The University of the State of New York

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

No. 24-389

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 Brian J. Reimels, 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 partially 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, and also cross-appeals from those portions of the IHO's decision which awarded the parent funding for private services and found that the district waived its June 1 defense. 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 March 27, 2023 and finding the student eligible for special education as a student with an other health impairment, developed an IESP for the student with an implementation date of September 5, 2023 (Parent Ex. B).[1] The March 2022 CSE recommended that the student receive 5 periods per week of direct, group SETSS in the student's general education classroom, two 30-minute sessions per week of group occupational therapy (OT) in a separate location, and two 30-minute sessions per week of group physical therapy (PT) in a separate location (id. at p. 8).[2] The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 11).

On December 26, 2023, the parent electronically signed a document, dated September 1, 2023, on Step Ahead's letterhead indicating that she was "aware" of the rate charged for services provided to the student, was aware that the services being provided were consistent with the March 2023 IESP, and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. C).[3]

According to session notes and a progress report produced by Step Ahead, the student began receiving special education services from Step Ahead on September 8, 2023 when the student was in a kindergarten class at her nonpublic school (Parent Exs. G at p. 1; H at p. 1; I 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 March 2023 IESP (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 for the provision of five sessions per week at an enhanced rate for the 2023-24

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] 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 within the district.

[3] 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).

school year and "direct funding" to each of the parent's related services providers, also at an enhanced rate (id. at p. 2). The parent further requested any other relief deemed appropriate (id.).

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

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. 1-42). During the hearing, the district raised the June 1 defense asserting that the parent did not

In a decision dated July 29, 2024, the IHO found that the district failed to offer the student equitable services for the 2023-24 school year (IHO Decision at p. 5). The IHO first addressed the June 1 deadline and found that the district did not raise it or allege a lack of notice or request for services and further determined that even if the district had raised it, the IHO would have found that the district waived the deadline by developing a program for implementation during the 2023-24 school year (id. at p. 4).

After finding that the district denied the student equitable services by failing to implement the March 2023 IESP for the 2023-24 school year, the IHO determined that the parent had met her burden to show that Step Ahead offered services that were specially designed to meet the student's needs "with respect to OT only" (IHO Decision at p. 6). Specifically, the IHO found that the OT attendance records "provided detailed descriptions of the work done in sessions" with the student (id.). The IHO noted that session descriptions reflected that they were "aimed at addressing the goals identified" in the March 2023 IESP including "fine motor skills (cutting and writing), balance and walking" as well as "exhibiting hand control and dynamic tripod grasp to write legibly" (id.). The IHO further found that the OT progress report sufficiently detailed the student's progress in OT and, accordingly, the evidence in the hearing record demonstrated that the parent met her burden with respect to establishing that the private OT services were appropriate (id.).

With respect to the SETSS services provided to the student by Step Ahead, the IHO found that the parent had not met her burden to establish that the SETSS were appropriate for the student (IHO Decision at p. 6). The IHO noted that there was no evidence that Step Ahead had assessed the student at the start of the 2023-24 school year "to ascertain [her] specific needs at that time (id.). The IHO further noted that the present levels of performance section of the SETSS progress report "merely indicated that [the s]tudent require[d] constant support from their provider to focus during lessons and master and apply academic lessons" (id.). The IHO stated that the progress report also indicated the student had difficulty sitting in an age-appropriate manner, lost focus easily, and was below grade level in math and reading(id.). The IHO found that because the student was in kindergarten during the 2023-24 school year, it was not clear what the student should have been able to accomplish at grade level and, without a witness to explain the student's performance in kindergarten as compared to what was expected at that grade level, the parent had failed to demonstrate what the student's needs were for the 2023-24 school years (id.). Additionally, the IHO noted that the SETSS attendance records did not contain any session descriptions until March 7, 2024 and many notes lacked detail or a connection to the student's IESP goals (id. at p. 7). Based on the lack of information concerning what was done during the student's SETSS sessions for the first six months of the school year, the lack of information concerning the student's needs at the

start of the school year, and the lack of progress towards the student's IESP goals, the IHO concluded that he was not able to determine that the SETSS sessions constituted specially designed instruction reasonably calculated to meet the student's unique needs and, therefore, the parent failed to meet her burden to show that the privately obtained SETSS were appropriate for the student (id.).

With respect to PT, the IHO found that although the parent requested compensatory education for missed PT services as she was unable to find a PT provider for the student, the hearing record was "devoid" of evidence of any missed sessions or whether the student had received any PT, but his review of the OT sessions notes revealed that the OT provider "did a great deal of work" that related to the student's PT goals in the March 2023 IESP, "such as improving balance and walking" (IHO Decision at p. 7). As a result, the IHO declined to award a bank of PT hours as compensatory education, as he would be issuing an order to fund OT services and any additional PT hours would be "duplicative" of services already received by the student during the 2023-24 school year (id.).

The IHO went on to address equitable considerations and found that the award of relief to the parent should be reduced by 10 percent due to the parent's failure to provide the district with a 10-day notice informing it of her intention to unilaterally obtain private services and seek district funding (IHO decision at p. 8). The IHO also determined that because the parent did not sign the agreement with Step Ahead until December 26, 2023, she did not provide any evidence that she was financially obligated to the agency before that date and, therefore, the parent was only entitled to funding, at the contracted rate, for services provided after that date (id.). The IHO ordered the district to fund the OT services provided by Step Ahead at a reasonable market rate from September 7, 2023 to December 25, 2023 and to fund the OT services at a rate of $225 per hour from December 26 to the end of the school year, reflecting a 10 percent reduction in the contracted for rate of $250 an hour based on equitable considerations.

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her claim for direct funding of the 5 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 March 2023 IESP.

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 should not apply.

Additionally, the parent asserts that the IHO's 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 requests an order reversing the IHO's decision and granting her request for direct funding for SETSS at the rate of $225 per hour and for OT at $250 an 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. The district cross-appeals the IHO's finding that the OT services provided by Step Ahead were appropriate for the student, asserts that the IHO did not have subject matter jurisdiction over the parent's due process complaint notice, and further asserts that the IHO incorrectly found that it waived its June 1 defense.[4]

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]).[5] "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

[4] The district also argues that the request for review should be dismissed because it was not properly verified by the parent, noting that the parent's signature appeared to be electronic and the notary was not registered in New York State to perform electronic notarizations. While I note the irregularities asserted by the district, I decline to dismiss the request for review on this basis but urge the parent and parent's counsel to review the regulations concerning the verification of pleadings as repeated irregularities may result in the discretionary dismissal of a request for review.

[5] 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]).

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.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

Here, neither party appealed from the IHO's finding that the district did not implement the student's March 2023 IESP by making providers available for the student and thus failed to offer the student equitable services for the 2023-24 school year (see IHO Decision at p. 5). Accordingly, that finding has 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. Preliminary Matters

1. Subject Matter Jurisdiction

Turning first to the district's cross-appeal asserting that the IHO and SRO lack subject matter jurisdiction over the parent's claims, although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in the proceeding, 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).

[6] 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.

Turning to the district's argument as 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 ¶¶ 14-15).

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 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, 17).

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 but contends that parents "'never had the right to file a due process complaint to request an enhanced rate for equitable services'" (Answer & Cr.-Appeal ¶ 16).

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.

2. June 1 Defense

The IHO found that the district did not properly raise the June 1 defense and even if it had, it waived that defense by developing the March 2023 IESP. The district appeals from the IHO's determination arguing that it properly raised the defense at the hearing and that its creation of an IESP for the student for the school year at issue did not constitute a waiver of the defense. However, contrary to the IHO's finding, the district did raise the defense during the hearing (Tr. pp. 13, 27-28). Accordingly, the IHO's determination of waiver based on the development of the March 2023 IESP must be addressed.

Generally, the State's dual enrollment statute requires parents of a New York State resident student with a disability who was parentally placed in a nonpublic school and for whom the parents sought to obtain educational "services" to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]). In this instance there does not appear to be any evidence satisfying this requirement under Education Law Section 3602-c, namely that the parent made a written request for equitable services by June 1 preceding the 2023-24 school year.

Turning to the IHO's finding of a waiver based on the development of the March 2023 IESP, a district may, through its actions, waive the statutory requirement for the June 1 notice (Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[7] However, the Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear

[7] The statute supports a policy of excluding State-resident students from receiving services under an IESP if parents miss the June 1 deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

A "clear and unmistakable waiver" of the statutory requirement of a parent request for services before June 1 has been found to exist where the CSE decided to create an IESP for the student after the deadline and then began providing services at the student's nonpublic school (see Application of the Board of Education, Appeal No. 18-088). Here, although the district's creation of the student's IESP in March 2023, without more, does not rise to the level of conduct that would constitute a waiver of the June 1 deadline for the 2023-24 school year, there are other factors at issue.[8]

For one, the March 2023 IESP was developed with an implementation date of September 5, 2023 (Parent Ex. B at p. 1).[9] Review of the IESP also shows that the student was a preschool student at the time of the March 2023 CSE meeting (Parent Ex. B at p. 1). Accordingly, the student would have first been eligible for special education through an IESP as a school aged student beginning in September 2023.[10] Without information leading up to how or why the March 2023 CSE meeting was scheduled, it can only be inferred that the district was aware the parent wanted special education for the student at the student's nonpublic school for the 2023-24 school year. The district could have provided such an explanation, as the district was required to provide the parent with notice of the meeting, including the purpose of the meeting (8 NYCRR 200.5[c][2][i]).

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[8] This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("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 3206-c" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. Additionally, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]).

[9] According to the March 2023 IESP, the student had been "recently recommended for special education services in February 2023"; however, the hearing record does not indicate whether the student was recommended for, or received, services during the 2022-23 school year (Parent Ex. B at p. 1).

[10] State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students).

Further weighing towards a finding that the district waived the June 1 deadline for the 2023-24 school year, the hearing record shows that during the 2023-24 school year, the CSE convened and met to develop another IESP for the student, this time with an implementation date of April 5, 2024 (Parent Ex. J).

Under these circumstances, I will not depart from the IHO's conclusion that the district waived the June 1 defense by developing both the March 2023 and April 2024 IESPs for the student for implementation during the 2023-24 school year.

B. Unilaterally-Obtained Services

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]).[11] 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 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

[11] 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]).

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 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

The March 2023 IESP noted that the parent expressed concern that the student had not been previously recommended for academic support services given her low average cognitive scores and that the March 2023 CSE reconvened to address this (Parent Ex. B at p. 2). According to the March 2023 IESP, the student had then-recently been administered the Wechsler Preschool & Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), which yielded a full-scale intelligence quotient (FSIQ) of 87, considered in the low average range (id. at p. 1). Further administration of the WPPSI-IV to the student yielded average standard scores in verbal comprehension (108) and working memory (90), low average standard scores in visual spatial (80) and processing speed (83), and a borderline standard score in fluid reasoning (77) (id.). Academically, the March 2023 IESP indicated that the student had difficulty focusing and attending, requiring redirection during instruction, further indicating that she "often require[ed] repetition of information and prompting to attend" (id. at pp. 1-2). During the administration of the WPPSI-IV, the student was unable to identify colors and shapes by name though her parent reported she did know "most of the colors and shapes" (id. at p. 1). The student was able to demonstrate counting by rote to seven and counted with 1:1 correspondence to five (id.). The student was also able to demonstrate knowledge of her birthday, age, and gender when asked and she was able to independently write her name (id.). The 2023 IESP stated that the student's language skills were "predominantly in the average range" with some mild deficits in expressive vocabulary (id. at p. 2).

A May 2024 SETSS progress report indicated that the student was below grade level in reading and math (Parent Ex, I at pp. 1-2). The report specifically noted, for math, the student had challenges in adding two numbers using manipulatives and that forming numbers accurately was a significant struggle for her (id. at p. 1). With respect to reading, the report noted that the student's strength was her ability to identify all letters in the alphabet and their corresponding sounds, but she had challenges in distinguishing vowel sounds, in answering "wh" questions related to a reading passage, and inconsistency in remembering sight words (id. at p. 2).

The March 2023 IESP indicated that the student was "functioning within normal limits" with regards to her adaptive skills and that there were no concerns regarding her social development at that time (Parent Ex. B at pp. 2-3). However, the May 2024 SETSS progress note reflected that the student had difficulty when overwhelmed and threw "tantrums," engaged in disruptive behavior, and struggled behaviorally when situations did not "meet her precise preferences" (Parent Ex. I at p. 3).

Turning to the student's physical development, the 2023 IESP indicated that the student presented with fine and gross motor delays, as exhibited by decreased muscle strength in her trunk and upper and lower extremities, and sensory processing delays (Parent Ex. B at pp. 3-4). A May 2024 OT progress report provided more detail as to the student's OT needs in the areas of fine and gross motor skills, strength and endurance, sensory processing, and attention (Parent Ex. H). According to the progress report, the student required constant verbal and tactile cues to use a tripod grasp for tasks such as coloring and writing (id. at p. 1). The student struggled with navigating obstacle courses where she required verbal and tactile guidance for correct body positioning and with manipulating small objects effectively due to her poor hand and finger strength (id.).

2. Privately Obtained Services

Turning to the services provided to the student by Step Ahead, the only witness who testified at the impartial hearing was the company's secretary who had never met the student and did not supervise or have any contact with the student's providers or parent (Tr. pp. 17-19).

The parent entered an exhibit into the hearing record identified as "attendance records"; however, the document itself does not bear any title or reflect the origin of the document (Tr. p. 9; Parent Ex. G). The document reflects session notes indicating the student's name; the SETSS provider's name; the occupational therapist's name; the dates of sessions, as well as the "time in" and "time out" for each session; and the location of the service (i.e., "school") (Parent Ex. G).

Review of the attendance record shows that the SETSS provider delivered services to the student for 60-minute sessions, occurring at various times throughout the school day from September 8, 2023 through June 18, 2024 (Parent Ex. G at pp. 1-18). However, information about the services delivered to the student by the SETSS provider were not listed in the session notes from September 8, 2023 through March 6, 2024 (see Parent Ex. G at pp. 1-12). Turning to the dates following March 6, 2024, the SETSS provider's notes were sparse and unclear as to whether the student was working on a concept individually with the provider or whether the concept listed was being presented to the entire class (Parent Ex. G at pp. 12-18). For example, on March 7, 2024, the SETSS provider reported working on " handwriting skills in uppercase letters X, Y, and Z," and that the student had "engaged in a reading activity focused on a short story containing words with the vowel "i"" in the one-hour session (id. at p. 12). Also, on March 19, 2024, the SETSS provider reported working with the student on "filling in missing numbers and identifying numbers that are one less and one more than a specific number in the math booklets," while on March 28, 2024, the SETSS provider worked on journal writing with the student "about the holiday of Purim and a corresponding picture was illustrated" and the student "filled out the March calendar" (id. at p. 13). The parent also presented a SETSS progress report dated May 15, 2024 which detailed more of the student's needs but did not describe any instruction provided by the SETSS teacher (Parent Ex. I). For example, the progress report indicated that the SETSS provider was working on the recommendations listed in the March 27, 2023 IESP, and that the student was below grade level in math and reading (id. at pp 1-2). The SETSS provider reported that the student required "constant" support to focus during lessons, she was sensitive and "overreact[ed] to simple things which caus[ed] outbursts and disruptions in the classroom" (id. at p. 1). The SETSS provider listed that the student "responded well" to positive reinforcement, encouragement, and redirection, and the use of "games, worksheets, mini-lessons, prizes and a timer" had helped the student's progress in reading, writing and math during the 2023-24 school year (id. at p. 3).

Review of the occupational therapist's session notes shows that therapy sessions with the student were 30 minutes in length and generally occurred between 11:00 a.m. and 2:30 p.m. at the student's school (Parent Ex. G at pp. 1-18). During sessions, the occupational therapist worked on improving the student's posture, balance, hand-eye coordination, manipulation of small objects, and various graphomotor activities to enhance the student's fine motor skills (id. at pp. 1-18).

In a progress report dated May 14, 2024, the occupational therapist indicated that the student required "constant" verbal and tactile cues for proper tripod grasp when coloring and writing and she struggled with fine motor arts and crafts, gross motor obstacle courses, and needed

ongoing guidance for body positioning (Parent Ex. H at p. 1). The therapist also reported that the student "fac[ed] challenges in manipulating small objects and tools effectively due to poor hand and finger strength" which impacted her participation in dressing, where she required assistance with buttoning and unbuttoning her clothes (id.). The student was noted to exhibit signs of fatigue during activities such as coloring and writing, indicating weaknesses in hand strength (id.). In terms of sensory processing and attention, the progress report indicated that the student sought "input from her environment," and benefitted from deep pressure and vestibular input (id.). The student also struggled with focus and attention, often requiring frequent redirection to sustain attention (id.). According to the report, OT interventions focused on improving the student's hand strength, dexterity, and coordination through exercises and activities, including finger strengthening, precision tasks, and balance beam activities (id.). Additionally, the student's poor seating posture and signs of fatigue during activities were addressed through upper body and core strengthening exercises (id.).

Under the totality of the circumstances, and taking into account the aforementioned attendance records, session notes, and the end-of-year progress reports for the SETSS and OT provided to the student by Step Ahead, the parent sufficiently demonstrated that the unilaterally-obtained SETSS and OT provided the student with specially designed instruction to address the student's needs. While a better hearing record would have included session notes, or other evidence such as testimony from the student's provider or someone else with knowledge of the program being provided to the student, which reflected what the student was working on with the SETSS provider for the entirety of the school year, and while the IHO had concerns that the student was not assessed at the beginning of the school year, in this instance, the evidence contained 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 with respect to the SETSS delivered to the student must be reversed. Given that the IHO correctly found that the OT delivered to the student was appropriate, the district's cross-appeal seeking a reversal of this finding must be denied.

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 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 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 ¶12).

Turning to the IHO's determination that the parent failed to establish a financial obligation for the SETSS and OT delivered by Step Ahead prior to December 25, 2023, the date the parent signed the agreement with 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, electronically signed by the parent, indicating that she was "aware" of the rate charged for services provided to the student consistent with the March 2023 IESP and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. C). Accordingly, the agreement contains the requisite acknowledgment by the parent that she would be obligated to pay for any services provided to the student in the amount of $225 an hour for SETSS and $250 an hour for OT for the entirety of the 2023-24 school year, 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 until after she signed the contract on December 25, 2023 and, accordingly, a reduction of the award of funding to the parent to a reasonable market rate prior to December 25, 2023 is not warranted on this ground.

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. Relatedly, because the parent's contract reflected her financial obligation to Step Ahead for the entirety of the school year, that portion of the IHO's decision ordering funding at a reasonable market rate, as opposed to the contract rate, for the period prior to December 25, 2023 is reversed.

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 not appropriate;

IT IS FURTHER ORDERED that upon proof of delivery, the district shall fund the costs of up to 5 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 and OT at the rate of $250 per hour.

Dated: **Albany, New York**
November 7, 2024

STEVEN KROLAK
STATE REVIEW OFFICER