The University of the State of New York

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

No. 25-029

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:
Shehebar Law P.C., attorneys for petitioner, by Ariel A. Bivas, Esq.

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 parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their son's private services delivered by Alpha Student Support (Alpha) for a portion of the 2023-24 school year. Respondent cross-appeals from that portion of the IHO's decision which denied its motion to dismiss the parents' due process complaint for lack of subject matter jurisdiction. The appeal must be dismissed. The cross-appeal dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on April 8, 2024, found the student eligible for special education as a student with a learning disability, and formulated an IESP for the student with a projected implementation date of April 22, 2024 (see Parent Ex. B).[1, 2] The CSE recommended that the student receive three periods per week of direct, group special education teacher support services (SETSS) in Yiddish (Parent Ex. B at pp. 8-9).[3] The IESP indicated that the student was parentally placed in a non-public school (id. at p. 11).

The parent signed a contract with Alpha Student Support on May 1, 2024 by which she "confirme[d] [her] understanding" that the student was "entitled to receive funding or reimbursement" from the district for the recommended SETSS, and that Alpha would "make every effort to implement the recommended services . . . with suitable qualified providers for the 2023-24 school year (Parent Ex. C).[4] The document specified that the parent understood that Alpha "intend[ed] to provide" the student's SETSS at a rate of $195 per hour (id. at p. 3).

According to a secretary employed with Alpha, Alpha staff delivered SETSS to the student during the 2023-24 school year (Parent Ex. D ¶ 2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Specifically, the parents alleged that the district failed to implement the special education services from the April 2024 IESP, and, as a result, the parents "unilaterally secured [their own providers to work with the [s]tudent at an enhanced rate" (id. at p. 2). The parents asserted that pendency was "based on the aforementioned [April 2024] IESP" and sought "funding for the services contained therein during the pendency of the proceeding" (id.).

The parents further alleged "[i]n the event that the [district] maintains that it did provide a FAPE or appropriate program for the [s]tudent, the [p]arents reserve the right to challenge the

[1] Both parties entered a copy of the student's April 2024 IESP into the hearing record (compare Parent Ex. B, with Dist. Ex. 3). For purposes of this decision only the parent's exhibit will be cited. Additionally, some of the parent's exhibits are not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Parent Exs. B at pp. 1-12; C at pp. 1-3; F at pp. 1-5).

[2] 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])

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

[4] Alpha has not been approved by the Commissioner of Education as an agency or school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

appropriateness of any recommended placement, as well as the [s]tudent's entire IESP including, but not limited to, the appropriateness of any: services, programs, classes, staffing ratios, performance levels, student participation, accommodations, objectives, and drafted annual goals."

As a proposed resolution to the problem, the parents requested that the IHO order "direct funding/reimbursement for the SETSS mandated" in the April 2024 IESP "at an enhanced rate" (Parent Ex. A at p. 2). The parents also stated their intent to "reserve the right to seek any compensatory educational relief for services that should have been provided or for services that were mandated to the [s]tudent but not provided due to the [district's] denial of a FAPE or failure to implement the SETSS and related services" (id. at pp. 2-3).

In a response to the due process complaint notice, the district indicated that it intended to present several defenses during the impartial hearing, including, among other things, that the IHO lacked subject matter jurisdiction to hear the dispute.

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 5, 2024 and concluded the same day (Tr. pp. 1-17). Prior to the impartial hearing, the district filed a motion to dismiss for lack of subject matter jurisdiction and ripeness on August 30, 2024, which the IHO denied on the record during the impartial hearing (Tr. p. 6). During the impartial hearing, the parties stipulated: that the Alpha secretary did not provide direct services to the student nor did she observe the services provided to the student during the 2023-24 school year; that Alpha charged $195 per hour and that the private SETSS teacher received $90 to $120 per hour for the services; and that the secretary did not know the breakdown of where the rest of the money went (Tr. pp. 10-11). Both parties rested on the documents admitted into the hearing record and provided combined opening and closing statements (Tr. pp. 12-15).

In a decision dated December 2, 2024, the IHO determined that there was no dispute that the student was entitled to services pursuant to the April 2024 IESP and that the district failed to implement the services mandated; accordingly, she found that the district failed to sustain its burden to demonstrate that it provided the student a FAPE for the 2023-24 school year (IHO Decision at p. 6). The IHO also held that it was the district's responsibility to offer the student compensatory education but that the district failed to show that it offered any compensatory services to the student (id. at p. 8).

The IHO considered whether to award compensatory education and determined that the evidence in the hearing record, including the testimony from Alpha's secretary who had no substantive knowledge of the student or his services, failed to support a compensatory education award because the parents failed to demonstrate that the student received "the mandated services" that met the student's special education needs (IHO Decision at pp. 7-8). Accordingly, the IHO denied the parents' requested relief (id. at p. 9).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in determining the parents failed to demonstrate that the student received the mandated services that met his special education needs. The parents argue the student's Alpha progress report admitted into the hearing record identifies

the student's struggles and deficits, what the provider had been working on to address such struggles and deficits, and how the student made progress in light of those services. As relief, the parents request direct funding to Alpha for the "[three] periods of SETSS at the provider's contracted rate of $195 per hour" (Req. for Rev. at p. 4).

In an answer with cross-appeal, the district denies the material allegations contained in the request for review. The district argues that the IHO properly denied the parents' requested relief. Generally, the district argues that the parents failed to meet their burden that the SETSS provided by Alpha was specially designed instruction to address the student's needs and that the equitable considerations do not favor the parents because the parents failed to send a 10-day notice of unilateral placement to the district indicating that they intended to obtain private services at public expense. In its cross-appeal, the district asserts the IHO erred by denying its motion to dismiss for lack of subject matter jurisdiction and ripeness and also argues that neither the IHO nor an SRO have subject matter jurisdiction over this matter.

The parents' filed an answer to the district's cross-appeal and the district filed a reply thereto.[5]

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

[5] Upon review, the affidavit of service for the parents' answer to the district's answer and cross-appeal reflects that, consistent with the district's contentions in its reply, it was untimely served on January 27, 2025 (see Parent Aff. of Personal Serv.). The district's answer and cross-appeal was served upon the parent's attorney on January 17, 2025 meaning the parents had until January 24, 2025 to service their answer upon the district. The answer was served three days later on January 27, 2025 (see Parent Aff. of Personal Serv.). No request for an extension of time in which to answer the district's cross-appeal was made by the parents, nor does the answer explain the failure to timely serve the answer to the district's cross-appeal (8 NYCRR 279.10[e]). Accordingly, I will not consider the parents' answer, as it was not served within the time permitted by regulations (8 NYCRR 279.4[b]; 279.5; 279.10[e]; 279.11[b]). Counsel is cautioned to comply with the Office of State Review's regulations governing practice before this office in future filings. Moreover, even if I had considered the parents' filing, it would not have changed the outcome in this case.

services is made (Educ. Law § 3602-c[2]).[6] "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.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

At the outset it should be noted that neither party appealed the IHO's determination that the district did not provide SETSS services to the student. 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 [S.D.N.Y. Mar. 21, 2013]).

[6] 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]).

[7] 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.

A. Preliminary Matters – Subject Matter Jurisdiction

I will turn first to the district's argument in its cross-appeal that the IHO erred by denying the district's motion to dismiss for lack of subject matter jurisdiction.

The IHO determined that the emergency rule adopted by the Board of Regents to amend 8 NYCRR 200.5 applied only to cases filed after July 15, 2024 and thus did not apply to the instant matter because the parents' filed their due process complaint notice on July 12, 2024 (IHO Decision at p. 4). Accordingly, the IHO denied the district's motion to dismiss, noting that the guidance issued by the State Education Department did not have the force of law (see Tr. p. 6; IHO Ex. II at p. 19).

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 and thus the parents' claims should be dismissed on such basis.

Recently in several 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., (see, e.g., Application of a Student with a Disability, Appeal No. 24-601; 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 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 New York Education Law has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent 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 free appropriate public education to the student" (Educ. Law § 4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals explained that student authorized to receive services pursuant to Education Law § 3602–c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further

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

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

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

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

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

[10] 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 12, 2024 (Parent Ex. A at p. 7), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[11] On November 1, 2024, the Supreme Court issued a second order clarifying that the temporary restraining order

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]).[12]

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

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 parents alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private services from Alpha Student Support 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

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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]).

[12] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website; but is included with the district's motion to dismiss (IHO Ex. II at p. 19).

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]).[13] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for

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

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. Student's Needs

Although not in dispute on appeal, a brief discussion of the student's needs is necessary to resolve the issue of whether the SETSS delivered by Alpha were appropriate for the student for the 2023-24 school year.

The evidence in the hearing record concerning the student's educational history is sparse. At the time the student's April 8, 2024 IESP was developed, the student was six years old, in kindergarten, and attending a private school (Parent Exs. B at pp. 2-3; F at p. 2). According to the IESP, a psychoeducational evaluation of the student was conducted in Yiddish on March 6, 2024 (Parent Ex. B at p. 2). The IESP noted that, at that time, the student's overall level of cognitive functioning as measured by the Wechsler Preschool and Primary Scales of Intelligence–Fourth Edition (WPPSI-IV) was in the borderline range (id.). The IESP indicated the student's

performance related to measures of verbal comprehension, visual spatial abilities, and processing speed were all in the low average range (id.). In addition, the IESP indicated the student's fluid reasoning abilities were in the extremely low range and his working memory was in the borderline range (id.). More specifically, the IESP identified the WPPSI-IV subtests in which the student had performed in the average range—information and cancellation, and subtests in which the student had performed in the low average range—block design, object assembly, and bug search (id. at pp. 2-3). Subtests in the borderline range were similarities, matrix reasoning, picture memory and zoo locations, and subtests in the extremely low range were picture concepts (id.).

According to the April 2024 IESP, an informal assessment of the student's basic readiness and pre-academic skills was conducted by a psychologist using the Wechsler Individual Achievement Test - Fourth Edition (WIAT-4) (Parent Ex. B at p. 2). With regard to reading, the IESP indicated that the student was unable to identify any of the letters of the English alphabet as his school waits until first grade to teach these skills (id. at p. 3). When presented with Yiddish alphabet letters the student "was able to identify most of the letters" (id.). According to the IESP, the student "learned to combine alphabet consonant sounds with some of the vowel sounds, which he attempted to perform for the[e] psychologist," however, he made multiple errors when doing so (id.). The IESP stated that the student's math skills were assessed informally and when presented with a chart of numbers in order the student identified numbers one through eleven and was also able to correctly identify "most of the common shapes and colors" (id. at pp. 3, 4). The IESP noted that according to the student's school staff, the school did not formally teach addition or subtraction but that students were given short stories that related to number sentences and the opportunity to use manipulatives to form base ten algorithms and problem solving for reasoning skills (id.)

A teacher update and report dated April 8, 2024, was included in the April 2024 IESP, and according to the report the student presented with poor verbal comprehension and deficient reasoning skills which impeded his ability to comprehend texts or pictures (Parent Ex. B at p. 3). Additionally, the teacher reported that the student had a "very delayed working memory and struggle[d] to recall information he ha[d] just listened to, or even skills he ha[d] previously mastered" (id.). As recorded in the IESP, the teacher also reported that the student struggled to understand a picture, retell a story, or sequence events and was unable to infer or predict (id.). In addition, the teacher reported that the student showed "worrisome delays in comprehension, that if not addressed significantly w[ould] exacerbate any academic challenges and cause him to fall further behind" (id.). The IESP further cited the teacher's report that indicated the student did not learn the alphabet, that his pre-alphabet skills were delayed and his phonemic awareness skills were deficient, and that the student was characterized as having poor retention and memory skills (id.).

Regarding writing, according to the April 2024 IESP, the teacher reported that the student was unable to write his name or copy letters, but at the student's school they didn't formally teach the students to write until first grade (Parent Ex. B at pp. 3-4). According to the April 2024 IESP, at the student's school, students were expected to recognize letters in Yiddish and some in English and the student showed some difficulty in both (id. at p. 4).

During the April 2024 CSE meeting, the private school instructor and parent who attended the meeting revealed that the student was retained in his then-current grade and was still having some difficulty in his dominant language and struggling with past and new concepts (Parent Ex.

B at pp. 3-4). The parent expressed that they paid a tutor to assist the student, "but moving forward [the parents were] looking for supports to aide their son academically" (id.at p. 4).

Regarding social development as per a social history report included in the April 2024 IESP, the student was a happy, respectful child who enjoyed building toys, playing sports and spending time with friends (Parent Ex. B at p. 4). The student was characterized as having difficulty focusing and following multi step directions and the IESP stated that he "[wa]s becoming aware of his academic struggles and [wa]s starting to become withdrawn" (id.).

According to the April 2024 IESP, physically the student was healthy, his hearing and vision were within normal limits, and he could participate in all school activities (Parent Ex. B at p. 4).

The April 2024 IESP identified modifications and resources needed to address the student's management needs including: differentiation/multi-sensory instruction, teacher prompts for focusing/redirections, mnemonic devices, preferential seating-closest to teacher, simplified directions/steps, graphic organizer, sentence starters, guided questions, manipulatives (white boards, dry erase markers, counting chips, dice), peer collaboration, positive reinforcement, extended processing time, small group instructions, scaffolding, praise and encouragement, restating, and student checklist (Parent Ex. B at p. 5). In addition, the April 2024 CSE recommended that the student receive three periods of group SETSS in Yiddish in a separate location and specially designed instruction to promote progression and involvement within the general education curriculum (id. at pp. 5, 8-9). According to the April 2024 IESP, due to the student's cognitive weaknesses in working memory and fluid reasoning the student struggled with attending to tasks, problem solving, and utilizing inductive reasoning which impacted his ability to solve problems, read and compose texts, decode and answer comprehension questions in an age-appropriate manner (id. at p. 5).

The April 2024 CSE developed five annual IEP goals for the student that addressed: writing using correct capitalization; composing a four to five sentence paragraph with appropriate spacing, formation and consistent size of letters/words; adding and subtracting with numbers 0 to 100 using strategies based on place value, properties of operations, and/or the relationship between addition and subtraction; answering wh- questions with logical responses to describe objects, categories, and tell a story in sequential order; and develop language skills to answer questions to describe a personal experience/story/event and retell in sequential order including two/three specific details using multisensory stimuli (Parent Ex. B at pp. 6-8). The April 2024 CSE did not recommend any related services, testing accommodations, or special transportation for the student (id. at pp. 8-9).

An updated description of the student's needs was provided in a June 21, 2024 progress report from the student's SETSS provider, which is summarized further below (Parent Ex. F).

2. Appropriateness of SETSS provided by Alpha

Turning now to the parents' claim that the SETSS provided by Alpha was appropriate, the hearing record is very sparse regarding the delivery of SETSS by Alpha and, as the IHO noted, did not include an affidavit or testimony from the parent or the SETSS provider to enhance the sparse information. The only evidence included in the hearing record was an unsigned SETSS progress

report dated June 21, 2024, the SETSS teacher certification, and a very brief affidavit from the secretary of Alpha (Parent Exs. D-F). The IHO determined that the evidence in the record failed to demonstrate that the student was receiving the mandated services that met the student's special education needs using compensatory education as a basis for the denial (IHO Decision at pp. 7-8). However, the IHO appeared to apply a compensatory education analysis for private services unilaterally obtained from Alpha without the consent of district officials and, therefore, erred by in failing to apply the Burlington/Carter standard as indicated above. Accordingly, the undersigned will apply the Burlington/Carter standard to determine if the SETSS provided by Alpha was appropriate.[14]

According to the affidavit testimony of the Alpha secretary she recognized "the parent service contract, progress report, and provider's credentials being offered into evidence as they were pulled from the [s]tudent's file with Alpha for the 2023-2024 school year" (Parent Ex. D ¶ 3). The Alpha secretary did not testify during the impartial hearing as she had no knowledge of the student, or the SETSS services provided (see Tr. p. 10-11). The SETSS provider credentials submitted by Alpha indicated that the provider was certified to teach students with disabilities (Birth to Grade 2)(Parent Ex. E).

According to the June 2024 SETSS progress report, the student presented with a learning disability, poor reasoning, and working memory "which hinder[ed] his ability to make progress in the mainstream classroom independently" (Parent Ex. F at p. 2).[15] The student was described as having a hard time focusing on lessons and tasks and the progress report noted that he often did not understand instructions or concepts being taught (id.). The student was also described as learning concepts at a slower pace than his peers and having a hard time retaining mastered skills (id.). The SETSS provider indicated that the student benefitted from refocusing, simplified instruction, individually leveled lessons, extra time to answer questions, pre-teaching of concepts taught, and visual aids (id.).

With regard to reading, the June 2024 SETSS progress report indicated the provider worked on identifying letters of the alphabet as the student "was completely unfamiliar with their forms or sounds" (Parent Ex. F at p. 2). The SETSS provider reported that she "spent much time teaching the student the first few letters to grant him the skills necessary to keep up this coming year when his classmates will be introduced to the English alphabet" (id.). The SETSS provider stated the student "receive[d] multisensory input and drills of some of these letters and their sounds" (id.). The SETSS provider reported that she used games to keep the student focused and engaged (id.). Further according to the June 2024 SETSS progress report, "[i]n April" the student reportedly "did not possess almost any phonemic skills" and barely increased his skills "despite the [SETSS] provider's intervention through the use of games, activities, and individualized teaching at his pace in a setting with minimal distraction" (id.). The SETSS provider reported that they used repetition, continuous practice, cues, prompts and motivation to help the student advance (id.).

[14] In the request for review the parents argue that they indeed met the Burlington/Carter test.

[15] The June 2024 SETSS progress report is not paginated; accordingly, it will be paginated with numbers 1-5 with the first page being the cover sheet for the purposes of this decision (see Parent Ex. F at pp. 1-5).

The student's "current reading goals" that were listed in the June 2024 SETSS progress report targeted the student's ability to apply grade-level phonic and word analysis skills in decoding words and ability to identify the name of the letter heard at the beginning of a series of words with the same beginning consonant, read by the teacher (Parent Ex. F at p. 3). The evidence does not describe the time period to which the goals apply, in terms of whether they were goals the student was already working on, or goals that the student might work on in the future.

Turning to the student's comprehension, the June 2024 SETSS progress report stated that the student had difficulty recalling information immediately after listening to it and could not answer basic comprehension questions correctly (Parent Ex. F at p. 3). The student struggled to retell stories, sequence accurately, and had difficulty interpreting pictures (id.). The June 2024 SETSS progress report stated that the student benefitted from scaffolded teaching methods, repetition, cuing, and prompts (id.). The SETSS provider reported in the June 2024 SETSS progress report that she taught the student skills to answer wh- questions about pictures and very short stories and "[w]ith much support the student [wa]s advancing in these skills." (id.)

According to the progress report, the student's "current comprehension goals" targeted his ability to answer wh- questions with logical responses and to develop language skills to answer questions and retell a story in sequential order (Parent Ex. F at p. 3). Again, the evidence in the hearing record does not describe the time period to which the goals apply.

In math, the progress report indicated that in April the student recognized most of the basic shapes and colors and "[w]ith provider input, he added more shapes and colors to his repertoire" (Parent Ex. F at p. 3). The SETSS provider reported that they reviewed numbers 1-10 with the student to help him maintain previously learned skills (id.). The provider also used manipulatives and drawings to help the student learn basic computation (id.). There was no description of what input was given by the provider to assist the student with his shapes and colors, and there was no description of the types of manipulatives or drawings used (see Parent Ex. F).

A current math goal listed in the progress report targeted the student's ability to fluently add and subtract with numbers 0-100 when provided with specially designed instruction and multisensory approaches, but once again if they were his then-current goals, it is hard to understand how the student would work on them if, at the same time, was still working on precursor skills such as identifying shapes and colors (Parent Ex. F at p. 4).

Regarding writing the June 2024 SETSS progress report stated that the student's writing skills were "non-existent in April (Parent Ex. F at p. 4). According to the June 2024 SETSS progress report, the provider taught the student to form letters and identify letters by providing the student with tracing and formation review (id.). The SETSS provider also reported that the student benefited from "sentence starters and graphic organizers which encourage[d] writing development" (id.). The student's current writing goals indicated that by using graphic organizers, sentence starters and a multi-sensory approach the student would be able to write a four to five sentence paragraph, which seems unrealistic (id).

The foregoing evidence in the hearing record does not support a finding that the parent met her burden under Burlington-Carter to prove that the services she unilaterally obtained for the student constituted specially designed instruction to address 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]). The hearing record did not include attendance records, or session notes, or an affidavit from the SETSS provider. Additionally, 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 how the SETSS delivered to him supported his functioning in the classroom, even if provided in a separate location in accordance with the IESP developed for him by the district. The June 2024 SETSS progress report mentioned almost the same exact information included in the April 2024 IESP (Compare Parent Ex. B at pp. 2-9 with Parent Ex. F at pp. 2-4).

The hearing record lacks any meaningful information concerning the student's general education schooling in terms of the instruction and curriculum provided that special education services privately obtained by the parent were supposed to support . Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate. The program, as a whole, consisted of enrollment at a general education nonpublic school along with the parent's unilaterally-obtained SETSS, with the idea that the specially designed instruction provided should support the student's access to the nonpublic school's curriculum; however, under the circumstances of this matter, the hearing record lacks any meaningful evidence to support such a finding. The only evidence about the student in his general education classroom was indicated in the June 2024 SETSS progress report which stated the student struggled in "many areas of classroom functioning" which impacted his ability to make progress in a mainstream classroom (Parent Ex. F at p. 4). According to the June 2024 SETSS progress report, the student required redirection, prompting and simplification to make meaning of new information and skills taught as well as required repetition to retain and master information learned (id.). There was no further information of when redirection and prompting were used in the classroom or how instruction was simplified to allow the student to retain and master information learned (id.). Consequently, the parents did not meet their burden of proving that the SETSS services provided by Alpha were appropriate to meet the student's unique needs for the 2023-24 school year and the IHO's determination is upheld.[16]

[16] Though the undersigned is not reaching the equitable considerations of this matter, the district is correct that the evidence does not indicate that a 10-day notice of unilateral placement was sent by the parent to the district indicating that they intended to make the district responsible for payment for privately obtained services without the consent of district officials. Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school (or public dual enrollment services in this instance), 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]). Parents of students enrolled in a private school are not exempted from the 10-day notice requirements (S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009]).

VII. Conclusion

As described above, the IHO did not err in concluding that she had subject matter jurisdiction over the parents' claims. However, as noted above, there is no challenge to the IHO's decision that the district denied the student a FAPE. Furthermore, while the IHO erred in relying on a compensatory education analysis rather that a Burlington/Carter analysis, I find that the outcome of the proceeding would not lead to a different conclusion because the parents did not ultimately meet their burden of proving that the unilaterally obtained SETSS services from Alpha were appropriate to meet the student's unique needs for the 2023-24 and, therefore, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 14, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER