The University of the State of New York

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

No. 24-472

Application of a STUDENT WITH A DISABILITY, by his 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 Offices of Regina Skyer and Associates, LLP., attorneys for petitioners, by Daniel Morgenroth, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 dismissed their due process complaint notice with prejudice for lack of subject matter jurisdiction. The district cross-appeals from that portion of the IHO's decision which ruled, in the alternative, that the private special education services unilaterally obtained and delivered to the student from Yes I Can Services Inc. (Yes I Can) during the 2023-24 school year were appropriate, and which directed the district to reevaluate the student and recommend appropriate educational programming. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20

U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, on June 14, 2019, the CSE convened, found the student eligible for special education as a student with a learning disability, and developed an IESP for the student with a projected implementation date of September 5, 2019 (see Parent Ex. B).[1, 2] The CSE recommended that the student receive four periods per week of group special education teacher support services (SETSS) in Yiddish and one 30-minute session per week of group counseling services in Yiddish (id. at p. 4).[3]

There is no evidence in the hearing record as to the student's education between the June 2019 IESP and the 2023-24 school year.

In an email dated May 24, 2023, the parents, via their attorney, informed the district that they had placed the student in a nonpublic school at their expense and wanted the student to continue receiving special education services during the "next school year" (Parent Ex. C).

On July 25, 2023, the parent electronically signed a letter on Yes I Can letterhead, which reflected that the parent was seeking the agency to provide SETSS to the student (Parent Ex. D). The document included a 2023-24 Yes I Can rate sheet which listed an hourly charge for SETSS at $200 (id. at p. 4).[4, 5]

For the 2023-24 school year, the student attended seventh grade at a nonpublic school and began receiving SETSS from Yes I Can, which continued over the course of the school year (Parent Exs. E at p. 1; G ¶¶ 42-45).

A. Due Process Complaint Notice

By due process complaint notice dated June 12, 2024, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year

[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][11]).

[2] The hearing record contains duplicate copies of the June 2019 IESP (Parent Ex. B; Dist. Ex. 2). For purposes of this decision, only the parent's exhibit will be recited. The IHO is reminded of her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or duly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

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

[5] The representative for Yes I Can electronically signed the letter on August 22, 2023 (Parent Ex. D at p. 3).

by failing "to properly discharge its duties in the development and implementation of the [IESP] developed for [the student]" (Parent Ex. A at p. 1).[6] According to the parents, the June 2019 IESP was the last educational program developed for the student and, for the 2023-24 school year, the CSE failed to convene to develop an educational program for the student and failed to implement the student's special education services at the start of the school year (id. at p. 2). The parents sought, in pertinent part, an order directing the district to fund the costs of the SETSS and related services provided to the student during the 2023-24 school year "at the provider's stated rate" (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on July 18, 2024 before an IHO appointed by the Office of Administrative Trials and Hearing (OATH) (Tr. pp 1-20). In a decision dated September 16, 2024, the IHO indicated that "[i]f the IHO had jurisdiction in this matter, the Burlington/Carter [s]tandard would guide the analysis" and applying that standard, the IHO found that the district denied the student a FAPE, the unilaterally obtained services were appropriate, and equitable considerations favored the parents (IHO Decision at p. 4). The IHO then noted that the sole remaining issue was the rate for services, but the IHO would not address this issue (id.).[7]

Turning to subject matter jurisdiction, the IHO held that IHOs do not have authority to hear issues on implementation of IESPs or provider rates and dismissed the case with prejudice for lack of subject matter jurisdiction (IHO Decision at pp. 4-5). The IHO pointed to the State Education Department (NYSED) memorandum that discussed emergency rulemaking promulgated in July 2024 which provided that parents did not have the right to file for due process to request an enhanced rate for equitable services, stating that it was a directive to the IHO because NYSED "is the certifying body which granted the IHO permission to decide these cases" (id. at p. 5). The IHO noted that per the memorandum, she still retained jurisdiction over issues related to identification, evaluation, and programming (id.). The IHO found that the district failed to convene a CSE or create a new IESP or IEP as these facts were not in dispute (id.). Because the student's last evaluations were dated more than three years from the date of the due process complaint notice, the IHO ordered the district to reevaluate the student in all areas of suspected disability within 60 days of the decision (id. at pp. 5-6). In addition, the IHO ordered the district to convene a CSE within 30 days of completing the evaluations (id. at p. 6).[8]

[6] Although the due process complaint notice was dated June 12, 2024, review of the transmittal email shows that it was filed with the district on June 14, 2024 (Parent Ex. A at p. 6).

[7] As to the rate for services, the IHO cited a recent SRO decision with similar facts, and concluded that based on the district's rate study, she "would have upheld the [d]istrict's rate" (IHO Decision at p. 4).

[8] The IHO further ordered that, during the CSE meeting, the parents shall advise the district of their preference of an IESP or IEP; that the CSE shall base its recommendations on the recent evaluative data; the district and parents shall consider goals, programs, and placement; and that the district shall issue a prior written notice that offers a cogent explanation of the program choices (id. at p. 6).

IV. Appeal for State-Level Review

The parents appeal.[9] The parents contend that the IHO erred by dismissing the matters related to implementation and rate for lack of subject matter jurisdiction as the contention that the parents do not have due process rights is without merit and contrary to the law. The parents argue that by disallowing jurisdiction in these types of cases, parents will be left without effective redress, and it prevents equal access as required for private school students with disabilities. Moreover, the parents assert that the emergency regulation only applies to due process complaints filed on or after July 16, 2024 and that the IHO should not have retroactively applied it to this proceeding. The parents also allege that the IHO should not have dismissed their claims "with prejudice" because the doctrine of res judicata would unfairly preclude an action in a different forum.

Additionally, the parents argue that the IHO erred in finding that the rate for services, if awarded, would have been at the district's offered rate. The parents contend that the requested rate of $200 per hour was reasonable and that rate study offered by the district artificially deflates the rate data by using rates from outside of the district. Further, the parents argue that any rate must include in the reasonable calculation that the SETSS provider agency is seeking a profit. As relief, the parents request that the IHO's subject matter jurisdiction determination be reversed and that the district be directed to fund the SETSS provided to the student during the 2023-24 school year at the rate of $200 per hour.

In an answer and cross-appeal, the district contends that the IHO properly dismissed the case for lack of subject matter jurisdiction as the parents never had the right to file a due process complaint in this circumstance. The district argues that the injunction on the regulation has no effect as parents have never had the right to file a due process complaint notice for implementation of IESPs or for enhanced rates for equitable services. The district further argues that the parents' assertions and arguments in the request for review are without merit.

In addition, the district argues that the IHO erred in ordering the district to reconvene a CSE for the 2024-25 school year as there was no evidence that the parents had filed a request with the district for equitable services prior to June 1, 2024 and that the IHO's order directing the CSE to convene was "outside the scope" of the impartial hearing. Further, the district argues that the IHO erred in finding that the parents met their burden to demonstrate that the unilaterally obtained services were appropriate for the student and that equitable considerations favored the parents. The district argues that the hearing lacked evidence regarding how the student was functioning or how the alleged progress was measured. As for equitable considerations, the district maintains that the IHO correctly held that the district rate should stand. The district contends that the record supports a finding that the requested rates were excessive.

In an answer to the cross-appeal, the parents contend that the evidence in the hearing records details "an appropriately-tailored program of instruction designed to address the needs

[9] The parents include a copy of their written closing statement and the transmittal letter of the closing statement to the IHO as additional evidence on appeal. However, the parents' closing statement is already a part of the hearing record as a supplemental document (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). Accordingly, it is unnecessary to further consider the parents' additional evidence.

identified by [the student's] providers." The parents request that the district's cross-appeal be dismissed, the IHO's decision to dismiss the case due to a lack of subject matter jurisdiction be overturned, and the district be ordered to directly fund the SETSS provided to the student during the 2023-24 school year at the provider's rate.

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]).[10] "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.).[11] Thus, under State law an

[10] 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]).

[11] 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.

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. Subject Matter Jurisdiction

At the outset, I will address the parents' assertion that the IHO erred by dismissing their claims for lack of subject matter jurisdiction.

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

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in

a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the parents would not have a right to due process under federal law; however, the student did not merely have a services plan developed pursuant to federal law, and the parents 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]).[12]

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, and 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 free appropriate public education to the student" (Educ. Law §4404; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[13] 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.

[12] 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]).

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

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 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.).[14] 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).[15]

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

[14] The due process complaint in this matter was filed with the district on June 14, 2024 (Parent Ex. A at p. 6), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the regulation has lapsed.

[15] 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]).

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 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]).[16]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

Accordingly, the IHO's dismissal of the appeal on the ground that the IHO lacks subject matter jurisdiction to determine the merits of the parents' claims was in error and must be overturned.

B. Unilaterally Obtained Services

I now turn to the district's cross-appeal from the IHO's alternative finding that the parents satisfied their burden to show that the SETSS delivered to the student during the 2023-24 school year by Yes I Can were appropriate (IHO Decision at p. 4).[17] Specifically, the district asserts that

[16] 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, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website; however, a copy of the August 2024 rate dispute guidance is included in the administrative hearing record (see IHO Ex. I).

[17] Notably, the district does not challenge the IHO's alternative finding that it failed to offer a FAPE or equitable services to the student for the 2023-24 school. Therefore, this finding 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. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Thus, the remaining issue to address is the

while the private school progress reports state that the student "made academic progress," the evidence in the hearing record failed to identify how the student was performing at the start of the school year. Further, the district argues that the evidence failed to offer any specifics as to how the student's academic progress was measured.

1. Legal Standard

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. 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 implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private services from Yes I Can 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 parents are 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 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 parents' request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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 (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[18] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered

parents' request for direct funding for the unilaterally-obtained SETSS and speech-language therapy delivered by Yes I Can.

[18] State law provides that the parents have the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Yes I Can (Educ. Law § 4404[1][c]).

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).

Turning to 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 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).

2. Student's Needs

While not in dispute, a brief discussion of the student's needs provides context for the issue to be resolved, namely, whether Yes I Can delivered specially designed instruction to the student to address his needs. In the present case, the last operative IESP was developed for the student on June 14, 2019 and reflected that the student was attending a nonpublic school (Parent Ex. B at pp. 1, 6). While the parents in this matter contend that the program recommended in the student's June 2019 IESP should have been continued for the 2023-24 school year, there is little information in the hearing record regarding the student's educational programming between the development of the June 2019 IESP and the 2023-24 school year (see Parent Exs. A at p. 2; B). The hearing record included a May 2019 district bilingual psychoeducational evaluation report, which noted, at that time, the student spoke Yiddish and had some knowledge of English, but that the student "must be seen as a Yiddish dominant child" (IHO Ex. II at pp. 1, 2). According to the report, the cognitive tests were presented exclusively in Yiddish, while "[a]cademic tasks were presented in a mixture of Yiddish and the required original English" (id. at p. 2).

Some of the results of the student's May 2019 psychoeducational evaluation were reflected in the June 2019 IESP (compare IHO Ex. II, with Parent Ex. B at p. 1). The June 2019 IESP indicated that results from administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) to the student yielded a score in the high average range on the verbal comprehension subtest, scores in the average range on the visual spatial and fluid reasoning subtests, and a full scale IQ in the average range (Parent Ex. B at p. 1).[19] The June 2019 IESP also reported results from administration of the "Conners Attention Deficit Scales" which indicated "significantly elevated" scores on the oppositional, cognitive problems/inattention, and ADHD indices (id.). The June 2019 IESP noted that while the student had "solid graphomotor skills and cognitive abilities," and "a particularly strong vocabulary," his "classroom behavior, participation, and attention" were poor (id.). The June 2019 IESP indicated that the student's "academic skills in all areas measured were significantly below his cognitive potential," and he had "emotional, social, and attentional issues that result[ed] in depressed academic performance" (id.). With respect to the student's physical development, the June 2019 IESP noted that while the student had not been formally assessed, he was reported to be in good health and there were no concerns noted by the parent (id. at pp. 1-2).

Turning to the student's social/emotional development, the June 2019 IESP reflected that the student had "poor awareness of his feelings, and poorly developed social responses," he did not have "gradations of reactions to emotional material," and he could be "behaviorally inappropriate" (Parent Ex. B at p. 1). Further the IESP noted the student required "close monitoring and redirection of his behavior," and "guidance in modulating his emotional reactions"

[19] Although not reflected in the June 2019 IESP, the student's WISC-V working memory subtest score was in the average range (IHO Ex. II at p. 4).

(id.). According to the 2019 IESP, the student had "significant oppositional traits," and "difficulty with attention and goal direction" (id.). The 2019 IESP indicated that results of personality testing "reflected a child with positive social interests and a clear sense of himself" but also who felt "distorted by personal pain and by bottled up feelings" (id.; see IHO Ex. II at pp. 1, 5).

As previously noted, the June 2019 CSE recommended that the student receive four periods per week of SETSS in a group and one period per week of group counseling, with both provided in Yiddish (Parent Ex. B at p. 4). The June 2019 CSE identified strategies to address the student's management needs including a multisensory learning approach, preferential seating when available, verbal and visual cues, prompting, and redirection as needed (id. at p. 2). The 2019 CSE developed eight annual goals that focused on the student's ability to identify physical symptoms brought about by emotional reaction, demonstrate strategies during social/emotional challenges, and improve his vocabulary, addition and subtraction computation skills, and reading fluency and comprehension (id. at pp. 2-4).

3. SETSS From Yes I Can

Turning to the disputed issues between the parties, during the 2023-24 school year the student attended seventh grade at a nonpublic school and received four hours of SETSS per week delivered by Yes I Can (Parent Exs. E at p. 1; G ¶ 35). The parents' witness, who testified both by affidavit and in person at the impartial hearing, was the company's associate director of educational services (director) (Tr. pp. 12-18; Parent Ex. G ¶ 24). The director stated that she was familiar with the student and while she trained and assisted teachers, providers, and supervisors on an "as needed basis," she was not the supervisor of the student's SETSS provider and had not observed the student during the 2023-24 school year (Tr. pp. 13, 16; Parent Ex. G ¶¶ 31, 35, 37-38). The director testified that the student received SETSS at a nonpublic school, and that the student's provider was certified in special education, spoke Yiddish, had experience working with middle school students, and was "selected based on his training and successful teaching experience with students similar in their education profile" to the student (Tr. p. 13; Parent Ex. G ¶¶ 39, 41-42). Further, the director stated that services were "typically provided both inside the classroom as push-in sessions and 1:1 in a separate location," and that the sessions were "individualized," including a "great deal of specialized instruction" (Parent Ex. G ¶ 45).

In a November 2023 progress report completed by the student's SETSS provider, the student was described as "a friendly boy" who demonstrated delays in reading comprehension, math, language, and social/emotional skills, and who presented with low self-esteem, which "negatively impact[ed] him in all areas" (Dist. Ex. 4 at p. 1). The SETSS provider reported that in reading, based on the Fountas and Pinnell assessment, the student was performing at level "S," which indicated a "delay of two grades below level," and that the student's struggle to read accurately and fluently affected his understanding of what he read (id.). The progress report indicated that the SETSS provider worked on the student's identified reading goals using "explicit instruction" of the Wilson reading program, high levels of praise, and multisensory activities (id. at pp. 1-2). Further, the SETSS provider indicated that the student participated in explicit phonics instruction and decoding and sight word activities, and used techniques such as repeated reading, highlighting techniques for comprehension tasks, modeling, graphic organizers, and visual cues (id.). The student was also learning skills to help him analyze and decode, and the SETSS provider noted that the student's reading progress was "slow but steady" (id.). In math, the November 2023

SETSS progress report reflected that, based on "informal assessment, class work, and teacher interviews," the student was experiencing delays (id. at p. 3). The SETSS provider reported that he developed math goals and implemented instructional strategies with the student that incorporated manipulatives, math activities, and graphic organizers to assist the student with "grasping new math concepts" and "comprehending word problems" (id.). The SETSS provider also reported that to assist the student with solving multi-step math problems and computing large numbers, he provided modeling, visual cue cards, explicit instruction, and repetition (id.).

The November 2023 SETSS progress report also included descriptions of the student's social/emotional and language needs, goals in those areas, and narratives regarding the student's progress (Dist. Ex. 4 at pp. 3-5). According to the report, the "focus of sessions" was to foster the student's "stronger sense of self" and "learn what trigger[ed] him and how to control himself" (id. at p. 3). The SETSS provider reported using social stories, guided discussion, reward systems, modeling, "short exercises," "abundant praise," guidance and support, and "other strategies" to address the student's social/emotional needs (id. at pp. 3-4). In the area of language, the SETSS provider reported that while the student demonstrated "average" skills expressing himself and understanding language in "his primary language," he faced challenges expressing himself effectively in English (id. at p. 4). Therefore, the SETSS provider indicated that he was "focused on developing [the student's] understanding of language conventions" in English, through modeling, encouraging self-corrections, observing "proper grammar and usage," interactive language activities, guided practice, and explicit instruction (id. at pp. 4-5). At the time of the November 2023 progress report, the SETSS provider indicated that the student was "currently performing below his grade level in various academic and social aspects" and that" [i]n order for him to make progress and successfully integrate into a mainstream setting, it [wa]s imperative" that he continue to receive four hours of SETSS per week (id. at p. 5).

The June 2024 SETSS progress report described that the student continued to struggle with "exhibiting self-esteem," which impacted his academic performance, and expressing his strengths and interests (Parent Ex. E at p. 1). The SETSS provider reported using the "Wilson Reading methodology, high levels of reinforcement and visual assistance" to enable the student "to make academic progress and benefit in the mainstream environment" (id.). In reading, the SETSS provider indicated that on the most recent Fountas and Pinnell assessment, the student was performing at level "T" and that he used the following to assist the student with his reading goals: "a Whole language approach," guided reading, phonemic awareness activities, Fountas and Pinnell readers, the visualizing and verbalizing approach, "Lakeshore's Comprehension Curriculum," five finger retell, and graphic/semantic organizers (id. at pp. 2-3). In math, the SETSS provider used step-by-step cue cards and the Go-Math curriculum, and broke down "examples into smaller steps" (id. at p. 3). The June 2024 progress report described the student's social/emotional and language needs and goals, and provided narratives regarding the student's progress (id. at pp. 4-5).

Review of the SETSS provider's progress reports shows that he reported, in general terms, that the student was making some progress (see Parent Ex. E; Dist. Ex. 4). For example, the SETSS provider indicated that the student had made some progress in literacy as demonstrated by the Fountas and Pinnell level increase from R to T, and his mastery of one goal for reading comprehension (Parent Ex. E at pp. 1, 2). The June 2024 progress report also reflected that the student mastered a goal to fluently multiply multi-digit whole numbers; however, the report also inconsistently reflected that the student required assistance solving multiplication problems

involving larger than single digit numbers (id. at p. 3). The June 2024 progress report indicated that the student's skills were emerging and that he continued to require more support to master the remainder of his goals in reading comprehension, decoding, addition and subtraction of fractions, social/emotional skills, and English grammar conventions when speaking, writing, reading or listening (id. at pp. 2-5).

A review of the hearing record indicates that the parent asserted on multiple occasions that the student required SETSS and counseling services as recommended in the June 2019 IESP, and in an IESP developed in May 2024, for the 2023-24 school year (Parent Exs. A at p. 2; H at p. 3). Additionally, although Yes I Can offers counseling services, the parent entered into a contract with Yes I Can for SETSS only with counseling services stricken from the contract (Parent Ex. D at pp. 3, 4). There is no explanation as to why counseling services were not provided to the student during the 2023-24 school year. Review of the SETSS progress report shows that as part of the four hours per week of SETSS, the SETSS provider was addressing some of the student's social/emotional and language needs in addition to the student's academic needs (Parent Ex. E at pp. 4-5; Dist. Ex. 4 at pp. 3-5). However, the hearing record does not indicate that the student received counseling despite his documented social/emotional needs and as recommended in the June 2019 IESP (Parent Exs. B at p. 4; E at p. 4; Dist. Ex. 4 at pp. 3-4). Overall, based on the above, the hearing record does not support finding that the student's social/emotional needs were sufficiently addressed without the provision of counseling services.

Additional questions arise regarding the parent's provision of SETSS. Pursuant to the June 2019 IESP, the student had been recommended for four periods per week of direct, group SETSS to be provided in Yiddish in a separate location (Parent Ex. B at p. 4). A CSE next convened in May 2024 and continued the same recommendation for SETSS (Dist. Ex. 3 at p. 9). Although the parent does not challenge the district's program recommendation, the parent contends that Yes I Can delivered an appropriate program by providing the student with four hours per week of 1:1 SETSS delivered in the student's classroom and a separate location (see Parent Ex. G at ¶¶ 35, 45). However, neither the director nor the progress report identified the language of the SETSS that were delivered to the student during the 2023-24 school year (see Tr. pp. 13-18; Parent Exs. E; G).[20] Both the November 2023 and June 2024 progress reports indicated that the SETSS provider was working with the student on English language knowledge during speaking, reading, writing and listening (compare Dist. Ex. 4 at pp. 4-5 with Parent Ex. E at p. 4). However, as noted above, it is not clear from the hearing record if this was designed to meet the student's identified needs.

Further, the director testified that student progress was measured through quarterly assessments, consistent meetings with the providers and support staff, classroom observations, and daily session notes; however, none of these are included in the hearing record (Parent Ex. G ¶ 46; see Parent Exs. A-H; Dist. Exs. 1-4; IHO Exs. I-III). In addition, the hearing record does not include information about the instruction the nonpublic school delivered to the student during the remainder of the school day outside of his four hours per week of SETSS, nor is there information

[20] The director testified that the SETSS provider spoke Yiddish, but did not identify the language of the service (Tr. p. 13).

describing how the SETSS complemented the student's general education instruction (see Parent Exs. A-H; Dist. Exs. 1-4; IHO Exs. I-III).

The foregoing evidence in the hearing record does not support an overall finding that the parents met their burden under Burlington-Carter to prove that the services they unilaterally obtained for the student from Yes I Can without consent from school district officials constituted specially designed instruction designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). While the progress reports contain some evidence of the student's progress and the various strategies and materials the student's SETSS provider employed during sessions with him, the SETSS provider did not identify how those strategies addressed the student's unique needs (see Parent Ex. E; Dist. Ex. 4).

Considering the above, the hearing record lacks evidence to show that the student's social/emotional needs were sufficiently being addressed, or evidence showing the student's general education instruction at the nonpublic school and how the SETSS obtained by the parent were connected to that instruction. The evidence shows that the four hours per week of SETSS were delivered in a one-on-one setting, yet the remainder of the time the student was expected to participate in the general education classroom in the nonpublic school and there was no evidence that he received any additional support. Additionally, the hearing record does not contain any information as to whether the general education instruction was delivered to the student in Yiddish or English, and, while the director testified that the SETSS provider spoke Yiddish, as noted above, neither the contract with Yes I Can, or the two progress reports in evidence reports that the student's SETSS were provided in Yiddish (see Parent Exs. D; E; Dist. Ex. 4). Accordingly, the hearing record lacks information concerning the student's general education school in terms of the instruction and curriculum provided, which necessitates assessing the unilaterally obtained services in isolation from the student's general education nonpublic school placement. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate. As a result, the parents have failed to meet their burden of proving that the services they obtained privately were appropriate for the student under the Burlington-Carter standard and, the IHO erred in her alternative determination that the unilaterally-obtained SETSS provided by Yes I Can were appropriate to meet the student's special education needs.

C. Reevaluation and CSE Meeting

Next, I will address the district's cross-appeal from the IHO's order directing the district to reevaluate the student in all areas of suspected disability because the student's last evaluation was more than three years prior to the date of the due process complaint notice, together with her order for the district to reconvene a CSE within 30 days of completing the evaluations (IHO Decision at p. 6).

Here, the evidence reflects that the CSE met on May 16, 2024, and issued an IESP to be implemented on May 31, 2024 (Dist. Ex. 3). The CSE recommended that the student receive four periods per week of group SETSS in Yiddish and one 30-minute session per week of group counseling services in Yiddish (id. at pp. 9-10). While the May 2024 IESP indicated that CSE evaluation results were based on the SETSS progress report dated November 22, 2023 (Dist. Ex. 4) and not on a reevaluation of the student, the parent was present at the CSE meeting and there is no evidence that the parent requested an evaluation of the student at that time or that the May 2024 CSE did not have sufficient evaluative information regarding the student to develop an IESP for him (id. at p. 12). In fact, although the parents had raised a failure "to conduct or update all of the required assessments and evaluations" in the due process complaint notice, the hearing record reflects that the attorney for the parents specifically withdrew this allegation prior to the start of the hearing (Tr. pp. 5-6).

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO should ensure that equitable relief awarded is designed to remedy an issue that was not raised. 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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

While it was within the IHO's broad authority to order that the district fulfill its obligation to reevaluate the student and convene a CSE meeting as a form of appropriate equitable relief, here the record reflects that the district did convene a CSE and developed an IESP for the student in May 2024. Based on the foregoing, the district's cross-appeal of the IHO's order directing the district to reevaluate the student and to convene a CSE meeting within 60 days of completing the evaluations is sustained. After remaining silent during the CSE meeting and withdrawing their inadequate evaluation claim during the impartial hearing process, the parents should inform the CSE in writing if they wish the student to be reevaluated at the present time.

Nevertheless, the district is reminded of its obligations in that generally a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303 [a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three

years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Just as the parent should raise any remaining concerns regarding evaluation with the CSE, the district staff on the CSE should consider whether reevaluation is warranted and inform the parent of their views on that point.

VII. Conclusion

As set forth above, the IHO erred in concluding that she lacked subject matter jurisdiction to hear the parents' claims. As for the district's cross-appeal, as further described above, the evidence does not lead to the conclusion that the SETSS delivered by Yes I Can during the 2023-24 school year were appropriate to support the student under the totality of the circumstances. Accordingly, the parents' request for funding for the costs of the services they unilaterally obtained from Yes I Can must be denied and it is not necessary to reach the issue of whether equitable considerations weigh in favor of the parents, or whether the costs charged by Yes I Can were excessive. In addition, the IHO's order directing the district to reevaluate the student and then reconvene a CSE within 60 days of the evaluation is overturned in light of the parents' explicit withdrawal of claims regarding the adequacy of the evaluation in this proceeding.

I have considered the parties' remaining contentions and find I need not 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 the IHO's decision dated September 16, 2024 is modified by reversing that portion which dismissed the parents' claims with prejudice for lack of subject matter jurisdiction; and

IT IS FURTHER ORDERED that the IHO's decision dated September 16, 2024 is modified by reversing that portion which found, that the services provided by Yes I Can for the 2023-24 school year were appropriate for the student; and

IT IS FURTHER ORDERED that IHO's decision dated September 16, 2024 is modified by reversing that potion which directed the district to reevaluate the student within 60 days of the IHO's order and convene a CSE meeting within 30 days of completing the evaluations.

Dated: **Albany, New York**
February 12, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER