



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-201

**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:**

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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 in part her request for funding for her daughter's private services delivered by Achieve More Resources, LLC (Achieve More) for the 2022-23 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that equitable considerations favored partial funding of the private services from Achieve More for the 2022-23 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (*see* Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming 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

On August 11, 2016, a committee on preschool special education (CPSE) found the student eligible for special education as a "preschooler with a disability" and recommended that she receive eight hours per week of individual special education itinerant teacher (SEIT) services, three 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. B at pp. 1, 2, 12).

Subsequently, a CSE convened on March 9, 2022, and developed an individualized education program (IEP) for the student for the 2022-23 school year (second grade), with an implementation date of September 8, 2022 (Dist. Ex. 3 at pp. 1, 12). Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended that she receive ten periods per week of integrated co-teaching (ICT) services for English language arts (ELA); five periods per week each of ICT services for math, social studies, and science; and two 30-minute sessions per week of individual speech-language therapy to address the student's needs (*id.* at p. 9).<sup>1</sup> The CSE recommended that all services be provided in Yiddish (*id.*).

The hearing record includes a September 1, 2022 agreement between the parent and a private provider for the provision of eight sessions of SEIT services to the student until March 28, 2023, followed by five periods per week of special education teacher support services (SETSS) after that date (Parent Ex. C). The agreement specified the rate for the services, but did not indicate the length of the sessions to be provided (*id.*).

A CSE convened on March 15, 2023, found the student remained eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of March 28, 2023 and a projected annual review of March 15, 2024 (Dist. Ex. 2). The IESP reflected that, at the time of meeting, the student was parentally placed at a nonpublic school (*id.* at pp. 1, 13). The March 2023 CSE recommended that the student receive five periods per week of group SETSS in Yiddish in a separate location and two 30-minute sessions per week of individual speech-language therapy in Yiddish in a separate location at the clinician's discretion (*id.* at p. 10). That same day, a district school psychologist confirmed with the parent via email that she was requesting to switch the student's IEP for public school to an IESP for private school placement (Dist. Ex. 4).

As of March 29, 2023, in accordance with the March 15, 2023 IESP, the student began receiving five periods per week of SETSS pursuant to a services agreement with a provider affiliated with Achieve More (*see* Parent Exs. C; G).

#### A. Due Process Complaint Notice

In a due process complaint notice dated October 21, 2023, the parent identified the nonpublic religious school that the student was attending and alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). Specifically, the parent asserted that the last program the district developed for the student that the

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<sup>1</sup> 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]).

parent agreed with was an "Individualized Education Services Program developed on 08/11/2016 (IEP) [sic]" which mandated that the student receive "8 sessions per week of special education itinerant teacher services (SEIT), as well as certain related services" (id. at p. 1). The parent disputed any subsequent programming developed thereafter that removed or reduced services, including the March 15, 2023 IESP (id.). The parent asserted that the district failed to provide any special education services to the student for the 2022-23 school year and the parent was unable to locate providers who would accept the district's "standard" rate (id.). The parent asserted that she was able to locate providers who were willing to provide the student with all required services at rates higher than the district's "standard" rate (id.).

For relief, the parent sought district funding for the cost of eight sessions per week of SETSS instruction for the 2022-23 school year.<sup>2</sup>

A pendency implementation form, reviewed by the district on January 23, 2024, indicated that the student's pendency was based on an October 20, 2020 pendency agreement entered into in a prior due process proceeding (see Pend. Impl. Form). Pendency services included eight hours per week of individual SEIT services in Yiddish, three 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT, all on a 10-month basis (id.). The pendency implementation form indicated that the student's pendency started on the day the parent filed the due process complaint notice, October 22, 2023 (id.).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO from the Office of Administrative Trials and Hearings (OATH) on March 21, 2024 (Tr. at pp. 1-30).<sup>3</sup> In a decision dated April 11, 2024, the IHO found that the student was not entitled to the services contained in the 2016 CPSE IEP as there was no evidence that those services addressed the student's current educational needs; the student was not entitled to services for the portion of the 2022-23 school year prior to the issuance of the March 15, 2023 IESP, and furthermore, the student was entitled to five periods of SETSS instruction from that portion of the 2022-23 school year starting March 28, 2023 to the end of the school year (IHO Decision at p. 3).

In reaching his conclusions, the IHO first found that the record was "unfortunately sparse" as the parent did not testify (IHO Decision at p. 4). Other than noting that the district's attorney "stated in closing" that the student received an IEP in 2020, 2021, and 2022, the IHO found that the hearing record was devoid of evidence regarding the intervening years between 2016 and September 2022 (id.). The IHO rejected the parent's argument that the student should receive the services as listed in the 2016 IEP, finding that the "[p]arent essentially seeks a restoration of services as listed in the 2016 CPSE IEP" (id. at p. 5). The IHO reasoned that the 2016 IEP had no

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<sup>2</sup> Although the due process complaint notice did not allege any facts related to the 2023-24 school year, the parent also sought "all related services and aides on the IEP for the entire 2023-2024 school year and if required by parent (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard [district] rate for such service" (Parent Ex. A at p. 2).

<sup>3</sup> The impartial hearing was conducted virtually and no prehearing conference was conducted.

relevance to the student's educational needs for the 2022-2023 school year, as it was six years old, and as a "matter of law," it "[could] not possibly address the needs of a nearly nine-year-old child in need of special education services" (*id.*). The IHO further found that the parent failed to proffer any evidence from a qualified professional that demonstrated the student's educational needs in 2022, and that without such evidence, the "wholesale acceptance of the student's expired [] IEP as an appropriate program for the student for the [] school year runs the risk of locking the student into an outdated, inappropriate program" (*id.*).

The IHO found that the parent attended the September 8, 2022 CSE meeting, the resulting IEP recommended an ICT class and the parent did not raise any specific challenge to the September 2022 IEP in her due process complaint notice, except insofar that the parent disputed "any subsequent program" beyond the August 11, 2016 IEP (IHO Decision at p. 5).<sup>4</sup> The IHO further noted that the parent did not offer any argument during the impartial hearing that the September 2022 IEP was inappropriate (*id.*).

The IHO further noted that for a student who is parentally placed in a private school, the dual enrollment statute in State law requires parents who are seeking special education services for their child to notify the district by June 1 preceding the school year in which the special education services are sought (IHO Decision at p. 6). With regard to special education services, the IHO found that the student was offered a public school placement under the September 2022 IEP, and it was not clear that the parent was required to provide a notice for such services (*id.*). However, with respect to dual enrollment services, the IHO found there was no evidence of a June 1 notice given by the parent prior to June 1 for the 2022-23 school year, and that the parent first requested dual enrollment services on March 15, 2023 (*id.*).<sup>5</sup>

The IHO found that the IESP developed on March 15, 2023 was appropriate and supported by adequate evidence (IHO Decision at p. 7). The IHO also found that it was "uncontroverted that the [district] failed to implement this IESP" (*id.*). The IHO explained the standards for parental reimbursement for private placements under a *Burlington/Carter* analysis (*id.* at pp. 7-8). The IHO ruled that the student was entitled to dual enrollment services in accordance with March 2023 IESP, but that the district failed to show it provided them from the effective date of the IESP through the end of the 2022-23 school year (*id.* at p. 8).

Next, the IHO determined that the parent met her burden to show that Achieve More provided appropriate educational services to the student (IHO Decision at p. 8). Additionally, the IHO noted that the district did not present any arguments to rebut the parent's assertions regarding the "suitability" of the privately-obtained services (*id.*).

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<sup>4</sup> The hearing record does not include evidence of a September 2022 CSE meeting; however, as noted above, the CSE convened on March 9, 2022, and developed an IEP with a projected implementation date of September 8, 2022 (Dist. Ex. 3 at pp. 1, 9, 12). The IEP developed on March 9, 2022, was entered into evidence as a September 8, 2022 IEP (Tr. p. 5).

<sup>5</sup> The IHO rejected the parent's argument that the district should be responsible to provide dual enrollment services from September 2022 to March 2023 because the district knew the student was placed in a nonpublic school (IHO Decision at p. 7).

With regard to equitable considerations, the IHO found that the parent established that she had a valid contract with Achieve More, and that the rates charged by Achieve More were reasonable (IHO Decision at pp. 8-9). Based upon his findings, the IHO denied "the parent's request for funding for eight hours of SETSS/SEIT services for the entirety of the 2022-2023 school year" except that the district was directed to fund up to five hours of SETSS instruction per week for the period of March 28, 2023 to June 30, 2023 at a rate of \$175.00 per hour (id. at p. 11). The IHO also ordered the district to fund one hour of compensatory speech-language therapy per week "at a reasonable market rate for each week that the [district] failed to provide this service for the period of March 28, 2023 through the end of the 2022-2023 school year" and that the compensatory education hours would expire one year from the date of the IHO's decision (id.).

#### **IV. Appeal for State-Level Review**

The parent appeals, alleging that the IHO erred by failing to place a burden on the district and failing to hold the district accountable for explaining why the CSE created an IEP instead of an IESP for the student from September 2022 to March 2023.<sup>6</sup> The parent asserts that "the 2022 IEP states that the [s]tudent would be mandated for SETSS, but then did not provide for that service." According to the parent, the district conceded the necessity of providing SETSS services to the student but did not ensure the provision of these services. As relief, the parent seeks reversal of the IHO's decision and direct funding for SETSS from September 1, 2022 to March 27, 2023 at a rate of \$175 per hour.

In an answer, the district asserts that the IHO correctly determined that the student was not eligible for dual enrollment services prior to the March 2023 IESP and that the parent did not provide notice in accordance with State education law section 3602-c that she was seeking IESP services for the student for the September 2022 through March 2023 time frame. Additionally, the district contends that the parent's claims related to the 2022 IEP are improperly raised on appeal, arguing that the parent did not raise such claims in the due process complaint notice.

In a cross appeal, the district challenges the IHO's determination that equitable considerations favored the parent, asserting that there is insufficient proof of a valid contract for SETSS services with Achieve More and contends that the parent did not demonstrate a legal obligation to pay such costs.

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<sup>6</sup> Among other requirements, State regulations provide that a request for review must enumerate the disputed issues, set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced," and shall contain citations to the hearing record (8 NYCRR 279.8[c][2],[3]; see also 8 NYCRR 279.4[a]). Here, the long rambling numbered paragraphs in the request for review do not contain concise, numbered challenges to specific factual determinations or legal rulings of the IHO and otherwise fails to comport with these regulatory requirements. The entire "Argument" section lacks citation to the evidentiary record for the facts therein. While I decline to exercise my discretion to reject and dismiss the parent's request for review in this instance, the parent's counsel is warned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents and/or dismissal (see 8 NYCRR 279.8[a],[b]).

## 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 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]).<sup>7</sup> "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.).<sup>8</sup> 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

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<sup>7</sup> 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]).

<sup>8</sup> 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 at (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.

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. Scope of Impartial Hearing and Review**

Initially, I note that neither party challenges the portions of the IHO's decision which rejected the parent's request to restore the services as listed in the student's 2016 CPSEIEP, found the student should receive the services listed in the March 2023 IESP "from the date of implementation through the end of the 2022-2023 school year," determined that the services from Achieve More were appropriate for the student, and directed the district to fund compensatory speech-language services for the student (IHO Decision at pp. 8-11). Accordingly, these determinations have become final and binding upon the parties and will not be further addressed in this appeal (see 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]).

To the extent that the parent argues that the September 2022 IEP improperly failed to provide for SETSS services for the student, the district asserts that there were no challenges to the services listed in the September 2022 IEP in the parent's due process complaint notice. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). The Phillips case explained that "[a]s case law holds, '[t]he due process complaint must list the alleged deficiencies with enough specificity so that the Department is able to understand the problems and attempt to remedy them.' T.G. ex rel. R.P. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 337 [S.D.N.Y. 2013] [finding 'catch-all allegations' about placement in a due process complaint did not preserve specific claims about placement because the broad allegation failed to inform the defendant 'of a specific problem to be remedied']" (Phillips v. Banks, 656 F. Supp. 3d 469, 482-83 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]).



Here, the district is correct that the parent did not identify any specific defects in the September 2022 IEP in her October 21, 2023 due process complaint notice, which offered 25 periods per week of integrated coteaching services (Dist. Ex. 3 at p. 9), and the parent may not raise them now for the first time on appeal (Parent Ex. A). Additionally, the allegation that the parent disputed "any subsequent program the [district] developed that removed and/or reduced the services on the [2016 CPSE] IEP" was inadequate to raise a challenge to the September 2022 IEP (*id.* at p. 1). In the due process complaint notice, the parent did specifically allege that the March 2023 IESP was inadequate because it reduced the number of SETSS sessions to "only five periods per week" (*id.*). In her request for review, the parent specifically states that the "[p]arent agrees with and does not appeal that portion of the [d]ecision that awarded direct funding to Parent's chosen provider for 5 periods per week of SETSS from March 28, 2023, through June 30, 2023, at the rate such provider charges" (Req. for Rev. ¶1). On appeal, the parent also does not challenge the IHO's determination that the March 2023 IESP was appropriate for the student and supported by adequate evidence (*see* IHO Decision at p. 7). Accordingly, the remaining issues to be resolved in this appeal are the parent's challenge to the IHO's findings that the student was not eligible for dual enrollment services between September 2022 and March 2023 based on the June 1 defense, and the district's cross-appeal of the IHO's rulings regarding equitable considerations that found there was a contract between parent and Achieve More and directed the district to fund the costs thereof between March 2023 and the end of the 2022-23 school year.

### **B. June 1 Defense**

Turning next to the parent's argument that the IHO erred in finding that the student was not entitled to dual enrollment services between September 2022 and March 2023, 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]).

In this case, the parent is requesting reimbursement for privately obtained SETSS for the September 2022 to March 2023 time period. However, upon my independent review of the evidence, I find that the hearing record is devoid of any evidence demonstrating that the parent provided notice to the district on or before June 1 that she was requesting equitable services for the 2022-23 school year. I therefore find no reason to disturb the IHO's finding that the district was not obligated to provide the student with equitable services because the parent did not comply with the June 1 deadline set forth in Education Law § 3602-c.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (*Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374 [1985]; *R.E.*, 694 F.3d at 185, 194; *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 [2d Cir. 2000]; *see Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 [1993] ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court

determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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"]).

Turning to the district's cross appeal, the district asserts that relief should be denied on equitable grounds because the parent had no legal obligation to pay for the costs of the unilaterally-obtained SETSS. More specifically, the district argues that no valid contract existed between the parent and Achieve More because it was unilaterally amended by Achieve More some six months after the parties initially executed their agreement in September 2022 to reflect the recommendations contained in the March 2023 IESP (see Tr. pp. 14-15; Parent Exs. C; G). The district asserts that neither the parent nor Achieve More could have known in September 2022 that the March 2023 CSE would change the type and frequency of service. The September 1, 2022 service agreement includes handwritten text inserted into the otherwise typed agreement that Achieve More would provide "SEIT x 8 until March 28, 2023, then SETTS x 5" (Parent Ex. C). On cross-examination, the owner of Achieve More simply testified that SETSS "was added latter" in response to the district's questions asking how the September 2022 agreement could reflect the March 2023 change in type and frequency of service (see Tr. pp. 14-15; see also Parent Ex. G [owner's December 2023 affidavit which also reflects a hand edited change in service type and frequency]). While there are valid questions regarding the circumstances surrounding the change of services from SEIT to SETSS in the agreement, there is insufficient basis to controvert the existence of the service agreement which indicated that the parent would be held financially responsible if the district did not pay for the services and identified essential terms of the agreement, such as the costs of the services (see Parent Ex. C; see also E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]). The district does not explain how the alteration of the document due to the change in circumstances in March 2023 that reduced the amount of services owed from 8 sessions to 5 sessions would lead the IHO to a different result; that is if the alterations on the face of the written contract are not contractually valid, then the original terms would stand instead, and that would be a matter between the Parent and Achieve more to resolve. Accordingly, upon my independent review, I find insufficient basis to disturb the IHO's findings that equitable considerations favor the parent and that she had a valid contract with Achieve More.

## **VII. Conclusion**

Based on the above, I find that the IHO did not err in finding that the student was not entitled to receive equitable services for the September 2022 to March 28, 2023 portion of the 2022-23 school year. Further, I find that the IHO did not err in ordering the district to fund up to five hours of SETSS instruction per week for the period of March 28, 2023 to June 30, 2023 at a rate of \$175.00 per hour.

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 1, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**