The University of the State of New York

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

No. 25-050

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

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Enhanced Support Services, Inc. (Enhanced) for the 2023-24 school year. The district cross-appeals, arguing that the IHO lacked subject matter jurisdiction to hear the matter. Both the appeal and cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

III. Facts and Procedural History

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

Briefly, the CSE convened on February 27, 2023, determined that the student was eligible for special education services as a student with a speech or language impairment, and created an IESP for the student with an implementation date of April 3, 2023 (see Parent Ex. B).[1] The February 2023 CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) in Yiddish and two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at p. 5).[2]

On May 18, 2023, the parent signed a district form advising the district that the student would be parentally placed in a nonpublic school at her own expense, and that she wanted the district to provide the student with special education services for the next school year (Parent Ex. D). On August 8, 2023, the parent executed a contract with Enhanced for the provision of SETSS at a rate of $195.00 per hour and speech-language therapy at the rate of $295.00 per hour for the 2023-24 school year (Parent Ex. E).[3] In an email dated August 21, 2023, the parent provided the district with a ten business day written notice (ten-day notice) of her intention to unilaterally place the student in a nonpublic school (see Parent Ex. C). Through the parent's ten-day notice, the parent requested that the district implement the student's IESP or the parent would have to locate providers at enhanced rates and seek reimbursement (id. at p. 2). The student attended first grade in a mainstream setting at a nonpublic school during the 2023-24 school year and received SETSS and speech-language therapy through Enhanced (see Parent Exs. F; G; I ¶¶ 11, 12).

The CSE reconvened on March 11, 2024 and created an IESP with an implementation date of March 25, 2024, which recommended that the student receive five periods per week of group SETSS in Yiddish and two 30-minute sessions per week of individual speech-language therapy in Yiddish (Dist. Ex. 2 at pp. 1, 7). Also on March 11, 2024, the district issued a prior written notice of recommendation, informing the parent of the recommendations made by the March 2024 CSE (IHO Ex. I at pp. 4-9).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent

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

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

Ex. A).[4] The parent asserted that the district failed to provide the student with the services mandated in the February 2023 IESP and that the parent was forced to secure a SETSS provider and a speech-language therapist at enhanced rates (id. at p. 2). The parent requested an award of compensatory education for any of the mandated SETSS and speech-language services that the student failed to receive for the 2023-24 school year (id.). The parent also requested an order directing the district to fund the SETSS and speech-language services at the contracted rates (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing was held before an IHO with the Office of Administrative Trials and Hearings (OATH) on November 6, 2024 (Tr. pp. 1-26). At the hearing, the IHO noted that the district failed to provide the parent's attorney with a written notice of intent to cross-examine the parent's witnesses after the parent's disclosure and therefore held that the district waived its right to cross-examination (Tr. p. 13). In a decision dated December 17, 2024, the IHO found that the district failed to meet its burden that it implemented the student's IESPs and therefore the district did not provide the student with a FAPE for the 2023-24 school year (IHO Decision at pp. 2, 4).

The IHO further held that the parent failed to meet her burden of proving that Enhanced provided the student with specially designed instruction that was sufficient to meet the student's unique needs (IHO Decision at pp. 2, 4-6). Accordingly, the IHO denied the parent's claim for direct funding for the 2023-24 school year (id. at p. 7). Regarding equitable considerations, the IHO noted that if he had found that the parent had met her burden of proving that Enhanced's services were appropriate to meet the student's unique needs, the IHO would have reduced the parent's requested award to funding at reasonable market rates as determined by the district because the hearing record lacked evidence as to the amounts paid by Enhanced to the SETSS provider or speech-language therapist (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent failed to meet her burden that the SETSS and speech-language services provided by Enhanced were appropriate to meet the student's unique needs. The parent argues that the IHO is biased against dually enrolled students and that the IHO erred by applying the Burlington-Carter three prong test to the parent's IESP implementation claim. The parent asserts that there was no equitable basis to reduce Enhanced's contracted rates for the provision of SETSS and speech-language services. The parent alleges that it is not the parent's burden to prove that Enhanced's contracted rates were appropriate, rather it is the district's burden to prove that the rates were excessive and the district failed to do so.

The district submits an answer and cross-appeal, asserting for the first time on appeal that the IHO lacked subject matter jurisdiction to hear the case. As a defense, the district argues that it was the parent's burden to prove that the SETSS and speech-language therapy services provided

[4] In a response to the parent's due process complaint notice dated September 26, 2024, the district notified the parent of its intention to "pursue all applicable defenses during the proceedings" and included a non-exhaustive list of potential defenses (IHO Ex. I at pp. 2-3).

by Enhanced were appropriate and that the parent failed to meet her burden. The district asserts that the IHO did not display bias against the parent. In the event of the reversal of the IHO's alternative determination that the SETSS and speech-language therapy service rates should be reduced to reasonable market rates, the district argues that equitable considerations support a full denial of the parent's requested relief.[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 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

[5] In a "statement of fact" that appears to be a reply to the district's answer and cross-appeal, the parent argues that the district made incorrect statements in its answer and cross-appeal and requests that the district be directed to fund the services provided by Enhanced at the contracted rates. However, the parent submitted the reply for this case on March 11, 2025, two days after it was due to be served on March 9, 2025. In general, documents that do not comply with the provisions of sections 279.4, 279.5, and 279.6 may be rejected at the sole discretion of the SRO (8 NYCRR 279.8[a]). While I am not permitted to unilaterally alter the 30-day timeline for issuing State-level review decisions, I am also not required to accept late filings whenever a party sees fit to do so. Considering that the parent in this case was given the opportunity to seek a timeline extension to correct the filing noncompliance and declined to do so, the reply and any defenses raised therein will not be accepted late and are rejected (8 NYCRR 279.8[a]).

[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]).

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

A. Preliminary Matters

1. Subject Matter Jurisdiction

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

In numerous 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. 25-077; Application of a Student with a Disability, Appeal No. 25-076; Application of a Student with a Disability, Appeal No. 25-075; Application of a Student with a Disability, Appeal No. 25-074; Application of a Student with a Disability, Appeal No. 25-071; Application of a Student with a Disability, Appeal No. 25-067; Application of a Student with a Disability, Appeal No. 24-620; 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

[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.

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]).[8]

[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]).

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 notice 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 text and legislative history of Education Law § 3602-c, concluded that the legislature has not eliminated a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals has

[9] In 2004, the State Legislature amended subdivision two of the Education Law § 3602-c, to take effect June 1, 2005 (see L. 2004, ch. 474 § 2 [Sept. 21, 2004]). Prior to such date, the subdivision read in part:

> Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 [June 6, 1990] [emphasis added]). The amendments that became effective on June 1, 2005, removed the last sentence of subdivision two relating to the review of a board of education's failure or refusal to provide equitable services by the Commissioner (L. 2004, ch. 474 § 2). A review of the statute's history and the New York State Assembly Memorandum in Support of Legislation shows that the Legislature intended to remove the language that an appeal to the Commissioner of Education under Education Law § 310 was the exclusive vehicle for review of the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c, given that the earlier sentence in subdivision two of such section authorized review by an SRO from a district CSE's determination in accordance with Education Law § 4404 (Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). The Memorandum explains further:

> The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide

explained that students authorized to receive dual enrollment 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.

In 2007 the State Department of Education issued guidance further interpreting Education Law § 3602-c after legislative amendments in 2007 took effect, which provides that "[a] parent of a student who is a [New York State] resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or the provision of special education services may submit a Due Process Complaint Notice to the school district of location" ("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 3206-c," Attachment 1 at p. 5, VESID Mem. [Sept. 2007] [emphasis added], https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

The number of disputes involving the dual enrollment statute statewide remained very small until only a handful of years ago and then dramatically intensified to tens of thousands of due process filings per year within certain regions of this school district in the last several years. As a result, public agencies and parents began to grapple with addressing these circumstances within the district.[10]

In its answer and cross-appeal, the district contends that the decision does not change the plain meaning of the Education Law and that under the Education Law, "there is not, and never

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> for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.

(Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). Thus, the amendments made by the State Legislature were intended to clarify the forum where disputes could be brought, not 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.

[10] 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. 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]); however enforcement was barred under a temporary restraining order (see Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24, Order to Show Cause [Sup. Ct., Albany County, Oct. 4, 2024]) and the regulation has since lapsed.

has been, a right to bring a complaint for the implementation of IESP claims or 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]).[11] However, the guidance was issued in conjunction with a regulation that was adopted on an emergency basis that has since lapsed as further described below.

Case law has not addressed the issue of whether Education Law § 3602-c imposes limitations on the right to an impartial hearing under Education Law § 4404 such as precluding due process complaints on the implementation of an IESP or if certain types of relief available under § 4404 are repudiated by the due process provisions of § 3602-c. Instead, case law has carved out a narrow exception of when exhaustion is not required if the "plaintiff's claim is limited to the allegation that 'a school has failed to implement services that were specified or otherwise clearly stated in an IEP.'" (Levine v. Greece Cent. Sch. Dist., 353 F. App'x 461, 465 (2d Cir. 2009); quoting Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 489 [2d Cir. 2002] see Intravaia v. Rocky Point Union Free Sch. Dist., 919 F. Supp. 2d 285, 294 [E.D.N.Y. 2013]).

More recently, the New York State Supreme Court has also signaled that administrative exhaustion is not required, indicating that, if the district fails to implement the services listed on their child's IESP, the parents seeking an enhanced rate apply to the district's Enhanced Rate Equitable Services (ERES) unit, and the requested rates are denied, the parents could seek judicial review (Agudath Israel of America v. New York State Bd. of Regents, No. 909589-24, slip op. at 7 [Sup. Ct., Albany, County, July 11, 2025]). However, the Court did not address whether parents must use the ERES procedure or whether they may also permissively utilize the administrative due process procedures. Because petitioners sought injunctive relief of a State regulation that had lapsed, the Court denied petitioners' request for a preliminary injunction as moot, and further denied their request for a permanent injunction "because there [wa]s an adequate remedy at law" regarding the ERES procedure and subsequent opportunity for judicial review (Agudath Israel of America, No. 909589-24, slip op. at 6, 7). The Court acknowledged that all parties believed the

[11] 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. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). The guidance document is no longer available on the State's website; however, it has been added to the administrative hearing record.

backlog in resolving the large number of "enhanced rate" cases in due process proceedings is "a significant problem" (id. at p. 7).[12] However, the Court did not resolve the parties' disagreement as to whether rate disputes could be resolved under the text of Education Law § 3602-c (id.). Although petitioners contended that the ERES unit was not equipped to address enhanced rate requests, the Court also declined to address that issue because the district was not a party to the litigation (id.).

Thus, case law has established that within the district, parents may use the ERES procedures and seek judicial review regarding the lack of implementation of the services in a child's IESP, particularly where the due process complaint is limited to that issue and the cost of such services; however, the Court declined to go further to hold that the dual enrollment statute precludes parents from using the due process procedures in Education Law § 4404 to resolve the dispute set forth in this case. Accordingly, the district's cross-appeal seeking a dismissal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

2. IHO Bias

On appeal, the parent alleges that the IHO in this matter exhibited bias towards her due to her religious beliefs and the religious community she lives within. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, affording each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). In this instance, the record does not support the parent's allegation that the IHO exhibited bias.

Rather than pointing to a specific allegation that the IHO exhibited bias, the parent focuses on a results-based argument. Generally, the parent asserts that the IHO's "extreme distrust of the agencies and institutions that serve [the parent's] community results in him denying funding in every case" and that "[t]his IHO exhibits extreme distrust of all [p]arents and individuals who work in the community" (Req. for Rev. at p. 4). The parent further asserts that "[t]his IHO's behavior is so well known in the community that it has become routine for service providers to discontinue

[12] There is no definition of an "enhanced rate" much less an enhanced rate dispute, and many cases brought before the Office of State Review that one or both of the parties and/or the IHO characterize as an enhanced rate dispute involve a variety of alleged infractions by the district beyond the district's failure to implement services on an IESP, such as allegations that the district failed to convene a CSE to develop an IESP or that the IESP developed was not appropriate for the student.

services the moment they learn that this IHO has been appointed" (id. at p. 6). Accordingly, the parent's argument generally asserts IHO bias as the primary reason for any parent losing on a request for funding for privately-obtained SETSS when appearing before the IHO who presided over this particular matter.

Initially, to the extent that the parent disagrees with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

The parent attempts to substantiate her allegation by stating that her attorney "ha[d] approximately 60 Decisions with this IHO . . . [a]pproximately 40 of which were dismissed with zero relief granted" and that "[t]his is a massive departure from the 90% success rate in obtaining funding resulting from implementation failure from other IHO's excluding this one" (Req. for Rev. at pp. 5-6). Although the parent's concerns are understandable, in that she is attempting to obtain funding for services for her child, it is worth noting, first, that the statements expressed by her attorney show far more balance than the "zero" chance of winning expressed in the parent's request for review. Review of the hearing record in this matter also demonstrates that the IHO did not exhibit bias during the proceeding and was not as one-sided as described by the parent, although he did ultimately rule in favor of the district. In this matter, the IHO issued an undated omnibus order (standing order) informing the parties of the IHO's expectations and deadlines (see Omnibus Order). Part of the standing order related to a party's notice of intent to cross-examine and directed that "[t]he opposing party must write to the offering party after receipt and review of the disclosures, copying [the IHO], at least three (3) calendar days before the hearing if they wish to have the witness appear for cross-examination" (id. at p. 1). While the standing order is undated, it is clear from the hearing record that it was provided to the parties well before the November 6, 2024 impartial hearing (Tr. pp. 12-13). When the parent argued that the district failed to notify the parent's attorney pursuant to the IHO's standing order that the district wanted to cross-examine the parent's witness, the IHO allowed both sides to be heard and ultimately ruled in favor of the parent, precluding the district from cross-examining the parent's witnesses (Tr. pp. 12-13). Additionally, at the beginning of the impartial hearing, the IHO admitted some of the parent's proposed exhibits over the district's objections and admitted some district proposed exhibits over the parent's objections (Tr. pp. 5-11, 16-17). When the district argued that one of the parent's submitted affidavits violated the five-day rule, the IHO gave both sides the opportunity to be heard and ruled in favor of the parent, entering the affidavit into the hearing record (Tr. pp. 13-17). The hearing record reflects that that IHO was not trying to "find every possible way to deny relief" as he allowed to parent to present her case, deciding the matter on the merits (Req. for Rev. at p. 4; see Tr. pp. 1-26).

To the extent the parent argues that the IHO has displayed a history of unfavorable rulings for IESP implementation claims, generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch.

Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091).

In her request for review, the parent also asserts that "[t]he IHO's draconian use of the Burlington Carter three prong test has created an insurmountable hurdle" which results in "the [d]istrict [being] incentivized to never provide services and take their chance at hearing" (Req. for Rev. at pp. 6-7). It is well established that in cases in which the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement but rather funding for private services unilaterally-obtained by the parent without the consent of the district after the district has failed to implement the student's recommended services, the Burlington-Carter framework is the proper method for assessing such implementation requests. "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."]).

To the extent the parent asserts that the Burlington-Carter framework should not apply to disputes solely related to implementation, such a claim is contrary to the IDEA. A district's delivery of a placement and/or services must be made in conformance with the CPSE's or CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP or IESP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 Fed. App'x 63 [2d Cir. 2014]).

Additionally, with respect to the "statistics" presented by the parent, regardless of the parent's attorney's statements concerning the statistics of his cases' outcomes, "statistics alone, no

matter how computed, cannot establish extrajudicial bias. There is no authority for, and no logic in, assuming that either party to a litigation is entitled to a certain percentage of favorable decisions" (In re Intl. Bus. Machines Corp., 618 F.2d 923, 930 [2d Cir. 1980]; see Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010] [noting that allegations regarding the percentage of rulings favorable to a school districts or disabled children were not cognizable claims]; E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 595 n.7 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167 [noting the uniform rejection of arguments based upon plaintiffs statistical or spreadsheet analysis of unfavorable outcomes by an administrative hearing officer]).

Based on all of the above, the parent's assertion of bias against the IHO must be dismissed, and the substance of the appeal considered by analyzing the applicable law and individual facts of the case.

B. Unilaterally-Obtained Services

Neither party appealed from that portion of the IHO's decision holding that the district denied the student a FAPE for the 2023-24 school year. Therefore, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Turning to a review of the appropriateness of the unilaterally-obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist.,

773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

Although not in dispute, a review of the student's needs is warranted in order to determine whether the services obtained unilaterally by the parent were appropriate. According to the student's February 2023 IESP, she demonstrated the ability to identify an object that was different from the others in a group, show an understanding of at least three prepositions, put rings on a stacking cone, match two colors, identify pictures that go together, and point to a group of objects that had more or less (Parent Ex. B at p. 1). At that time, the student inconsistently pointed to shapes, understood numbers one to four and gave a specified quantity, classified objects by grouping them into categories, and pointed to an object in the "middle" and had not yet demonstrated the ability to correctly point to various types of coins and bills (id.). The IESP indicated that the student spoke using "a whispered or low volume much of the time, and present[ed] with significant articulation delays, including a severe frontal lisp" (id.). Due to her speech difficulties, the student was difficult to understand, and also exhibited "difficulty following directions, answering questions, relating an event or sequence, producing adequate sentences, and identifying and explaining associations between words" (id.). Further, the student's pragmatic language skills were delayed and she had "difficulty participating in a conversation, asking questions, and making comments" as well as initiating and maintaining conversations, which impeded her ability to "thrive and progress in the classroom setting" (id. at pp. 1, 2). Regarding social development, the student's expressive language delays impacted her ability to socialize appropriately (id. at p. 2). The February 2023 IESP indicated that the student could focus on an activity for 10 minutes or longer and attended to lessons in school, and she did not exhibit any concerns regarding her physical development (id.). Strategies to address the student's management needs included a multisensory learning environment, manipulatives, teacher check-ins, refocusing

and redirection, and positive peer models, in addition to recommendations for SETSS and speech-language therapy (id. at pp. 2, 5).

2. SETSS

The parent appeals from the IHO's determination that she did not meet her burden to show that the unilaterally-obtained SETSS were appropriate. Specifically, the IHO found that the progress report "contain[ed] no specific information as to how [the s]tudent's weaknesses [we]re being addressed" and although it referred to "various interventions," the report "fail[ed] to provide any specificity, indicate what strategies [we]re used during any particular session, how any of these particular strategies assist[ed] [the s]tudent in making progress toward any of [her] goals, or how [the s]tudent [wa]s responding to any or all of these interventions" (IHO Decision at p. 6). The IHO also stated that "the progress report did not detail the materials, strategies, or specially designed instruction techniques that the SETSS provider used to address [the s]tudent's deficits," and that the "hearing record was devoid of any description of the work actually done" with the student during the sessions and otherwise lacked "any indication as to how the instruction was specially designed to meet [the s]tudent's unique needs" (id.).

With respect to the general nature of the services provided by Enhanced to the student, the Enhanced service coordinator (service coordinator) testified in an affidavit that the student received five periods per week of SETSS and two 30-minute sessions of speech-language therapy during the 2023-24 school year at her mainstream nonpublic school (Parent Ex. I ¶¶ 3, 8, 9, 14). According to the service coordinator, "[a]side from providing services to [the student]," the SETSS provider and speech-language pathologist "also prepare[d] for lessons, create[d] goals, w[rote] progress reports, and m[et] with teachers and parents" (id. ¶ 13). Additionally, "[g]oals were created for [the student] to work on during the 2023-24 school year and [we]re reviewed quarterly," and the service coordinator testified that the progress reports in the hearing record were "accurate representation[s]" of what the SETSS provider and speech-language pathologist worked on with the student, "including goals" (id. ¶¶ 15, 16). The service coordinator testified that the student's "progress [wa]s measured through quarterly assessments and consistent meetings with teachers and school staff," and that she "ha[d] already shown signs of progress with her SETSS and [s]peech-[l]anguage [t]herapy"; however, her "academic and social delays warrant[ed] the need for continued services" (id. ¶¶ 17, 18).

With respect to SETSS specifically, the provider held a New York State Students With Disabilities (Birth-Grade 2) initial certificate and the service coordinator testified that the provider was "trained and experienced in teaching literacy and comprehension to school-aged children and adolescents" (Parent Exs. F at p. 1; H; I ¶ 11). The service coordinator testified that although the student was mandated for group services, the student's SETSS were delivered "in a 1:1 setting" as the agency was "not able to locate a similarly situated group of students" (Parent Ex. I ¶ 10).

In a SETSS progress report dated March 7, 2024, the student's SETSS provider reported that the student, who was in first grade at the nonpublic school, was "lagging behind grade level in many scholastic domains" (Parent Ex. F at pp. 1, 2). According to the report, despite "significant improvement" and her ability to decode CVC words and consonant digraphs, the student "grapple[d] with many decoding skills, such as magic e, blending, vowel teams, and ruling R" (id.

at p. 1). The SETSS provider reported that regarding reading comprehension, the student had exhibited "minimal progress," and although the student could answer wh questions and predict while a story was being read to her, she had difficulty answering why, how, and temporal questions and providing basic details (id.). The student also struggled to identify the main idea in a text and use inferencing skills (id.). To address the student's reading needs, the SETSS provider reported using "the Orton Gillingham Methodology which include[d] working with tactile manipulatives," questioning techniques, visualization strategies, and read-alouds (id.). The report included annual goals to improve the student's sound blending skills, application of grade-level phonics and word analysis skills when decoding, knowledge of final -e and vowel team conventions, engagement in group reading activities, and ability to retell stories including key details (id.).

According to the SETSS progress report, the student's "writing skills [we]re weak since her phonics skills [we]re poor" (Parent Ex. F at p. 1). The SETSS provider reported that the student could not "complete a full sentence with correct syntax and ha[d] difficulty with written expression" (id.). In the area of math, the SETSS progress report indicated that "significant progress has been observed," and the student exhibited skills such as counting with 1:1 correspondence and adding and subtracting within 10 (id. at p. 2). The SETSS provider reported that the student "struggle[d] to tackle problem-solving examples and ha[d] difficulty with number concepts," and that tactile manipulatives such as base ten blocks and counters were used with the student (id.). The SETSS progress report did not include annual goals for the student in the areas of writing and math (see id. at pp. 1-2).

3. Speech-Language Therapy

The IHO found that with respect to speech-language therapy, "while the progress report contain[ed] descriptions of [the s]tudent's abilities and challenges, it otherwise lack[ed] any substantive discussion (or even mention) of the specific strategies used or services provided for [the s]tudent" (IHO Decision at p. 5). The IHO also found that "the progress report did not detail any materials, strategies, or specially designed instruction techniques that the [speech-language therapy] [p]rovider used to address [the s]tudent's deficits," and that the record "otherwise lack[ed] . . . any indication as to how the instruction was specially designed to meet [the s]tudent's unique needs" (id.). Therefore, the IHO determined that the parent failed to meet her burden with respect to the appropriateness of the unilaterally obtained speech-language therapy services Enhanced delivered to the student (id.).

The service coordinator testified the provider of the student's speech-language therapy was "a licensed and certified [s]peech-[l]anguage [p]athologist" in New York (Parent Ex. I ¶ 12). In a March 12, 2024 progress report, the speech-language pathologist indicated that the student, who was bilingual, participated in therapy "to address moderate delays in speech and language" skills (Parent Ex. G at p. 1). Specifically, regarding receptive language, the student was able to follow multistep related and unrelated directions but had difficulty following directions with greater complexity (id.). She sorted pictures into categories, sequenced five events, and identified basic concepts (id.). According to the report, the student had difficulty responding to questions due to her vocabulary and pragmatic deficits, and inattention (id.). Filling in auditory closure sentences and accurately retaining details in a particular sentence or passage were also challenging for her (id.).

Regarding the student's expressive language skills, the report indicated that the student expressed her needs, responded to various what, where, and who questions in stories and during structured activities, used full sentences with age-appropriate syntax, labeled complex prepositions and basic concepts, and predicted events and inferenced information in repetitive storybooks (Parent Ex. G at p. 1). According to the speech-language pathologist, the student struggled with verbal reasoning, explaining the process necessary to complete a task, responding to logical questions requiring several steps and why, how, and when questions, and identifying/labeling vocabulary words (id.). By report, the student needed prompts to label categories, list items, respond to hypothetical events, retell a story, inference new information, and summarize a picture or short story (id.). Pragmatically, the student had difficulty maintaining a topic in a dialogue and needed redirection, the content of her responses was often "below level, inappropriate and out of context," and she had difficulty labeling character emotions other than happy or sad (id.). Additionally, the report reflected that the student exhibited moderate articulation delays consisting of sound substitutions of identified phonemes (id.).

The progress report reflected the "SMART" goals the student was previously working on and described the progress she had made toward them (Parent Ex. G at pp. 1-2). The speech-language pathologist reported that the student had achieved most of the short-term objectives related to receptive language; however, multistep and complex two-step directions remained challenging for her (id. at p. 2). Regarding expressive language, the progress report indicated that the student "demonstrate[d] a basic understanding of the information but ha[d] difficulty providing accurate responses and labels when asked questions about information presented in the classroom or in therapy" (id.). The student used target pronouns, plurals, possessives, and verb tenses accurately; however, she demonstrated difficulty with "verbal reasoning, responding to logical questions, and retelling stories" (id.). Although the student's vocabulary had increased, it remained below age expectations (id.). In the area of articulation skills, the progress report indicated that the student had made progress toward production of specific sounds, but had "not met stated levels for mastery" (id.). The speech-language pathologist developed new SMART goals for the student in the areas of responding to questions, developing expressive vocabulary, providing verbal reasoning, improving pragmatic language, and developing conversational skills (id.).

In light of the above, the parent did not sustain her burden to establish that the private services she arranged for with Enhanced were appropriate for the student during the 2023-24 school year. While there is some general evidence of the SETSS provider's and speech-language therapist's instruction methods used with the student that identified specific goals and strategies, notably absent from the hearing record is testimony from the student's providers and session notes or other evidence describing the specially designed instruction that was actually delivered to the student during the 2023-24 school year, particularly with respect to how the instruction assisted the student in accessing the general education curriculum.

Without such information, it is not possible to ascertain whether the student received special education support in the classroom to enable her to access the general education curriculum or whether the SETSS and speech-language therapy delivered to her, even if provided in a separate location, supported her 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 (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]), under the totality of the circumstances, the evidence

in the hearing record is insufficient to demonstrate that the student's program was appropriate to meet her needs. As a result, the parent failed to meet her burden of proving that the services she obtained privately were appropriate for the student under the Burlington-Carter standard, and the IHO's determination is affirmed.

VII. Conclusion

As set forth above, the IHO had subject matter jurisdiction to hear the parent's claims. The evidence in the hearing record supports the IHO's finding that the parent did not meet her burden of proving that the unilaterally-obtained services from Enhanced for the 2023-24 school year were appropriate to meet the student's unique needs. Accordingly, the parent is not entitled to district funding of those services and there is no need to reach the issue of equitable considerations.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 15, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER