The University of the State of New York

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

No. 25-018

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 Cynthia Sheps, 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 cost of her son's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which denied the district's motion to dismiss for lack of subject matter jurisdiction. 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

At all relevant times, the student was parentally placed at a nonpublic school and eligible for special education as a student with a speech or language impairment (see Parent Exs. B at pp. 1, 10; D).[1]

A CSE convened on September 22, 2020 and developed an IESP for the student with a projected implementation date of September 22, 2020 (Parent Ex. B at p. 1). The September 2020 CSE recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group (id. at p. 7).[2]

On July 26, 2023, the parent signed a contract, in which EdZone agreed to assign providers to deliver services to the student, during the 10-month 2023-24 school year, "in accordance with the last agreed upon IEP/IESP/FOFD/Pendency Order/Pendency Agreement/Court Order or Decision of SRO/Medi[]ation Agreement/Resolution Agreement" (Parent Ex. C at pp. 2-3).[3] Under her contract with EdZone, the parent agreed to be responsible for any fees not covered by the district (see id. at p. 1).

In a letter dated August 23, 2023, the parent, through a lay advocate, notified the district that it had "failed to assign a provider" to deliver the student's mandated services during the 2023-24 school year (Parent Ex. D at p. 1).[4] The August 2023 letter requested that the district fulfill its mandate and stated that, if the district "fail[ed] to assign a provider, the parent [would] be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

During the 2023-24 school year, the student received SETSS through EdZone beginning on September 07, 2023 (Parent Exs. F at p. 1; G at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 16, 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 at pp. 1-2). As for the 2023-24 school year, the parent alleged that the district failed to convene a CSE meeting to review and update the student's educational program in advance of the extended school year; and the district failed to supply a provider to deliver the student's recommended services (id. at p. 2). The parent further alleged that she was unable to

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The September 2020 CSE terminated the student's speech-language therapy services due to the student's progress in that area, a decision with which the parent reportedly agreed (Parent Ex. B at p. 2).

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

[4] The subject line of the August 2023 letter stated, "TEN (10) DAY NOTICE" (Parent Ex. D at p. 1).

procure a provider for the 2023-24 school year at the district rate and "had no choice but to retain . . . an agency to provide the mandated services at an enhanced rate set by the provider" (id.). As for the 2024-25 school year, the parent alleged that the district again failed to review and update the student's educational program (id.). As relief, the parent requested funding of the cost of the private services provided to the student during the 2023-24 school year at the provider's enhanced rate; a bank of compensatory services, funded at the provider's enhanced rate, to make up for any mandated services not provided to the student; and an order directing the district to provide the student's recommended services for the 2024-25 school year (id. at p. 3).

In a response to the due process complaint notice, dated September 18, 2024, the district raised several defenses (Due Process Response). On or about November 7, 2024, the district made a motion to dismiss, which the parent opposed (see IHO Exs. II at pp. 1-6; III at pp. 1-5). The district requested dismissal on grounds that the IHO lacked subject matter jurisdiction and that the parent's claims were unripe for adjudication (see IHO Ex. II at pp. 1-6).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 15, 2024 and concluded the same day (see Tr. pp. 1-48). The parent presented various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 7-10; Parent Exs. A-L). The parent's exhibits included direct testimony by affidavit from the parent herself and from an administrative employee of EdZone, each of whom also appeared for cross-examination during the hearing (see Tr. pp. 7, 10, 12-30; Parent Exs. E; L). The district presented no witness testimony but offered several documents, each of which the IHO admitted into evidence (see Tr. pp. 5, 7, 10; Dist. Exs. 1-4).

In a decision dated November 26, 2024, the IHO denied the district's request for dismissal based on lack of subject matter jurisdiction (IHO Decision at pp. 7-8). As for the 2023-24 school year, the IHO found that the district failed to demonstrate that it provided services for the student in accordance with the September 2020 IESP (id. at p. 4). Thus, according to the IHO, the district denied the student a FAPE on an equitable basis (id.).

The IHO then addressed whether the services provided by EdZone during the 2023-24 school year were appropriate for the student (see IHO Decision at pp. 4-5). According to the IHO, the parent presented no persuasive evidence that EdZone provided instruction specially designed to meet the student's unique needs (id. at p. 5). The IHO reasoned that the parent's testimony did not describe the substance of the student's SETSS sessions or explain the impact of EdZone's services on the student; the administrative employee never observed or assessed the student and lacked personal knowledge of the student's needs, the methodologies used, or how progress was assessed; the progress report, which was undated, did not identify the author and contained no evaluative data; and the parent presented no session notes (id.). Having determined that the parent failed to prove the appropriateness of EdZone's services for the 2023-24 school year, the IHO denied the requested relief (id. at p. 11).

Regarding the 2023-24 school year, the IHO further determined that, even assuming the unilaterally obtained services were appropriate, equitable considerations did not favor the parent and would have warranted either complete denial of an award or reduction of the requested rate of

funding to the lowest rate set by the district (IHO Decision at p. 5). The IHO found that the parent did not act in good faith, reasoning that the parent executed the contract with EdZone in July 2023, well before the start of the school year, and presented no evidence regarding her efforts to locate a provider at the district-approved rate (id. at p. 6). The IHO also considered the lack of evidence regarding the SETSS provider's qualifications and the lack of evidence that EdZone's services provided an educational benefit to the student (id. at pp. 6-7).[5]

As for the 2024-25 school year, the IHO denied the district's request to dismiss the parent's claim as unripe, reasoning that the impartial hearing took place nearly a month after the start of the school year (IHO Decision at p. 8). However, the IHO granted the district's request for dismissal based on the June 1 notice affirmative defense (id. at pp. 8-9).[6] The IHO found that the parent was not entitled to relief for the 2024-25 school year because the hearing record lacked evidence regarding the parent's alleged request for equitable services (id. at p. 9).[7] The IHO also determined that the parent failed to prove that EdZone provided appropriate services to the student during the 2024-25 school year (id. at pp. 9-10).[8] Finally, the IHO determined that equitable considerations precluded any relief for the 2024-25 school year (id. at p. 10).[9] Thus, according to the IHO, the parent would still be denied relief, notwithstanding the IHO's dismissal of the claims based on the June 1 defense (id. at pp. 9-10).

[5] More specifically, in the discussion of equitable considerations, the IHO cited lack of evidence regarding the SETSS provider's education, training, or experience to show that the provider was sufficiently qualified to provide services or to justify the requested rate (IHO Decision at p. 6). The IHO also cited, as equitable considerations, the absence of testimony from the provider detailing the activities conducted to assist the student, as well as the progress report's lack of any detail regarding the methodologies used, assessments given, how progress was measured, the student's abilities at the start of the school year, or how the student's abilities changed by the end of the school year (id. at pp. 6-7).

[6] The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school, and for whom the parents seek to obtain educational services, to file a request for such services in the district 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]).

[7] According to the IHO, the hearing record contained no documentary evidence that the parent sent the district a written request for equitable services by June 1, 2024 (IHO Decision at p. 9). Although the parent testified that she sent a June 1 letter, the IHO found the parent's testimony unpersuasive due to lack of detail regarding the letter's content or the date on which the letter was sent (id.).

[8] The IHO found that, although the hearing took place after the start of the 2024-25 school year, the hearing record included no provider contract for that school year, no information on the assigned provider or their qualifications, no time sheets or session notes, and no assessments or evaluations from the beginning of the year (IHO Decision at p. 9).

[9] The IHO cited, as equitable considerations, lack of evidence regarding the provider's qualifications or the parent's obligation to pay for services during the 2024-25 school year; insufficient evidence that the parent requested equitable services for the 2024-25 school year; and insufficient evidence that the parent submitted a 10-day notice to the district before unilaterally obtaining private services (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parent appeals, and the district cross-appeals. The parties' familiarity with the issues raised in the parent's request for review, the district's answer and cross-appeal, the parent's reply and answer to the cross-appeal, and the district's reply to the answer to the cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. As for the 2023-24 school year, the parties dispute the following issues: whether the IHO erred in denying the district's request for dismissal based on lack of subject matter jurisdiction; whether the IHO erred in determining that the parent failed to prove the appropriateness of the unilaterally obtained services; and whether the IHO erred in determining that equitable considerations weighed against the parent's request for relief. As for the 2024-25 school year, the only disputed issue on appeal is whether the IHO should have dismissed the parent's claim for lack of subject matter jurisdiction. Finally, the district argues that an SRO should dismiss the parent's appeal for noncompliance with the practice requirements of Part 279 of the State regulations, which govern appeals to the Office of State Review.[10]

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

[10] The parent's advocate was allowed the opportunity to correct deficiencies in the initial request for review and affidavit of service. Specifically, the parent's advocate was advised that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney;" and the affidavit of service must accurately describe the manner of service (8 NYCRR 279.8[a][4]). The district argues that the SRO should reject the parent's amended request for review and the parent's reply and answer to the cross-appeal, citing the parent's conformed signature, the lack of consecutive pagination, and the inclusion in the statement of facts in the request for review of a different student's name and other case details that do not relate to the present matter. In this instance, I decline to exercise my discretion to reject and dismiss the amended request for review on the grounds cited by the district. However, the parent's advocate is again cautioned that, in future matters, defects in the pleadings are far more likely to result in rejection of submitted document (see 8 NYCRR 279.4[e], 279.8[a][3], [4]). As another example of noncompliance not raised by the district, once again, the parent's advocate has failed to clearly and accurately describe the manner of service. According to the affidavit of service of both the amended request for review and the reply and answer to the cross-appeal, the parent's advocate purportedly effectuated service by personal delivery to an attorney for the district at the advocate's own business address (see Aff. of Serv. of Amended Req. for Rev.; Aff. of Serv. of Reply & Answer to Cross-Appeal). Finally, I note that, while the amended request for review is dated January 16, 2025, the affidavit of verification was notarized on January 6, 2025 (Amended Req. for Rev. at pp. 9-10). It appears that the parent's advocate reused the initial pleading's affidavit of verification (compare Req. for Rev. at pp. 9-10, with Amended Req. for Rev. at pp. 9-10). Given that the amended request for review is substantively the same as the initial request for review, I decline to reject and dismiss the amended request for review as unverified. However, the parent's advocate is cautioned that the practice regulations require verification of all pleadings submitted to an SRO in connection with an appeal; and verification of a document entails a sworn statement that the affiant knows the contents of the document and knows the contents of the document to be true; or, with respect allegations made "upon information and belief," the affiant believes the allegations to be true (see 8 NYCRR 279.7[b]).

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]).[11] "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.).[12] 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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[11] 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]).

[12] 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

As a threshold matter, it is necessary to address the issue of subject matter jurisdiction which was raised in the district's cross-appeal. The district argues that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2023-24 school year (Parent Ex. A at p. 2). While the due process complaint notice also alleges that the district did not implement services from the most recent IESP during the 2023-24 school year (id.), this is not an instance where there is a timely and current IESP with which both parties agree that the district just failed to implement. As the parent's claims also related to the failure to develop an IESP for the student for the 2023-24 school year, this is not an instance where the parent's claim was solely related to the implementation of an IESP. Accordingly, there can be no dispute that the IHO had jurisdiction to address this aspect of the parent's due process complaint notice.

In addition, even if this matter did solely involve implementation of the student's IESP during the 2022-23 school year, such a claim is subject to due process. In several recent decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-615; 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 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 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]).[13]

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]).

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 [FAPE]" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). SROs have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[14] In addition, the New York Court of Appeals has explained that students

[13] 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]).

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

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). 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.).[15] 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

[15] 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 notice in this matter was filed with the district on July 15, 2024, prior to the July 16, 2024 date set forth in the emergency regulation (see Parent Ex. A at p. 6). Since then, the emergency regulation has lapsed.

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[16]

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

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on 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]).[17]

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

B. Unilaterally Obtained Services

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.

[16] On November 1, 2024, Albany County 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]).

[17] 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; thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

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 private services from EdZone 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 expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[18] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered 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. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable

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

the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of the 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 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

Turning to the merits, the following disputed issues remain to be addressed: whether the student received appropriate services from EdZone during the 2023-24 school year; and, if so,

whether equitable considerations support the parent's request for relief.[19] First, a review of the information available in the hearing record concerning the student's needs and then-current functioning will provide context to help assess whether the unilaterally obtained services were appropriate for the student.[20]

The hearing record includes what is apparently the student's most recent IESP, created on September 22, 2020 when the student was in sixth grade (Parent Ex. B at p. 1). According to the September 2020 IESP, the student functioned at a fifth grade reading level and exhibited "good decoding and phonological awareness skills but struggled with reading comprehension, inferencing, and higher-level thinking" (id. at p. 2). Although the student enjoyed reading, "the books he enjoy[ed] [were] often below his grade level" (id.). The student benefitted from visual aids, such as graphic organizers, and breaking paragraphs down into smaller chunks (id.). When writing, the student struggled with organizing paragraphs correctly and adding strong details (id.). Due to poor comprehension, the student had trouble expressing his thoughts on paper (id.). His sentence structure was incoherent, with poor spelling and grammatical errors, and his penmanship was "small, messy, and often hard to read," as he usually rushed through his writing (id.). The student benefitted from outlines, which helped him organize his thoughts and transfer them to paper (id.). In math, the student exhibited "good basic computation skills" but "struggled with word problems and forming equations" due to his processing delays (id.). According to the IESP, the student did not exhibit social or physical development needs (id. at p. 3).

The hearing record also includes an undated EdZone progress report for the 2023-24 school year (ninth grade) (see Parent Ex. F at pp. 1-4). As the IHO noted, the progress report is undated, but it appears to describe the student's needs as of the end of the 2023-24 school year (see IHO Decision at p. 5; Parent Ex. F at pp. 1-4). According to the progress report, the student's struggle with reading academic texts negatively impacted his comprehension, and "[h]e often [had] trouble answering basic 'wh' questions" and higher-order questions, lacking deep understanding (Parent Ex. F at p. 1). In writing, the student was able to express his ideas "but struggle[d] with organizing his thoughts coherently" (id. at p. 2). Additionally, the student's "essays often lacked logical progression and supporting details," and "his writing displayed frequent grammatical and spelling errors, with sentence fragments and run-on sentences being common" (id.). In math, the student

[19] As for the 2023-24 school year, neither party has appealed the IHO's determination that the district denied the student a FAPE on an equitable basis. As for the 2024-25 school year, neither party has appealed the IHO's determinations that the parent's claim was ripe for adjudication or that the June 1 affirmative defense precluded any relief.. Those unappealed determinations have, therefore, become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 (S.D.N.Y. March 21, 2013).

[20] In finding that parent did not meet her burden to prove that the services delivered to the student by EdZone during the 2023-24 school year were appropriate, the IHO, in part, noted that "the lack of evaluative data render[ed] the contents of the Progress Report as unpersuasive" (IHO Decision at p. 5). The IHO's rationale is flawed in this regard in that "it was the district's obligation to evaluate the student and present its view of [her] needs at the impartial hearing" (Application of a Student with a Disability, Appeal No. 18-049; see 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]; A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208, 214 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate although the private school's assessments and reports were alleged to be incomplete or inaccurate, as the fault for such inaccuracy or incomplete assessment of the student's needs lied with the district]).

"struggle[d] with multi-step problems and higher-order thinking tasks" (id.). He had difficulty "integrat[ing] concepts like fractions, negative numbers, and the distributive property, often missing key steps in solving problems, such as forgetting negative signs" (id.).

The progress report indicated that the student "struggle[d] with processing and organizing his thoughts, particularly in tasks that required higher-order thinking" (Parent Ex. F at p. 1). The student "struggle[d] with handling academic frustration, particularly when faced with correcting his mistakes or when tasks [felt] overwhelming" (id. at p. 3). The student's tendency to rush through tasks and overestimate his understanding interfered with his use of learning strategies and resulted in careless mistakes, particularly in reading comprehension and math (id. at pp. 1, 2).

According to the progress report, services should "focus on building [the student's] confidence in organizing his thoughts, reinforcing foundational math skills, and improving [the student's] reading comprehension" (Parent Ex. F at p. 3). The student "require[d] encouragement and scaffolding to help build resilience and improve his confidence in handling difficult tasks" (id.). Further, the student benefitted from a combination of visual, auditory, tactile, hands on, and cooperative learning modalities (id. at p. 2). His curiosity and his interest in technology, programming, and hands-on projects provided an incentive for him to engage in problem-solving and building activities (id. at pp. 2-3).

2. Services delivered by EdZone

In the instant appeal, the parties dispute whether the IHO erred in determining that the parent failed to prove the appropriateness of the services provided to the student by EdZone during the 2023-24 school year. The parent argues that testimony from a noneducational employee is sufficient so long as the hearing record includes documentary evidence to prove that the student received services. The parent asserts that, contrary to the IHO's findings, the progress report is dated and authored, contains evaluative data, highlights the methodologies used, and explains why those methodologies were necessary.[21] The parent further argues that, while the progress report shows that the student made progress, progress is not necessary for showing that unilaterally obtained services were appropriate. The district asserts that the progress report, which is not dated, states the goals the SETSS provider was working on with the student, but it does not explain how the student was functioning at the beginning of the school year, document the student's progress over the course of the school year, or document the extent to which the student achieved any goals by the end of the school year. The district further asserts that the hearing record includes no evidence regarding the instruction the student received in the general education classroom. Thus, according to the district, it is not possible to ascertain whether the student received special education support in the classroom to enable him to access the general education curriculum or whether the SETSS provided to the student, even if provided in a separate location, supported his functioning within the classroom.

[21] Contrary to the parent's assertions on appeal, although the EdZone progress report reflects that it related to the 2023-24 school year and lists the name of a provider, it does not state the date on which the report was prepared or the name of the person who authored the report (see Parent Ex. F at pp. 1-4; see also Tr. p. 20).

As explained below, the hearing record supports the IHO's determination that the parent failed to prove that the SETSS she unilaterally obtained from EdZone for the 2023-24 school year were appropriate for the student.[22]

Initially, as the IHO found, neither the testimony of the parent nor that of the administrator from EdZone offered any substance with regard to the SETSS provided to the student and the evidence in hearing record does not reflect the qualifications of the SETSS provider (see IHO Decision at p. 5; see also Tr. pp. 12-30; Parent Exs. E; L). The administrator testified that she never met the student, and she did not have any knowledge regarding the services provided to the student from the "educational side" (Tr. pp. 14-15). In her affidavit testimony, the administrator named the student's SETSS provider and indicated that the provider was "certified as [a] special education teacher[]" (Parent Ex. E at ¶¶ 3-4); however, during cross-examination, the administrator admitted that she did not check the provider's credentials (Tr. pp. 16-17). Instead, the administrator indicated that the agency's "HR department" reviewed providers' credentials before hiring them and, "being that this provider was hired by [the] agency, that means they are credentialed properly" (Tr. pp. 15-17). Yet, the administrator further indicated that EdZone did not hire the provider because EdZone used a "staffing agency," Evalcare, that hired the providers (Tr. p. 17). While the unilateral program need not be delivered by a certified special education teacher (Carter, 510 U.S. at 13-14), evidence of certification would lend some support for finding that the provider was qualified or experienced to deliver special education services absent other evidence. Here, the provider did not testify and there is no evidence in the hearing record regarding the provider's experience or qualifications.

Documentary evidence in the hearing record regarding the SETSS provided to the student during the 2023-24 school year includes time sheets and a progress report (Parent Exs. F-G). According to the EdZone progress report, the student received four periods of SETSS weekly, to address his reading, writing, and math delays (Parent Ex. F at p. 1).[23] The report noted that the student received SETSS in small groups, engaging in interactive and hands-on learning (id.). SETSS sessions included the use of visual aids, graphic organizers, and tactile activities involving real-world applications (id. at p. 2). The student's reading interventions "focused on guided reading strategies, breaking down complex texts, and improving comprehension through graphic

[22] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district; a static and reliable definition of "SETSS" does not exist within the district; and, unless the parties and the IHO take the time to develop a record on the topic in each proceeding, it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (see Application of a Student with a Disability, Appeal No. 19-047).

[23] The EdZone administrative employee testified, in an affidavit dated November 5, 2024 after the conclusion of the 2023-24 school year, that, during the 2023-24 school year, the student was "entitled to [five] hours per week of SETSS," and that EdZone "ha[d] the capacity to provide these services to be billed as performed for the entire school year" (Parent Ex. E ¶¶ 1, 2). However, according to the time sheets, the student only received four periods per week of SETSS, which equated to three hours per week of SETSS (see Parent Ex. G).

organizers and repetition" (id. at p. 1). Writing interventions "included structured writing exercises that emphasize[d] organizing ideas, using transitions, and editing for grammar," as well as graphic organizers to help the student plan his essays (id. at p. 2). Math interventions "emphasized breaking down complex problems into manageable steps and reinforcing foundational skills" (id.).

With regard to reading, the progress report indicated that "[w]ithout continued support, there [wa]s a concern that [the student] might regress in reading" (Parent Ex. F at p. 1). According to the progress report, the student "often [found] it challenging to revise and improve his [writing]" (id. at p. 2). While the student had made progress in math, "there [were] concerns about regression without continued support, as his reliance on external tools like calculators limited his ability to detect and correct errors independently" (id.). The progress report described the student's general progress as "fragile" and expressed concern about regression if supports were withdrawn (id. at p. 4).

Although the progress report included goals to address the student's needs in reading comprehension, writing, and math, it appears that the goals were recommended for the student for the 2024-25 school year and, therefore, do not reflect what skills the provider targeted with the student during the 2023-24 school year (Parent Ex. F at p. 4).

As stated above, the Burlington-Carter framework requires the parent to prove that the services she unilaterally obtained for the student constituted specially designed instruction designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

By itself, the SETSS progress report indicates that the services provided to the student addressed the student's identified areas of weakness in reading, writing, and math. However, due to the noted issues with the reliability of the progress report, such as the lack of evidence of the provider's certification and the progress report not being dated and not identifying who authored the report, the report alone is not sufficient to support finding that the approximately three hours per week of SETSS delivered to the student were appropriate to meet his needs.

Review of the EdZone SETSS timesheets for the 2023-24 school year shows that the student predominantly, if not always, received SETSS from 3:20 p.m. to 4:05 p.m., and, as there was no class schedule entered into the hearing record, it is unclear whether these services were delivered as part of the student's school day or after school (see Parent Ex. G).

Pertinently, the hearing record does not include any information regarding the curriculum at the student's nonpublic school or the instruction the student received from his nonpublic school outside of the SETSS. Nor does the hearing record include information describing the way in which the SETSS supported the student in the general education classroom. Without such information, it is not possible to ascertain whether the student received special education support in the classroom to enable him to access the general education curriculum or whether the SETSS delivered to him, even if provided in a separate location, supported his classroom functioning. 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, although the progress report does provide some evidence of specially designed instruction, overall, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate to meet his needs.

Thus, considering the totality of the circumstances, the parent failed to meet her burden of proving that EdZone's services were appropriate for the student (see Application of a Student with a Disability, Appeal No. 24-436; see also Application of a Student with a Disability, Appeal No. 548 [finding that the parent failed to prove the appropriateness of unilaterally obtained SETSS where the hearing recorded included no evidence regarding the curriculum at the student's general education nonpublic school or the instruction the student received there]).

VII. Conclusion

In summary, the district's request for dismissal of the parent's appeal and underlying claim for lack of subject matter jurisdiction is denied. As explained above, the evidence supports the IHO's finding that the parent failed to prove the appropriateness of the services she unilaterally obtained from EdZone for the 2023-24 school year. Thus, the necessary inquiry is at an end, and I need not reach the issue of whether equitable considerations support the parent's request for relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).[24]

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2025

STEVEN KROLAK
STATE REVIEW OFFICER

[24] Although I find it is unnecessary to weigh the equities in this case, I note that the IHO erred by comingling consideration of whether the unilaterally obtained services were reasonably calculated to enable the child to receive educational benefits—the second prong of the Burlington/Carter analysis—with equitable considerations—the third prong of the Burlington/Carter analysis (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations within the IHO's analysis of the appropriateness of the unilateral placement]). The following factors cited by the IHO as equitable considerations, while not proper equitable considerations, were relevant to the issue of whether the unilaterally obtained services were educationally appropriate: the lack of evidence regarding the SETSS provider's qualifications; the absence of testimony from the provider detailing the activities conducted to assist the student; and the progress report's lack of detail regarding the methodologies used, assessments given, how progress was measured, the student's abilities at the start of the school year, or how the student's abilities changed by the end of the school year (IHO Decision at pp. 6-7).