The University of the State of New York

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

No. 24-397

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

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

DECISION

I. Introduction

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

A CSE convened on March 3, 2021 to develop an IESP with an implementation date of March 17, 2021 (IHO Ex. I at pp. 1, 7, 10). The March 2021 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at p.

1).[1] The March 2021 CSE recommended that the student receive four periods per week of direct group special education teacher support services (SETSS) delivered in a separate location, and two 30-minute sessions per week of group speech-language therapy delivered in a separate location (id. at p. 7).[2]

According to an entry in an event log related to the student in the district's special education student information system (SESIS), dated September 30, 2022, the district received an email that indicated the student was refusing to attend speech-language therapy (Dist. Ex. 5 at p. 3). The event log further noted that the parent was contacted, and she stated that she would speak to the student (id.). The parent was also "instructed to submit a letter to [the district] to terminate speech services" (id.).

A CSE convened on February 28, 2023 to develop an IESP with an implementation date of February 28, 2023 (Dist. Ex. 1 at pp. 1, 6, 9). The February 2023 CSE continued to find the student eligible as a student with a speech or language impairment and recommended that the student receive four periods per week of direct group SETSS delivered in a separate location (id. at p. 6). By prior written notice dated March 17, 2023, the district summarized the recommendations of the February 2023 CSE (Dist. Ex. 2 at pp. 1-4).

A letter with the salutation "Dear Chairperson," dated May 16, 2023, bearing the parent's conformed signature (i.e., "/s/"), that was emailed from a generic "Parents Submissions" email address to various email addresses with the district's email domain, indicated that the parent intended to place the student in a nonpublic school at her own expense and requested that the district provide equitable services to the student for the 2023-24 school year (Parent Ex. E at pp. 1-2).

On August 11, 2023, the parent electronically signed a payment agreement with EdZone for the 2023-24 school year (Parent Ex. C at pp. 1-2).[3] In an addendum, the parent "confirm[ed] that for the 2023-2024 [s]chool [y]ear, [the student] w[ould] receive services provided by EdZone LLC in accordance with the last agreed upon IEP/IESP/FOFD/Pendency Order/Pendency Agreement/Court Order or Decision of SRO/Meditation [sic] Agreement/Resolution Agreement at the following rates" (id. at p. 3). The addendum further indicated that it was for a 10-month program and listed all of the services offered by EdZone and the corresponding rates for each service (id.).

The hearing record includes a letter dated August 23, 2023, with a salutation "Dear Chairperson," from Prime Advocacy, LLC (Prime Advocacy), which indicated it was authorized

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

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

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

to communicate on the parent's behalf and advised the "Chairperson" that the parent intended to unilaterally obtain services from a private agency due to the district's failure to assign a provider for the services recommended by the district for the 2023-24 school year (Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated May 29, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the district impermissibly shifted its responsibilities to the parent by failing to supply "providers for the services it recommended" for the student and by "fail[ing] to inform the [p]arent how the services would be implemented" (id. at p. 2). The parent indicated that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school year at enhanced rates (id.). The parent further alleged "[u]pon information and belief" that the district had failed to convene a CSE meeting in advance of the 2023-24 extended school year and that by failing to do so, the district "thereby denied the [s]tudent an[] opportunity for a FAPE and/or Equitable Services under federal and state law" (id.). The parent alleged that the student "require[d] extensive support and services to address and remediate the disabilities which impede the Student's capacity to make age-appropriate progress towards goals and objectives" (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's SETSS and speech-language therapy at enhanced rates, and an award of compensatory educational services for any mandated services not provided by the district (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 23, 2024 (Tr. pp. 1-50). In a decision dated August 7, 2024, the IHO found that the district failed to meet its burden to prove that it offered the student services on an equitable basis for the 2023-24 school year, that EdZone provided the student with specially designed instruction sufficient to meet his needs, and that equitable considerations would only partially support the parent's requested relief (IHO Decision at p. 2).

At the outset, the IHO found that the parent's May 29, 2024 due process complaint notice asserted that the last IESP developed for the student was dated March 3, 2021, and that this assertion was demonstrably false as the district offered a February 28, 2023 IESP into evidence at the impartial hearing (IHO Decision at p. 4). The IHO then found that the parent's request for an order awarding all related services set forth on the last IESP was "impossible" because the February 2023 IESP only recommended four periods per week of group SETSS (id. at pp. 4-5). The IHO also found that, based on representations of the parties during the impartial hearing, the parent's "[r]epresentative was unaware of the existence of the February 28, 2023 program, despite the fact that [the p]arent was present for this more recent meeting" (id. at p. 5). The IHO determined that "by not making any specific allegations regarding the operative IESP, [the p]arent did not put [the d]istrict on notice of what issues they had regarding the program" and that the parent was "essentially raising issues beyond the scope of the claims made" in the due process complaint notice (id. at p. 5). The IHO then stated that his analysis would "focus on [the d]istrict's

obligation to implement the March 3, 2021 IESP," the appropriateness of the services provided by EdZone and equitable considerations (id.).

Turning to the parent's request for equitable services, the IHO stated that the district had not raised a defense regarding the parent's notice (IHO Decision at p. 6). Nevertheless, the IHO noted that he had "concerns" with the parent's June 1 notice (id.). The IHO listed his concerns, culminating in a finding that it was unclear whether Prime Advocacy had any relationship with the parent (id.). Notwithstanding his allusions to a relationship between Prime Advocacy and EdZone, the IHO noted that the district had not raised any issues related to the parent's representation (id.). Further, the IHO found the district had not challenge the student's entitlement to equitable services for the 2023-24 school year during the impartial hearing (id.). Ultimately, therefore, the IHO found that the student's entitlement to services for the 2023-24 school year was not in dispute (id.).

The IHO then found that it was undisputed that the district did not implement the March 3, 2021 IESP for the 2023-24 school year but that "the March 3, 2021 IESP was not the operative program at the start of the 2023-2024 school year (or at the time the DPC was filed)" and thus the district "was under no obligation to implement the program [the p]arent claimed" in the due process complaint notice (IHO Decision at p. 7). The IHO further determined that the "[p]arent ha[d] failed to satisfy Prong I of the Burlington/Carter analysis and their requested relief must be denied" (id.). However, the IHO then made alternative findings in the event that the parent's inaccurate reference to the 2021 IESP in the due process complaint was not fatal, or that the district "opened the door" to the subsequent IESP, and accordingly determined that the district had otherwise "failed to meet its burden at hearing" (id.). The IHO also found that it was undisputed that the district did not implement the February 2023 IESP either, which had recommended four periods per week of SETSS (id.). Lastly, the IHO stated that "a review of the record herein would establish that the weight of the evidence supports the conclusion that the [district] failed to offer [the s]tudent an educational program reasonably calculated to offer equitable services for the 2023-2024 school year" (id.).

The IHO then analyzed the appropriateness of the services provided by EdZone "for completeness of the record" (IHO Decision at p. 7). The IHO noted that the parent provided the testimony of the EdZone educational supervisor, a contract, a progress report, session notes, and time sheets to demonstrate the appropriateness of the services the student received (id. at p. 8). The IHO stated that the hearing record supported a finding that EdZone was providing SETSS in the duration and frequency recommended in "the IESPs" and working on goals established in the student's "IESP" (id.). The student was making some progress and overall, the parent had met her burden of demonstrating that SETSS provided by EdZone were specially designed to meet the student's needs (id.). The IHO stated that the parent had met her burden with respect to the student's "SETSS, and would be entitled to relief, were there no Prong I issue" (id.).

Next, the IHO discussed equitable considerations (IHO Decision at p. 8). Initially, the IHO found that the parent did not present sufficient evidence of 10-day written notice of her intention to seek funding from the district for the private services obtained by the parent, noting that the letter dated August 23, 2023 was on the letterhead of Prime Advocacy and "did not indicate if, when, or how this notice was sent to the CSE" (id. at p. 9). The IHO found this "noteworthy, as it differ[ed] from the proof [the p]arent provided with respect to their 'June 1st letter'" (id.). The IHO further described the differences in the two exhibits and noted that the 10-day notice did not state

that the parent intended to seek public funding for her unilaterally obtained services (id.). The IHO stated that "a reduction of any award ordered would be warranted" for those reasons (id.).

In addition, the IHO found that the contract with EdZone was "missing essential terms, such as identifying the services to be provided as well as the frequency and duration of said services" (IHO Decision at p. 9). The IHO found "this language to be overtly vague, and further f[ou]nd that it fail[ed] to truly articulate what services [the p]arent expect[ed] to receive and therefore what fees they (and ultimately District) would be responsible for" (id. at p. 9). The IHO further found that the parent had "not established that they incurred a financial obligation with respect to the services from [EdZone], given the lack of terms in the contract itself" and that "the contract at issue [wa]s intentionally vague" and that "it [wa]s impossible to determine the extent of [the p]arent's financial liability" to EdZone" (id. at p. 10). The IHO stated that the contract made no reference to any particular IESP or program or any specific services to be provided, which was further complicated by the existence of the February 2023 IESP (id.). The IHO further found that while the parent's representative indicated the parent was not seeking speech-language therapy at the impartial hearing, that "in and of itself d[id] not clarify whether [the p]arent was contracting with [EdZone] for SETSS and [speech-language therapy] or solely for SETSS" (id.). The IHO found "that by not specifying the services to be provided or the frequency or duration of said services[,] . . . the contract d[id] not create a clear financial obligation for [the p]arent and therefore none for [the d]istrict as well" (id.).

Next, the IHO found the rate charged by EdZone was unreasonable (IHO Decision at p. 10). The IHO recounted the testimony of the educational supervisor and found "that with respect to the rate charged, [the p]arent provided no evidence as to what expenses [we]re included in this amount or why this rate [wa]s reasonable, only that they [we]re charging what other agencies indicated they [we]re charging" (id.). The IHO further found that there was no evidence that EdZone incurred costs equal to the other agencies and had provided no justification for the rate charged (id.). The IHO then described the testimony related to the rates charged and the payment received by the student's provider and determined that EdZone was "inconsistent in its accounting" and the overall amounts were unreasonable (id. at pp. 10-11).

Turning to the full testimony of the educational supervisor, the IHO found it "incredible" and gave "little weight" to the witness's explanation of rates (IHO Decision at p. 11). In conclusion, the IHO found that equitable considerations warranted an award of funding at a "reasonable market rate" as determined by employees of the district, rather than the contract rate, and that the documentary evidence supported funding beginning on October 30, 2023 through the end of the 10-month 2023-24 school year (id.).

Based on his initial determinations, the IHO denied the parent's request for SETSS funding and dismissed the matter with prejudice (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parent appeals with the assistance of a lay advocate from Prime Advocacy, alleging that the IHO incorrectly found that the district did not owe a FAPE to the student and that the parent could not use the last agreed upon IESP from March 2021. The parent also argues that the IHO incorrectly found that the contract was invalid and that the parent did not owe a financial

obligation and incorrectly reduced the rate because there was no evidence the 10-day notice was submitted. The parent also asserts that the IHO erred in finding the educational supervisor's testimony was not credible and that the parent did not provide evidence of services provided in September 2023. As relief, the parent requests an award of funding for SETSS for the 10-month, 2023-24 school year at the contract rate for group SETSS of $148 per hour.

In an answer with cross-appeal, the district argues that the IHO correctly determined that the parent did not allege in her due process complaint notice that the district failed to implement the February 2023 IESP. The district further asserts that the parent only raised two claims related to FAPE and the district refuted both claims during the impartial hearing. The district therefore contends that the IHO correctly found in favor of the district. The district also argues that the IHO's findings related to equitable considerations should be affirmed. As its cross-appeal, the district alleges that the parent's implementation claims should be dismissed for lack of subject matter jurisdiction as the parent does not have a right to file a due process complaint notice regarding services recommended in an IESP.

The parent did not file a reply or an answer to the district's cross-appeal.[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

[4] By letter dated October 7, 2024 and in response to a request for an extension to serve and file an answer to the cross-appeal, the parent's advocate was granted an extension to October 25, 2024. In a letter dated October 30, 2024, the Office of State Review requested information from the parent's advocate as to the status of the parent's answer to the district's cross-appeal. The parent's advocate has not responded to the status inquiry.

[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]).

"develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[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

Turning to the merits, 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 EdZone 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

[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.

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]).[7] 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).

A. Preliminary Matters

1. 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 this appeal. 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).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP (Answer and Cr.-Appeal ¶¶ 11-15).

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

[7] 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 EdZone (Educ. Law § 4404[1][c]).

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 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 ¶¶ 13-14).

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

Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed

on or after July 16, 2024 (id.). Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause dated 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. 909589-24).[8]

The district acknowledges the limitation on applicability of the regulation amendments relating to the date of the due process complaint notice and also acknowledges the temporary injunction arising from the pending litigation regarding the regulation, but contends that parents "'never had the right to file a due process complaint to request an enhanced rate for equitable services'" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction (Answer & Cr.-Appeal ¶ 14 n.6; Oct. 9, 2024 Letter from Dist).

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]).

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

[8] 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.

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. Scope of Impartial Hearing and Review

Turning to the IHO's determinations regarding the scope of the impartial hearing, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In his discussion of the parent's due process complaint notice, the IHO correctly noted that the parent did not specifically challenge the February 2023 IESP, however I do not agree with his conclusion that lack of reference to the more recent IESP supports a finding that the complaint "did not put the district on notice of what issues [the parent] had regarding the program" (IHO Decision at p. 5). Although the March 2021 IESP is referenced throughout the parent's due process complaint notice, the parent did not assert a challenge to the design of any IESP and, instead, specifically asserted a claim that the district "failed to offer the [s]tudent" a FAPE by failing "to supply a provider for the [s]tudent for the 2023-2024 school year" and that the district's "failure to implement services for [the student] . . . denied [the student] the right to equitable special education services" (Parent Ex. A at p. 2). Thus the due process complaint notice sufficiently alleged that the "issue[] [the parent] had regarding the program" (IHO Decision at p. 5) was that the district was not implementing any of the student's mandated services for the 2023-24 school year (Parent Ex. A at p. 2).[9]

[9] Although I find that the parent sufficiently raised the district's failure to implement special education services for the 2023-24 school year, I note that the parent's argument that she could "use the last agreed upon IESP" to allege a denial of a FAPE is misguided in that it ignores the IHO's point, which was directed at the parent's allegations as to the district's failures that led to the parent engaging in self-help and bringing a due process complaint. While the parent's argument regarding a "last agreed upon IESP" may pertain to identifying a student's pendency placement or explain why the parent obtained certain private services (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145 170-71 [2d Cir. 2014] [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]), it does not speak to the district's responsibility to implement services in the first place.

Based on the foregoing, I find that the parent consistently challenged the district's failure to implement services for the 2023-24 school year.[10]

Turning to the remaining issues before me on appeal, review of the parties' appeals reveals that the district has not cross-appealed the IHO's factual determinations, made in the alternative, that the district did not provide the student a FAPE or equitable services for the 2023-24 school and the findings that the parent's unilaterally obtained SETSS were appropriate (see IHO Decision at pp. 2, 7, 8). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; 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 addition, the district does not appeal the IHO's finding that the student was entitled to receive special education services from the district while enrolled in a nonpublic school for the 2023-24 school year (see IHO Decision at p. 6), and the district's evidence established that the operative IESP in place at the beginning of the 2023-24 school year was the February 2023 IESP (see Dist. Exs. 1; 2). However, the district did not produce evidence that the IESP was implemented. Further, a review of the hearing record yielded no reason to disturb the IHO's findings that the parent met her burden to prove that the unilaterally obtained services were specially designed to meet the student's needs (Tr. pp. 30-33; Parent Exs. F-I; Dist. Ex. 1). Accordingly, even if properly cross-appealed by the district, there would be no basis in the hearing record to reverse the IHO's factual determinations that the district failed to implement the student's mandated special education services for the 2023-24 school year or that the unilaterally obtained SETSS from EdZone were appropriate.

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' 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

[10] The parent additionally raises allegations on appeal claiming that the timing of the CSE's development of the student's IESP in February 2023 "rather than before the start of the school year" constituted a denial of a FAPE. The parent did not raise any allegation in the due process complaint notice pertaining to the timing of the CSE (see Parent Ex. A) and, therefore, may not pursue the issue for the first time on appeal. Even if raised, the claim would fail as the February 2023 IESP was in place at the beginning of the 2023-24 school year and the regulations do not specifically prescribe when a CSE meeting should occur (see 20 U.S.C. § 1414[d][3][D], [F]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; [f]-[g]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]).

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"]).

1. 10-Day Notice of Placement

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).

Regarding the IHO's findings about the notice to the district of the parent's intent to unilaterally obtain services for the student, as noted above, the parent submitted into evidence a letter dated August 23, 2023, from Prime Advocacy, stating that, if the district did not implement services, the parent intended to unilaterally obtain private services at enhanced rates (Parent Ex. D). The letter does not set forth a mailing or email address to which it was purportedly sent and the salutation of the letter broadly reads "Dear Chairperson" (id.). As the IHO noted, the letter was not accompanied by an email or other documentation of transmittal.[11] There was no testimony or additional evidence regarding the transmittal of the letter. Under the circumstances, while the district did not directly deny or concede receipt of the letter, given the factors noted above, there is no basis to disturb the IHO's finding that the document alone is not sufficiently reliable evidence upon which to conclude that the letter was sent to the district (IHO Decision at p. 9). In addition, as the IHO noted, the letter did not notify the district that the parent intended to seek public funding for the private services obtained (Parent Ex. D).

[11] By way of comparison, the May 2023 letter requesting equitable services and the April 2024 due process complaint notice were submitted into evidence with accompanying copies of the transmittal emails (Parent Exs. A; E).

The IHO's concerns about the parent's alleged 10-day notice are well-founded. Based on the foregoing, there is no basis in the hearing record to disturb the IHO's determinations that, given the concerns with the 10-day notice, a reduction in an award of funding for private services would be warranted.

The IHO did not specify the amount of reduction that he felt would be warranted based on the issues with the 10-day notice. Weighing the equitable factors discussed herein, I find that a twenty percent reduction is warranted due to the deficiencies found by the IHO.

2. Financial Obligation

The parent contends that the IHO erred by finding that her agreement with EdZone was not valid and therefore, the parent was not financially obligated pursuant to the terms of the agreement for payment of the SETSS delivered. According to the parent, any blanks present in the agreement did not automatically render the agreement invalid or void, so long as the intent of the parties could be reasonably ascertained.

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]).

At the impartial hearing, the parent's sole witness—the EdZone educational supervisor—testified about the parent's agreement with EdZone (see Tr. p. 34; see generally Parent Ex. C). More specifically, the IHO asked the supervisor to identify within the agreement exactly what services were being provided to the student, and in response, the supervisor pointed to language in the agreement indicating "the child will receive services by EdZone in accordance with the last agreed-upon IEP, IESP, FOFD, pendency order, pendency agreement. That's C-3" (Tr. p. 40). The IHO asked which of those applied to this student, and the educational supervisor answered that services were according to his IESP (id.). The IHO then asked if she knew which IESP it would be and she responded that she thought it was from 2021 (id.).

Although the IHO found that the contract with EdZone was missing essential terms, he did not conclude that an outright denial of relief would be warranted on this ground (see IHO Decision at pp. 9-10). As the district has not cross-appealed the IHO's decision in this regard, I decline to opine as to whether the contract terms, or lack thereof, render the contract too vague. Under the circumstances, it is sufficient to note that the parent's agreement with EdZone reflects an acknowledgement by the parent that, by signing the document, the "fees for services [we]re listed in Addendum 1," and that she "assume[d] complete financial responsibility for the services provided" to the student by EdZone and moreover, that she was "legally obligated to pay, when

due, the total cost of fees" (Parent Ex. C at p. 1). To be sure, the parent's agreement with EdZone does not specifically reference the March 2021 or February 2023 IESPs or otherwise specify the exact services to be delivered to the student for the 2023-24 school year, other than noting that services would be provided "in accordance with the last agreed upon" IESP, which the educational supervisor later identified at the impartial hearing as only being SETSS and not any related services (id. at p. 3; see Tr. pp. 30-32).

Ultimately, as the IHO did not find the lack of specificity in the agreement determinative, and as the evidence demonstrates that the parent agreed to be bound to pay EdZone for certain services, the issue of the parent's obligation does not warrant a denial of relief sought by the parent.

3. Excessiveness of Rate

The parent also appeals the IHO's finding that the rate charged by EdZone for private SETSS was unreasonable (IHO Decision at p. 10). Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

The parent's contract with EdZone set the hourly rate for group SETSS at $148 per hour (Parent Ex. C at p. 3). According to the testimony of the EdZone educational supervisor, the student received four hours per week of SETSS (Tr. p. 28; Parent Ex. F at ¶ 13). The educational supervisor testified that the hourly rates set forth in the contract with the parent included $87 per hour paid to the SETSS provider plus an additional $10 or $15 per student in a group setting (Tr. pp. 29-30, 35-36; Parent Ex. F at ¶ 15).

An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the private provider but evidence of reasonable market rates for the same or similar services. During the impartial hearing, the district argued that the rate charged by EdZone was excessive and that any amount awarded should not include ancillary fees (Tr. pp. 42-43); however, the district presented no evidence regarding the reasonableness of the rate charged by EdZone. In the absence of any reliable documentary or testimonial evidence regarding the reasonableness of the costs of the SETSS provided by EdZone, the IHO's finding that the hourly rate charged was not reasonable lacks support in the hearing record (see IHO Decision at pp. 10-11).

As a final matter, the hearing record demonstrates that contrary to the testimony of the educational supervisor, the student received SETSS in 40-minute sessions, not one-hour sessions and that services began on October 30, 2023, not September 2023 (compare Parent Ex. I at pp. 1-10, with Tr. pp. 28, 36; Parent Ex. F at ¶ 6). Nevertheless, the IHO erred in denying the parent's request for direct funding to EdZone for the provision of four 40-minute (2.68 hours per week) sessions per week of SETSS at a group rate of $148 per hour during the 2023-24 school year from October 30, 2023 through June 16, 2024.

VII. Conclusion

In summary, the district does not challenge—and the evidence in the hearing record supports—the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year and that the parent's unilaterally obtained SETSS from EdZone were appropriate. Regarding equitable considerations, although the IHO erred in finding the rate charged by EdZone for private SETSS was unreasonable, there is insufficient basis in the hearing record to disturb the IHO's finding that the parent did not provide adequate 10-day notice to the district and that this would warrant "a reduction of any award ordered. I further find that the IHO correctly awarded funding for the time period of October 30, 2023 through June 16, 2024. As a result, the parent is entitled to funding for the services actually provided by EdZone. However, based on equitable considerations, the concerns identified by the IHO regarding the parent's purported 10-day notice to the district of her intent to unilaterally obtain private services weighs against an award of the parent's requested hourly rate of $148.00 per hour, and, therefore, the award will be reduced by 20 percent.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated August 7, 2024, is modified by reversing that portion which found that the parent's claims against the district for failing to implement the student's mandated special education services were not within the scope of the impartial hearing; and

IT IS FURTHER ORDERED that the district shall fund eighty percent (i.e., $118.40 per hour) of the costs of no more than four 40-minute sessions per week of SETSS delivered to the student by EdZone during the 2023-24 school year from October 30, 2023 through June 16, 2024, upon the presentation of invoices from EdZone and affidavits of the student's SETSS teachers attesting to the frequency and duration of the SETSS delivered to the student during the 2023-24 school year.

Dated: **Albany, New York**
November 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER