The University of the State of New York

The State Education Department
State Review Officer
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No. 24-163

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 for direct funding of equitable services for her son for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which denied the district's motion to dismiss the parent's request for equitable services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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

Briefly, on June 7, 2022 a Committee on Preschool Special Education (CPSE) convened to review the student's educational programming (Parent Ex. B at p. 2).[1] The CPSE found that the student continued to be eligible for special education as a preschool student with a disability and recommended that the student receive 10 hours per week of special education itinerant teacher (SEIT) services in a group of two, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) beginning on or around June 8, 2022 (id.at pp. 1, 13).[2, 3] The CPSE also recommended that the student receive 12-month services for "July/August 2022 Only" (id. at pp. 1, 14).

Neither party provided any information regarding what occurred during the 2022-23 school year. Approximately one year later, on May 31, 2023, the parent notified the district of her intent to place the student in a nonpublic school for the 2023-24 school year at her expense and requested that the district provide the educational services recommended in the student's IEP at the nonpublic school (Parent Ex. D; Tr. pp. 79-81). On June 20, 2023, the parent contracted with EdZone, LLC (EdZone) for the provision of services, in accordance with the student's "last agreed upon" IEP for the 12-month 2023-24 school year (Parent Ex. E at p. 3).[4]

The district did not respond to the parent's request and the parent filed a due process complaint notice on July 6, 2023 (Parent Ex. A at p. 6.). By letter dated August 23, 2023, the parent advised the district that it had failed to assign a provider for the service mandated for the student for the 2023-24 school year and requested that the district "fulfill the mandate" (Parent Ex. C). In addition, the parent notified the district of her intent to locate her own provider should it fail to do so (Parent Exs. B at p. 1, C.).

[1] The June 2022 IEP indicated it was amended from a prior IEP (Parent Ex. B at p. 1). According to the IEP, the date of the CSE meeting was January 11, 2022 and the implementation date listed on the IEP was January 31, 2022 (id. at p. 3). However, the specific recommendations for special education and related services had an implementation date of June 8, 2022 (id. at p. 13).

[2] The student's eligibility for special education as a preschool student with a disability for the 2022-23 school year is not in dispute (see 34 CFR 200.1[mm]; 8 NYCRR 200.1[mm]).

[3] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

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

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2023, the parent, through her attorney with Prime Advocacy LLC, alleged the district failed to convene a CSE meeting in advance of the 2023-24 school year to review and update the student's program of services and thereby denied the student an opportunity for a FAPE and/or equitable services under federal and State law (Parent Ex. A at p. 1). According to the parent, the district had not assigned any qualified provider to the student for special education services nor had it taken any steps to implement services for the student and the parent was unable to locate or hire a qualified provider at the district's "published session rate" (id. at p. 2). The parent alleged that she was able to find a SEIT at a higher rate (id.). The parent requested a finding of a denial of a FAPE and funding for the SEIT services, speech-language therapy, and OT for the 2023-24 school year (id. at p. 3). In addition, the parent sought compensatory education for any services that the district did not provide to the student (id.). Finally, the parent asserted that the student's pendency placement arose from the June 7, 2022 IEP (id. at p. 1-2).

B. Impartial Hearing Officer Decision

An IHO was appointed to the matter, who conducted a hearing on the issue of pendency and seven additional appearances (Tr. pp. 1-56). An evidentiary hearing on the merits convened on March 6, 2024 (Tr. pp. 57-129). The district did not present any witnesses or offer any documents into evidence (Tr. p. 61). The parent's advocate called two witnesses, including the parent and an educational supervisor from the agency from which she was seeking reimbursement (Tr. pp. 72-87, 93-112). The IHO admitted all of the parent's offered exhibits into evidence without objection (Tr. pp. 63-64). The district argued that the parent's May 31, 2023 request for dual enrollment services under Education Law § 3602-c was unreliable evidence based on the testimony of the parent (Tr. pp. 124-25).

In a decision dated March 22, 2024, the IHO stated that he was not certain if the parent was truthful and accurate in her testimony that she emailed the May 31, 2023 letter seeking dual enrollment services; however, the IHO also found that the district failed to rebut the parent's evidence regarding the letter (IHO Decision at p. 8). The IHO further found "the parent [was] an unreliable witness as to any services that her son received for the school year" (id.). The IHO determined, among other things, that a supervisor from EdZone testified that the student's SEIT assessed the student but there was no evidence regarding how the student's grade levels were determined and the supervisor wrote her name on the progress report, but it appeared as if the student's SEIT was the individual who prepared it (id.). The IHO also found that the student's IEP called for 2:1 SEIT services and there was no evidence why the services were changed to a 1:1 SEIT (id. at p. 9). The IHO determined that the group rate for SEIT was $148 per hour rather than the $198 sought by the parent (id.). Additionally, the IHO found that the student there was no credible evidence to show the student received summer services and denied the parent's request for payment as it related to summer services in a camp (id. at pp. 9-11).[5] While the IHO's decision

[5] The IHO limited funding to no more than nine days in June 2024 based on the school calendar (IHO Decision at p. 11).

omits an overt finding in favor of the parent, the IHO nevertheless denied the district's "motion to dismiss" for the parent's non-compliance with the June 1 deadline and awarded the parent funding at a "reasonable rate not to exceed $130 an hour—in which the provider receives $85 an hour," excluding time in religious instruction and summer services (id. at pp. 8, 10-11.). The IHO denied speech-language therapy because the student was receiving speech-language therapy and ordered the district to provide a related service authorization (RSA) for OT (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the student did not receive services at summer camp. Relatedly, the parent also alleges that the IHO's conduct and demeanor during the hearing demonstrated bias against the parent's advocate and witnesses such that he would often interrupt witness testimony during the hearing and stated on the record that he would not be providing reimbursement for services provided in a camp. The parent argues that the IHO erred in finding the student did not receive services during the summer and in particular, that the IHO erred in finding that the testimony of the parent and the EdZone supervisor were not credible on this point. Additionally, the parent asserts that the IHO improperly determined that the student was only entitled to group services. The parent argues that the decision to provide individualized SEIT services was not challenged by the district, nor did the district present any evidence on this issue at the hearing, thus the hearing record was devoid of evidence indicating individual services were inappropriate.

According to the parent, the IHO erred in his determination of the amount of reimbursement due to the absence of timesheets indicating services were provided. Moreover, the parent argues that the IHO improperly made a negative inference that the services were not provided due to the absence of records evidencing the provision of services. The parent seeks to submit additional evidence from EdZone to show that services were provided on certain dates in July, August, September, and October 2023. The parent argues that the IHO arbitrarily and impermissibly modified the rate allowed for the SEIT services without any evidence in the hearing record from the district as to an appropriate rate. The parent argues that "the burden is not on the [p]arent to implement the services at a reasonable rate."

In an answer and cross-appeal, the district argues that the IHO erred in declining to dismiss the parent's case on the basis that the parent failed to prove that she timely requested dual enrollment services. In the alternative, the district asserts that the IHO was correct to deny funding for SEIT services, for the summer and 10-month 2023-24 school year, from EdZone due to a lack of evidence that SEIT services were provided 1:1 rather than in a group. The district asserts that, if the parent's claims are not otherwise dismissed, the IHO correctly awarded group SEIT services from EdZone from the date of his decision to the end of the 2023-24 school year at a reduced rate.

The parent submits an answer to the district's cross-appeal and a reply refuting the district's argument regarding the IHO's findings as to the provider's rate.

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]). In some instances, parents voluntarily enroll their children in private schools. In those instances, 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]).

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 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

[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.

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. IHO Bias

As a preliminary matter, I will address the parent's argument that the IHO was biased against her in conducting the impartial hearing. 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, according 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]).

As described above, the parent alleges the IHO did not allow the parent's advocate to properly develop the hearing record by way of witness testimony, as the IHO frequently interrupted the parent's advocate's questioning and made what the parent considers to be unfair rulings as to the credibility of witnesses. The parent also argues that the IHO improperly taunted the parent's advocate during the hearing and advised of a predetermined ruling on the record, which she believed exhibited bias against her claims . The parent takes particular issue with the IHO's credibility findings as they pertain to the IHO's decision to disallow reimbursement for the summer 2023 SEIT services provided by EdZone. The district responds that although the IHO abruptly cut off questioning regarding the summer services, he later brought up the same issue and invited further questioning by the parent's advocate.

Upon further review of the record, I find several instances in which the IHO engaged in impetuous behavior toward the parent's representative and in a heated interchange stated it was because "you are not an attorney and you don't know how to do hearings" to which the representative responded that she was not required to be an attorney or go to law school to participate in the proceeding and was capable of representing the parent (Tr. p. 102). The IHO argued with the parent representative over whether the student received special education services while attending a summer camp and indicated that the line of questioning did not matter because "I'm not giving services with the student in camp" (Tr. pp. 101-03). The IHO stated in pertinent part

> if you don't move on, I will close this hearing, and then it will be another six months for you to appeal my decision. If I find anything for your client, it will

> be six months before EdZone gets any money because you will have to appeal my whole decision. And then you will learn that hearing officers have the right to allow certain questions and not allow certain questions.

(Tr. p. 103.) This type of behavior, first demeaning the representative because she was not an attorney and then telling her she would learn her lesson after an appeal was unquestionably inappropriate and unbecoming of an IHO, and the IHO failed to comport himself with the requirement to avoid the appearance of impropriety and to act with patience and courtesy towards any litigant appearing before him. As for whether questioning regarding summer services should have continued, the IHO was legally incorrect; first, because the issue of whether the student received special education services in a summer camp location was relevant to the issues to be decided and, second, because the parent's representative was correct that, at the time the IHO stated he had already determined he would not award any services provided at a summer camp, no evidence on the issue had been presented and, accordingly, I find it was not duplicative of other evidence in the hearing record that had been developed up until that point.

The effect of the impropriety of the IHO's conduct toward the parent's representative must be considered next. I have conducted an independent review of the entire hearing record and find that there is insufficient basis to invalidate the IHO's determinations or remand for a new proceeding due to the IHO's poor demeanor. With regard to the private summer services from EdZone in dispute, the district is correct that the IHO, while cutting off the parent's questioning initially, later indicated that the parent's representative could revisit the topic. The transcript of the proceeding reveals that the IHO, perhaps upon sensing that he had overstepped or simply realizing the relevancy upon further listening to the witness, did allow the parent's advocate to further develop the record on the issue of summer services (Tr. p. 119). The parent's representative asked one question on the topic and then discontinued her examination without interference from the IHO (Tr. p. 119). Therefore, on this issue, while I admonish the IHO for his behavior, the record does not indicate that any bias led to inadequate development of the evidentiary record because any potential harm was later mitigated by the IHO. Furthermore, the undersigned has conducted an independent review of the merits of the parent's case as it relates to the services privately obtained from EdZone which is further described below.

2. Additional Evidence

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In the instant matter, the parent seeks to submit timesheets for the months of July and August 2023 and session notes from September 2023 through November 2023 as evidence of services provided to the student during those months (Req. for Rev. Exs. A; B). The parent's advocate did not offer these documents during the impartial hearing; however as noted above she ultimately was permitted to ask questions of the witness she called regarding summer services (Tr.

Pp. 1-130). The parent contends that the IHO erred in "assuming that SEIT services were not provided just because of the missing time sheets" (Req. For Rev. at p. 7). However, the IHO did not rely on the lack of the time sheets or the sessions notes in particular, but on the overall lack of evidence in the hearing record that services were provided to the student during the summer 2023 (see IHO Decision at pp. 9-10). As discussed below, the burden of proving that unilaterally obtained services were appropriate to meet the student's special education needs, or in this instance that summer services were provided to the student, is on the parent. Accordingly, the IHO's determination to hold the lack of evidence as to the provision of services against the parent was not in error.

Additionally, I am not persuaded that the parent should be allowed to present this documentary evidence on appeal as the parent acknowledges the additional evidence was available at the time of the impartial hearing, but was not submitted into the hearing record and subjected to judicial scrutiny. The parent argues that the time sheets for July and August should be accepted as "they were not missing on purpose" and are "necessary to prove that the [s]student was receiving services" and the session notes for September and October should be included on the basis that they were "inadvertently left out" and are "necessary to prove the [s]tudent received services." However, to the extent that the parent asserts these documents were omitted by mistake, there is no indication the parent ever intended to include them as part of the hearing record. More specifically, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). In this instance, there is no indication that the documents submitted on appeal were ever disclosed to the district prior to the instant appeal. Accordingly, even if they were submitted while the impartial hearing was ongoing, I most likely would have disallowed the timesheets on the basis that they were not properly disclosed five days prior to the hearing. Further, as noted by the district, the district has not had an opportunity to examine the veracity of the documents being submitted on appeal. The parent cannot now present additional evidence she purports to be dispositive on the outcome of the hearing to fill the significant "gap" in the administrative record after she failed to present this evidence at the time of the impartial hearing where it would have been subject to challenge and/or cross-examination (see M.B. v. New York City Dep't of Educ. , 2015 WL 6472824 at *2-3). Therefore, for the reasons set forth above, the parent's request for consideration of additional evidence is denied.

C. Dual Enrollment Services - June 1 Deadline

The district cross-appeals from the IHO's decision not to dismiss the parent's request for dual enrollment services, arguing that the parent did not present sufficient evidence to show that she requested equitable services under the dual enrollment statute prior to June 1, 2023. As noted above, the IDEA does not provide an individual right to special education services to be delivered to a student who has been parentally placed in a nonpublic school. However, the State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made

(Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In the instant matter, the district raised the issue of the June 1 deadline at the hearing as an affirmative defense in its closing argument.[8] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, the IHO found that he was not certain of the truthfulness or accuracy of the parent's testimony that she emailed the letter, dated May 31,

[8] The IHO would not allow counsel for the district to raise this argument in an opening statement, so it was stated in the closing (see Tr. pp. 64-65, 124-25). However, counsel for the district did indicate an intention to cross-examine the parent as to the May 31, 2023 letter requesting dual enrollment services (Tr. p. 63).

2023, to the district on June 1, 2023 (IHO Decision at p. 8). However, the IHO weighed the parent's testimony against the fact that the district did not submit any evidence or testimony on the issue of the parent's compliance with the June 1 deadline (id.). As I am similarly left with weighing the district's lack of evidence against the parent's testimony, and neither the documentary evidence nor the hearing record in its entirety justifies a conclusion that the notice was not sent to the district on or before June 1, 2023, I will not disturb the IHO's weighing of the available evidence on this issue.

D. Unilaterally Obtained Services

As discussed above, the parent appeals from the IHO's denial of funding for summer services, for limiting the student's services to group SETSS, and for limiting compensation during June and October.

Prior to reaching the merits of the appeal, a discussion of the standard to be applied is necessary. The student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from EdZone, LLC for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts which fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under the 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 obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[9] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by

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

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 the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

> unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student Needs

Although not in dispute, a description of the student's needs is necessary to determine the issue on appeal; namely, whether the parent met her burden to show that the unilaterally-obtained SEIT services constituted specially designed instruction designed to meet the student's identified needs. Based on the limited information available in the hearing record, the student's needs at the start of the 2023-24 school year can only be guessed at based on the June 2022 IEP, developed for the prior school year when the student was still a preschool student (Parent Ex. B). With respect to intellectual ability, the June 2022 IEP indicated that the student obtained a score "in the [b]orderline [r]ange of overall intelligence" as measured by the Stanford-Binet Intelligence Scales, Fifth Edition (id. at p. 3). As noted in the IEP, the student's verbal skills "f[ell] within the [b]orderline range," and his nonverbal skills "f[ell] within the [l]ow [a]verage range" (id.). Additional testing characterized the student's adaptive behavior as "moderately low" and identified delays in the student's cognitive, language, and fine motor skills (id.).

According to the June 2022 IEP, the student "establishe[d] eye contact and respond[ed] to his name" as well as "display[ed] comprehension of one[-]step and related commands" (Parent Ex. B at p. 4). However, the IEP also indicated that the student had difficulty attending to a story for five minutes and demonstrated a "reduced" attention span (id.). The June 2022 IEP indicated the student "communicate[d] via short phrases," demonstrated a limited vocabulary, and "displayed word retrieval difficulties" (id.). The student also demonstrated a significant delay with speech intelligibility (id. at pp. 3, 4). According to the June 2022 IEP, the student "participate[d] in the classroom environment, yet ha[d] a hard time answering questions on target, retaining education concepts, and socializing appropriately with his peers" (id. at p. 4). The IEP noted that the student was able to follow instructions with cues, label a few objects and pictures, and use words in a sentence (id.). However, the student was unable to respond to "wh," "logical" or "hypothetical" questions and lacked understanding of numerous basic concepts (id.).

Socially, the June 2022 IEP indicated the student participated in at least one game with his family and "engage[d] in pretend play" (Parent Ex. B at p. 4). While he was interested in peer activities, the student had difficulty "sharing his possessions and waiting his turn in play" (id.). The June 2022 IEP indicated the student demonstrated difficulty expressing his emotions and was "easily frustrated" (id.).

The June 2022 IEP indicated the student's motor skills were delayed including "grasping skills, prewriting, cutting, communication, attention span, sensory processing, and visual motor skills" (Parent Ex. B at p. 5). The June 2022 IEP indicated the student's motor skills were "very poor for his age level" and he was "highly sensitive to a variety of sensory experiences" (id.).

To address the student's management needs, the June 2022 IEP recommended models, prompts, a "mirror for visual feedback," tactile cues, and "repetition of directions" (Parent Ex. B at p. 5). In addition, the June 2022 IEP recommended "[l]anguage facilitation methods, verbal redirections, [and] visual cues and schedules" to allow for "participat[ion] in age[-]appropriate activities" (id.). A variety of goals were included in the June 2022 IEP to improve the student's verbal expression, pre-academic skills, speech intelligibility, social interaction with peers, fine motor coordination, and visual perceptual and perceptual motor skills, as well as his ability to follow verbal instructions, respond to "wh" questions, and process sensory information (id. at pp. 7-12).

2. Appropriateness of SEIT Services from EdZone

The hearing record contains little information about the student's general education program. However, the hearing record shows that for the 2023-24 school year the student attended a first grade class at a nonpublic religious school (Tr. p. 86; Parent Ex. G at p. 1). The EdZone educational supervisor testified there were "around 23 or 24" students in the class (Tr. p. 108; see Tr. p. 93). The educational supervisor further testified that Hebrew instruction occurred in the morning, and secular instruction occurred in the afternoon, beginning around 1:30 p.m. (Tr. pp. 115-16).

Although the student was in first grade during the 2023-24 school year, the parent contracted with EdZone to deliver a portion of the special education program recommended for the student in the student's last preschool IEP, which the parties refer to as SEIT services (see Tr. pp. 76-77; Parent Exs. E-G). State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/sites/default/files/programs/special-education/specialeducationitinerantservicesforpreschoolchildrenwithdisabilities.pdf). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

A January 1, 2024 report,, prepared by the student's EdZone SEIT, indicated the student required "[o]ngoing 1:1 support," "substantial support for independent and appropriate social interactions," and "frequent redirection" to "sustain productivity in class" (Parent Ex. G at pp. 1-2; see Tr. p. 96; Parent Ex. G at p. 4). The hearing record was unclear as to how a student who required such intense and individualized instruction was supported outside of his time with the SEIT. At the time of the hearing, the parent included SEIT session notes for November and

December 2023 to demonstrate the specially-designed instruction provided to the student (Parent Ex. F). Although the parent was seeking reimbursement for the entire 12-month 2023-24 extended school year as discussed above, at the time of the impartial hearing the parent did not submit SEIT session notes for July and August 2023.

The SEIT session notes for November and December 2023 indicated the SEIT provider worked with the student during classroom activities and small groups (Parent Ex. F). For each of the session notes the SEIT provider commented on the student's difficulty with focus and attention and noted the student's need for frequent redirection or verbal prompts and verbal and tactile cues (id.). The SEIT provider indicated during one session note that the student was "easily [] frustrated when the material [was] not understood or challenging" (id. at p. 2). According to the session notes, the SEIT provider worked with the student on rhyming, reading aloud, answering "wh" questions, letter sounds, decoding cvc words, speech intelligibility, social skills, sight word and number identification, and adding and subtracting numbers less than 10 (Parent Ex. F).

The hearing record also includes a January 2024 EdZone SEIT report, which indicated the student was "friendly and happy" but "relie[d] on support to navigate the school environment, comprehend lessons, and complete tasks" (Parent Ex. G at p. 1). According to the January 2024 report, the student had particular difficulty "dealing with distractions" and he "requir[ed] frequent redirection in the classroom" (id.). The January 2024 report indicated the student required individual support to address his social skills, cognitive skills, and his ability to follow instructions (id.). According to the January 2024 report, the student had difficulty with transitions and "task maintenance" (id.).

The January 2024 report indicated the student was able to identify the letters of the alphabet "and their corresponding sounds" and demonstrated an "inconsistent" ability to recognize sight words (Parent Ex. G at p. 1). The report indicated the student's "current reading grade equivalent [was] end of kindergarten" (id.). The student tended "to rush through" reading material — which led to decoding mistakes, "bec[ame] confused about the storyline," had difficulty with "sequencing events," and "require[d] substantial support in retelling stories" (id.). According to the January 2024 report, the SEIT provider offered the student "visual aids, such as storyboards or graphic organizers," and provided the student with redirection, repetition, and prompts "during reading sessions" (id. at p. 2).

In writing, the January 2024 report indicated the student "wr[o]te all his letters" but "some of them [were] backwards" (Parent Ex. G at p. 2). The January 2024 report indicated the student had difficulty with spacing as well as writing and coloring within the lines, which was "exacerbate[d]" by the student's "haste" to "finish quickly" (id.). According to the January 2024 report, the SEIT provider offered the student "valuable reminders about correct grammar" and "utilize[d] checklists to help reinforce them" (id.).

The January 2024 report also indicated the student's math skills were "at the beginning of first grade level" (Parent Ex. G at p. 2). The report indicated the student "identif[ied] and wr[o]te numerals from 0 to 100" and "ha[d] a grasp of addition and subtraction concepts" (id.). The student was unable to "tell time or do word problems" and required "guidance from the provider" (id.). According to the January 2024 report, the student "struggle[d] to maintain focus and follow instructions without repeated guidance" (id.). The report indicated the SEIT provider used

encouragement, "repeated instructions, visual supports, [] math manipulatives," and chunking to assist the student (id.).

The January 2024 report indicated the student's "primary challenge[]" was related to his limited attention span (Parent Ex. G at p. 3). The student demonstrated difficulty following multi-step directions and classroom rules (id.). According to the January 2024 report, the student was easily frustrated and discouraged "[w]hen faced with academic or social difficulties" (id.). The report also noted that while the student enjoyed socializing with peers and adults, his social skills were below grade-level expectations, and he required considerable support to sustain appropriate social interactions (id.).

Although goals in the November and December session notes do not align perfectly with the goals in the January 2024 SEIT report, in general, they both addressed the student's areas of need (compare Parent Ex. F with Parent Ex. G). While the goals might have been better aligned, the shortcoming does not render the parent's evidence deficient in this case and, furthermore, "[t]he test for the private placement is that it is appropriate, and not that it is perfect" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 (2d Cir. 2016]).

The parent testified that the agency sent a provider to the student's school Monday through Thursday (Tr. p. 75). The parent testified that "[t]he provider help[ed] [her] son to focus, concentrate, stay on track[,] and encourage[d] him to start an assignment, put his effort and also t[aught] him to complete assignment[s] if possible" (Tr. p. 78). The EdZone educational supervisor testified that the provider communicated weekly with the parent (Tr. p. 103).

To address the student's needs, the educational supervisor testified that the SEIT provider "d[id] a lot of one-on-one support" with the student (Tr. p. 97). While the June 2022 IEP recommended the student receive SEIT provided in a group of two, the educational supervisor testified that, due to his distractibility, the student required one-to-one teaching from the provider because he would not "do well if he had somebody working with him and another student together" (Tr. p. 99; Parent Ex. B at pp. 1, 13). In her testimony, the educational supervisor stated that the SEIT provider chunked information for the student, used manipulatives, visual aids, reminders to focus, and taught him to consider others' perspectives to improve social interactions (Tr. pp. 97-98). In addition, the SEIT provider's session notes indicate that she assisted the student through the use of redirection, verbal and visual cues, educational/interactive games, flash cards, worksheets, manipulatives and charts (Parent Ex. F). Also, as noted above, the January 2024 EdZone SEIT report indicated that she provided the student with 1:1 support, repetition of instructions, math manipulatives, and hands-on activities; broke tasks down into manageable steps; and employed the use of visual aids such as storyboards and graphic organizers and checklists to reinforce grammar rules (Parent Ex. G).

The June 2022 IEP and the January 2024 SEIT report recommended the student receive both speech-language therapy and OT (Parent Exs. B at pp. 1, 13; G at p. 4). The parent testified that the student received speech-language therapy and OT beginning at the end of October, but she did not know who was providing those services (Tr. p. 85). The parent later testified that she had spoken with the speech-language therapist but not the occupational therapist (Tr. p. 85). After further questioning, the parent testified that the student did not, in fact, receive OT (Tr. p. 86).

Finally, limited information was available in the hearing record regarding the student's progress. While not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). The January 2024 SEIT report indicated the student was in first grade and "ma[de] progress towards age-appropriate goals and objectives" (Parent Ex. G at p. 1). The report indicated there was "improvement in [the student's] fine motor skills, particularly in pencil grip" (Parent Ex. G at p. 2). The January 2024 report also indicated the student "demonstrate[d] progress in small group activities, interactions with classmates, and social skills" (id. at p. 3). Although the November and December session notes included a "[r]ating" with a corresponding number for each goal listed, the meaning of the numbers was not explained (Parent Ex. F).

The EdZone educational supervisor testified that prior to the school year, the student's functioning was "well below grade level for reading, writing, math, and socially" (Tr. pp. 93-94). She reported the student "had a very short attention span" and that he was unable to "be a student in a regular ed class" (Tr. p. 94). The educational supervisor testified that the student made progress in decoding, addition, subtraction, fluency, and letter reversals (Tr. pp. 98-99). In addition, the educational supervisor testified that the student was "getting better with staying on task" and that he was "sitting in a seat for longer periods of time" (Tr. p. 99). The educational supervisor also testified that the student offered "more relevant" responses in class (Tr. p. 99).

Based on the foregoing, the evidence in the hearing record leads me the conclusion that the parent's unilaterally-obtained SEIT services for the 10-month school year were appropriate to meet the student's needs and provided the student with specially designed instruction.

The same conclusion cannot be said regarding any services privately obtained from EdZone during summer 2023. No clarity is present from the evidence admitted by the IHO into the hearing record as to what was provided to the student in July and August 2023. The parent testified that the services for the student began in the "summertime" and then later stated "[w]henever the school year started" (Tr. p. 83). When asked by her advocate whether or not the student received summer services, the parent confirmed that he had (Tr. p. 87). The parent testified that during the summer the student received services "[i]n camp" (Tr. pp. 89, 90). There were no SEIT session notes provided for the months of July or August. The educational supervisor testified that while she did not supervise the student during the summer, she was aware the student received summer services because she conversed with the summer supervisor who suggested the student and his SEIT provider were a "good match" and that their relationship should continue during the school year (Tr. pp. 101, 117). Under the totality of the circumstances of this case, there is no information in the hearing record that indicates that the student is likely to experience substantial regression in skills in the absence of receiving summer services and it is not clear why the student was offered summer services. Thus, I decline to find services from EdZone were deficient merely because the evidence proffered to the IHO only covers the 10-month 2023-24 school year.[10]

[10] Even the district's IEP did not explain that the student had experienced a loss of skills that he learned previously. "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the

With regard to related services, the parents proposed solution in her July 6, 2023 due process complaint notice included the provision of two 30-minute sessions each of speech-language therapy and OT at market rates for the 2023-24 12-month school year (Parent Ex. A at p. 3). However, at the May 6, 2024 hearing the parent's advocated indicated that the parent was seeking RSA's for speech-language therapy and OT (Tr. p. 67). Later during the same hearing date the parent testified that the student was receiving speech-language therapy and OT but that she did not know if EdZone or someone else was providing the student's related services (Tr. p. 85). The parent testified that she had spoken with the student's speech therapist but could not recall if the therapist said who employed her (Tr. p. 85). She then acknowledged that the student had not received any occupational therapy during the 2023-24 school year (Tr. pp. 85-86). In her request for review the parent states that the student is receiving speech therapy services,[11] and she does not seek relief related to speech-language therapy or challenge the IHO's finding that the district is providing the student's speech-language services. The parent does not otherwise address speech-language therapy in her request for review. Consistent with the discussion at the impartial hearing and on appeal, the parent seeks to uphold the IHO's directive that the district provide an RSA for occupational therapy only. In its answer and cross appeal any of the related services findings or directives of the IHO, including the IHO's directive for the district to provide the parent with an RSA for OT. In this instance I find the lack of OT services was not so significant under the totality of the circumstances that it would deprive the student of a program that was reasonably calculated to enable the student to receive educational benefits under the Rowley standard, and it is not necessary to otherwise disturb the IHO's findings and directives regarding the related services.

E. Equitable Considerations

The parent appeals from the IHO's reduction of the contracted rate for the privately obtained SEIT services. The district contends that the IHO correctly reduced the rate charged by EdZone from $198 to $130 per hour both because the group rate was lower than the individual rate and because a substantial portion of the rate went towards "fringe benefits."

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child

previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf).

[11] The parent's citations provided to the transcript related to speech-language therapy are not accurate.

available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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 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]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In this matter, the parent entered into a contract with EdZone, pursuant to which EdZone agreed to provide the student with special education services, counseling, OT, PT, and speech-language therapy at a rate of $198 per hour for individual services and a rate of $148 per hour for group services (Parent Ex. E at pp. 2, 3).[12] As noted above, the only services provided to the student by EdZone during the 2023-24 school year were the SEIT services. The IHO reduced the rate awarded for the SEIT services, finding that the EdZone supervisor was not credible as to administrative expenses for the agency and, further finding, that based on the supervisor's testimony as to the agency's expenses and what was paid directly to the provider, the rate of $198 per hour was "unreasonable and inappropriate" (IHO Decision at pp. 10-11). Review of the EdZone supervisor's testimony shows that the provider who delivered the student's services was paid $85 per hour and the agency charged $198 for that time (Tr. p. 104). When asked to explain this discrepancy, the EdZone supervisor testified that "the provider gets fringe benefits" (Tr. p. 104). She also testified that the provider was an employee of EdZone and the provider did not do anything other than work besides working with the student in this case (Tr. pp. 104-05).[13]

[12] Although the contract indicated the parent "assume[d] complete financial responsibility for the services provided to [the student] by EdZone," it also indicated that if the parent's request for district funding of the services "is denied at the conclusion of a hearing, EdZone will work with the [p]arents to arrange a mutually acceptable payment plan" (Parent Ex. E at pp. 1, 2).

[13] I agree with the IHO's credibility assessment insofar as an employer paying fringe benefits for part-time work

Initially, to the extent that the IHO may have reduced the rate awarded based on his determination that the student was recommended for group services, but was provided with services individually by EdZone, this was not a proper basis for making a rate reduction. As discussed above, the parent's unilaterally obtained services were appropriate. The provision of individual services does not form a proper basis for reducing the amount of funding based on equitable considerations. The Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Thus, the IHO's proposed reduction on that ground was error.

Additionally, upon review of the evidence above, as noted by the IHO, the contract with EdZone and the EdZone supervisor's testimony as to rate do appear suspect, particularly the vague statement that over half of the rate charged by the agency goes towards "fringe benefits" for the provider for a very small number of hours of employment. However, a reduction of the rate awarded based on reasonableness must include evidence of what a reasonable rate would be, or at least a factual basis for finding a rate unreasonable, and a review of the hearing record does not include any offer of evidence by the district at all as to what a reasonable rate for SEIT services.

VII. Conclusion

The evidence provides insufficient basis to overturn the IHO's determination that the student was eligible for dual enrollment services during the 2023-24 school year. The parent sufficiently established the appropriateness of the SEIT she contracted for with EdZone during the 10 month portion of the 2023-24 school year which supports the conclusion that the services were appropriate for the student; however there is insufficient evidence to show that the student received appropriate services from EdZone during summer 2023. Under the totality of the circumstances, the lack evidence of the provision of summer services to the student was not fatal to the parent's case. Upon weighing equitable considerations, the IHO erred in concluding that the hourly rate from EdZone must be reduced due to the teacher-to-student ratio. Upon reaching these findings, the necessary inquiry is at an end and it is unnecessary to further address the parties remaining contentions.

THE APPEAL IS SUSTAINTED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

consisting of 10 hours of work per weeks seems too good to be true, but the district has not proffered alternative evidence to rebut the parent's case.

IT IS ORDERED that the March 22, 2024 IHO decision is modified by reversing that portion which the reduced the hourly rate of the SEIT from EdZone during the 10 month portion of the 2023-24 school year, and

IT IS FURTHER ORDERED that the district shall fund the costs of the SEIT provided by EdZone for the 10-month portion of the 2023-24 school year at the rate listed in the Ed Zone contract upon the parent's submission to the district of proof of delivery of the services to the student.

Dated: **Albany, New York**
July 22, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER