The University of the State of New York

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

No. 24-355

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 Beyond Support Services, LLC (Beyond Support) for the 2023-24 school year. The district cross-appeals asserting that equitable considerations constitute a bar to relief and that the IHO did not have subject matter jurisdiction to hear the case. The appeal must dismissed. The cross-appeal must be sustained in part.

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

A CSE convened on July 28, 2020 and found the student eligible for services as a student with a speech or language impairment (Parent Ex. B at p. 1).[1] The CSE recommended seven periods of direct, group special education teacher support services (SETSS) per week with two 30-minute sessions of individual speech-language therapy per week and one 30-minute session of individual counseling services per week (id. at p. 8).[2, 3] The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 10).

In a letter dated May 30, 2023, the parent requested equitable services for the 2023-24 school year (see IHO Ex. III).

An electronic signature of the parent appears on a service contract with Beyond Support dated September 1, 2023 (see Parent Ex. C). The contract indicated that the parent was requesting that Beyond Support provide the student with the same services as identified in the July 2020 IESP for the entire 2023-24 school year "to whatever extent possible" (id. at p. 1). The contract also indicated that Beyond Support would "make every effort to implement" the recommended services by qualified providers (id. at p. 2). The contract set the rates for the services with SETSS at the rate of $200 per hour, speech-language therapy at the rate of $250 per hour and counseling services at the rate of $250 per hour (id.).

An affidavit of the academic supervisor at Beyond Support, dated June 17, 2024, indicated that the agency provided the student with seven 60-minute sessions of SETSS per week for the 2023-24 school year and that the student required the continuation of that number of SETSS each week for the 2023-24 school year (Parent Ex. D at ¶¶ 9, 16).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated May 3, 2024, the parent, through her attorneys, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent asserted that the student's last IESP was dated July 28, 2020 and that the district failed to implement the recommended services (id. at p. 2). The parent contended that due to the district's failure, she unilaterally secured her own providers to work with the student at an enhanced rate (id.). The parent asserted that the July 2020 IESP constituted the student's pendency and that she was seeking funding for those services through

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] All the of services were recommended to be provided in Yiddish (Parent Ex. B at p. 8).

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

[4] Although the academic supervisor did not directly indicate that the student received individual SETSS, he indicated other tasks the student's SETSS provider undertook "[a]side from providing direct 1:1 service to [the student]" (Parent Ex. D at ¶11).

pendency (id.). For relief, the parent requested direct funding/reimbursement for SETSS and related services recommended in the July 2020 IESP at an enhanced rate and reserved the right to seek compensatory education services for any services that were not provided to the student due to the district's failure to implement services (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 25, 2024 and concluded the same day (see Tr. pp. 1-53). During the hearing, the district moved to dismiss the parent's due process complaint notice asserting that it was not within an IHO's jurisdiction to address claims related to implementation of an IESP; the argument focused on what at that time was a proposed amendment to State regulation to clarify the jurisdictional issue (Tr. pp. 8-17). The IHO denied the district's motion during the hearing (Tr. p. 17).

Following the hearing, in an interim decision related to pendency, dated July 8, 2024, the IHO found that the basis for pendency was the July 28, 2020 IESP (Interim IHO Order at pp. 6-7).[5] The IHO again rejected the district's argument noting that the proposed amendment was not yet in effect (id. at p. 6). The IHO ordered pendency retroactive to May 3, 2024, the date of the due process complaint notice, consisting of seven 60-minute sessions per week of group SETSS in Yiddish, two 30-minute sessions of individual speech-language therapy per week in Yiddish, and one 30-minute session of individual counseling services per week in Yiddish (id. at pp. 6-7).

In a final decision dated July 12, 2024, the IHO noted that the appropriate standard to apply was the Burlington-Carter analysis (IHO Decision at pp. 5, 14). The IHO found that the parent was not on notice that the district would raise an affirmative defense based on a proposed amendment to clarify State regulations "which [was] not yet in effect, nor ha[d] retroactive language" (id. at pp. 9-10). The IHO noted that the district did not provide a copy of the proposed amendment that it was relying upon to allow the parties to review and respond (id. at p. 10). The IHO determined that the parent was prejudiced by the district raising the affirmative defense during the hearing (id.). Further, the IHO took judicial notice that the proposed amendment to the regulation would not take effect until September 2024; and, therefore, the IHO found that the district's motion was untimely and had no bearing on the matter (id.). The IHO noted that the district also raised the defense of June 1 at the hearing and that the parent subsequently provided a copy of the letter with proof of delivery via email into the hearing record (id.). The IHO held that the district failed to provide proof that it did not receive the June 1 letter and that the parent rebutted the June 1 affirmative defense by providing compelling proof that the June 1 notice was delivered to the district (id.).

The IHO determined that the district failed to implement the student's IESP for the 2023-24 school year (IHO Decision at p. 11). However, the IHO found that the hearing record was "devoid of independent information as to the Student's current strengths and weaknesses, goals and Student's needs" and the IHO did not find that the parent met her burden to establish that the unilaterally-obtained SETSS were appropriate for the student (id. at p. 12). Having rejected the parent's request for funding of SETSS, the IHO turned to the parent's request for compensatory

[5] The IHO's interim decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Interim IHO Decision at pp. 1-7).

education for missed speech-language therapy services and counseling services (id.). The IHO held that the student did not receive the recommended services and was not receiving services and because the student was entitled to services, the IHO directed the district to fund a bank of hours for the services the student did not receive at a reasonable market rate for the 2023-24 school year (id.).

The IHO ordered the district to fund compensatory relief for the 2023-24 school year consisting of two 30-minute sessions per week of individual speech-language therapy in Yiddish at a reasonable market rate for a total of 36 hours and one 30-minute session of individual counseling services per week in Yiddish at a reasonable market rate for a total of 18 hours (IHO Decision at p. 13). The IHO ordered that the bank of compensatory services for speech-language therapy and counseling services would expire in two years and may be provided during the school year, summer, weekdays, weekends, holidays, or school vacations (id.). The IHO further ordered that the provider was required to identify whether any portion of the fee charged was for legal fees and, if so, the award would be reduced by that amount (id.). Lastly, the IHO ordered that the district "shall not fund any services provided for herein that have already been funded under a pendency order or agreement for the 2023-2024 school year" (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that, while she did not explicitly disagree with the IHO's use of the Burlington-Carter standard, she believes that the "law affords parents some general leeway in meeting" their burden when there is no claim for tuition reimbursement. According to the parent, she agreed with the district's mandated program and was simply seeking funding for those services that she was forced to unilaterally implement due to the district's failure for provide them.

The parent contends that the IHO erred by finding that the services were not appropriate as the IESP described the student and it was the district's obligation to develop a more recent IESP. As the district failed to do so, the parent should not be penalized for reasonably relying on the IESP as the baseline for the student's needs. Further, the parent argues that the district did not challenge the appropriateness of the unilaterally-obtained SETSS and the IHO should have considered those services appropriate. The parent requests that the SRO remand the case to afford the parent the opportunity to supplement the hearing record or in the alternative, the SRO should find that the unilaterally-obtained services were appropriate and order direct funding for SETSS at the provider's contracted rates.[6]

The district submits an answer and cross-appeal. Initially, the district asserts that the IHO correctly found that the parent failed to demonstrate that the unilaterally-obtained services were appropriate. The district argues that the hearing record does not contain sufficient evidence to support a finding that the services were appropriate as it does not specifically describe the student's individual needs or any of the specific elements of instruction that the student received.

[6] The parent attached additional evidence to the request for review, consisting of a four page "23-24 Q3 Progress Report" from Beyond Support (Req. for Rev. Ex. A).

For the cross-appeal, the district contends that the IHO erred as neither she nor the SRO has jurisdiction to hear the parent's claims. The district argues that there is no subject matter jurisdiction to hear the claims as the State Education Department clarified that State regulations do not grant students with IESPs the right to file a due process complaint notice in order to implement an IESP. Moreover, the district asserts that the Board of Regents amended State regulations with an emergency rule in July 2024 and that the rule is scheduled for adoption on a permanent basis in November 2024. The district contends that in guidance following adoption of the emergency rule, the State indicated that parents have never had the right to file a due process complaint notice in order to request an enhanced rate for equitable services.

As a second cross-appeal, the district asserts that equitable considerations do not favor the parent's request for relief. The district contends that there is no evidence that the parent gave timely notice to the district of her intent to unilaterally obtain services for the 2023-24 school year and that relief should be denied on this basis alone. Further, the district argues that that the requested rates of services at $200 or $250 per hour were unreasonable. The district contends that a reasonable rate is $125 per hour and that the parent failed to justify a higher rate.

Lastly, the district cross-appeals from the IHO's orders related to compensatory education and pendency. Without further explanation, the district argues that the orders should be vacated.

The parent submits a reply and an answer to the district's cross-appeal. The parent reasserts that she met her burden to demonstrate that the services she unilaterally-obtained were appropriate under the Burlington-Carter standard. As for the district's contention that the IHO and SRO do not have jurisdiction, the parent contends that the IHO properly rejected the district's argument. The parent asserts that the emergency regulation specifically states that it only applies to cases filed on or after July 16, 2024 and the due process complaint in this matter was filed before that, in May 2024. The parent argues that equites favor her claim for relief as the district failed to meet its obligation to develop an IESP and implement that IESP. The parent contends that since the district failed in its obligations, the equities "already weigh in favor of the parent at the outset of the school year." Moreover, the parent asserts that any 10-day notice would have been futile as the district did not offer to implement the services and that if the district wanted to curtail costs, it should have provided the student with services. Lastly, the parent argues that the IHO's pendency order is well-founded and compensatory education was appropriate. The parent requests that the SRO affirm the IHO's pendency and compensatory education order and reverse the IHO's finding that she failed to demonstrate that the unilaterally-obtained services were appropriate. The parent requests that the SRO dismiss the district's cross-appeal.

V. Applicable Standards

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

the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[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]).

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[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.

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

Initially, I will address the additional evidence submitted by the parent with the request for review. In general, 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]).

I note that the parent did not explicitly request that the progress report be entered into the hearing record (see Req. for Rev.). The parent simply requested that the SRO remand to the IHO or find that the unilaterally-obtained services were appropriate "upon supplemental evidence provided herein" (id. at p. 3). The proposed exhibit was dated May 30, 2024, which was almost a month prior the impartial hearing on June 25, 2024. The parent has presented no reason as to why she did not submit this progress report at the time of the impartial hearing. Moreover, after the conclusion of the hearing, the IHO requested that the parent provide a copy of the progress report mentioned in the affidavit of the Beyond Support academic supervisor and the parent failed to submit it to the IHO (see IHO Ex. IV). As such, I decline to amend the hearing record and will not review the proposed exhibit.[9]

2. Subject Matter Jurisdiction

Next, I will turn to the district's argument that the IHO and SRO lack subject matter jurisdiction in this case. The district made a motion to dismiss at the impartial hearing, which was denied by the IHO, in part because the IHO treated the district's position as to subject matter jurisdiction as an affirmative defense and found that it was not raised timely (IHO Decision at pp. 9-10). However, subject matter jurisdiction is not an affirmative defense, as it refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument in accordance with the IHO's rules for a motion to dismiss at the hearing before the IHO, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP

[9] It is also noted that the parent submitted the June 1 notice with the answer to the cross appeal. As the IHO found that the parent complied with the June 1 deadline and the district did not appeal that finding, the admittance of that document is not necessary (see IHO Decision at pp. 10-11; see also Dist. Answer with Cross Appeal). Moreover, the exhibit was already entered into the hearing record by the IHO (see IHO Ex. III).

and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP (Answer and Cr.-Appeal ¶¶18, 19).

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 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 alone, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). 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 student's individual needs 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 that State law "does not grant Section 4404 due process rights for the purpose of IESP implementation" and that the State Education Department clarified this existing law by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶ 19).

Initially, § 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.).[10] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of 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).

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice and also acknowledges the injunction but contends that the emergency regulation merely clarified existing law and that the injunction had no effect whatsoever on its core argument regarding subject matter jurisdiction (Answer & Cr.-Appeal ¶ 19; Oct. 9, 2024 Letter from Dist). Consistent with the district's position, State guidance issued in August 2024 noted that:

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

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

[10] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

[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.

However, acknowledging that the question has 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 regardless of the guidance document.

B. Unilateral Placement

Turning next to the substance of the parties' dispute, the parties agree that the IHO properly used the Burlington-Carter standard to determine whether the unilaterally-obtained services were appropriate. However, the parent argues that she should receive some leeway as this was not a tuition reimbursement case and she was merely attempting to secure funding for services she was required to obtain to implement the student's educational programming. The district contends that the parent failed to meet her burden and the IHO's decision should be affirmed.

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 Beyond Support for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.

Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85;

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[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.

[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 Beyond Support (Educ. Law § 4404[1][c]).

> 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).

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS were appropriate to meet the student's needs. As an initial matter, I note that it is difficult to ascertain the student's needs at the beginning of the 2023-24 school year as, at that time, the student's most recent IESP was from July 28, 2020 and included evaluation results from an IEP dated July 1, 2014 (Parent Ex. B at pp. 1, 10). Generally, the evaluation results indicated that the student's cognitive ability, expressive and receptive language, and fine motor and gross motor skills were all in the average range (id. at pp. 1-2). However, the results of at least one evaluation indicated that the student's social/emotional development was below average, and another assessment indicated that student presented with "several phonological processes" (id. at p. 1).

In contrast to the "average" test results, the present levels of performance of the July 2020 IESP indicated the student presented with cognitive, social/emotional/behavioral, and prewriting/handwriting deficits (Parent Ex. B at p. 3). In addition, the IESP stated the student exhibited delays in reading readiness, reading/decoding, and math readiness, as well as "organization and study and basic concepts" (id.). It was noted that the student was "able to recite the ABCs and their sounds," "spell CVC words correctly with 80 [percent] accuracy," write numbers correctly and add and subtract basic math facts, and read "many" sight words correctly (id.). According to the IESP, the student was unable to tell time on a clock and had difficulty completing math word problems (id.). The student also had difficulty attending to task and was unable to filter outside stimuli and distractions (id.). With regard to social development, the July 2020 IESP indicated that the student was "unable to willingly participate in a new or unfamiliar task," was unmotivated and gave up easily, and had difficulty with peer relationships (id. at p. 4). In addition, at home he acted out physically when things did not go his way (id.). Turning to the student's physical development, the July 2020 IESP indicated the student demonstrated significant weaknesses in prewriting and handwriting skills that affected his ability to form letters, stay within lines, and leave appropriate spacing between words (id.). The IESP included an additional statement that indicated the student "demonstrated deficits with answering questions with one word/complete sentences with detail, comprehending explanations and following instructions given by adults, and recognizing consequences of actions and making proper choices" (id.).

The July 2020 IESP recommended the following modifications and resources to address the student's management needs: a multisensory approach to instruction, focusing prompts, graphic organizers, scaffolding material for reading, and chunking (Parent Ex. B at p. 5). In addition the IESP included annual goals that targeted the student's ability to read a fourth grade text with 25 words correct per minute; demonstrate the correct understanding of words with multiple meanings, when a word is provided in a sentence; produce a multiple paragraph composition; order/compare mixed whole numbers and decimals; compute problems requiring addition and subtraction of multi-digit numbers greater than 10,000; begin a task within one minute and remain on task for a minimum of 10 minutes; demonstrate self-control of his body and voice; produce final consonants at the word, phrase, sentence, and conversational level; demonstrate age-appropriate verbal reasoning by identifying the main idea and critical details from a text; and demonstrate grade appropriate vocabulary skills (id. at pp. 5-7).

On September 1, 2023, the parent entered into a contract with Beyond Support in which the agency agreed to provide seven periods per week of direct, group SETSS in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, and one 30-minute session per week of counseling in Yiddish (Parent Ex. C).

The IHO found that in her attempt to prove the appropriateness of the unilaterally-obtained SETSS, the parent provided evidence including testimony by the academic supervisor from Beyond Support (academic supervisor) and the credentials of the Beyond Support SETSS provider (IHO Decision at p. 11; see Parent Exs. D; E). The IHO found that in addition to identifying the SETSS provider's credentials, the academic supervisor testified regarding the instruction provided to the student, and the student's progress, as detailed in a progress report (IHO Decision at pp. 11-12). The IHO noted that the academic supervisor made reference to a progress report, and that the IHO requested the report, but no evidence was provided by the parent (id. at p. 12). The IHO found that the hearing record was devoid of independent information as to the student's current strengths and weaknesses, goals and needs, and did not find the parent's unilaterally-obtained services to be appropriate (id.).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 36-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In an affidavit dated June 17, 2024, the academic supervisor at Beyond Support reported that the agency provided the student with seven 60-minute sessions per week of SETSS for the 2023-24 school year (Parent Ex. X at ¶ 9). He identified the student's SETSS provider by name and indicated that the provider was certified by New York State to teach students with disabilities (Parent Ex. X at ¶ 10; see Parent Ex. E). He further reported that the provider was trained and experienced to teach ELA and math to school-aged children and adolescents (Parent Ex. X at ¶ 10). According to the academic supervisor, in addition to providing direct 1:1 services to the student, the SETSS provider also prepared for sessions, created goals, wrote progress reports, and met with teachers and parents (id. at ¶ 11). The academic supervisor stated that the progress report

entered into evidence was an accurate presentation of what the SETSS provider had been working on with the student, including how the services were addressing the student's specific delays, and that it included goals that were worked on during the course of the 2023-24 school year (id. at ¶ 12). The academic supervisor reported that the student's services were typically provided outside of the classroom, were individualized, and included a great deal of specialized instruction (id. at ¶ 13). He further reported that the student's progress was measured though quarterly assessments, consistent meetings with the provider and support staff, observation of the student in the classroom, and daily session notes (id. at ¶ 14). In addition, the academic supervisor reported that the student had already shown signs of progress with his SETSS provider but that his academic and social delays warranted the need for continued services (id. at ¶ 15).

In an email to the parties, dated July 9, 2024, the IHO noted that the academic supervisor for Beyond Support referenced a progress report in his affidavit that was not provided (IHO Ex. IV). The IHO requested that a copy of the progress report be provided by close of business on July 10, 2024 "for inclusion in the record and consideration when preparing by [sic] FOFD" (id.). In her decision, the IHO reported that the parent representative failed to provide a copy of the requested progress report (IHO Decision at p. 12, fn. 5). On appeal, the parent does not explain why the progress report was not entered into evidence at the time of the impartial hearing or provided in response to the IHO's request. Rather, the parent submits a progress report with her request for review and asks for a remand of the matter to afford her the opportunity to supplement the hearing record or in the alternative a finding that the unilaterally-obtained SETSS were appropriate based upon the supplemental evidence provided.

Here, the hearing record supports the IHO's determination that the parent did not meet her burden regarding the appropriateness of the unilaterally-obtained SETSS. In addition to referencing a progress report, the Beyond Support academic supervisor also referenced quarterly assessments and daily session notes that were maintained by the student's SETSS provider to measure his progress. However, none of those documents were entered into evidence during the hearing. As a result, the only evidence of the appropriateness of the service was a three-year old IESP recommending SETSS, testimony by the academic director of the provider agency that the student was "currently" receiving SETSS provided by another named individual, and a printout indicating the academic supervisor held a "Students With Disabilities (Grades 1-6), Initial Certificate" (Parent Exs. B; D; E). Accordingly, there is little information in the hearing record indicating that the student received SETSS, or how frequently the student received SETSS during the 2023-24 school year, and there is no record of the deficit areas targeted by the student's SETSS provider nor of the goals he worked on, instruction he provided, materials he used, or tasks or activities he employed to address the student needs. As a result, the parent's appeal must fail.

C. Relief

The district contends that the IHO erred by ordering the district to fund compensatory relief for speech-language therapy and counseling services citing its prior argument regarding the NYSED proposed regulations, which as previously noted have been stayed and do not support dismissal of the due process complaint notice on jurisdictional grounds.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The

purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The parties did not appeal the order on pendency dated July 8, 2024 which found that the student's pendency was the July 2020 IESP (see IHO Interim Order). The district does not argue that it was not required to provide the student with services as it failed to appeal the IHO's finding that the parent complied with the June 1 deadline. Instead, the district's sole challenge to the compensatory education award is the same as its jurisdictional challenge. As there is no dispute that the district was required to provide the student with the services for the 2023-24 school year and there is little evidence other than the July 2020 IESP upon which to base any kind of award, the IHO's decision that the student was entitled to compensatory education equivalent to the related services recommended in the July 2020 IESP is not sufficiently challenged on appeal. However, the IHO erred by ordering the services be provided by a provider of the parent's choosing as this is effectively engaging in an end run around the burden of proof for privately obtained services. This office has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 24-213; Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally selected private special education companies, I find it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief. In most cases, the district, as the party responsible to implement special education services in the first place, should be directed to carry out the remedial relief ordered by an administrative hearing officer.

Here, the IHO erred in her order directing that compensatory education be delivered by a provider of the parent's choosing. Instead, the order is modified to find that the parent is entitled

to both speech-language therapy and counseling services as recommended in the July 2020 IESP, but for the duration of the 2023-24 school year, to be provided by the district, unless the parties otherwise agree.

VII. Conclusion

Having found that the IHO correctly determined that the parent failed to meet her burden to demonstrate that the unilaterally-obtained services were appropriate, it is unnecessary to address equitable considerations. The IHO erred in ordering the district to fund the student's compensatory education to be delivered by the parent's chosen providers at their specified rates. The parent is entitled to 36 hours of compensatory speech-language therapy and 18 hours of counseling services, to be provided by the district, less any services provided pursuant to pendency, unless the parties otherwise agree.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 12, 2024 is modified by vacating those portions which ordered the district to fund therapists selected by the parents, and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 36 hours of individual speech-language therapy and 18 hours of individual counseling services for the 2023-24 school year, less any services already provided to the student pursuant to pendency.

Dated: **Albany, New York**
October 25, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER