The University of the State of New York

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

No. 24-647

Application of a STUDENT WITH A DISABILITY, by his 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 Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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 son's private services delivered by Education Optimized LLC (EDopt) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which denied its motion to dismiss the parent's claims based on a lack of subject matter jurisdiction. The appeal must be sustained. 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 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 January 21, 2021, 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 four periods per week of group special education teacher support services (SETSS) (id. at p. 8).[2]

The hearing record is silent regarding the student's educational history from the time of the January 2021 IESP up until the beginning of the 2023-24 school year (see Parent Exs. A-M; Dist. Exs. 1-10; IHO Exs. I-VI).

In a letter dated May 15, 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 for the 2023-24 school year, that she requested that the district provide the educational services that the student was entitled to as a result of having an "[individualized education program] IEP/IESP," and that she understood that the district may provide information about the student to the nonpublic school in which the student was enrolled (see Parent Ex. E).

On June 15, 2023, the CSE convened and developed an IESP for the student with a projected implementation dated of September 5, 2023 (Dist. Ex. 1 at p. 11). Finding the student remained eligible for special education as a student with a learning disability, the June 2023 CSE recommended that the student receive four periods per week of group SETSS (id. at pp. 1, 8, 11). According to the IESP, the student presented with delays in reading comprehension and math skills, as well as distractibility, that interfered with age/grade-appropriate school functioning (id. at p. 4). The IESP stated that the student needed educational support and services with specially designed instruction to progress in the general education curriculum (id.).

By 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 September 19, 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/ [findings of fact and decision] FOFD" (Parent Ex. C at pp. 1, 3). The schedule also provided rates for a variety of services

[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 company 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).

including group "Special Education Services," for which the contract indicated an hourly rate of $145 (Parent Ex. C at p. 3).

On May 30, 2024, the parent electronically signed a letter which indicated that she had placed the student in a nonpublic school at her own expense, that she wanted the student's special education services to continue to be provided during the 2024-25 school year, that she understood that the district would provide information about the student to the nonpublic school, and that she consented to any necessary evaluations and to the recommended services to be provided by the district to the student (see Parent Ex. F).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (Parent Ex. A).[4, 5] The parent asserted that the student's last IESP was dated January 21, 2021 (id. at pp. 1). The parent alleged that the district failed to implement services for the student for the 2023-24 school year and that the district impermissibly shifted the responsibility to the parent to find individuals to provide the student with the IESP services (id. at p. 2). The parent contended that due to the district's failure, she unilaterally secured her own providers to work with the student at an "enhanced rate" (id. at p. 2).

The parent further asserted that the district failed to develop updated programming for the student for the 2024-25 school year (Parent Ex. A at p. 2). For relief, the parent requested, among other things, a pendency hearing, funding for SETSS provided to the student during the 2023-24 school year at an enhanced rate, and a bank of compensatory education services for any services that were not provided to the student due to the district's failure to implement services (id. at p. 3). The parent also requested an order directing the district to provide the student with the services and supports included in the student's "last program of services" at enhanced provider rates for the entirety of the 2024-25 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 20, 2024 and concluded on November 1, 2024, after three days of

[4] The parent included a district Pendency Implementation Form which notes that the student's pendency is based on a January 1, 2021 IEP, and consisted of four periods per week of SETSS, to be provided at the student's then unilateral placement school, for a 10 month school year, and at a rate of $195 (Due Proc. Compl. Not. at p. 4).

[5] Both parties submitted copies of the parent's July 14, 2024 due process complaint notice; for the purposes of this decision, the parent's exhibit will be referenced and cited to (see Parent Ex. A; Dist. Ex. 9).

proceedings inclusive of a prehearing conference (August 20, 2024 Tr. pp. 1-8; October 9, 2024 Tr. pp. 9-25; November 1, 2024 Tr. pp. 1-32).[6, 7]

On August 28, 2024, the district filed a motion to dismiss arguing the IHO did not have subject matter jurisdiction over the parent's claims and that the claims for the 2024-25 school year were not ripe (see IHO Ex. III). The parent filed a response to the motion to dismiss on October 7, 2024 (see IHO Ex. IV).

In a decision dated November 20, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year by failing to assign a SETSS provider to provide special education services pursuant to the student's IESP for the 2023-24 school year (IHO Decision at pp. 1, 4).

The IHO determined that the parent failed to demonstrate that the unilaterally-obtained SETSS delivered by EDopt were tailored to meet the student's unique special education needs (IHO Decision at pp. 1, 5). The IHO determined that the hearing record lacked any testimony from the student's providers or supervisors; that the parent's witness lacked any personal knowledge of the student's needs, the methodologies used, or how progress was assessed; and that the EDopt progress report was unpersuasive because it lacked evaluative data, the report was undated, and the report did not identify who created it (id.). The IHO also noted that the parent did not provide any testimony regarding her observations of the student over the course of the school year or of the impact the private services "potentially had" on the student (id. at p. 5).

The IHO determined that equitable considerations did not favor the parent and, therefore, either the complete denial of an award or a reduction in the requested rate to the lowest rate set by the district would be warranted (IHO Decision at pp. 1, 6-7). In addition, the IHO found equitable considerations weighed against the parent because she did not act in good faith to locate a provider at the district-approved rate for SETSS; the EDopt providers were not sufficiently qualified; and the evidence did not demonstrate that the services provided an educational benefit to the student (id.).

The IHO also denied the district's motion to dismiss on the basis of subject matter jurisdiction (IHO Decision at pp. 7-8). The IHO determined that he did have subject matter jurisdiction over the parent's claims and further denied the district's motion because the district did not challenge the amount or frequency of services requested by the parent in her due process complaint notice (id. at p. 8).

The IHO also denied the district's motion to dismiss on the basis of ripeness determining that the district failed to demonstrate what activities it engaged in either before or after the school

[6] While the transcripts of the first two hearing dates were consecutively paginated, the transcript of the November 1, 2024 hearing date began at the same page as the August 20, 2024 hearing date; for ease of reference, the first two hearing dates will be cited to by their consecutively paginated transcript pages and the November 1, 2024 hearing date will be cited by reference to the date of the hearing (Tr. pp. 1-25; Nov. 1, 2024 Tr. pp. 1-32).

[7] A representative from the district did not appear for the prehearing conference on August 20, 2024 (Tr. pp. 1-8).

year started or that it provided any services for the 2024-25 school year (IHO Decision at p. 9). However, regarding the parent's claims for the 2024-25 school year, the IHO granted the district's application to dismiss based on a June 1st affirmative defense because the parent did not notify the district of her intent to seek services by the first day of June that immediately proceeded the school year in question (id.). The IHO determined that the parent's May 30, 2024 letter did not include proof of transmission or proof that it was sent before June 1, 2024 and that the parent failed to provide testimony or evidence regarding any notices sent to the district (id.). The IHO also determined, in the alternative, that if the June 1 affirmative defense was not applicable, the parent would still be denied relief for the 2024-25 school year because the parent would not have met her burden of proof (id. at p. 10). The IHO determined that no contracts were provided for the 2024-25 school year, even though the school year started before the impartial hearing; no evidence was presented on who was assigned as a provider, what their certification and qualifications were, and what their education or work experience was; no time sheets or session notes were submitted; and no assessments or evaluations from the beginning of the year were provided (id.). The IHO also determined that equitable considerations did not favor the parent because there was no evidence regarding the certifications of the various providers for the 2024-25 school year; no evidence regarding a contract to outline the terms of services or demonstrate a financial obligation to pay for services; and the parent failed to demonstrate that the services were likely to provide an educational benefit to the student (id.). The IHO also determined that the parent failed to provide requisite notices to the district regarding the 2024-25 school year (id. at pp. 10-11).

Accordingly, the IHO denied the parent's request for funding/reimbursement for the services provided by EDopt to the student during the 2023-24 and 2024-25 school years (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in determining that (1) proof of the provider's certification was required; (2) there was a lack of evaluative data to determine appropriateness of the SETSS provided by EDopt; (3) the EDopt administrator was inadequate to testify as a witness for the student's progress; and (4) the parent did not present evidence of the actions she took to locate a provider at the district-approved rate, arguing that it is the district's responsibility to ensure services were delivered, and that the parent did not send the requisite 10-day notice to notify the district of the need for a provider. As relief, the parent requests an order "overturn[ing] the IHO's decision and order the contract rate of $145 for group SETSS" (Req. for Rev. at p. 7).

In an answer, the district argues the IHO's determination regarding the 2024-25 school year should be affirmed arguing the parent did not properly appeal the IHO's finding regarding the June 1 affirmative defense. The district also argues the IHO's determinations that EDopt did not provide SETSS that addressed the student's special education needs during the 2023-24 school year and that equitable considerations did not favor the parent should be affirmed. As for the district's cross-appeal, it argues that the SRO and IHO lack subject matter jurisdiction to adjudicate the parent's

implementation claims. As relief, the district argues that the parent's appeal should be dismissed and all relief sought by the parent be denied.[8]

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]).[9] "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.).[10] Thus, under State law an eligible New

[8] The district correctly argues in its answer with cross-appeal that the parent's request for review does not conform to practice regulations governing appeals before the Office of State Review because her lay advocate with Prime Advocacy "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in the rejection of submitted documents (see 8 NYCRR 279.8[a]).

[9] 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]).

[10] 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-

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

At the outset, the parent has not appealed from the IHO's determination that the parent failed to timely request services by June 1, 2024 for the 2024-25 school year. Accordingly, 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 [see S.D.N.Y. Mar. 21, 2013]).

A. Preliminary Matters - Subject Matter Jurisdiction

Next, I will address the district's cross-appeal that the IHO erred in denying its motion to dismiss for lack of subject matter jurisdiction. 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]). Here, the district asserted in its motion to dismiss that there is no federal right to file a due process claim 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 lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in a number of 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. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; 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

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.

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 parent 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 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]).[11]

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 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]).

[11] 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]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confer IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities, 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).[12] 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]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf).[13] 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]).

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

[13] In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

The amendment to the regulation does not apply to the present circumstances 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]

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint" for implementation of IESP claims or enhanced rate for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, 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]

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[14] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 15, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[15] On November 1, 2024, the Supreme Court Albany County 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]).

[16] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only

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 determination that he possessed subject matter jurisdiction to adjudicate the parent's claim was correct, and the district's cross-appeal requesting that the IHO's denial of its motion to dismiss the parent's due process complaint notice be overturned must be denied.

B. Unilateral Placement

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district 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 State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally-obtained 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 that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their

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 SROs 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. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). 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 as an attachment to the district's motion to dismiss (see IHO Ex. III at pp. 17-26).

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]).[17] 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).

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 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 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.,

[17] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the SETSS that the parent obtained from EDopt (Educ. Law § 4404[1][c]).

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).

1. Student's Needs

Turning to the student's needs, which are not in dispute on appeal, the January 2021 (second grade) and the June 2023 (fifth grade) IESPs offer a description of the student's needs (see Parent Ex. B at pp. 1-5; Dist. Ex. 1 at pp. 1-11). The IHO noted in his decision that the parent did not explain why the due process complaint notice only referred to the January 2021 IESP when the parent was present for the creation of the June 2023 IESP (see IHO Decision at p. 5).[18]

At the time the June 2023 IESP was created, the student was attending fourth grade at a nonpublic school, where he received four periods per week of SETSS (Dist. Ex. 1 at p. 1). In terms of evaluation results, the June 2023 IESP included the student's 2022-23 term one and term two report card grades, which were as follows: computer science 3, 2; handwriting B, A; language and grammar P, C; mathematics C+, C; physical education A-, A; reading fluency B, B; reading comprehension B-, C; science A, A; social studies A-, A; spelling/word study A-, A; and writing A-, A (id.).[19]

In terms of academic skills, the June 2023 IESP noted that according to a SETSS report, while the student had shown strengths in certain areas, there was room for improvement in reading comprehension and fractions, decimals, and multiplication (Dist. Ex. 1 at p. 1). The June 2023

[18] The June 2023 IESP attendance page indicated that the parent participated in the CSE meeting by telephone (Dist. Exs. 1 at p. 11; 2 at p. 1).

[19] The number grades are not explained in the IESP (see Dist. Ex. 1).

IESP reflected that during the CSE meeting, the student's teacher reported that the student was "below level in [English language arts] ELA and [m]ath" and noted that while the student was then-currently at a reading level "O" (third grade), the student's fluency was better than his comprehension and that he did well with decoding but would rush and guess (id. at p. 2). As recorded in the June 2023 IESP, a SETSS report noted the student "may" continue to struggle with making accurate inferences and summarizing information correctly (id.).

Regarding math, the June 2023 IESP reflected the teacher's comments during the CSE meeting that the student had trouble with math word problems and although he was able to add, subtract, multiply with regrouping, and divide, he struggled with long division (Dist. Ex. 1 at p. 2). In addition, the student was able to add and subtract fractions but struggled with converting mixed numbers (id.). According to the IESP, the teacher estimated that the student was on an "early [third] grade level" in math and needed math word problems broken down (id.). The IESP noted that the student's SETSS report reflected that he required additional support and practice in the area of math, specifically with fractions, decimals, and multiplication (id.). The IESP further cited the SETSS report which noted the student "may find it challenging to understand the concept of fractions and decimals, including their relationships and how to perform operations with them" (id.).

With respect to writing, the June 2023 IESP indicated that, according to the student's teacher, the student was able to write a paragraph and use full sentences if he was "focused and in the mood" (Dist. Ex. 1 at p. 2). The student was also able to apply basic grammar rules (id.).

Turning to social development, the June 2023 IESP noted that the student's teacher reported the student had been suspended for behavior and aggression toward others (Dist. Ex. 1 at p. 3). According to the IESP, the teacher further reported that the student would interrupt or distract others to try to be sent out of class, was, at times, aggressive or hurt other students, and was suspended for a week for hitting another student (id.).

Additionally, as memorialized in the June 2023 IESP, the student's teacher further noted that the student would shut down and refuse to do work if he was not in the mood (Dist. Ex. 1 at p. 3). The teacher indicated that she thought that the student could benefit from in-school support to give him a break from the class and help him refocus and also opined that counseling could be beneficial for the student (id.). Finally, the June 2023 IESP noted that the parent thought the student may benefit from occupational therapy (OT) due to suspected sensory issues, and indicated the parent may pursue an evaluation (id. at p. 4). The parent reported during the June 2023 CSE meeting that the student liked to touch people if he wanted to talk to them and he did not realize he was doing it (id. at p. 3). The June 2023 IESP reflected the parent's concerns that the student's behavior at home was "fine," and she did not see the student as being violent, further noting it was "the first year that the school has complained" (id.). The June 2023 IESP indicated that during the CSE meeting, the parent said that she would be "open to counseling" and would consider writing a letter to request it (id.).

In terms of physical development, the June 2023 IESP noted that the parent reported the student was in good health (Dist. Ex. 1 at p. 3).

2. Appropriateness of SETSS provided by EDopt

As an initial matter, the IHO's findings that the "lack of evaluative data" in the EDopt 2023-24 progress report rendered it "unpersuasive," and that the progress report did not reflect the student's academic levels at the start or end of the school year, purportedly to show progress, I first note that it was not the parent's responsibility to evaluate the student and identify his needs (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Additionally, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

While review of the hearing record shows that there is insufficient evidence to support the IHO's viewpoint that a "lack of evaluative data renders the contents of the EDopt progress report as unpersuasive," the IHO correctly found, as a factual natter, that the parent provided no testimony regarding her observation of the student over the school year at issue or the impact that the agency's or provider's services potentially had on the student's progress (IHO Decision at p. 5). However, as noted above, progress is not a dispositive issue in determining whether or not unilaterally obtained services are appropriate and, accordingly, a lack of evidence of such progress in the parent's testimony does not support a finding that the services provided by EDopt were not appropriate for the student.

The IHO also found that the parent's witness, the lead case manager for EDopt who provided testimony by affidavit and upon cross-examination, lacked any personal knowledge of the student's needs, the methodologies used to instruct the student, or how progress was measured (id.).[20] The case manager testified that she did not personally know the student, but she was "involved in the administrative department of the company" and knew about the services EDopt provided (Nov. 1, 2024 Tr. p. 7). In an affidavit, the case manager stated the student had two

[20] The parent in her appeal argues that the case manager was adequate to testify as a witness to the student's progress; however, a review of the case manager's testimony shows that the case manager did not testify specifically regarding the student's progress but rather referred to the progress report for notes regarding the student's progress (Nov. 1, 2024 Tr. p. 12). Additionally, the IHO did not find that the case manager lacked credibility, but rather the IHO summarized that the case manager's testimony did not include information regarding the student's needs, the methodologies used, or how progress was assessed (IHO Decision at p. 5).

SETSS providers who were New York State certified special education teachers, and the SETSS providers maintained timesheets and progress reports (Parent Ex. G ¶¶ 3-4, 5). The hearing record includes one EDopt progress report for "School Semester 2023-24" (see Parent Ex. H at p. 1). The case manager testified that progress reports were created for students three times a year (Nov. 1, 2024 Tr. p. 22). Specifically, the case manager testified that "[i]n the beginning of the year, they assess the [student] and they write a report on that and then, the midyear and end of year progress reports" (id.). The case manager further testified that she did not have any involvement with the progress reports (id.).

The case manager testified that EDopt's providers submit a session note for each session (Nov. 1, 2024 Tr. p. 11). Specifically, the case manager testified that EDopt has a tracking system where providers enter their times which creates time sheets and notes, and the providers need to submit a session note for each session (id.). Next, the case manager testified that the time sheet and the session notes are submitted together and then reviewed by supervisors to make sure that the providers are actually working on the student's needs (id.). The case manager testified that she was not sure, not very involved, and did not feel comfortable answering a question about when session notes were created by providers (Nov.1, 2024 Tr. pp. 12-13).

The case manager further testified that she was not a supervisor or a clinical director at EDopt and that she could not answer a question regarding what professional development was done for one of the student's SETSS providers (Nov. 1, 2024 Tr. pp. 13-14). Finally, the case manager identified the student's case manager, who was a different individual than herself (Nov. 1, 2024 Tr. pp. 15-16). The case manager further identified the supervisor handling the student's case and noted that others may have had direct contact with the student depending on his needs (Nov. 1, 2024 Tr. pp. 13-14). The parent did not submit any session notes or invoices in this case (Parent Exs. A-M).

The case manager asserted in her affidavit and upon cross-examination that SETSS were provided to the student throughout the entire school year, beginning on September 26, 2023, noting both timesheets and progress reports completed by the providers, and generally asserted that the student's two SETSS providers were certified by the New York State Department of Education as special education teachers (see Nov. 1, 2024 Tr. pp. 7-23; Parent Ex. G ¶¶ 2-5). The IHO determined that the SETSS progress report did not identify who created the report (IHO Decision at p. 5); however, consistent with the case manager's testimony, the SETSS progress report generally identified the student's two SETSS providers who were both listed on the timesheets for the 2023-24 school year (see Parent Exs. G-H; J). As a result, while the IHO did not give much weight to the case manager's testimony, such testimony was not the only evidence submitted by the parent and, accordingly, it is necessary to assess the other evidence in the hearing record as well in order to determine whether the services provided by EDopt were appropriate, particularly given that any findings regarding the appropriateness of unilaterally-obtained services should be based on a consideration of the totality of the evidence.

Regarding specially designed instruction, a review of the undated SETSS progress report shows that it listed the names of the student's providers and described the supports and techniques

used to instruct the student (see Parent Ex. H).[21] The SETSS providers reported that the student was in fifth grade at a nonpublic school, and his "deficits and delays" were "evident" in the areas of academic and cognitive development (id. at p. 1). The SETSS providers also reported that the student exhibited "behavioral challenges, particularly difficulty maintaining focus during tasks, which significantly hamper[ed] his ability to complete activities independently" (id.). The SETSS progress report noted that the "[four] periods per week of individualized support" "focused on providing interventions in reading, writing, and math to remediate [the student's] academic delays and ensure progress toward age-appropriate learning goals" (id.).

According to the SETSS progress report, the four SETSS sessions per week were used to address the student's deficits, were "specially designed" to meet his unique needs, and were "necessary to help [the student] advance towards h[is] goals and objectives" (Parent Ex. H at p. 1). The report noted that SETSS were delivered in small group settings, which allowed for more tailored "interventions" aimed at improving the student's concentration and task completion (id.).

Further, the SETSS providers reported that the SETSS sessions were "utilized to address [the student's] deficits through activities and strategies that [we]re designed to remediate [the student's] deficits and support[ed the student] in making progress towards age-appropriate goals and objectives" (Parent Ex. H at p. 1). In the progress report, the SETSS providers noted that to address the student's behavioral challenges and his ability to maintain focus, a combination of positive reinforcement and small group instruction was "crucial" (id.). The SETSS progress report identified supports and strategies to address the student's management needs that included the use of graphic organizers and anchor charts, and the provision of multi-sensory learning experiences (id. at pp. 3-4). Additionally, the SETSS providers noted that reinforcing positive behavior through incentives would help the student maintain his focus and engagement in learning (id. at p. 4).

With regard to reading, the SETSS progress report indicated that the student's reading abilities were "notably below grade level, with his comprehension significantly lagging behind" (Parent Ex. H at p. 1). The SETSS progress report noted the then-fifth grader's reading grade equivalent was at a third-grade level (id.). The SETSS progress report reflected that while the student's decoding skills were stronger, he struggled with understanding the meaning of the text (id.). The progress report indicated that this discrepancy resulted in challenges across subjects, as the student's inability to follow written directions impacted his performance overall (id.).

According to the SETSS progress report, to address the student's needs in reading, the SETSS sessions "focused heavily" on improving the student's comprehension skills through the use of multi-sensory strategies like the "Stop, Observe, Summarize" (SOS) method, graphic organizers, and repetition of grade-level material (Parent Ex. H at pp. 1-2). However, the progress report noted that despite these efforts, the student continued to face difficulties with open-ended comprehension questions, often rushing through passages without fully grasping the content (id. at p. 2). The SETSS providers identified that prompts to slow down, break apart unfamiliar words, and focus on syllabication helped to improve the student's accuracy (id.). With respect to progress

[21] The SETSS progress report did not reflect a specific date it was prepared, rather, the document noted "School Year**:** School Semester 2023-24" (Parent Ex. H at p. 1).

in reading, the SETSS progress report noted "[t]here ha[d] been incremental improvements" such as the student's ability to answer comprehension questions when provided with structured guidance (id.). Reading goals for student included a goal to improve the student's ability to answer comprehension questions by using graphic organizers to summarize text and break down difficult passages into manageable sections, another goal to read multi-syllabic words using decoding strategies, and another goal to enhance his ability to identify the main idea and supporting details in grade-level texts using visual aids and teacher guidance (id. at p. 4).

In the area of writing, the progress report indicated that the student demonstrated some strengths, particularly in his ability to generate ideas and include detail in his paragraphs but noted he struggled with organization, often producing writing that lacked clarity and coherence (Parent Ex. H at p. 2). The progress report reflected that the student frequently lost track of the main idea, resulting in writing that was disconnected and difficult to follow (id.).

The SETSS providers reported interventions to assist the student with writing, including the use of rubrics and graphic organizers, and noted he worked on improving sentence structure, spelling, and punctuation, but still required substantial support to avoid frequent errors (Parent Ex. H at p. 2). With respect to progress in writing, the SETSS progress report indicated that despite those challenges, the student showed gradual progress in writing, and with continued intervention, his ability to compose clear, organized paragraphs should improve (id.). Annual goals developed for the student were designed to improve his ability to organize his writing using graphic organizers, to compose well-structured paragraphs with appropriate grammar and punctuation, and to write cohesive narratives that stayed on topic with minimal teacher support (id. at p. 4).

Regarding math, the SETSS providers reported that the student's skills were at a beginning of fifth-grade level and that his math skills were mixed (Parent Ex. H at pp. 1-2). While he showed proficiency in basic operations such as addition and subtraction, particularly with multi-digit numbers, he struggled with more complex concepts such as multi-digit multiplication, division involving decimals, and understanding decimal place value (id.). According to the progress report, the student's difficulties were compounded by his distractibility during lessons, which often resulted in incomplete work or incorrect solutions (id. at p. 2).

The progress note indicated that to address the student's needs in math, small group interventions focused on repeated practice, the use of anchor charts, and the use of manipulatives such as decimals charts to aid in understanding (Parent Ex. H at p. 2). According to the progress note, although the student had made noticeable improvements such as achieving 80 percent accuracy in solving multi-digit multiplication problems with teacher prompts, his grasp of more advanced topics like division with decimals and word problems remained "weak" (id.). According to the report, "[o]ngoing support will be critical to ensure he retains th[o]se skills and continues to build on them" (id.). Annual goals which targeted the student's math needs were designed to improve the student's ability to demonstrate proficiency in solving multi-digit multiplication and division problems, including those involving decimals, to solve multi-step word problems by accurately identifying the necessary operations and solving, and to align decimals and solve place value problems using anchor charts and visual aids (id. at p. 4).

In terms of learning style, the SETSS providers reported that the student learned best through hands-on and visual approaches, benefiting from the use of graphic organizers, anchor

charts, and frequent breaks to maintain focus (Parent Ex. H at p. 2). Specifically, the progress report indicated that multi-sensory instruction, such as the use of manipulatives in math and visual cues during reading, had "proven essential" in the student's progress; however, his tendency to lose focus and go off-topic during sessions required continuous redirection (id. at pp. 2-3). The SETSS providers further noted that the student responded positively to reinforcement strategies including rewards and breaks which helped him to stay engaged (id. at p. 3). In their opinion, given the student's need for consistent redirection and repetition, small group settings that allowed for personalized attention had been "vital" in addressing his learning needs (id.).

In contrast to the information reported in the June 2023 IESP regarding the student's behavior, the SETSS providers reported that the student was outgoing, had established positive relationships with his peers, and enjoyed socializing and playing with his friends but could "occasionally act impulsively, disrupting classroom dynamics" (compare Dist. Ex. 1 at p. 3, with Parent Ex. H at p. 3). The report further noted that the student's difficulty with maintaining focus and following directions sometimes led to conflicts, particularly when the student called out in class without raising his hand, which could frustrate his peers (Parent Ex. H at p. 3). The case manager reported that "EDopt maintain[ed] a dedicated team of case managers, administrative staff, and a Behavioral Analysis expert to support both parent and students throughout the process" (Parent Ex. G ¶ 10). However, the hearing record does not reflect that a board certified behavior analyst (BCBA) provided any consultation to the student's parents, the teachers at the nonpublic school, the student's SETSS providers, or any related services to the student, or that the student required a functional behavioral assessment (FBA) or a behavioral intervention plan (BIP), which, similarly, is not in dispute on appeal here (see Tr. pp. 1-25; Nov. 1, 2024 Tr. pp. 26-32; Parent Exs. A-M; Dist. Exs. 1-10).

To address the student's social/emotional needs, according to the progress report, SETSS interventions included social-emotional support to help the student "recognize and regulate his emotions in classroom settings" (Parent Ex. H at p. 3). The report further noted that although the student had made progress in that area, ongoing reinforcement of those skills was necessary for continued improvement (id.). However, other than the management needs section of the report which, as discussed above, noted the student benefited from reinforcing positive behavior through incentives, the report included no further information regarding any social/emotional goals the student was working on with the SETSS provider (id. at pp. 3-4). In terms of physical development, the report reflected that the student was healthy, displayed "good" coordination and mobility, had legible handwriting, did not exhibit any motor delays, and no concerns regarding his physical development were noted at that time (id. at p. 3).

Time sheets for the 2023-24 school year with dates ranging from September 26, 2023 through June 10, 2024 indicated that the student did not consistently receive four sessions of SETSS per week for the entire month during the months of September 2023, March 2024, April 2024, and June 2024 (see Parent Ex. J at pp. 1-18). A review of the timesheets does not provide specific details about the content or nature of the group SETSS sessions, although they do reflect the consistent documentation of service dates and times, along with the providers' signatures for the entirety of the 2023-24 school year (see generally Parent Ex. J).

In light of the foregoing, the totality of the evidence shows that the parent's unilaterally-obtained SETSS delivered to the student by EDopt provided specially designed instruction to

address the student educational needs, and therefore, were appropriate under the Burlington-Carter standard.

C. Equitable Considerations

Having found that the SETSS provided by EDopt was appropriate, the inquiry now turns to consideration of the final criterion for a reimbursement award, which is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Among the factors that may warrant a reduction or denial of funding of under equitable considerations is whether the parent provided notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).[22] Another factor that may warrant a reduction in funding under equitable considerations is whether the rate charged by the private agency was unreasonable or whether any segregable costs charged by the private agency exceeded the level that the student required to receive a FAPE (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). However, the Second Circuit Court of Appeals recently explained that the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement

[22] The 10-day notice requirement "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

award" "once parents pass the first two prongs of the Burlington-Carter test, (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]).

The IHO determined equitable considerations did not favor the parent for three separate reasons: (1) there was no evidence to show the providers were sufficiently qualified to provide services or justify the requested service rates; (2) there was no evidence of the parent's actions to locate a provider at the district-approved rates; and (3) the parent failed to demonstrate that the services provided an educational benefit to the student (IHO Decision at p. 7).

As an initial matter, the IHO's findings regarding the certification of providers and educational benefit should have been considered when determining whether the SETSS provided to the student during the 2023-24 school year was appropriate, and not as an equitable consideration (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]).[23] Having found that the parent met her burden with respect to the appropriateness of the unilaterally-obtained services, this aspect of the IHO's equitable considerations findings will not be further addressed herein.

The parent appeals from the IHO's determination that the parent was required to present evidence of her efforts to locate a provider at the district-approved rates. The district in its answer and cross-appeal alleges that equitable considerations do not favor the parent because the parent did not comply with the 10-day notice regulations; the rate charged by EDopt was unreasonable and unsubstantiated; and the parent did not demonstrate a legal obligation to pay for such services.

With respect to the district's assertion that the parent failed to demonstrate that she had a financial obligation to pay for the SETSS, this assertion is without merit, as the parent produced the contract with EDopt obligating her to pay for the services (see Parent Ex. C).

Regarding the 10-day notice, the district did not argue during the impartial hearing that the parent failed to comply with the 10-day notice provisions (see Tr. pp. 9-15; Nov. 1, 2024 Tr. pp. 1-32). The IHO did not make any determinations regarding the 10-day notice in his decision (see IHO Decision). During the impartial hearing, the parent submitted into evidence a 10-day notice letter dated August 23, 2023 sent by Prime Advocacy on the parent's behalf (see Parent Ex. D). The district did not present any evidence or make any arguments during the impartial hearing that it did not receive the parent's 10-day notice letter or that it was deficient (see Tr. pp. 9-15; Nov. 1, 2024 Tr. pp. 1-32). It was not until its cross-appeal that the district now argues that the parent offered no testimony or documentary evidence to demonstrate the 10-day notice was transmitted to the district; however, under the circumstances presented here, I decline to find that such argument raised for the first time in a cross-appeal is a ground for reducing or denying tuition pursuant to equitable considerations.

Regarding the district's argument that the rate charged by EDopt for group SETSS was unreasonable because the case manager was unable to testify about the breakdown of expenses, how many students attended the group therapy, the overhead amounts or the true amount

[23] I note that in an analysis of unilaterally-obtained services, the agency need not employ certified special education teachers (Carter, 510 U.S. at 13-14), and therefore, the details of the provider's certification would not be a bar to relief.

compensated to each provider, such argument is not supported by the hearing record. Here the evidence shows that EDopt charged $145 per hour for group SETSS, and such rate includes the costs of leasing the office space, covering utilities, insurance premiums, and regular software licenses, as well as accounting for loan payments with a significant portion of the rate dedicated to the supervision provided by the team of special education supervisors, who oversee the planning, execution, and quality of educational programs (Parent Ex. G ¶ 7). The rate also includes the cost of "essential educational materials and supplies" such as textbooks, workbooks, and digital resources, as well as assessment tools used to measure and track student progress (id. ¶ 8). According to the testimony of the case manager, the providers were paid $85 to $95 out of the $145 charged and an additional $25 per student who was a part of the group SETSS (Nov. 1, 2024 Tr. pp. 16-17).

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Here, although the district attempted to make an unreasonable rate argument by entering into the hearing record as evidence, a prior SRO decision, an American Institutes for Research (AIR) report dated October 2023 and a related services – independent provider rate schedule; the district does not provide any further argument as to how such documents apply to this matter (see Tr. pp. 9-25; Nov. 1, 2024 Tr. pp. 1-32; Dist. Exs. 6-8). Other than submitting such evidence, the district did not present any argument during the impartial hearing or in its answer and cross-appeal regarding the reasonableness of the enhanced rate for SETSS. The district representative presented a closing statement during the impartial hearing but did not assert any argument that the rate charged by EDopt for SETSS was unreasonable based off of the evidence presented in the hearing record (Tr. pp. 9-25; Nov. 1, 2024 Tr. pp. 1-32). Accordingly, the district did not sufficiently challenge the rate of $145 for group SETSS charged by EDopt and I decline to reduce the rate without an argument by the district explaining why an enhanced rate for SETSS was not reasonable.

Accordingly, the only remaining issue relating to equitable considerations is whether the parent's inaction to locate providers at the district-approved rates necessitates a complete denial of the parent's requested relief or a reduction in the cost requested for the SETSS provided by EDopt. Here, the IHO, rather than focusing on whether the rate charged for a service was reasonable, which requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services, improperly determined that equitable considerations did not favor the parent because she did not present any evidence of the actions she took to secure services at the district rate or any evidence that the SETSS provider

was sufficiently qualified to provide services or to justify the requested rates for services (IHO Decision at p. 7). However, this improperly placed the burden on the parent to find a provider rather than the district.

In this instance, the hearing record supports a finding that equitable considerations favor the parent. The district did not raise an argument that the parent failed to cooperate in the IESP process or that the rate charged for SETSS was unreasonable, and the evidence shows that the parent, through her lay advocate, provided the district with a 10-day notice on August 23, 2023. As a result, there are no equitable considerations that weigh against the parent's requested relief of direct funding for the cost of the SETSS provided by EDopt to the student during the 2023-24 school year at a rate of $145.

VII. Conclusion

The hearing record supports a finding that the IHO had subject matter jurisdiction to adjudicate the parent's claims but that the IHO erred in finding that the parent failed to meet her burden in establishing the appropriateness of the unilaterally-obtained SETSS provided by EDopt to the student. Since no equitable factors would warrant a denial or reduction of funding for such services, the parent is entitled to funding for the services actually provided by EDopt for the 2023-24 school year, at the contracted group rate of $145 per hour, for four hours per week.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated November 20, 2024 is modified by reversing those portions which found that the parent did not meet her burden to establish that the unilaterally-obtained SETSS from EDopt were appropriate, and which denied the parent's request for the district to fund the unilaterally-obtained SETSS delivered by EDopt during the 2023-24 school year in its entirety; and

IT IS FURTHER ORDERED that the district shall fund the costs of four hours per week of SETSS delivered to the student by EDopt during the 2023-24 school year at the contracted group rate of $145 per hour, upon proof of delivery.

Dated: **Albany, New York**
May 8, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER