The University of the State of New York

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

No. 24-346

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 Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Succeed Support Services, LLC (Succeed) for the 2023-24 school year.[1] The district cross-appeals that the IHO lacked jurisdiction to adjudicate the parent's implementation claim. The appeal must be sustained to the extent indicated and remanded for further proceedings. 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

[1] On appeal, the student's father signed the affidavit of verification of the request for review but the request for review itself appears captioned to refer to the student's mother. For purposes of this decision, "the parent" refers to the student's mother.

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, Parent 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

Given the limited nature of the appeal and the procedural posture of the matter, it is unnecessary to recite the student's educational history in detail. Briefly, in October 2022 and March 2024, CSEs convened, determined that the student was eligible for special education as a student with a learning disability, developed IESPs, and recommended that he receive four periods per week of group special education teacher support services (SETSS) in Yiddish and one 45-minute session per week of counseling in Yiddish (Parent Ex. B at pp. 1, 5-6; IHO Ex. I at pp. 1, 8).[2] During the 2023-24 school year the student attended a nonpublic school where he received SETSS delivered by Succeed (see Parent Ex. E).[3]

In a due process complaint notice, dated May 14, 2024, the student's mother alleged that the district failed to implement the services recommended in the student's October 21, 2022 and March 27, 2024 IESPs, which she asserted constituted a denial of a free appropriate public education (FAPE) to the student for the 2023-24 school year (Parent Ex. A at pp. 1-2). As relief, the student's mother sought direct funding of the SETSS and counseling services obtained by the parent and a bank of compensatory services for those services the student did not receive during the 2023-24 school year (id. at p. 3).

On June 20, 2024, the district filed a motion to dismiss alleging that the IHO did not have subject matter jurisdiction over the parent's implementation claim (Mot. to Dismiss at pp. 1-10).

After appointment of the IHO by the Office of Administrative Trials and Hearings (OATH) an impartial hearing was conducted on June 27, 2024 (Tr. pp. 1-45). During the impartial hearing, the IHO first addressed the district's motion to dismiss for lack of subject matter jurisdiction (Tr. p. 5). He afforded each party an opportunity to be heard on the jurisdiction issue and advised that he would reserve decision and address it in his findings of fact and decision (Tr. p. 9). Then, the IHO ruled on documentary evidence (see Tr. pp. 13, 16-19, 23-29). The IHO declined to admit two of the parent's proposed exhibits because they were not provided to the district five days before the hearing (Tr. pp. 22, 24, 29).[4]

In a decision dated July 2, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year, the parent failed to meet her burden of proving the appropriateness of the unilaterally obtained services, and equitable considerations did not favor the parent's request

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The October 2022 CSE recommended group counseling for the student, and the March 2024 CSE recommended that the student's counseling be delivered on an individual basis (compare IHO Ex. I at p. 8, with Parent Ex. B at p. 6).

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

[4] The proposed parent exhibits consisted of a "supervisor affidavit" and a "progress report" (Tr. pp. 22, 24).

for relief (IHO Decision at pp. 5, 6, 9).[5, 6] The IHO dismissed the parent's due process complaint notice with prejudice (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate and argues that the IHO erred in refusing to admit the parent's exhibits into evidence, in finding the parent did not meet her burden to prove the appropriateness of the unilaterally-obtained services and that equitable considerations did not weigh in favor of the requested relief, and in dismissing the due process complaint notice with prejudice. The parent requests that the matter be remanded to a different IHO for further proceedings to allow the claims to be heard on the merits.

In an answer and cross-appeal, the district responds to the parent's allegations by generally denying the material allegations, arguing that the IHO's decision should be upheld, and asserting that the IHO acted within his discretion because of the parent's failure to comply with the IHO's directives. As for its cross-appeal, the district alleges that the IHO lacked jurisdiction to adjudicate the parent's implementation claim.

In a reply to the district's answer and cross-appeal, the parent generally denies all allegations and argues that IHOs and SROs do have jurisdiction to adjudicate an implementation of services claim.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is

[5] The IHO noted that while the parent produced the IESPs at issue, the contract between the parent and the provider, the 10-day notice, time sheets, and a June 1 letter, the hearing record was devoid of any evidence regarding the work the SETSS provider actually did with the student, the provider's qualifications and certifications, goals for the student or progress made, or any testimony regarding the services for which the parent sought funding (IHO Decision at p. 6).

[6] For "completeness of the record," the IHO discussed equitable considerations and found that he would deny the parent's requested relief as the contract lacked essential terms to establish the parent's financial obligation, and had the contract established financial obligation, he would have reduced the award by ten percent due to the parent's failure to provide the district with 10-day notice of her intent to unilaterally obtain services (IHO Decision at pp. 7-9).

located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "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.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Subject Matter Jurisdiction

The district argues that the IHO lacked subject matter jurisdiction to the extent that this matter involves a request for implementation of services and that the parents had no right to file a due process complaint notice. The district filed a motion to dismiss, which the IHO represented

[7] 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]).

[8] 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.

that he would address in his written decision, but he ultimately did not do so (see Tr. p 5; IHO Decision at pp. 1-12).

The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and, accordingly, that the parent in this matter never had the right to file a due process complaint notice with respect to implementation of an IESP.

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and to develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, 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.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that

"[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district specifically asserts neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services and that a memorandum issued by the State Education Department supports its position.

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now

increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[9] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, (No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[10]

The district does not rely on the amendment to State regulation and, instead, argues that there has never been a right to bring a complaint for implement of IESP claims or enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

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

[9] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter is dated May 14, 2024 and was filed (received) in the Office of State Review on July 15, 2024 (see Parent Ex. A at p. 1).

[10] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided.

> jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[11]

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

B. Unilaterally-Obtained Services

1. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the 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 Succeed for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch.

[11] For reasons that are not apparent, the guidance document is no longer available on the State's website, so I have added a copy to the administrative hearing record on appeal in this matter.

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

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

[12] 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 Succeed (Educ. Law § 4404[1][c]).

> 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).

2. Impartial Hearing Officer's Evidentiary Rulings

Taking into account the foregoing, it is undisputed that the evidence received into evidence by the IHO was insufficient to demonstrate that the services provided by Succeed were appropriate to meet the student's needs for the 2023-24 school year. Accordingly, this matter turns on whether the IHO erred in refusing to enter into evidence the progress report and supervisor's affidavit offered by the parent.[13]

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and

[13] Although on appeal, the parent alleges that the IHO improperly dismissed the matter with prejudice as a sanction without reaching the merits, this is not accurate. Instead, the IHO made evidentiary rulings, as discussed herein, and, taking into account the evidence presented, reached the merits, finding that the parent did not meet her burden of proof.

federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

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]). Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Here, during the impartial hearing, the IHO stated his intent to identify the documents offered by the parties and give each party an opportunity to voice any objection to the documents offered by the other party (Tr. p. 5). The IHO noted that he received several e-mails from the parent both before and after the disclosure deadline (Tr. p. 17). A discussion ensued wherein the IHO and the parent's advocate identified that "Parents A through G" were provided in a timely manner but that on "Monday" (i.e., June 24, 2024), the parent's advocate "sent the last update because it [had been] missing" from the original disclosures (id.). The IHO confirmed that on Monday, June 24, he received "nine documents identified [as] Parents A through Parents' I" (Tr. p. 18). The district's attorney did not object to Parent Exhibits "A" through "E" and "G" and they were admitted into evidence (Tr. pp. 18-19, 21). However, the district objected to parent exhibits "H" and "I," a "supervisor's affidavit" and an undated progress report, "based on the fact that [they] w[ere] not timely disclosed" (Tr. pp. 21-22, 24-25).

In response to the district's objection, the parent's advocate indicated that a "disclosure was actually sent in time" but that the exhibits H and I were left out of the original disclosure inadvertently; nevertheless, the advocate claimed she had "reserve[d] the right to amend" (Tr. p. 22). Further the parent's advocate argued that to refuse to admit the exhibits would prejudice the parent (Tr. pp. 23-25, 27-28).[14]

The IHO referred to the requirement rooted in regulations, as noted above, that "each party shall have the right to prohibit the introduction of any evidence, the substance of which has not been disclosed to such party at least five business days before the hearing" and further indicated that there was no provision in those regulations allowing a party the right to reserve the opportunity "to add disclosures less than five business days before" (Tr. pp. 22-23). After hearing the parties'

[14] In view of the evidence not being entered, the parent's advocate considered withdrawing the parent's due process complaint notice without prejudice, but the district requested that any such withdrawal be deemed with prejudice and the IHO indicated he would be disinclined to allow withdrawal without prejudice at that juncture since the impartial hearing had begun (see Tr. pp. 25-28). The parent's advocate decided not to request withdrawal of the due process complaint notice (Tr. p. 28).

positions, the IHO sustained the district's objections to parent's exhibits H and I, declining to admit them into evidence given the untimely disclosure and the lack of authority cited "to support the late disclosure" (Tr. pp. 24, 29).

Based on the foregoing, it is undisputed that the parties' disclosures were due on Thursday, June 20, 2024, five business days prior to the start of the hearing on Thursday, June 27, 2024, and that, while the parent timely disclosed several documents, parent's exhibits H and I were not disclosed until June 24, 2024. While the parent's counsel attempted to argue that the disclosure did not go through in a timely manner due to a "glitch" in its system, the IHO did not find the proffered explanation to be a sufficient excuse to justify the late disclosure and was also dissatisfied with counsel's inability to cite any authority that would countervail the five-day discovery rule found in federal and State regulation (Tr. p. 23; 34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Moreover, while the parent's advocate contemplated withdrawal of the due process complaint notice, at no point did she request that the IHO adjourn the matter to allow the district additional time to review the disclosures.

On appeal, the parent's main contention is that the delay in disclosing the two documents at issue was minimal and did not prejudice the district while the exclusion of the two documents caused demonstrable prejudice to the parent. While I am mindful of the IHO's broad discretion to conduct the impartial hearing, under the particular facts of this matter, I find that the countervailing due process interests of robust record development and affording each party an opportunity to present their case in full compel a reversal of the IHO's dismissal of the parent's due process complaint. Having found that the IHO failed to develop the hearing regarding the issue of whether the parent met her burden of proving that the unilaterally-obtained services from Succeed were appropriate under a Burlington-Carter analysis due to his exclusion of the parent's exhibits H and I during the impartial hearing, the IHO's decision must be vacated and the matter remanded to the IHO. [15]

VII. Conclusion

The finding by the IHO dismissing the parent's due process complaint notice must be reversed and the matter remanded for admission of Parent Exhibits H and I, and a determination regarding whether the parent has met her burden of demonstrating that the unilaterally-obtained services from Succeed were appropriate.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

[15] SROs are authorized to remand matters back to an IHO to take additional evidence or make additional findings (see 8 NYCRR 279.10[c]).

IT IS ORDERED that the IHO's decision, dated July 2, 2024, is modified by reversing the IHO's dismissal with prejudice of the parents' due process complaint notice and the matter is remanded for further proceedings consistent with this decision.

Dated: **Albany, New York**
November 12, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER