The University of the State of New York

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

No. 24-412

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 Abigail Hoglund-Shen, 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 compensatory education related to the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which denied its request to dismiss the parent's claims. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law

§ 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The CSE convened on December 14, 2023 and found that the student was eligible for special education as a student with a learning disability (see Dist. Ex. 2).[1] The CSE created an IESP for the student, who was parentally placed in a nonpublic school where he attended first grade at the time of the meeting (id. at p. 2). The CSE recommended that the student receive five periods per week of direct group special education teacher support service (SETSS) in Yiddish, with related services of one 30-minute session per week of individual speech-language therapy in Yiddish and one 30-minute session per week of group speech-language therapy in Yiddish (id. at p. 10).

The parent submitted an affidavit from Kinship Resources, which indicated that the agency was able to provide bilingual SETSS in Yiddish at the rate of $210 per hour and was able to provide bilingual speech-language therapy at the rate of $350 per hour (see Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated June 6, 2023,[2] the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). According to the parent, the district failed to assign service providers to deliver the services mandated in the student's December 14, 2023 IESP (id.). The parent contended that she was unable to find providers on her own that would implement the services at the district's set rates (id.). The parent requested a finding that the district failed to offer the student a FAPE for the 2023-24 school year, and an order that the district provide "banks of special education services" for all mandated services not provided directly by the district at the enhanced rates arranged by the parent, and an order that the district provide "banks of special education services" not provided to the student (id.).[3] The parent also requested pendency services, asserting that the December 14, 2023 IESP was the student's "then current placement" (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 8, 2024 (see Tr. pp. 1-44). In a decision dated August 15, 2024, the IHO found that there was no evidence that the parent timely requested equitable services; however, she also held that the district waived the defense (IHO Decision at p. 4). The IHO noted that the district

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

[2] It appears that the June 6, 2023 date is a typographical error as the due process complaint notice relates to an IESP developed in December 2023 and both the Authorization for Representation and Exchange of Information and transmittal email accompanying the due process complaint notice were dated June 6, 2024.

[3] Specific to this, the parent requested that these "compensatory education services" be funded at rates similar to those enhanced rates charged by the providers "operating within the specific neighborhood of the Student and providing SETSS and Related Services in Yiddish" (Parent Ex. A at pp. 1-2).

did not dispute the parent's contention that it failed to implement the student's December 14, 2023 IESP (id.).

The IHO found that the agency administrator was credible (IHO Decision at pp. 5-6). The IHO held that the AIR Report was of "little evidentiary value" noting that the study was for SETSS, not related services, and that the methodology of the study was flawed (id. at p. 6).[4] Despite these findings, the IHO acknowledged that the AIR Report did "provide some information about the costs above the individual providers' rate/salary that would be reasonable to include in an overall rate" (id.). Based on calculations on what the maximum amount should be charged, the IHO found that the $210 rate for SETSS was within that rate, while the charge of $350 per hour for speech-language therapy was not (id.).

The IHO noted that she must determine whether to apply the compensatory education or Burlington/Carter "framework" (IHO Decision at p. 13). The IHO found that while she believed that compensatory education was appropriate in this case, as the student was entitled to services and the district failed to provide them, that fact did not allow the parent to "perform an end run" around their responsibility to demonstrate that the services are appropriate (id. at p. 14). The IHO noted that this was particularly true when a parent has selected a provider, as happened in this case (id.). Therefore, the IHO held that "although compensatory education [was] warranted, it [was] not appropriate to order that relief at the provider and rate of the Parent's choosing" (id.). Moreover, the IHO noted that even if she believed such an award would be warranted, she would not have awarded the rate for equitable reasons (id.). The IHO held that the parent's advocate's actions at the hearing were "highly inappropriate" as it was clear she tried to influence the witness's answer after the administrator gave an answer she did not like and then attempted to undermine the credibility of that witness (id.). The IHO also held that the representations of the parent's advocate attempted to mislead the IHO regarding the existence of a contract (id.). The IHO determined that the advocate's actions were "done in furtherance of their argument" for a compensatory education award rather than an award pursuant to a Burlington/Carter analysis (id.). The IHO noted that it has been well established that the actions of a party's representative can be factored into equitable considerations (id.). Moreover, the IHO held that the agency's rate for speech-language therapy was excessive, and that the agency was not an appropriate choice for the services as they did not offer group speech-language therapy (id.). The IHO determined that the maximum reasonable rate for speech-language therapy is $322.43 (id.).

The IHO ordered the district to provide a bank of compensatory education services of 120 periods of group bilingual SETSS, 12 hours of individual bilingual speech-language therapy and 12 hours of group bilingual speech-language therapy (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred by ordering the district to provide the services directly, instead of allowing the parent to implement the services through a provider

[4] The IHO noted that the study included hourly rates of full-time salaried employees, which is not relevant, and that the data included New Jersey and Pennsylvania, "which would necessarily have brought down the average calculation (and the study admits as much) from what is reasonable in New York City" (IHO Decision at p. 6). Lastly, the IHO noted that the study did not account for bilingual rates (id.).

of her choice. According to the parent, the district's failure to provide the student's services demonstrates that the district does not have a provider available, it intentionally disregarded its obligations, or alternatively, that it is not interested in implementing the services. Notably, the district did not offer an excuse as to its failure to implement the student's services at the impartial hearing, nor did the district offer to implement the services at the impartial hearing. According to the parent, "[g]iving the services back to the [district] without any timelines or conditions is simply abdicating responsibility for this child's services." The parent argues that the IHO's order is not relief for the wrongdoing but is perpetuating the wrongdoing. Additionally, the parent asserts that the district has shown itself incapable of implementing the services, therefore the parent should be given the opportunity to implement the services that the district failed to provide. Moreover, the parent argues that the rates should not be limited.

The parent requests the IHO decision be modified to allow the parent to find a provider of her choosing at those rates for the awarded hours of compensatory education. If the SRO finds that the district should be given the opportunity to implement the compensatory services, the parent requests that the district be given a short window to implement, or else the parent will be given the opportunity to implement the services with a provider of her choosing at the rates charged by the provider.

The district cross appeals. The district asserts that the IHO should have dismissed the due process complaint for lack of subject matter jurisdiction as parents do not have the right to due process for equitable services. The district points to the New York State Department of Education emergency regulation and education law to support its argument. The district asserts that the IHO correctly denied compensatory education from the selected provider and contends that the IHO should have found that the parent was not entitled to any compensatory services under the Burlington/Carter standard. The district argues that the parent failed to meet her burden as the hearing record lacks any evidence as to how the agency was appropriate for the student's needs.

The district argues that equitable considerations do not favor the parent and notes that the parent did not appeal the IHO's finding on this issue. The district contends that those findings are final and binding, and that the SRO should deny relief. Additionally, the district argues that the SRO should deny relief because the parent failed to demonstrate financial obligation as the contract was not included in the hearing record. In the alternative, the costs for services should not exceed the rate of $128 per hour.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that 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

A. Preliminary Matters – Subject Matter Jurisdiction

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

[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]).

[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.

impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to a rate for services for implementation of an IESP (see Answer & Cr.-Appeal ¶¶ 7-13).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

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

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs who attends a nonpublic school (Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

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

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services and the State Education Department made a "carve-out" of jurisdiction for this issue explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶ 12).

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, as the number of due process cases involving the dual enrollment statute statewide have drastically increased within certain regions of this school district in the last several years, it is understood that public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.). Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice but contends that the amendments "merely codify NYSED's preexisting position on implementation claims" (Answer & Cr.-Appeal ¶ 12 n. 1).

Consistent with the district's position, State guidance issued in August 2024 noted that:

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

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

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

the amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

B. Compensatory Education

Here, there is no dispute that the student was entitled to the services requested as the district representative agreed that the services recommended in the December 2023 IESP were appropriate (Tr. p. 13). Further, there is no dispute that the student did not receive any services during the 2023-24 school year (Tr. pp. 22, 26, 37). As the student has not received any services, the parent is not seeking reimbursement for any unilaterally-obtained services and is seeking compensatory education for the missed services during the 2023-24 school year.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

As stated above, the district has not disputed that the student was entitled to the services recommended in the December 2023 IESP; rather, the district agreed they are appropriate (Tr. p. 13). Also, there is no dispute that the student did not receive any services from the district. Since the student is entitled to these services pursuant to the December 2023 IESP, the district was required to provide them. In its cross-appeal, the district does not challenge the type or amount of compensatory education ordered by the IHO on the grounds that the award was not aligned with the student's needs or would not serve to place the student in the position he would have occupied but for the district's violations of Education Law § 3602-c. Instead, the district primarily argues that testimony from an agency administrator indicated that the parent may have entered into an

agreement with the agency to provide the student with services. As there is no evidence that the student received any services during the 2023-24 school year from a private provider and the agency director testified that the agency had not provided the student with any services during the 2023-24 school year (Tr. pp. 26-27), remediation of the district's failure to implement the equitable services recommended by the district in the student's December 2023 IESP through an award of compensatory education provided by the district is appropriate. Moreover, as noted by the IHO, such an award would provide the student with a remedy for the district's failure to implement equitable services to which he was entitled while preventing any "end run" by the parent in obtaining private services for the student and seeking funding for such services without demonstrating that they were appropriate under a Burlington-Carter analysis (see IHO Decision at p. 14). As a result, the IHO properly ordered the district to provide compensatory education to the student consisting of 120 periods of group SETSS in Yiddish, 12 hours of individual speech-language therapy in Yiddish, and 12 hours group speech-language therapy in Yiddish, representing the missed special education and related services that the district should have provided to the student in the first instance pursuant to the December 2023 IESP.

VII. Conclusion

As discussed above, the IHO had subject matter jurisdiction over the parent's claim and the district denied the student a FAPE for the 2023-24 school year by failing to implement the services in the student's December 2023 IESP. The student is entitled to compensatory education as a result of the district's failure to implement the equitable services to which he was entitled for the 2023-24 school year and, therefore, the district is ordered to provide those services to him.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that unless the parties otherwise agree, the district is ordered to provide 120 periods of compensatory group SETSS in Yiddish; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district is ordered to provide 12 hours of compensatory individual speech-language therapy in Yiddish; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district is ordered to provide 12 hours of compensatory group speech-language therapy in Yiddish.

Dated: **Albany, New York**
November 29, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER