The University of the State of New York

The State Education Department
State Review Officer
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No. 24-386

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

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

Briefly, the CSE convened on October 20, 2022 and finding the student eligible for special education as a student with a learning disability, developed an IESP for the student (Parent Ex. B).[1] The October 2022 CSE recommended that the student receive 10 periods per week of direct, group SETSS in a separate location and the IESP noted that the student was parentally placed in a nonpublic school (id. at pp. 7, 11).

The hearing record includes a document dated September 1, 2023, on Step Ahead's letterhead, which, according to the testimony of the secretary from Step Ahead, the parent signed "manually"; however, there is no indication as to when the document was signed by the parent (Tr. pp. 30-33; Parent Ex. C). The document indicates that the parent was "aware that the rate of the SETSS services provided to [her] child [wa]s $225 an hour, and that if the [district] d[id] not pay for the services" she would be "liable to pay for them" (Parent Ex. C).[2]

According to session notes and a progress report produced by Step Ahead, the student began receiving special education services from Step Ahead on September 11, 2023 when the student was in a seventh grade class at her nonpublic school (Parent Exs. G at p. 1; H at p. 1).

A. Due Process Complaint Notice and Subsequent Event

In a due process complaint notice dated May 23, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the last program developed by the district that the parent agreed with was the October 2022 IESP and argued that the student required that same program for the 2023-24 school year (id.). The parent contended that she was unable to locate providers at the district standard rates for the 2023-24 school year and that the district did not provide any (id.). According to the parent, she was able to find providers to deliver all required services for the 2023-24 school year, but at rates higher than the standard district rates (id.). The parent requested a pendency hearing and an order directing the district to fund the student's special education teacher at an enhanced rate for the 2023-24 school year (id. at p. 2). The parent also requested any other relief deemed appropriate (id.).]

The district submitted a due process response dated May 29, 2024 (Parent Ex. F).

[1] 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]).

[2] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The secretary from Step Ahead testified that the parent manually signed the parent rate agreement rather than signing electronically (Tr. pp. 28, 32, 33).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on July 9, 2024 (Tr. pp. 1-56). In a decision dated July 29, 2024, the IHO found that the district did not implement the student's October 2022 IESP by making providers available for the student and failed to offer the student equitable services for the 2023-24 school year (IHO Decision at pp. 5, 8).

Next, the IHO determined that the parent had not met her burden to show that Step Ahead offered services that were specially designed to meet the student's needs (IHO Decision at p. 6). Specifically, the IHO found that the SETSS records were "problematic" because the first 12 pages of the attendance records covering the period from September 2023 through February 2024 "lack[ed] any notes whatsoever to indicate what was done in any particular session during that period," and that subsequent notes were "unclear what work was done with [the s]tudent or how that work related to the goals established" in the IESP (id.). As such, the IHO concluded that the hearing record lacked evidence concerning the SETSS delivered to the student over the first five months of the school year (id. at p. 7). Regarding the May 2024 SETSS progress report, the IHO found that the goals were "identical to those established in the October 20, 2022 IESP in math, reading, and writing," and given that those goals were developed "two school years ago" it was "troubling" and "weighed against the appropriateness of the services provided by [the] SETSS [p]rovider" (id.). Further, the IHO determined that he "must either find that [the s]tudent ha[d] been unable to make any progress under these services or that the progress report [wa]s inaccurate or unreliable," noted that the progress report lacked "any recommendations," and also stated that it was "troubling that [the] SETSS [p]rovider t[ook] no position whether [the s]tudent should continue with services or whether the frequency of services should be changed" (id.). Therefore, the IHO found that the parent had not met her burden to show that the SETSS was reasonably calculated to meet the student's needs (id.).

The IHO went on to address equitable considerations "for completeness of the record" and found that the "[p]arent presented no evidence of a 'Ten-Day Notice' which would have put [the d]istrict on notice of [the p]arent's intention to unilaterally obtain services and seek funding from [the d]istrict" (IHO Decision at p. 7). He then found that the lack of notice "failed to give [the d]istrict an adequate opportunity to address" the parent's concerns (id.). Next, the IHO determined that the "SETSS [p]rovider was only certified to work with students through the sixth grade but was providing services to [the s]tudent, who was in the seventh grade" during the 2023-24 school year (id.). As such, "were an award to be ordered," the IHO found that a 20 percent reduction in the contracted rate, or $180 for SETSS, would be warranted (id. at p. 8). Additionally, the IHO determined that the hearing record did "not establish that [the p]arent assumed a financial obligation" to Step Ahead for the 2023-24 school year (id.). Specifically, the IHO described the "'contract' [as] comprised of two sentences," and did not indicate what services the student was receiving, what program those services were based on, how many hours of services the student would receive, or when the services would start (id.). Further, the IHO found that the parent's signature was undated, so it was unclear when she assumed her financial obligation (id.). As the IHO determined that the "[p]arent assumed no financial obligation" to Step Ahead, "it would be inequitable to assign such obligation" to the district at that time (id.). As a result of his finding that the parent had not demonstrated that the unilaterally-obtained SETSS were appropriate for the

student, the IHO denied the parent's request for funding of the SETSS delivered by Step Ahead to the student during the 2023-24 school year and dismissed the matter with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her claim for direct funding of the 10 periods per week of SETSS provided to the student by Step Ahead during the 2023-24 school year. At the outset, the parent contends that the IHO used an incorrect standard and that the burden of proof and persuasion lay entirely with the district. According to the parent, she utilized the services of appropriately credentialed providers for SETSS and simply requested that Step Ahead be paid for delivering the services which were mandated on the student's October 2022 IESP. The parent contends that the SETSS provider's "grade level on her certificate" was not a proper basis to deny the parent's claim. Further, according to the parent, "any arguments that the services were not appropriate" were not based on the hearing record; the SETSS provider submitted a progress report with the student's present levels of performance and goals, and the attendance records had "several months of the detailed action being taken by the provider to address [the s]tudent's needs," therefore demonstrating that the SETSS were appropriate.

As to equitable considerations, the parent asserts that the 10-day notice requirement only applies to tuition reimbursement cases and not to 3602-c service implementation cases. The parent further contends that even if the 10-day notice requirement was applicable to this matter generally, such notice only applies when a student is removed from a public-school. Further, the parent argues that there is no evidence in the hearing record that the parent had received notice regarding the applicability of the 10-day notice requirement and, as such, the 10-day notice requirement cannot apply.

Additionally, the parent asserts that the IHO's alternative finding that equitable considerations also weighed against the parent due to issues with the agreement between the parent and Step Ahead had "no legal support." The parent argues that "this is not a contract required to be in writing," and because the parties agreed to the terms and memorialized the agreement in writing, a "valid and binding financial obligation exists." Additionally, the parent asserts that the agreement otherwise did not demonstrate any inequitable conduct by her and that the district is the party that has acted inequitably. The parent also claims that she is "entitled to funding at least under pendency since [the district] failed to agree to pendency, supply a provider during pendency, and [the] IHO failed to issue a pendency order."

The parent requests an order reversing the IHO's decision and granting her request for direct funding for SETSS at the rate of $225 per hour.

In an answer and cross-appeal, the district asserts that the IHO properly held that the parent failed to prove that the unilaterally obtained SETSS from Step Ahead were appropriate and that equitable considerations weighed against the parent on the grounds found by the IHO, and also on the ground that the rates charged by Step Ahead were excessive and warranted either a reduction or denial of any relief awarded.[3] The district cross-appeals on the ground that the IHO did not

[3] With respect to excessiveness of rates, the district specifically argues that "the SRO should defer to the AIR Study submitted into evidence" at the impartial hearing by the district and limit funding of the SETSS to a rate of

have subject matter jurisdiction over the parent's due process complaint notice and therefore the parent's claims should be dismissed.

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]).[4] "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.).[5] Thus, under State law an eligible New

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$117.99 which "constitutes a fair market rate for a special education elementary school teacher, after accounting for indirect costs and fringe benefits, as it would provide a market rate within the 75th percentile" (Answer and Cr.-Appeal at ¶ 12).

[4] 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]).

[5] 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

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

Here, neither party appealed from the IHO's finding that the district did not implement the student's October 2022 IESP by making providers available for the student, and failed to offer the student equitable services for the 2023-24 school year (see IHO Decision at p. 5). Accordingly, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Subject Matter Jurisdiction

As an initial matter, I will address the district's cross-appeal that the IHO and SRO lack subject matter jurisdiction in this case. Although the district did not raise the argument during the impartial hearing, 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 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 ¶¶ 13-15).

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

the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). 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 (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 "there is not, nor has there ever been, a right to bring a complaint for implementation of IESP claims or enhanced rate services" and that the State Education Department clarified this existing law by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 as explained in its related guidance document (Answer & Cr.-Appeal at ¶ 15).

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, as the number of due process cases involving the dual enrollment statute statewide have drastically increased within certain regions of this school district in the last several years, it is understood that 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. 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.). 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).

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 parents "'never had the right to file a due process complaint to request an enhanced rate for equitable services'" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction (Answer & Cr.-Appeal ¶ 15; 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]).

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. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

B. Unilaterally-Obtained Services

Initially, the parent contends that the IHO did not apply the correct legal standard because the parent agreed with the educational program as set forth in the student's October 2022 IESP and was not attempting to implement a different program for the student. According to the parent, a Burlington/Carter analysis should not apply when a parent is attempting to implement the same program as called for in an IESP and in this instance, according to the parent, she "utilized the services of an Agency using appropriately credentialed providers for SETSS" and "simply requested that the providers be paid for delivering the services based on the IESP."

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 Step Ahead 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]).[6] 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).

With respect to the parent's assertion that the above framework should only apply to IEP disputes, and not to disputes solely related to implementation, such a claim is contrary to the IDEA. A district's delivery of a placement and/or services must be made in conformance with the CPSE's or CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services

[6] 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 Step Ahead (Educ. Law § 4404[1][c]).

called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 Fed. App'x 63 [2d Cir. 2014]).

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 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).

Under the above framework, the parent argues that, contrary to the IHO's determination, she sustained her burden to establish that the unilaterally-obtained SETSS delivered by Step Ahead were appropriate, because the SETSS provider was "credentialed," and that the Step Ahead attendance records and progress report demonstrated that the SETSS were appropriate to address the student's needs.

1. The Student's Needs

Although not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal, namely whether the SETSS delivered by Step Ahead were appropriate to address the student's needs.

The October 2022 IESP, developed when the student was attending sixth grade at the nonpublic school, reflected reading scores that indicated her skills were in the third to fourth grade range (Parent Ex. B at pp. 1, 10; see Parent Ex. H at p. 1). According to the IESP, the student made text to self connections when reading class novels, and when in small groups, asked questions as needed and applied that guidance to her work (Parent Ex. B at p. 2). The IESP described the student as a "strong writer" and that writing was a "strength" (id.). Math "tend[ed] to be challenging" for the student and results of the most recent math assessment indicated that her skills were on a fourth grade level (id. at pp. 1, 2). Review of the student's social and physical development present levels of performance in the October 2022 IESP did not indicate difficulties in those areas (id. at p. 3). The CSE identified strategies to address the student's management needs that included reassurance that she was on the right track, directions read twice, break down questions to determine what each question was asking the student to do, 1:1 instruction outside of the classroom to supplement learning, extra practice with basic multiplication and division facts, preferential seating, and additional time (id. at p. 4). To address the student's academic needs, the CSE recommended that she receive 10 periods per week of group SETSS in a separate location (id. at p. 7).

2. SETSS From Step Ahead

Turning to the services the student received during the 2023-24 school year, the hearing record included what appears to be a fillable document, which the parent submitted into evidence and is identified as "Attendance Records"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. G at pp. 1-28). The attendance records reflect the student's name; the SETSS provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); and areas for notes (id.). Overall, a review of the attendance records shows that from September 11, 2023 to June 14, 2024 the student generally received SETSS from a provider who holds a New York State Students with Disabilities Grades 1-6 Professional Certificate (Parent Exs. E; G at pp. 1-28).[7] Review of the attendance records indicates that most sessions lasted an hour and were conducted at the student's school (see Parent Ex. G). The IHO is correct that the SETSS provider did not complete any session notes from September 11, 2023 to February 29, 2024 (id. at pp. 1-13).

Thereafter, from March 1, 2024 through June 14, 2024, the SETSS provider reported supporting the student with reading skills such as following along, taking notes, annotating and summarizing what she read, practicing decoding and comprehension strategies, building vocabulary, discussing book facts to facilitate recall, reading aloud, making inferences, answering questions about the reading, and selecting grade appropriate reading material (see e.g., Parent Ex. G at pp. 13, 14, 16, 17, 18, 20, 21, 22, 23, 25, 27, 28). To improve the student's written language skills, the SETSS provider reported working with the student to improve her organization, grammar, and sentence structure; her ability to express ideas clearly, use graphic organizers, correct spelling, add punctuation, and check her work; increase editing and revising skills, and use of stronger word choices, a "creative hook," sentence starters, relevant evidence in her writing, and brainstorming to develop essay paragraphs (id. at pp. 19, 20, 21, 22, 23, 25, 26, 27, 28). In math, the SETSS provider reported working on concepts and skills such as accurately copying math notes, and completing problems involving concepts such as volume, positive/negative numbers, Pi, word problems, percentages, variables, equations, fractions, money, math facts, exponents, and geometry (id. at pp. 13-28). Additionally, the SETSS provider reviewed material and practiced questions for tests with the student, helped her organize and complete missing work and homework, administered assessments, and created study guides (id. at pp. 16, 17, 20, 23, 24, 27, 28).

The Step Ahead SETSS progress report, dated "END OF 23-24" indicated that "at times" the student "need[ed] teacher support to help her stay on top of her work," and she benefitted from working 1:1 and sitting next to someone who could support her throughout the day (Parent Ex. H at p. 1). According to the progress report, the student needed support with decoding and reading fluency, and she benefitted from targeted phonics and morphological instruction to break down words into smaller parts, and 1:1 instruction for repeated readings and application of decoding strategies (id. at p. 2). In the area of writing, the progress report indicated that the student needed

[7] The SETSS provider's last name is different between the certification document and the progress report/attendance records (compare Parent Ex. E, with Parent Exs. G; H at p. 1). The secretary testified that the SETSS provider used both her maiden name and married name, but that the name on the documents reflects the same person (Tr. pp. 38-39). The secretary from Step Ahead testified that she did not personally know the student and did not "offhand" know anything about the services she was receiving (Tr. pp. 28-29, 33-34).

guidance creating longer, detailed sentences, and that she struggled with proper capitalization, verb tense, sentence structure, and spelling (id.). Further, the progress report reflected that the student benefitted from anchor charts, graphic organizers, checklists, and rubrics when writing (id.). As for math, the SETSS provider reported that the student benefitted from breaking down multi-step math problems using anchor charts, multiplication tables, and re-reading directions (id. at p. 1). The student also required material to be retaught several times before she understood it, she had difficulty determining which operation to use to solve equations, and she was confused by word problems (id.).

The SETSS progress report identified annual goals for reading and writings directed at the student determining the meaning of unknown words using context clues, quoting accurately from text, and drawing inferences, as well as improving her ability to self-correct spelling, capitalization, tense, and punctuation in writing assignments (Parent Ex. H at p. 2). As noted by the IHO, these goals were almost identical to the annual goals included for the student in the October 2022 IESP (compare Parent Ex. H at p. 2, with Parent Ex. B at p. 5). Accordingly, the IHO was right to question what progress the student may have made with the use of SETSS since the October 2022 IESP is worth questioning and it would have been preferable for the SETSS provider to have reported the student's progress in meeting the identified goals, i.e. if the student was progressing towards meeting the annual goals; especially considering that the progress report indicated the student's progress towards the reading and writing goals was to be measured by teacher observations, class activities, teacher made materials, and assessments (see Parent Ex. H at p. 2). However, the continuation of the same goals from the October 2022 IESP does not by itself warrant a finding that the SETSS delivered to the student during the 2023-24 school year was not an appropriate service. Additionally, the SETSS progress report did identify different annual goals for math, directed at using tools to solve multi-step equations using different operations, and solving word problems involving multiplication and division using strategies (compare Parent Ex. H at p. 2, with Parent Ex. B at pp. 5-6).

Turning to the specially designed instruction identified in the hearing record, both the Step Ahead attendance records and the progress report reflected that the SETSS provider used strategies with the student including number lines, repetition, vocabulary building exercises/activities, text preview, visual aids, positive reinforcement, differentiated instruction, tape diagrams, extra time, sentence starters, math hangers, flash cards, study resources/guides, card sort, graphic organizers, evidence tracker, models, "quick jots," worksheets, guided discussion, scaffolding, checklists, anchor charts, directions re-read, and direct reading instruction (see e.g., Parent Exs. G at pp. 13-28; H at pp. 1-2).

Under the totality of the circumstances, and taking into account the aforementioned attendance records, session notes, and the end-of-year progress report, the parent sufficiently demonstrated that the unilaterally-obtained SETSS provided the student with a number of strategies, supports, and goals which constituted specially designed instruction to address the student's unique needs. While the IHO might have preferred session notes which reflected what the student was working on with the SETSS provider for the entirety of the school year and also had some concerns regarding the certification of the SETSS provider and the annual goals, the parent was not obligated to meet her burden with specific types of evidence. In this instance, the evidence in the hearing record supported a finding of appropriateness. Accordingly, as the evidence in the hearing record supports a finding that the parent obtained appropriate private

services for the student under a Burlington-Carter analysis, the IHO's contrary finding must be reversed.

C. Equitable Considerations:

The final criterion for a reimbursement award is that the parent's' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IHO determined in the alternative that equitable considerations weighed against the parent because she had not provided the district with a 10-day notice stating that she intended to obtain private services and seek direct funding or reimbursement from the district. The parent argues on appeal that the IHO erred because she was not obligated to provide a 10-day notice since she was not seeking turion reimbursement as relief, the student was never removed from the public school and the district did not provide any evidence that it had provided her with the requisite notice that the ten-day notice requirement applied to the matter. Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, it is undisputed that the parent did not provide the district with a 10-day notice of her intent to obtain private services for the student and seek public funding for the unilaterally-obtained SETSS from Step Ahead. However, the parent asserts that she was not required to provide 10-day notice because it was an equitable services matter and the student had not been removed from a public-school placement and the district did not present evidence that it provided the parent with the procedural safeguards notice.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). Ultimately, there was no argument or allegation during the impartial hearing regarding either the lack of 10-day notice or a lack of procedural safeguards notice or prior written notice. The IHO should utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before him so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]). While the hearing record does not include a 10-day notice from the parent, given the lack of discussion during the impartial hearing and the undeveloped state of the hearing record, it would be imprudent to reduce the award of district funding for the unilaterally-obtained services based solely on the absence of a 10-day notice. This is particularly so, as the district has not responded to the parent's assertion that the lack of a procedural safeguards notice warrants a finding that a 10-day notice was not required (see Req. for Rev at ¶21; Answer with Cr.-Appeal at ¶11).

In addition to the above, the IHO indicated he would have reduced the award based, in part, on what he construed as the SETSS provider's insufficient certification, an issue more properly addressed in the context of the appropriateness of the unilateral placement and not as an equitable consideration (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"]). Accordingly, the IHO's proposed reduction must be reversed.

Turning to the IHO's determination that the parent failed to establish a financial obligation for the SETSS delivered by Step Ahead, in Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated

that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

As noted above, the hearing record includes a document on Step Ahead's letterhead, dated September 1, 2023, bearing the parent's signature, which indicated that the parent was "aware that the rate of the SETSS [] provided to [her] child [wa]s $225 an hour," and that if the [district] d[id] not pay for the services" she would be "liable to pay for them" (Parent Ex. C). While the IHO found that the brevity of the document, the lack of a date next to the parent's signature, and the failure of the document to clarify the amount and type of service the student would actually be receiving weighed against a determination that the parent had incurred a financial obligation to Step Ahead, the agreement nonetheless does contain an acknowledgment by the parent that she would be obligated to pay for any SETSS provided to the student in the amount of $225 an hour, absent district funding. Based on the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the parent did not incur a financial obligation to pay for services delivered by Step Ahead and, accordingly, a reduction of the award of funding to the parent is not warranted on this ground.

As part of the district's answer and cross-appeal, the district argues that if the parent is awarded direct funding for SETSS it should only be at a rate of $117.99 per hour, which the district submits is the rate identified in the report it submitted into the hearing record. During the impartial hearing, both a rate study conducted by the "American Institutes of Research" (AIR study report) and data from the U.S. Bureau of Labor Statistics was admitted into evidence over the parent's objection (Tr. pp. 5-8; Dist. Exs. 1; 3). However, during the hearing, the district did not make any arguments as to the applicability of these documents to this matter (Tr. pp. 1-56). Although the AIR study report may be considered as evidence of an appropriate rate for SETSS, the district should have pressed for the application of the AIR study report for a specific rate during the hearing. In this instance, the district did not request application of the AIR study report by the IHO, the IHO did not consider the report in his final decision, and rather than cross-appealing from the IHO's failure to address the issue, the district raises it as part of its answer. Accordingly, based on these factors, I will not consider the request for application of the AIR study report as raised for the first time on appeal.

VII. Conclusion

Having found that the evidence in the hearing record supports a determination that the IHO erred by denying funding for the SETSS unilaterally obtained by the parent and that equitable considerations do not weigh against the parent's request for relief, the necessary inquiry is at an end.

I have considered the parties remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 29, 2024, is modified by reversing those portions which found that the SETSS which were unilaterally obtained by the parent and provided by Step Ahead to the student for the 2023-24 school year were inappropriate;

IT IS FURTHER ORDERED that upon proof of delivery, the district shall fund the costs of up to 10 hours per week of SETSS delivered to the student by Step Ahead during the 2023-24 school year at the rate of $225 per hour.

Dated: **Albany, New York**
October 28, 2024

STEVEN KROLAK
STATE REVIEW OFFICER