



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-423

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

### **Appearances:**

Shehebar Law P.C., attorneys for petitioner, by Ariel A. Bivas, Esq.

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 the costs of her daughter's private services delivered by Grow With Us, LLC (Grow With Us) for the 2023-24 school year and dismissed the parent's due process complaint notice for lack of subject matter jurisdiction. The district cross-appeals from the IHO's factual findings. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### **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 programming 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 student has received a diagnosis of autism spectrum disorder (ASD) (Dist. Exs. 4 at pp. 4, 14-16; 7 at pp. 1, 3, 6-7). According to a November 2022 private neuropsychological evaluation, the student had been home schooled since the COVID-19 pandemic (Dist. Ex. 4 at pp. 1, 5).

A CSE convened on March 10, 2021, found the student eligible for special education as a student with autism, and developed an IESP with a projected implementation date of March 25, 2021 (see Parent Ex. B).<sup>1</sup> The March 2021 CSE recommended that the student receive ten periods per week of direct group special education teacher support services (SETSS), along with two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual physical therapy (PT), and quarterly parent counseling and training sessions (id. at p. 12).<sup>2</sup>

Leading up to the 2023-24 school year at issue, on April 24, 2023, a CSE convened and developed an IESP with a projected implementation date of May 15, 2023 (see Dist. Ex. 3). The IESP noted that the student was in eighth grade at that time and was "being home schooled" (id. at p. 3). The April 2023 CSE recommended ten periods per week of direct group SETSS together with three 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of individual PT (id. at p. 18).

On March 5, 2024, the parent entered into a contract for special education services with Grow With Us for the 2023-24 school year (Parent Ex. C).<sup>3</sup> Pursuant to the terms of the contract, the agency was to provide the student with ten periods per week of SETSS (id.).

#### A. Due Process Complaint Notice

In a due process complaint notice dated June 11, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). In particular, the parent asserted that the district "failed to implement the special education services recommend on the [March 2021] IESP" for the 2023-24 school year (id. at p. 2). The parent indicated she had found providers to deliver the services "at an enhanced rate" (id.). The parent also requested pendency in the March 2021 IESP (id. at pp. 1-2). For relief, the parent requested that the district directly fund the costs of SETSS and related services delivered by private providers (id. at p. 2). The parent also "reserve[d] the right to seek any compensatory

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<sup>1</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>2</sup> SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

<sup>3</sup> Grow with Us is an LLC and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

educational relief for services that should have been provided or for services that were mandated to the [s]tudent but not provided due to the [district's] denial of a FAPE" (*id.* at p. 3).

## **B. Impartial Hearing Officer Decision**

On August 7, 2024, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-29). In a decision, dated August 26, 2024, the IHO dismissed the parent's due process complaint notice on the ground that she lacked subject matter jurisdiction (IHO Decision).

With respect to the unilaterally obtained services from Grow With Us, the IHO made some factual findings before turning to an analysis of the parent's claims (IHO Decision at p. 5). In particular, the IHO found that the parent entered into "an enforceable contract" with Grow With Us and had an obligation to pay for the SETSS for the 2023-24 school year (*id.*). The IHO found that, although the SETSS teacher who provided the student private services did not testify, the Grow With Us report dated June 9, 2024 was "generally reliable" because it was consistent with the student's recent IESP (*id.*). Further, the IHO concluded that the SETSS provided to the student "consist[ed] of special education instruction by a qualified special education teacher consistent with the service recommended in the [s]tudent's most recent IESP" (*id.*).

The IHO found that the district failed to provide the student with her mandated SETSS, and, therefore, failed to sustain its burden to demonstrate that it offered the student a FAPE (IHO Decision at p. 7). The IHO noted that the student "should have received 10 periods of SETSS per week" for the 2023-24 school year (*id.* at pp. 7-8, 10). However, the IHO determined that she did not have jurisdiction to order the relief requested by the parent pursuant to a New York State Education Department (NYSED) guidance memorandum from August 2024 (NYSED memorandum) discussing an emergency regulation and stating parents do not have the right to file due process "to request an enhanced rate for equitable services" under Education Law § 3602-c (*id.* at p. 8).<sup>4</sup> Relying on the NYSED memorandum, the IHO determined that she was constrained to dismiss the parent's due process complaint notice even though it was filed before the date that the emergency regulation went into effect in July 2024 (*id.* at p. 9). Accordingly, the IHO dismissed the parent's due process complaint notice for lack of subject matter jurisdiction and denied the parent's request for funding for the costs of the unilaterally-obtained SETSS (*id.* at pp. 9-10).

## **IV. Appeal for State-Level Review**

The parent appeals, alleging that the IHO erred in finding that she did not have jurisdiction to order relief in this matter. The parent contends that the IHO improperly relied on the NYSED memorandum which was contradictory to the emergency regulation relating to cases seeking an enhanced rate. The parent agrees with the IHO's finding that the student should have received ten periods per week of SETSS for the 2023-24 school year. The parent requests reversal of the portion of the IHO's decision finding that she lacked jurisdiction and, as relief, the parent seeks funding

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<sup>4</sup> For reasons that are not apparent, the NYSED memorandum is no longer available on the State's website, so I have added a copy to the administrative hearing record on appeal in this matter.

for the SETSS at the parent's contracted rate, or for a remand to the IHO for a determination on rate.

The district filed an answer and cross-appeal, generally denying the material allegations contained in the request for review. The district asserts that the IHO properly found that she did not have subject matter jurisdiction over the parent's claims. However, the district cross-appeals the IHO's finding that the student was entitled to SETSS. The district asserts that, since the IHO found that she lacked jurisdiction over the matter, she exceeded her authority in making a finding that the student was entitled to SETSS and alternatively argues that the parent failed to meet her burden to demonstrate that the SETSS delivered by Grow With Us were appropriate. Lastly, the district argues that, if it is found that the IHO did have jurisdiction to hear the parent's claims, the evidence in the hearing record shows that the rate charged by the agency was excessive. The district further objects to a remand to determine the rate.

## 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]).<sup>5</sup> "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.).<sup>6</sup> Thus, under State law an eligible New

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<sup>5</sup> 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]).

<sup>6</sup> 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

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

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

## **VI. Discussion**

### **A. Subject Matter Jurisdiction**

At the outset it is necessary to address the parent's assertion that, because she filed her due process complaint notice before the emergency regulation took effect, the IHO erred by dismissing her claims for lack of subject matter jurisdiction. Recently, the undersigned and other SROs have rejected the position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

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

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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.

merely have a services plan developed pursuant to federal law alone 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]).<sup>7</sup> 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]). Education Law § 4404, 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). In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to § 3602-c are considered part-time public-school students under State law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusions that part-time public-school student are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, 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.

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

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<sup>7</sup> 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]).

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]). However, 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, and therefore is not applicable to the parent's due process complaint notice dated June 11, 2024 (*id.*).<sup>8</sup> Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of 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).<sup>9</sup>

The district acknowledges the filing of the due process complaint notice occurred before the effective date of the emergency regulation, but contends that the emergency regulation "merely codif[ies] NYSED's preexisting position on implementation claims" and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP (Answer & Cr.-Appeal ¶ 14). Similarly, the IHO noted that the parent's due process complaint notice predated the effective date of the emergency regulations, but found that she was constrained to dismiss the parent's claims pursuant to "unambiguous language" in the NYSED memo that stated:

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.

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<sup>8</sup> A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in the present matter is dated June 11, 2024, prior to the effective date of the emergency regulation (see Parent Ex. A).

<sup>9</sup> 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 (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).



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

However, acknowledging the increased attention from State policymakers as well as at least one court at this juncture, and 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. Further, the NYSED memorandum issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. For these reasons, the IHO's dismissal for lack of subject matter jurisdiction must be reversed.

### **B. Unilaterally Obtained SETSS**

During the proceedings, the attorney for the parent represented that the other mandated related services of speech-language therapy, OT, and PT were provided to the student by the district and were not an issue in this matter (Tr. p. 24). However, the IHO found that the district failed to provide the student with her mandated SETSS, and, therefore, failed to sustain its burden to demonstrate that it offered the student a FAPE (IHO Decision at p. 7). The district has not appealed this determination and, accordingly, it has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). I next turn to whether the unilaterally-obtained SETSS delivered by Grow with Us were appropriate.

As previously noted, the student was reportedly home schooled (see Dist. Ex. 4 at pp. 1, 5), and she received the unilaterally obtained SETSS at home (Parent Ex. D ¶ 13). Under New York State law, a student with a disability whose parent has submitted an individualized home instruction plan (IHIP) for home schooling the student pursuant to State regulations is deemed to be a student enrolled in and attending a nonpublic school for the purpose of receiving special education services (Educ. Law § 3602-c[2-c]; 8 NYCRR 100.10). Absent from the hearing record is an IHIP for the student's home instruction for the 2023-24 school year (see Parent Exs. A-F; see Dist. Exs. 1-8); however, the district does not dispute the student's eligibility for dual enrollment services.<sup>10</sup> Nevertheless, 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, the parent unilaterally-obtained private services from Grow With Us 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

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<sup>10</sup> In New York State, a district is required to provide special education services to students with disabilities who are enrolled by their parents in nonpublic schools provided that a request for such services is filed with the board of education on or before the first day of June preceding the school year for which the request is made (Educ. Law § 3602-c[2][a]). An exception to the June 1 deadline for filing a written request for special education services for a home schooled student provides that a parent may request services within 30 days after a change of the district of residence or 30 days after being identified as a student with a disability (Educ. Law § 3602-c[2-c]).

under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).<sup>11</sup> 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).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private

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<sup>11</sup> 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 Grow With Us (Educ. Law § 4404[1][c]).

placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. The Student's Needs**

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS were appropriate to meet the student's needs. The April 2023 IESP was based upon a psychological-educational evaluation report dated September 28, 2022, a speech-language evaluation report dated on October 5, 2022, an OT evaluation report dated October 14, 2022, and a comprehensive neuropsychological assessment report dated December 9, 2022 (Dist. Ex. 3 at pp. 1-9; see generally Dist. Exs. 4-7).

The April 2023 IESP noted that, during the comprehensive neuropsychological assessment, the evaluator observed that the student had difficulty understanding "standardized directions," would answer in one-word phrases, and used headphones to "reduce auditory overstimulation" (Dist. Ex. 3 at p. 3). The evaluator found that the student's cognitive functioning was "significantly

below her peers" and she had difficulty expressing herself, following multi-step directions, staying on task independently, and waiting patiently between tasks (id.). The IESP indicated that on a standardized measure of academic functioning, the student performed in the extremely low range on reading, spelling, and math subtests (id.). According to the IESP, the student was able to identify both upper- and lower-case letters and read a few words but at a slow pace (id.). In addition, she could spell her name and write different letters upon request (id.). In math, the student was able to identify numbers and perform one digit math problems with manipulatives (id.). As noted in the IESP, the student used a poor pencil grip when drawing which made it difficult to write in preassigned spaces (id.).

With regard to adaptive functioning, the April 2023 IESP described the student as "lower functioning than that of almost all individuals her age" (Dist. Ex. 3 at p. 3). The IESP indicated that communication and leisure skills were areas of relative weakness for the student, while self-direction was an area of relative strength (id.). The IESP reflected the results of autism rating scales which indicated the student exhibited severe signs of autism spectrum disorder requiring very substantial support (id. at p. 4). The student engaged in "repetitive or stereotyped behaviors," repeated "unintelligible sounds (babble[d]) over and over," and displayed "ritualistic or compulsive behaviors" (id.). Additionally, the IESP noted that, based on the October 2022 speech-language evaluation, the student presented with a "severe mixed receptive-expressive disorder and severe pragmatics disorder" (id. at p. 5).

The IESP indicated that, according to the parent, the student required some assistance with activities of daily living, i.e., brushing teeth, adjusting shower water temperature, tying shoes, and buttoning and zipping her clothes (Dist. Ex. 3 at p. 7). In terms of social development, the parent stated that the student needed help with her communication skills, could not maintain a two-way conversation, and communicated only with one-word responses (id. at pp. 7-8). According to the IESP, the parent reported that the student "ha[d] regressed in her speech" (id.). With respect to her physical development, the IESP cited the OT report which noted that the student had difficulty processing sensory information from her environment appropriately, which impacted her interactions with others (id. at p. 8). The IESP noted that the student had weaknesses in her upper body strength and poor visual motor integration, motor coordination, and perceptual skills (id. at pp. 8-9).

The IESP indicated that the student required various modifications and resources to address her management needs including the use of manipulatives, visual aids, multi-sensory teaching techniques, praise and encouragement, repetition, scaffolding of instruction, chunking of information, highlighting key information, redirection and prompting, movement breaks, and graph paper for scrap work (Dist. Ex. 3 at p. 9).

According to the April 2023 IESP, the student's "expressive, receptive and pragmatic delays along with fine and gross motor weaknesses . . . impede[d] her overall academic performance" (Dist. Ex. 3 at p. 9). The IESP contained annual goals that targeted the student's sensory processing ability; ability to follow directions to complete activities; motor coordination; development of appropriate articulation; production of a simple sentence; bilateral coordination; ability to skip; ability to prepare food with assistance; shopping skills with adult assistance; ability to spell 20 words from the "third grade Dolch list;" ability to write one paragraph; ability to identify characters, setting, problem and solution in a story by referring back to the text; ability to

demonstrate "automaticity" of multiplication tables; and ability to solve ten math problems involving fractions with the use of manipulatives (id.).

## 2. SETSS from Grow With Us

Regarding the SETSS provided by Grow With Us, the parent presented the testimony of the Grow With Us supervisor and a June 9, 2024 report from Grow With Us (see Parent Exs. D; F).

The Grow With Us supervisor testified that Grow With Us began delivering services to the student in January 2024 (Tr. p. 16; see Parent Ex. D ¶ 10). In her written testimony, the Grow With Us supervisor testified that the agency provided the student individual SETSS for the 2023-24 school year from a certified teacher (Parent Ex. D ¶¶ 10-12).<sup>12</sup> She testified that the student's progress was measured by assessments, meetings with the student's provider, daily session notes, and progress reports (id. ¶ 15; see Tr. p. 13). The Grow With Us supervisor testified that she never observed the student but read the student's progress reports (Tr. p. 13).

The June 2024 report from Grow With Us detailed the student's needs as of the date of the report but did not provide a description of instruction provided by the SETSS teacher during the 2023-24 school year and included only a general statement that the student had made moderate progress (see Parent Ex. F). As related to math, the report stated the student was performing below her grade level, specifically at a "pre1A to second grade level" (id. at p. 1). The Grow With Us report noted the student was able to identify numbers 1-100 and answer addition questions with numbers 1-10 (id.). For reading, the June 2024 Grow With Us report stated that the student was able to recite the alphabet and read on a first-grade level (id.). In addition, she was able to listen to stories read to her but had difficulty responding to questions without cues or assistance (id.). According to the Grow With Us report, the student was unable to identify abstract concepts when discussing a story line and unable to think beyond the "literal facts" (id. at p. 2). The student was able to identify letters but required "picture cues to create the sound letter connection for the beginning of words" (id.). In connection with writing, the Grow With Us report indicated the student had difficulty "creating the written word" even when copying or with prompting (id.). The student had the inability to attend to writing and needed to trace in order to accurately formulate letters (id.). With respect to language, the student was able to understand one and two step instructions (id. at p. 3). The student was noted to be silent when "behaviorally acting up" or ignored the adult to avoid following directions (id.). The provider described the student's social/emotional functioning as working well with adults when she elected to do so (id.). In connection with her peers, the student was described as either being playful or very aggressive in her peer interactions (id.). However, the provider noted that most of the time the student was uncooperative or in a hyperactive state (id.).

The June 2024 Grow With Us report set forth annual goals and recommendations for the upcoming 2024-25 school year but offered little information regarding what was provided during the 2023-24 school year (see Parent Ex. F). The only supports and strategies described in the June 2024 report as having been provided to the student during the 2023-24 school year included

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<sup>12</sup> The hearing record reflects that the teacher named by the supervisor and on the June 2024 Grow With Us report was a New York State certified special education teacher (Parent Ex. E; see Parent Exs. D ¶ 11; F at p. 1).

behavior tracking and provision of rewards, use of a "rigid schedule" to prevent transition issues, allowance for outside breaks when the student was unable to contain her energy or direct herself, and offer of replacement items to redirect the student's anxiety and emotions (*id.* at p. 4). While such strategies align with the student's needs, under the totality of the circumstances, the report does not sufficiently describe how the SETSS provider addressed the student's academic weaknesses. A report with goals for the 2023-24 school year was not offered into evidence during the impartial hearing. Further, the hearing record does not include assessments or session notes despite the supervisor's testimony that such documents were developed (Parent Ex. D ¶ 15). Nor did the parent present testimony from the SETSS provider to describe the services delivered to the student during the 2023-24 school year, and the testimony of the Grow With Us supervisor, who did not work directly with the student, did not offer any insight into the services delivered (*see* Parent Ex. D). Notably lacking from the evidence is any description of how the SETSS were provided to allow the student to benefit from her home instruction.

In summary, taking into account the totality of the circumstances, the hearing record does not sufficiently explain how any services that may have been provided by Grow With Us addressed the student's identified needs in academics, behavior, and language during the 2023-24 school year. Accordingly, I find that the parent did not meet her burden to show that the SETSS delivered by Grow With Us to the student constituted specially designed instruction sufficient to meet the student's identified needs.

## **VII. Conclusion**

As set forth above, the IHO erred in finding she did not have subject matter jurisdiction to hear the parent's claims. Ultimately, however, the parent's requested relief is denied on other grounds. Namely, the parent did not meet her burden to prove that the unilaterally obtained SETSS from Grow With Us were appropriate to meet the student's needs during the 2023-24 school year. Accordingly, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO decision dated August 26, 2024, is modified by reversing that portion that dismissed the complaint for lack of subject matter jurisdiction; and

**IT IS FURTHER ORDERED** that the parent's requested relief is denied as the parent did not meet her burden to prove the appropriateness of unilaterally obtained SETSS delivered by Grow With Us during the 2023-24 school year.

**Dated:** Albany, New York  
November 21, 2024

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**