The University of the State of New York

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

No. 24-478

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's unilaterally-obtained special education teacher support services (SETSS) delivered by EDopt, LLC (EDopt) during the 2023-24 school year. The district cross-appeals asserting that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims. The appeal must be dismissed. The cross-appeal must be dismissed.

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, a CSE convened on May 23, 2018, determined the student was eligible for special education as a student

with a learning disability, and formulated an IESP for the student (Parent Ex. B).[1] The CSE recommended that the student receive five periods per week of group SETSS (id. at p. 6).[2]

The hearing record does not include any information as to the student's educational program between the development of the May 2018 IESP and the 2023-24 school year.

In a letter dated April 24, 2023, the parent informed the district that the student resided in the district, that she had parentally placed the student in a nonpublic school also located within the district, that she consented to all services recommended by the CSE, and that the information was provided so that the CSE would provide the student with all recommended services on school premises for the 2023-24 school year (Parent Ex. E).

In a letter dated August 23, 2023, the parent, through her lay advocate, Prime Advocacy, LLC (Prime Advocacy), informed the district that it had failed to assign a provider to deliver the student's services mandated during the 2023-24 school year and further notified the district that should it not assign a provider, the parent would be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate (Parent Ex. D).

On August 23, 2023, the parent electronically signed an EDopt "Enrollment Agreement for the 2023-24 School Year" (Parent Ex. C).[3] The agreement indicated that services would be provided pursuant to an attached schedule, and the schedule attached thereto, indicated that services would be provided "[a]s per the last agreed upon IEP/IESP/FOFD" (id. at pp. 1, 3). The schedule also provided rates for a variety of services including group "Special Education Services," for which the contract indicated an hourly rate of $145 (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent, through Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent asserted that the district failed to convene a CSE meeting in advance of the 2023-24 school year (id. at p. 2). The parent further asserted that the last program the district developed for the student was the May 2018 IESP and the district failed to provide the SETSS recommended in the May 2018 IESP (id. at pp. 1-2). The parent further alleged that she was unable to locate a SETSS provider at the district rate on her own and had to retain services "at an enhanced rate" (id.). In addition, the parent asserted that the district denied the student a FAPE for the 2024-25 school year as the prior program "ha[d] passed its annual review date" and the district failed to develop a current and appropriate program (id.at p. 2). As

[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] 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.

[3] EDopt is a limited liability com 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).

relief, the parent sought an award of direct funding at the provider's contracted rate for services delivered by the provider located by the parent and an order directing the district to fund a bank of compensatory SETSS at the provider's contracted rate for any mandated services not provided to the student for the 2023-24 school year (id. at p. 3). In addition, the parent sought an order directing the district to provide the student with the services recommended by the CSE for the entirety of the 2024-25 school year at the provider's contracted rate because the district had not developed an updated program of services for the student (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 4, 2024 (Tr. pp. 1-76). In a decision dated September 20, 2024, the IHO found that the district failed to implement the May 2018 IESP for the 2023-24 school year and consequently failed to provide the student with a FAPE for the 2023-24 school year (IHO Decision at p. 5).

Next, the IHO determined that the parent failed to meet her burden of establishing that EDopt's services were specially designed to meet the unique needs of the student (IHO Decision at pp. 5-7). Specifically, the IHO found that the SETSS providers' progress report, which was undated, was generic and contained contradictory information, so much so that the IHO found it impossible to ascertain the student's true levels of performance (id. at p. 6). In addition, the IHO concluded that there was little to no credible, current evidence of the student's levels of performance either at the start of the 2023-24 school year, at the time that the SETSS were provided, or at any point between the May 2018 IESP and the 2023-24 school year (id.). Without a baseline of the student's levels of performance at the start of the school year, the IHO found it impossible to measure the student's progress (id. at pp. 6-7). The IHO further noted that EDopt was providing the student with an educational program recommended five years prior to the 2023-24 school year and it was impossible to determine if it was still an appropriate program for the student (id. at p. 7). Based on the foregoing, the IHO denied the relief requested by the parent for the 2023-24 school year.

For the completeness of the record, the IHO went on to weigh equitable considerations. The IHO concluded that the parent submitted a copy of a 10-day notice into the hearing record; however, she did not indicate if, when, or how the notice was sent to the district (IHO Decision at p. 6). In addition, the IHO found that the 10-day notice did not include a statement that the parent intended to seek public funding for the special education services (id. at pp. 7-8). Given these concerns, the IHO concluded that a 20 percent reduction of any award would be warranted, had an award been ordered (id. at p. 8).

Next, the IHO concluded that the EDopt enrollment contract lacked essential terms and was "overtly vague" (IHO Decision at p. 8). In addition, the IHO found that the parent had not established that she incurred a financial obligation with respect to the provider's services (id.). Further, the IHO found that the parent's witness, the financial administrator of EDopt (administrator), was not credible (id. at p. 9). Based on EDopt’s unknown costs and unjustified overhead, the IHO concluded that had an award for the funding of the SETSS been ordered, the IHO would have ordered a rate to be determined by the district's implementation unit (id.). In addition, since no provider session notes reflecting services provided before November 27, 2023

were presented at the hearing, the IHO would have not awarded funding for any services prior to that date (id.).

Finally, the IHO turned to the parent's request for an order directing the district to provide the student with the services recommended by the CSE for the entirety of the 2024-25 school year at the provider's contracted rate (IHO Decision at pp. 9-10). The IHO found that the parent's claims for the 2024-25 school year were based on the district's alleged failure to implement an educational program for the 10-month school year, starting in September 2024 (id. at p. 10). As the 10-month 2024-25 school year had not started when the due process complaint notice was filed, the IHO concluded that the student was not entitled to services pursuant to the filing (id.). Further, the IHO found that any claim that the district may not implement an educational program for the student for the 2024-25 school year was contingent on an event that might never occur (id.). Based on the foregoing, the IHO ruled that the parent's claims for relief for the 2024-25 school year were not ripe for adjudication and were dismissed without prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals from so much of the IHO Decision that denied her request for funding of SETSS provided to the student during the 2023-24 school year.[4] Specifically, the parent asserts that the IHO erred in finding that she did not meet her burden of proof that the provider's services were appropriate as they were specially designed to meet the unique needs of the student. Further, the parent maintains on appeal that the IHO erred in concluding that equitable considerations weighed in favor of reducing the provider's rate . The parent asserts that the IHO was incorrect in determining that the administrator lacked credibility, that there was no evidence of submittal of a 10-day notice to the district, that the EDopt enrollment contract was invalid, that the parent had no financial obligation to pay EDopt under the contract, and that the EDopt hourly rates were unreasonable.

The district submits an answer and cross-appeals asserting that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims.

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]).

[4] The parent does not appeal the IHO's determination that the parent's claims relating to the 2024-25 school year were not ripe for adjudication and consequently dismissed without prejudice.

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]).

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[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.

VI. Discussion

A. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time at the hearing and then reasserted in its answer and cross appeal.[7] Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]).The district argues on appeal that federal law confers no right to file a due process complaint notice regarding services recommended in an IESP and New York law confers no right to file a due process complaint notice regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

In a number of 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

[7] While the district asserted in its closing argument at the impartial hearing that the IHO lacked subject matter jurisdiction to determine the parent's claims (Tr. 56-58), the IHO did not address the subject matter jurisdiction issue in his decision.

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

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian **or person in parental relation** 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[1][a]; 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).[9] In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

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

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.).[10] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

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

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

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[10] The due process complaint in this matter was filed with the district on July 12, 2024 (Due Process Compl. Not. at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the regulation has lapsed.

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

> 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]).[12]

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, that portion of the district's cross-appeal asserting that the IHO lacked subject matter jurisdiction to determine the merits of the parent's claims must be denied.

B. Unilaterally-Obtained Services

The district does not challenge the IHO's determination that it failed to offer a FAPE or equitable services to the student for the 2023-24 school year. Therefore, that determination 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 Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; 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 be addressed is the IHO's denial of an award of direct funding for the unilaterally-obtained SETSS delivered by EDopt.

[12] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 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.

1. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private SETSS from EDopt 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 which 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 v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately obtained SETSS delivered by EDopt must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (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]).[13] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist.

[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 services that the parent obtained from EDopt for the student (Educ. Law § 4404[1][c]).

No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of claims 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 v. Fla. 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"]). 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 at 364; 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. Unilaterally-Obtained Services from EDopt

The parent appeals from the IHO's decision which determined that the parent did not meet her burden to show that the unilaterally-obtained SETSS delivered by EDopt to the student during the 2023-24 school year were appropriate. Specifically, the parent asserts that the IHO erred in finding that the student's progress report was "extremely generic and offere[d] no information specific to the [s]tudent" (Req. for Rev. at p. 4). Rather, the parent asserts that the SETSS provider "thoroughly outlined the [s]tudent's current levels of performance, the [s]tudent[']s progress, and how the [s]tudent's goals were met" (id. at p. 6). Next, the parent argues that although the IHO found there were missing session notes prior to November 27, 2023, time sheets indicated that the student began receiving SETSS in September 2023 (id.). Additionally, the parent asserts that the IHO was incorrect in finding that it was impossible to determine whether the IESP was appropriate for the student, arguing that the SETSS progress reports indicated the student had similar goals as to the IESP, which were being met through the SETSS, and that the parent should not be penalized because of the district's failure to develop a new IESP for the student (id.).

Regarding the student's special education needs, the 2018 IESP, developed when the student was in seventh grade, reflects that she was receiving SETSS at that time, her reading skills were at a fourth grade level, her math skills were at a fifth grade level, and she exhibited weak writing skills characterized by difficulty formulating ideas and demonstrating spelling and grammar mistakes (Parent Ex. B at p. 2). The 2018 CSE recommended that the student receive five periods of group SETSS per week (id. at p. 6).

The EDopt administrator testified by affidavit that EDopt began delivering SETSS to the student on September 11, 2023, which "continued throughout the entire school year" (Parent Ex. F ¶¶ 1, 2). The administrator testified that two individuals, who both held Masters degrees in special education and were "certified special education teachers," delivered SETSS to the student during the 2023-24 school year (id. ¶¶ 3, 4). The EDopt administrator testified at the hearing that she did not provide direct education services and did not have educational information regarding the student (Tr. pp. 28-30, 36-37, 44).

In an undated 2023-24 progress report, the SETSS providers reported that the student was in 12th grade at a nonpublic school, and her "deficits and delays" were "evident" in the areas of academic and cognitive development (Parent Ex. G at p. 1). Specifically, the SETSS providers reported that the student exhibited "significant delays in academic, cognitive, and social-emotional development, which impact[ed] her performance in mainstream classes" including challenges with oral processing, comprehension, and staying focused (id.).

According to the SETSS progress report, the five SETSS sessions per week were used to address the student's deficits, were "specially designed" to meet her unique needs, and were "necessary for her to advance towards her goals and objectives" (Parent Ex. G at p. 1). The report noted that SETSS were delivered both in 1:1 and small group settings, which allowed the student to ask questions, receive immediate feedback, and work at her own pace (id.). Further, the SETSS providers reported that the SETSS sessions were "designed to break down complex academic concepts into more manageable components," which provided the student "with the targeted support she need[ed] to succeed" (id.). They identified that the student benefited from engaging activities, frequent redirection to maintain focus, repetition and visual aids (id. at p. 3).

With regard to reading, the progress report indicated that the student was at a 12th grade equivalent, demonstrated growing ability to self-correct and "awareness of her own reading process," identified the main ideas in passages, and had improved tone and expression in oral reading exercises (Parent Ex. G at p. 1). However, the SETSS providers also reported that the student struggled "significantly with reading comprehension, particularly when it involve[d] inferential thinking or identifying supporting details" (id.). Further, the student's difficulties were reported as being compounded by her lack of motivation toward reading, which she found frustrating (id. at pp. 1-2). Additionally, while the report noted that the student was in a 12th grade class and was at a 12th grade equivalent in reading, it also indicated that the student's "overall reading skills remain[ed] below grade level" (id. at pp. 1, 2). To address the student's reading needs, the SETSS providers reported that sessions focused on the student's comprehension and expression strategies through repeated reading, guided discussions, graphic organizers, gradual introduction of more complex materials, and punctuation, grammar, and key detail identification activities (id. at p. 2). To reduce the student's frustration, the SETSS providers reported using positive reinforcement and encouragement (id.). Reading goals for the student included that she would improve reading comprehension by identifying the main idea and supporting details in seventh grade texts (id. at p. 4).

In the area of writing, the progress report indicated that the student exhibited "significant difficulties with grammar, spelling, and sentence structure," in that she often produced informal writing that lacked grade level organization and coherence (Parent Ex. G at p. 2). According to the report, the student's vocabulary was limited and she demonstrated fifth grade spelling proficiency (id.). The SETSS providers reported working with the student to differentiate parts of speech, expand her vocabulary, practice the correct spelling of commonly misspelled words, develop more structured and formal writing skills, and revise/edit her work (id.). The report also noted that the student often became frustrated with writing tasks, and benefited from a calm, supportive environment (id.). An annual goal developed for the student was designed to improve her ability to write structured paragraphs with correct grammar, spelling, and punctuation (id. at p. 4).

As for math, the SETSS providers reported that the student was at a 12th grade equivalent, but also that it "continue[d] to be a significant challenge" and that the student's "overall math performance remain[ed] significantly below grade level" (Parent Ex. G at pp. 1, 3). According to the progress report, the student struggled with selecting the appropriate operations when faced with word problems, had difficulty grasping the underlying logic of math concepts, and relied on memorization rather than understanding (id. at p. 3). The SETSS providers reported using simplified visual materials, manipulatives and diagrams, individualized instruction, complex

problems broken into manageable steps, repeated explanations, varied teaching approaches, opportunities for repeated practice, and a supportive learning environment (id.). The report included an annual goal for the student to solve basic math word problems by selecting the appropriate operation and applying learned strategies (id. at p. 5).

Socially, the SETSS progress report indicated that the student exhibited challenges in "discerning her audience's interest during conversations and maintaining appropriate topics of discussion" (Parent Ex. G at p. 4). Due to her self-consciousness about her learning challenges, the student reportedly withdrew socially and avoided seeking help from peers (id.). The SETSS providers reported providing the student with a comfortable environment, support to develop social skills, and developed an annual goal to improve social interaction skills through participating in group discussions, responding appropriately to peers, and staying on topic (id. at p. 5). Regarding physical development, the progress report indicated that the student's handwriting "remain[ed] a concern, as it [wa]s frequently illegible despite extensive practice" which at times affected her test scores (id. at p. 4).

The SETSS progress report is internally inconsistent in that on the one hand, the SETSS providers reported the student was at the 12th grade level (while in 12th grade) in math and reading and had made some progress academically, yet the same report indicated that the student "experience[d] significant delays in academics" that "impact[ed] her performance in mainstream classes" such that the providers recommended that she continue to receive five periods of 1:1 and small group SETSS per week (Parent Ex. G at pp. 1, 4).

Review of the session notes submitted into the hearing record shows that one of the SETSS providers prepared weekly summaries of the activities, outcomes, and goals addressed during the SETSS sessions from the week beginning November 27, 2023 through the week ending June 16, 2024 (compare Parent Ex. G at p. 1, with Parent Ex. H). Generally, review of the session notes shows that the student worked on skills such as note taking, understanding social studies content taught in the mainstream class, answering Regents questions, and writing paragraphs about various social studies topics (see Parent Ex. H). Strategies used with the student included small group instruction, visual guides, guided notes, information broken down, slower pace, repetition, maps, Venn diagrams, and graphic organizers (id.). Review of the session notes shows that, while the student may have benefited from SETSS interventions in social studies, there was no information regarding how the SETSS providers addressed the student's "significant" identified needs in reading and math (id.).

The foregoing evidence in the hearing record does not support a finding that the parent met her burden under Burlington-Carter to prove that the services she unilaterally obtained for the student constituted specially designed instruction to address her 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]). As noted above, the hearing record does not include any evidence of the instruction that the student received while attending the general education nonpublic school. Thus, considering the discrepancies in the descriptions of the student's performance in reading and math, it is not possible to ascertain whether the student

received special education support in the classroom to enable her to access the general education curriculum or how the SETSS delivered to her supported her functioning in the classroom, even if provided in a separate location in accordance with the IESP developed for her by the district (Parent Ex. B at p. 6). 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 private 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. The program, as a whole, consisted of enrollment at a general education nonpublic school along with the parent's unilaterally-obtained SETSS, with the idea that the specially designed instruction provided should support the student's access to the nonpublic school's curriculum; however, under the circumstances of this matter, the hearing record lacks evidence to support such a finding. As a result, the parent has failed to meet her burden of proving that the services she obtained privately were appropriate for the student under the Burlington-Carter standard. Thus, the IHO correctly denied funding for the parent's unilaterally-obtained SETSS during the 2023-24 school year.

VII. Conclusion

Having determined that the IHO possessed subject matter jurisdiction to adjudicate the parent's claims and that the totality of the evidence in the hearing record supports the IHO's conclusion that the parent failed to meet her burden to prove that the SETSS delivered by EDopt to the student during the 2023-24 school year were appropriate, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
February 10, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER