion of the 2024-25 school. Upon remand, the IHO may reopen the record and consider additional evidence; the IHO should consider whether the parents' met their burden of proving that the unilaterally obtained services were appropriate for the student for the full 12-month 2024-25 school year; and the IHO should reconsider whether the equities support the parents' request for relief. Finally, as explained above, the student is entitled to pendency services, pursuant to the April 2024 IEP and IESP from July 1, 2024 until the conclusion of these proceedings.

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 12 periods of SETSS, five 45-minute sessions of individual speech-language therapy, three 45-minute sessions of individual OT, and two 30-minute sessions of individual PT per week, 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 10, 2024 is reversed to the extent that it dismissed the parents' claims pertaining to the 10-month portion of the 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**
February 20, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER