The University of the State of New York

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

No. 24-394

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:
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, 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) fully fund the costs of her daughter's private special education teacher support services (SETSS) provided during the 2023-24 school year. The 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.

In summer 2022 the student moved to the United States and, although she was bilingual, her dominant language was Yiddish (Parent Ex. B at pp. 1, 2). During the 2022-23 school year the student attended kindergarten at a nonpublic school, at which time the parent reported that the student presented with communication difficulties and that her studies were "quite difficult for her" (id. at p. 2). In February and March 2023, speech-language, occupational therapy (OT), and psychoeducational evaluations of the student were conducted (id. at pp. 1-2).

On May 8, 2023 a CSE convened for an initial meeting, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of May 22, 2023 (Parent Ex. B at p. 1; Dist. Ex. 4 at p. 1).[1] The May 2023 CSE recommended that the student receive four periods per week of direct, group SETSS in Yiddish, along with three 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT in English (Parent Ex. B at pp. 1, 5).[2]

On July 24, 2023, the parent executed a contract with Yeled v'Yalda ECC (Yeled), for the provision of "any hours of services" to the student starting on September 1, 2023 through June 30, 2024 (Parent Ex. E).[3]

In a letter dated September 7, 2023, the parent, through her attorney, notified the district that she consented to all of the services recommended in the student's May 2023 IESP "being implemented by [the district]" but that she was unable to locate providers to deliver the student's SETSS and related services at the district's "standard rate" (Parent Ex. C at p. 1). The parent informed the district of the nonpublic school the student was attending for the 2023-24 school year, and of her intention to implement the IESP on her own and seek reimbursement or direct payment from the district (id. at pp. 1-2).

During the 2023-24 school year, the student was parentally placed in a mainstream nonpublic school where she received four hours per week of special education services delivered by Yeled (Parent Exs. H ¶ 4; I ¶¶ 10, 14).

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

[2] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. 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, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[3] The Commissioner of Education has not approved Yeled as a school or company with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

A. Due Process Complaint Notice

In a due process complaint notice dated March 28, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year and that it "fail[ed] to implement the most recent IESP" (Parent Ex. A at p. 2). According to the parent, she has been unable to locate SETSS or related services providers for the 2023-24 school year and the district failed to implement its own recommendations (id.). The parent asserted that the student's parental placement was "untenable" without supports (id.). For relief, the parent requested a finding that the district denied the student a FAPE for the 2023-24 school year, an order requiring the district to fund providers located by the parent for the 2023-24 school year at the providers' contracted rate, and a bank of compensatory periods of SETSS and related services for any sessions not delivered to the student during the 2023-24 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

After a prehearing conference (Tr. pp. 1-8), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 30, 2024 and concluded on July 12, 2024 after three days of hearings (Tr. pp. 9-109). At the impartial hearing, the district argued the parent did not request dual enrollment services from the district by the first day of June as required by Education Law § 3602-c, that the parent's unilaterally obtained services from Yeled were "not appropriate to meet the student's needs," and that the rate charged by the provider was "unreasonable and excessive" (Tr. p. 23). Conversely, the parent argued that district failed to provide its own recommended program for SETSS for the 2023-24 school year and the parent obtained her own provider and sought reimbursement at a contracted for rate (Tr. p. 25). The district did not present any witnesses; however, all six of the district's exhibits were admitted into the record (Tr. p. 15). All of the parent's exhibits were also admitted into the record (Tr. p. 22).

In a decision dated September 8, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year, holding that the district "failed to demonstrate that [it] provided services compliant with the 202[3] IESP" and that the district's inability to provide "any special education services . . . was improper and unlawful" (IHO Decision at pp. 4, 8). Next, the IHO held that the parent failed to demonstrate Yeled provided appropriate services for the student (id. at p. 5). Specifically, the IHO held that the parent's evidence "only vaguely indicated that [Yeled] underst[ood] [the] [s]tudent's special education needs" (id. at p. 6). The IHO cited a lack of evidence, particularly, a lack of session notes or testimony of an individual with firsthand or actual knowledge of the services provided or the student's progress as a result (id.). In addition, the IHO found that an "adverse inference" was warranted against due to the failure of Yeled to respond to or produce any documents in response to a subpoena issued by the IHO requesting the session notes, attendance records, progress reports, and communications with the parents (id.). The IHO noted that Yeled and the parent were required to respond to the subpoena; however, the parent did not object to the subpoena or otherwise respond (id.). Accordingly, the IHO determined that if the subpoenaed documents were produced, they would not have supported the parent's contention that the services provided to the student were appropriate (id.). Considering the hearing record, as a whole, the IHO determined that there was insufficient evidence to show that the services provided to the student by Yeled were appropriate and the IHO denied the parent's request for funding of the services on that basis (id. at pp. 6-7, 8).

In addition, although it was not necessary to reach equitable considerations, the IHO found that the rate charged by Yeled for SETSS was unreasonable and if relief were warranted, the IHO would have only awarded services at a market rate set by the district (IHO Decision at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's request for district funding of the unilaterally obtained SETSS delivered by Yeled. In particular, the parent asserts that the IHO mischaracterized the parent's evidence and failed to take into account the specific goals developed for the student and evidence of the student's progress contained in the record and testimony provided at the hearing. The parent also argues that the IHO's adverse inference was improper because there was no proof the subpoena was properly served on the parent and Yeled.

In an answer, the district seeks to have the IHO's decision affirmed on the basis that the parent did not prove the services she unilaterally obtained were appropriate and the adverse inference was proper. Moreover, the district seeks dismissal of the instant appeal and raises the argument that neither the IHO nor the SRO have subject matter jurisdiction over the claims in the parent's due process complaint notice.

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

[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]).

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

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

VI. Discussion

A. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time in its answer. 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]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that neither Education Law § 360-c, nor § 4404, confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services.

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

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

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 individual needs of a student who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department has issued guidance and pursued regulations changes that support its position.

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, and 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 May 2024, the State Education Department proposed amendments to State regulation, and the district points to a memorandum in support thereof as stating the State Education Department's position that the Education Law did not allow for due process for disputes involving implementation of dual enrollment services. Ultimately, however, the proposed regulation was not adopted and, instead, 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, as correctly noted by the IHO, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (Tr. p. 17; 8 NYCRR 200.5[i][1]).[6] 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).[7]

The district acknowledges the temporary restraining order and does not directly rely on the amendment to State regulation; instead, the district argues that there has never been a right to bring a complaint regarding implementation of dual enrollment services or to seek enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on 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]).[8]

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[6] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

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

[8] For reasons that are not apparent, the guidance document is no longer available on the State's website. A copy is, however, included in the hearing record as an exhibit to the district's motion to dismiss.

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendment 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. Legal Standard

Turning to the merits, the IHO failed to address the district's June 1 defense in his decision, and the district does not interpose a cross-appeal alleging that the IHO erred in failing to address the issue; therefore, the district's June 1 defense is deemed abandoned (IHO Decision at pp. 1-14; 8 NYCRR 279.8[c][4]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Furthermore, the district has not appealed from the IHO's finding that it failed to provide the student a FAPE for the 2023-24 school year; therefore, that determination 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]).

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 Yeled 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]).[9] 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).

C. Unilateral Placement

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; 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

[9] 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 Yeled (Educ. Law § 4404[1][c]).

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).

Here, the IHO found that the parent failed to demonstrate that Yeled provided appropriate services to the student (IHO Decision at p. 3). Specifically, the IHO determined that the January 2024 Yeled progress report comments were "incredibly vague and d[id] not show how they [we]re tailored to address [the s]tudent's specific learning challenges, as opposed to general homework assistance" (id. at p. 9). Additionally, the IHO found none of the testimony demonstrated how the services were appropriate for the student or showed how the services assisted the student in making academic progress (id.).

Turning to a review of the appropriateness of the unilaterally obtained services, for the reasons set forth below, the evidence supports the IHO's finding that the hearing record contained "insufficient evidence that [Yeled's] services provided [the s]tudent with an educational benefit" (IHO Decision at p. 6).

1. Student's Needs

While not in dispute, a discussion of the student's needs provides context to determine whether the unilaterally obtained SETSS delivered by Yeled were appropriate for the student for the 2023-24 school year (first grade).

With respect to the 2022-23 school year, the student's May 2023 IESP indicated that she was in kindergarten at a nonpublic school, eligible for special education as a student with a speech or language impairment, and exhibited delays in executive functioning, reading, writing, math,

receptive and expressive language, and fine motor skills (Parent Ex. B at pp. 1-2).[10] Specifically, the IESP reflected results from a 2023 psychoeducational evaluation, which indicated that administration of the Wechsler Preschool and Primary Scale of Intelligence—Fourth Edition (WPPSI-IV) to the student yielded a full scale IQ in the average range, with composite scores on the fluid reasoning, processing speed, and nonverbal indices in the average range, and a composite score on the verbal comprehension index in the low average range (id. at p. 1). Regarding executive functioning, the IESP indicated the student often had a hard time keeping items organized and having the materials she needed for class (id. at p. 2).

The May 2023 IESP reported the student's academic performance on the Kaufman Survey of Early Academic and Language Skills (K-Seals), specifically that the student achieved scores in the low end of the below average range in vocabulary, scores in the low end of the average range in expressive skills and on the early academic and language skills composite, and scores in the average range on the numbers, letters, and words; receptive skills; number skills; and letter and word skills subtests (Parent Ex. B at pp. 1-2).

With respect to reading, similar to the May 2023 IESP meeting minutes, the IESP indicated the student knew some of the alphabet but was struggling in the classroom with letter recognition and blending the sounds of the letters together (compare Parent Ex. B at p. 2, with Dist. Ex. 4 at p. 2). According to the IESP, the student was able to identify capital and lower case letters and letter sounds, and able to select the correct word from a field of several words evidenced by the ability to identify the sound of the first letter (Parent Ex. B at p. 2). Regarding writing, the IESP reported the student was able to write her first name in Hebrew; however, her handwriting was described as being illegible (id.). With regard to math, the IESP noted the student's nonpublic school reported she was "struggling to complete math work in class with ease"; however, the IESP indicated that according to the psychoeducational evaluation report, she was able to identify single digit numbers and many double digit numbers (id.). The May 2023 IESP meeting minutes noted the nonpublic school reported the student's math book was difficult for her (Dist. Ex. 4 at p. 2).

A 2023 speech-language evaluation report, reflected in the May 2023 IESP, indicated that the student presented with mild receptive language delays and moderate expressive language delays, including difficulty understanding oral and visual narratives, relating a sequence or event, answering "wh" questions, understanding inferences, making predictions, and solving problems (Parent Ex. B at p. 1). Regarding social/emotional development, according to the IESP, the psychoeducational evaluation report reflected that the student was cooperative, attentive, and compliant; however, the nonpublic school reported the student could go from being "very exuberant" to "very upset" further noting when she did not know something, although she was encouraged to do so, she did not ask for help (id. at p. 2). The May 2023 IESP meeting minutes noted the nonpublic school reported the student had strong feelings and at times could "get into a bad mood," which due to the communication lag, would last for the rest of the lesson (Dist. Ex. 4 at p. 2).

[10] District exhibit 1 is a duplicate of parent exhibit B, both of which are slightly cut off on the right margin of the document; for the purposes of this decision, parent exhibit B will be used to cite to the May 2023 IESP (see Parent Ex. B; Dist. Ex. 1).

With respect to physical development, the May 2023 IESP reflected parent report that the student's eyesight and hearing were within normal limits, and she could not hold a pen or pencil correctly, and that her writing was "illegible" (Parent Ex. B at p. 2). The IESP reported results of a 2023 OT evaluation that indicated the student's performance on the McMaster Assessment Protocol reflected a writing sample with, among other things, number reversals and poor letter and number formation, further noting the student was recommended for school based OT at that time (id.).

The May 2023 CSE determined that academic challenges along with delays in her organization, handwriting, and receptive and expressive language skills affected the student's progress in the general education environment, and recommended supports to address the student's management needs including verbal and visual cueing with organized lesson materials; positive reinforcement; preferential seating; repetition; chunking and simplification of directives; small group instruction; graphic organizers; verbal negotiation/preparation; modeling; repetition/directions-instructions read, re-read, and repeated; access to teachers' notes prior to lesson; and teacher check-ins during "vulnerable academic subjects" (Parent Ex. B at pp. 2-3). Overall, the CSE recommended that the student receive four periods per week of direct, group SETSS in Yiddish, along with three 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT in English (id. at pp. 1, 5).

2. Services from Yeled

Turning to the evidence regarding the SETSS provided to the student by Yeled, the hearing record includes a SETSS progress report dated January 13, 2024 and affidavits in lieu of direct testimony from the program director of Yeled, as well as an individual who "overs[aw] the finances at Yeled," and the parent (Parent Exs. G; H; I; J).[11] In her affidavit, the program director described Yeled as a nonprofit agency which provides special education services to students classified with a disability including students in Early Intervention through school age, further noting Yeled provides a wide range of services such as special education itinerant teacher (SEIT), SETSS, speech-language therapy, OT, and physical therapy (PT) to students (Parent Ex. I ¶ 5). During the 2023-24 school year, the student attended first grade at the nonpublic school, where she received four hours per week of 1:1 SETSS from Yeled (Tr. pp. 38, 40; Parent Exs. I ¶¶ 10, 14; H ¶ 4). The program director from Yeled testified that the student received SETSS as a pull-out service on Mondays, Tuesdays, and Thursdays from a provider who was New York State certified to teach students with disabilities and who was "trained and experienced in teaching literacy and comprehension to school-aged children" (Tr. p. 49; Parent Ex. I ¶¶ 4, 11, 17). According to the program director's written testimony, the student's SETSS provider delivered SETSS to the student as an individualized "1:1 direct service" which included "a great deal of specialized instruction" (Parent Ex. I ¶¶ 13, 17). The program director indicated that the SETSS provider also prepared for sessions, created goals, wrote progress reports, and met with the teacher and parents (id. ¶¶ 13,

[11] As Yeled is described in the hearing record as a non-profit organization (Parent Ex. I at ¶5), the IHO's finding that the witnesses testifying on behalf of Yeled held "financial motivations" such that the organization would benefit from an "impression of academic progress" is not supported by the hearing record and was an improper basis to weigh against their testimony without giving the attorneys or witnesses an opportunity to respond to such a characterization.

15, 16). Additionally, the program director stated that the student's progress was measured through quarterly assessments, consistent meetings with the SETSS provider and support staff, observation of the student in the classroom at the nonpublic school, and session notes (id. ¶ 18).

The program director testified that the student was matched with the SETSS provider based on the student's needs at the beginning of the school year given the SETSS provider's ability to help such students "attend and focus" and her experience working on pre-reading skills and academics (Tr. p. 32). Additionally, the program director noted the SETSS provider had a very good rapport with students that had "lots of energy" (id.). Specifically, the program director described that the SETSS provider created good incentives and programs to help students focus for longer including the understanding of whole body listening, noting she had the personality to make lessons exciting and motivating to students (Tr. pp. 32-33). Further, the program director testified that the student's IESP provided that the student's services be delivered in Yiddish, and that the SETSS provider spoke fluent Yiddish and the program director believed the SETSS provider had a bilingual Yiddish extension (Tr. pp. 45-46; Parent Ex. B at p. 5).[12]

According to the program director's testimony, the SETSS provider recorded session notes "in Yeled's system" on a weekly basis (Tr. p. 33). The program director further testified that she observed the SETSS provider once during the school year, and noted the SETSS provider's supervisor observed her weekly (Tr. p. 39). The hearing record does not contain testimony from the student's SETSS provider or the provider's supervisor, any session notes which detail the student's SETSS sessions, or any attendance records (see Tr. pp. 1-109; Parent Exs. A-J; Dist. Exs. 1-6).

The program director testified that the student's SETSS provider informally assessed the student at the beginning of the school year and created the goals to work on for the 2023-24 school year (Tr. p. 47). The January 2024 progress report reflected annual goals to improve the student's word recognition and decoding skills, general math skills, organization and study skills, and prewriting/handwriting skills (Parent Ex. G at pp. 5-7). The report identified the criteria to determine whether the goal had been achieved (e.g. 90 percent of the time), the method of how the student's progress would be measured (e.g. teacher checklist, informal assessments, classroom activities/observation), and the schedule for when progress would be measured (e.g. quarterly) (id.).

Turning to the student's performance during the 2023-24 school year, the January 2024 progress report reflected that the student made progress in her ability to follow a simple single step direction presented orally and showed improvement in her ability to place pictures in sequence, further noting she was able to identify and name three basic geometric shapes (Parent Ex. G at p. 1). With respect to prewriting and handwriting skills, the report noted the student was proficient with coloring within a specific area, was "now" able to trace letters of the alphabet, and "learned how to use a correct pencil grasp" (id.). The report identified additional areas of concern related to the student's needs in the areas of cognition, reading, motor skills, and math but generally stated that the student's needs were addressed with a handwriting program and a phonics based reading

[12] A copy of the SETSS provider's credentials included in the hearing record did not indicate the provider had a bilingual extension and instead, reflected she held a current "Students With Disabilities (Grades 1-6) Transitional B Certificate" (see Parent Ex. F).

approach, further noting the student "belong[ed] in a general education placement yet require[d] 1:1 support" and recommended continued "1:1 intensive special education services" to address the academic concerns generally identified in the progress report, namely, delays in academic areas including early literacy skills, math skills, phonemic awareness, and transitioning independently (id. at pp. 1-3).

The program director from Yeled attributed the student's progress in reading to "a very, very targeted interventional program" further indicating she "really made nice progress with this" (Tr. pp. 42-43). With respect to the student's reading skills, the program director testified that at the beginning of the 2023-24 school year, the student was not ready for a Fountas & Pinnell reading assessment; in January 2024 the student "was at a level A," and by May 2024, she was at a "level C," which she described as a "mid-first grade" level (Tr. pp. 42, 43). The program director further noted that, at the beginning of the school year, the student was "still struggling with accuracy on the ABCs" and was beginning to "do initial and final sounds" and the very basics of phonemic awareness (Tr. p. 42). The program director described that in the beginning of the school year, the student "could [not] do any sight words" but she learned the words "would, because, [and] want" which she "could not do at the beginning of the year" (Tr. p. 42). According to the program director's testimony, the student learned to read "CVC words" with short vowels, read long vowels, and was working on reading vowel digraphs and vowel blends (Tr. pp. 42, 46). Regarding reading comprehension, the program director testified the student learned to answer basic "WH" questions and was working on grasping the main idea, reasoning skills, and predictions and inferences (Tr. pp. 46-47).

With respect to math, the program director testified that the student began the school year at a kindergarten level and did not understand place value but in May 2024, she was "at a mid-first-grade level" in math and understood place values of ones, tens, and hundreds and the difference between two digit numbers (Tr. p. 44). The program director testified the student needed a lot of visuals and used manipulatives, e.g., 100 baseboards, 10 rods, and single units; as a result, she was "really gaining nice skills" (id.). The program director further testified the student could complete single digit addition and subtraction problems with manipulatives (Tr. pp. 46-47).

The program director testified that SETSS was the only service Yeled delivered to the student during the 2023-24 school year (Tr. p. 38). The hearing record does not indicate that the student received speech-language therapy or OT during the 2023-24 school year, and the parent testified by affidavit that she was unable to locate a speech-language therapy or OT provider for the student, reporting "no one was available to service [the student] at the standard [district] rate" and that the district did not make a provider available (see Tr. pp. 1-109; Parent Exs. A-I; J ¶ 4; Dist. Exs. 1-6). The parent testified that the only service being provided to the student by Yeled during the 2023-24 school year was SETSS and that no sessions were missed during the entire school year (Tr. pp. 87, 96). Yet, related services were contemplated in the parent's contract with Yeled, and there is no explanation in the hearing record why Yeled did not arrange for the related services for the student per the terms of the contract (Parent Ex. E). This is particularly troubling as the Yeled program director testified that Yeled provides both speech-language therapy and OT but did not explain why those services were not delivered to the student during the 2023-24 school year (Parent Ex. I at ¶ 5).

In this instance, although the hearing record includes some information about the services provided to the student, the evidence is not robust. Additionally, the lack of evidence that should have been available—such as attendance records, sessions notes, teaching materials, the student's schedule, and correspondence relating to the services provided—must be weighed as part of the totality of the circumstances considering the IHO's adverse inference due to the failure to comply with a subpoena (see IHO Ex. III).

Initially, the IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" (Letter to Armstrong, 28 IDELR 303 [OSEP 1997]). IHOs and SROs may assert appropriate discretionary controls over the due process and review proceedings and, specifically, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]); however, in New York, IHOs have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049). Nevertheless, at least one SRO has noted that adverse inferences may be drawn when private agencies, which contracted for services with the parents in the proceeding, failed to respond to subpoenas (Application of a Student with A Disability, Appeal No. 24-031 at n. 6]).

A document subpoena was signed by the IHO on May 10, 2024,[13] which required Yeled, on or before May 21, 2024, to provide the district with certain documents related to the student, including session notes, attendance records, progress reports, and communications with the parent (IHO Ex. III). On appeal, the parent concedes that there was no objection to the issuance of the subpoena and that neither she nor Yeled produced any document to comply with the request (see Req. for Rev. at p. 9). Instead, the parent argues that Yeled did not receive the subpoena, arguing that the subpoena was in an improper form and was not lawfully served in the manner set forth in the Civil Practice Laws and Rules (id.).[14] However, review of the hearing record shows that the parent was aware of the subpoena and there is no indication that the parent could not have produced the subpoenaed documents.

At the end of the impartial hearing, the district's attorney requested that the IHO take a negative inference due to Yeled's failure to respond to the subpoena (Tr. pp. 106-07). At that time, the parent's attorney expressed a desire to respond to the district's request but had to leave for another conference (Tr. p. 107). Accordingly, the IHO invited the parent's attorney to "feel free to send [the IHO] an email" regarding the issue and that anything submitted would be included in the hearing record as an IHO exhibit (id.). The parent's attorney agreed and the IHO indicated that the record would remain open (Tr. pp. 107-08). Given that the parent's attorney was provided an

[13] It appears that as of the prehearing conference held on May 1, 2024, no subpoenas were sought by either party (IHO Ex. I at p. 2) but on May 7, 2024, the district submitted a subpoena for Yeled to produce documents, as well as a subpoena requiring the parent's testimony (IHO Ex. III).

[14] Review of the subpoena shows that it was on a form provided by OATH (IHO Ex. III). The subpoena form included instructions for serving the subpoena, which indicated the requesting party could serve the document by mail, email, or in person (id.).

opportunity to address concerns about the form and service of the subpoena at the impartial hearing, I decline to address the parent's objections for the first time on appeal.

At this point, it is worth noting that many of the requested documents were referenced in the testimony of the Yeled program director as support for the parent's argument that Yeled was providing an appropriate program for the student (Tr. pp. 33-34, 42-43, 47; Parent Ex. I ¶¶ 13, 15, 16, 18). In particular, review of the director's testimony indicates sessions notes were prepared by the student's provider, were kept in Yeled's computer system, and could have been produced, and also that the session notes were a method of measuring the student's progress (Tr. pp. 33-34; Parent Ex. I ¶¶ 13, 18). Despite a specific request for documents that were described by the Yeled program director as a means for measuring the student's progress, and despite the parent having the opportunity to submit the requested documents after the conclusion of the hearing, the hearing record does not include a response from the parent's attorney regarding the subpoena, and on appeal the parent does not allege that such a response was ever submitted.

The IHO determined that the documentation sought in the subpoena would have likely provided further insight into the services offered to the student and the requisite progress she made as a result of those services, particularly, when the testimony and documentary evidence provided by the parent was lacking, a finding that, as noted above, was supported by the testimony of the Yeled program director (see IHO Decision at pp. 7-8; see Tr. pp. 33-34; Parent Ex. I ¶18). Accordingly, there is insufficient basis in the hearing record to find that the IHO abused his discretion in applying an adverse inference.

Finally, taking into account the totality of the circumstances, review of the hearing record supports the IHO's determination that the parent did not meet her burden to prove that the services provided by Yeled were specially designed to meet the student's needs for the 2023-24 school year. Despite the progress report included in the hearing record and the testimony from the program director, the adverse inference coupled with the lack of evidence that services from Yeled addressed the student's need for OT and speech-language therapy leads me to conclude that the IHO did not err in determining that the unilaterally obtained services were not appropriate.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the unilaterally obtained services provided to the student by Yeled during the 2023-24 school year, there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 14, 2024

STEVEN KROLAK
STATE REVIEW OFFICER