The University of the State of New York

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

No. 24-431

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

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 for relief for the 2024-25 school year finding that her claims were not ripe for adjudication and dismissed her complaint without prejudice. The district cross-appeals from that portion of the IHO's decision which found the parent was entitled to pendency and that the IHO had jurisdiction over claims related to implementation of equitable services. 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

The Committee on Preschool Special Education (CPSE) convened on February 3, 2021 for an annual review and finding the student continued to be eligible for special education services as a preschool student with a disability developed an IEP for the student with an implementation date of February 9, 2021 (Parent Ex. D at p. 3). The February 2021 CPSE recommended that the student receive two hours of 2:1 special education itinerant teacher (SEIT) services for four days a week, as well as three 30-minute sessions of group (2:1) speech-language therapy per week and three 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 18). The CSPE recommended the student for 12-month services consisting of the same services as the 10-month portion of the school year (id. at p. 19).[1]

On March 24, 2022, the CSE convened to develop school aged-programming, and found the student eligible for special education and related services as a student with a speech or language impairment, and created an IESP for the student with an implementation date of September 8, 2022 (Parent Ex. E at p. 1).[2] It is noted in the IESP that "parental rights were reviewed at the beginning of the meeting" and that the parent "expressed verbally [her] understanding of her rights" (id.). The IESP also noted that the parent indicated the student was attending a nonpublic kindergarten and would continue in the same school for his upcoming kindergarten school year (2022-23 school year) (id.). The CSE recommended that the student receive five periods of direct, group special education teacher support services (SETSS) per week along with three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and one 30-minute session of individual counseling per week (id. at p. 12).[3]

In a prior due process proceeding the parent asserted that there was a delay in revising the student's IEP and that the district failed to continue to implement special education services during the 2023-24 school year (Parent Ex. B at p. 3). In a decision dated October 17, 2023, an IHO in the prior proceeding held that the March 2022 IESP was not appropriate for the student and as

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs.

[2] 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]).

[3] 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.

relief ordered that the district fund SETSS, speech-language therapy, counseling, and OT for the 2023-24 school year (see Parent Ex. B).[4]

In a letter, electronically signed by the parent on May 9, 2024, the parent notified the district of her intent to parentally place the student at a nonpublic school at her own expense and her desire for the district to continue to provide special education services for the 2024-25 school year (Parent Ex. F at p. 2). The letter was sent to the district via email on May 22, 2024 (id. at p. 1).

On July 4, 2024, the parent signed a contract with Mount Resources for the 2024-25 school year (see Parent Ex. G).[5] The contract indicated that Mount Resources intended to provide the student with SETSS or SEIT services at a rate of $215 per hour, speech-language therapy at a rate of $295 per hour, and OT at a rate of $295 per hour for the 2024-25 school year (id. at p. 2). The contract also provided that it was the parent's understanding that the student was entitled to five periods of direct, group SETSS per week, three 30-minute sessions of individual speech-language therapy per week, and three 30-minutes sessions of individual OT per week (id. at p. 1).

In a letter dated July 8, 2024, the parent notified the district of her disagreement with the March 2022 IESP, noting that the IESP reduced the services the student was recommended for and did not include a recommendation for summer services (Parent Ex. C at p. 2). According to the parent, the student required either SEIT services or a hybrid special education/general education program (id.). The parent informed the district that she was rejecting the district's program, would "make efforts to provide [the student] with the prior recommended services," and would seek reimbursement and/or direct funding for those services (id. at p. 3).[6]

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). Initially, the parent requested pendency services pursuant to the October 17, 2023 IHO decision in the prior proceeding and sought 8 hours per week of SEIT services, three 30-minute sessions per week of each of speech-language therapy and OT, and one 30-minite session per week of counseling on a 12-month basis (id. at p. 2). Turning to the substance of the complaint, the parent alleged that the district, in the March 2022 IESP, failed to recommend an appropriate placement for the student and reduced the recommendation of special education teacher services from eight periods per week of SEIT services to five periods per week of SETSS, recommended SETSS as a group service, and completely removed the 12-month program (id. at

[4] It is noted that the counseling was ordered as compensatory education consisting of one 30-minute session per week for the 12-month 2023-24 school year, while SETSS, speech-language therapy, and OT were each ordered as district funding to a private provider selected by the parent at specified rates (Parent Ex. B at p. 10).

[5] The Commissioner of Education has not approved Mount Resources as a school or agency with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] Attached to the letter were two emails which indicated that the parent's counsel emailed the letter on July 9, 2024 to the district and that the district sent notice of receipt the same day (Parent Ex. C at p. 1).

p. 3). The parent contended that the student was making progress with SEIT services and needed continuation of SEIT services or a hybrid special education/general education program (id.). The parent further alleged that SETSS was a more limited service that would not have addressed the student's organizational, executive functioning, and social skills needs (id.). The parent next asserted that she was forced to implement SEIT services independently and was seeking reimbursement for those services (id.). In addition to requesting reimbursement or direct funding for SETSS and related services, the parent requested compensatory SETSS and related services for any period during the 12-month 2024-25 school year that services were missed (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 28, 2024 (see Tr. pp. 1-24). During the hearing, the district representative indicated that the district did not have a position on pendency, declined to cross-examine either of the parent's witnesses, and as part of a closing statement argued that the parent's due process complaint notice should be dismissed on jurisdictional grounds (Tr. pp. 10, 12-14).

The IHO, in a decision dated August 30, 2024, found that the March 2022 IESP offered the student a FAPE and that any claim that the March 2022 IESP was not implemented during the 2024-25 school year was not ripe for adjudication (IHO Decision at pp. 4-5). More specifically, the IHO found that the March 2022 IESP "was comprehensive and detailed in its characterization of [the s]tudent's present levels of performance, as well as areas of concern," though the IHO did note that the CSE only relied on progress reports (id.). The IHO also held that the March 2022 CSE wrote measurable annual goals for the student, added related services based on the information before it, and considered the parent's input, as well as, the evaluative data from the providers to "create an IESP reasonable expected to confer an educational benefit to Student" (id. at p. 5). With respect to her ripeness finding, the IHO noted that since the March 2022 IESP recommended a 10-month school year and services were not expected to start until September 2024, the parent's claims as to implementation were not ripe for adjudication and the IHO dismissed them without prejudice (id.).

The IHO did find that the student was entitled to compensatory education services under pendency based on the final October 2023 IHO decision that was not appealed (IHO Decision at p. 6). The IHO noted that the October 2023 IHO decision "awarded services to [the s]tudent for the summer months" pursuant to the February 2021 IEP and that the student was entitled to compensatory education consisting of eight hours per week of SEIT services, three 30-minute sessions per week of speech-language therapy, and three 30-minutes sessions per week of OT (id.). Therefore, the IHO awarded the parent was direct funding or reimbursement at the agency's rate of $215 per hour for SEIT services and $295 per hour for speech-language therapy and OT delivered to the student during July and August 2024 (id.). The IHO noted that the compensatory education services was based on the six-week summer school year and that they could be used "at

any time over the next two years beginning on the day of the order but shall expire thereafter" (id.).[7]

IV. Appeal for State-Level Review

The parent appeals. The parent contends that the IHO erred by finding the parent's claims were not ripe for adjudication. More specifically, the parent contends that the district failed to adequately explain why the student was not recommended for summer services in the March 2022 IESP. According to the parent, the school year began on July 1, 2024 and the injury already occurred as of that date when the district failed to implement summer services for the student. The parent asserts that requiring her to wait would be prejudicial to the student as "[n]o tribunal should require that the entirety of the harm be fully complete before allowing [a p]arent to have their concerns addressed." In addition, the parent contends that she met her burden to demonstrate that the services she planned on having provided to the student beginning in September 2024 were appropriate and she requests services be awarded for the full 2024-25 school year for SEIT, speech-language therapy, and OT at the same rates awarded by the IHO for the summer program.

The district submits an answer and cross-appeal. Initially, the district contends that the IHO correctly found that the parent's claims were not ripe as the due process complaint notice was filed months prior to the start of the 2024-25 school year. The district asserts that it is required to have an educational program in effect for the beginning of the school year and the 10-month school year did not start until September 2024. The district argues that summer services are not provided through an IESP and, accordingly, any claim for summer services is separate from the parent's IESP claims and has no bearing on the ripeness of the IESP claims. Moreover, the district contends that "to the extent that the IHO did apply a FAPE analysis in the Decision, that determination should be reversed given that the [s]tudent was neither seeking nor entitled to a FAPE."

Turning to the district's cross-appeal, the district argues that the IHO erred in failing to dismiss the parent's due process complaint notice based on a lack of subject matter jurisdiction. The district contends that the parent does not have due process rights for claims related to implementation of an IESP. The district asserts that the enjoinment of the proposed amendment has no bearing on their argument because the law makes it clear that a parent has never had due process rights for IESP implementation cases. The district also asserts that the student was not entitled to pendency in a due process hearing because pendency does not attach to a request for equitable services under Education Law § 3602-c. The district further asserts that students who are parentally placed are not automatically entitled to a continuation of equitable services from year to year as a parent has an affirmative obligation to request services each year; therefore, there is no entitlement to pendency. In the alternative, the district argues that the case should be remanded for the IHO to hear the merits of the parent's claims as she did not consider the appropriateness of the unilaterally obtained services or equitable considerations.

[7] The district was directed to pay the providers within 30 days of receipt of the "Student's class schedule, receipts and/or invoices detailing the exact dates of service and number of minutes/hours the services were provided, and session notes" (IHO Decision at p. 7).

In an answer to the cross-appeal, the parent contends that the IHO and SRO have subject matter jurisdiction over her claims and argues that the district's interpretation of the law is incorrect. Further, the parent argues that the student has pendency rights in a due process hearing.

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]).[8] "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.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at

[8] 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]).

[9] 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.

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 a preliminary matter, I must first address the district's cross-appeal alleging that the IHO lacked subject matter jurisdiction to address the parent's requested relief.

Initially, I note that, during the impartial hearing, the district's argument focused on an amendment of 8 NYCRR 200.5 by emergency rulemaking to clarify that under Education Law § 3602-c parents who parentally place a student with a disability in a nonpublic school and seek payment for unilaterally obtained services included in the student's IESP are not granted the right to file a due process complaint notice to dispute "whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the student[']s market rate for SETSS" (Tr. p. 13). However, much of the parent's due process complaint notice challenged the adequacy of the IESP and noted that the CSE had failed to timely convene to conduct planning for the 2024-25 school year (Parent Ex. A). At no point in the parent's due process complaint notice, nor during the hearing, did the parent assert that the district failed to implement the March 2022 IESP (Parent Ex. A; Tr. pp. 1-24). Despite this, the IHO addressed implementation of the March 2022 IESP in her decision and now, on appeal, both the district and the parent center their arguments around the implementation of equitable services pursuant to an IESP (see Req. For Rev. at p. 3; Answer & Cr.-Appeal at ¶¶12-16; Answer to Cr.-Appeal). More specifically, the district's argument related to jurisdiction as presented on appeal is 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 (id.). However, while the parent discusses implementation of summer services, the parent does repeat her arguments from the due process complaint notice—allegations that the district failed to provide the student with a FAPE for the 2024-25 school year due to a reduction of special education teacher support from eight hours a week to five and the removal of the summer program (Req. for Rev. at pp. 1-2). As the arguments related to implementation were not within the scope of the impartial hearing, it is not necessary to further discuss, in detail, whether the IHO or an SRO have jurisdiction over claims related to implementation of an IESP.

Nevertheless, even if I were to do address them, the district's arguments mirror the same arguments that have been addressed in a number of recent State-level administrative decisions and in line with those decisions, at this juncture, there is not a sufficient basis to find a lack of jurisdiction (see e.g.; Application of the Dep't of Educ., Appeal No. 24-473; Application of a Student with a Disability, Appeal No. 24-463; Application of a Student with a Disability, Appeal

No. 24-423; Application of a Student with a Disability, Appeal No. 24-434; Application of a Student with a Disability, Appeal No. 24-446; Application of a Student with a Disability, Appeal No. 24-24-392; Application of a Student with a Disability, Appeal No. 24-399; Application of a Student with a Disability, Appeal No. 24-346; Application of a Student with a Disability, Appeal No. 24-364; Application of the Dep't of Educ., Appeal No. 24-435). As noted in prior State-level decisions the emergency regulation cited by the district was not permitted to be enforced and has since lapsed.

As an additional preliminary matter, I turn next to address the IHO's findings that the parent's claims were not ripe for adjudication. A claim is ripe once a cause of action accrues and, under the IDEA, a claim for implementation cannot accrue until there is a failure to implement, as a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). However, as with the district's arguments related to jurisdiction, the IHO's finding as to ripeness focused on implementation of the March 2022 IESP, a claim that was not actually raised by the parent as part of the due process complaint notice nor did the parent seek to add that claim as part of the impartial hearing. Accordingly, the IHO's finding on this point was error.

B. 2024-25 School Year

Turning to the substance of the claims against the district falling within the scope of this proceeding, the parent asserted in the due process complaint notice that recommendations made by the March 2022 CSE were not appropriate to meet the student's educational needs (see Parent Ex. A).

The IHO held that March 2022 IESP was appropriate for the student and provided the student with a FAPE; however, dismissed the case due to lack of ripeness (IHO Decision at p. 5). The parent did not directly appeal the finding that the district offered the student a FAPE; however, in its cross-appeal, the district raised the IHO's determination as to FAPE. In particular, the district contends that the IHO erred in utilizing a FAPE analysis as the student was not seeking nor entitled to a FAPE. However, a review of the due process complaint notice shows that the parent argued that the educational placement recommendation made by the March 2023 CSE was not appropriate, asserting the student required additional special education services and 12-month services (Parent Ex. A at p. 3).[10] Further, the parent during the impartial hearing argued that the

[10] The district's cross-appeal highlights the deficiencies in its own argument as the district correctly noted that summer services are not provided through an IESP (Answer & Cr.-Appeal ¶8). State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "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 3206-c," at p. 14, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-

reduction in services was a denial of FAPE (Tr. p. 17). The district's contention that it was not required to offer a FAPE is without merit and its appeal of the IHO's finding on this issue, opens the door to address the parent's claim that the student was denied a FAPE.

Second, I am not convinced that the IHO's substantive findings related to FAPE can stand in this context as they are in direct conflict with a prior unappealed finding made by a prior IHO regarding the adequacy of the same March 2022 IESP (compare IHO Decision, with Parent Ex. B). The district was required to timely challenge the prior IHO's decision and it did not. However, regardless of the substantive appropriateness of the March 2022 IESP for the 2022-23 school year, the facts of this case make it clear that the district failed to offer the student a FAPE for the 2024-25 school year, whether the student was a 10-month or 12-month student. The last IESP was dated March 2022 and there is no indication that the district attempted to convene a CSE prior to start of the 2024-25 school year.[11] The district may argue that, at the time of the impartial hearing, the 2024-25 10-month school year had not started; however, the parent sufficiently alleged that she was seeking 12-month services in the due process complaint notice (Parent Ex. A at p. 3), and the district failed to present any evidence or make any argument that it had sent out a meeting notice or attempted to schedule a CSE prior to the start of either the 2023-24 or 2024-25 school year, nor did the district make an argument that the student did not require 12-month services.

Moreover, any argument that the parent did not provide the district with notice of that she was seeking services for the 2024-25 school year is without merit as the parent filed both a June 1 letter and a 10-day notice (see Parent Exs. C; F). As the last IESP was dated March 2022, a CSE should have convened no later than one year later in March 2023, and there is no evidence of any such meeting or any attempt to hold a CSE meeting. Further, this fact was repeated for both the 2023-24 school year and the 2024-25 school year. The district is required to convene the CSE at least annually, and in this case, the district failed to do so. Therefore, the hearing record supports a finding that the student was denied a FAPE for the 2024-25 school year.

Nevertheless, the timing of the parent's due process complaint notice and the conclusion of the hearing in this proceeding prior to the start of the 2024-25 school year did create issues regarding the parent's burden of proof as to the privately obtained services. Accordingly, a discussion of the legal standard to be applied is warranted. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents alleged that the district failed to offer the student's summer services or dual enrollment services for the 2024-25 school year and,

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month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 38-39, Office of Special Ed. [updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf). Based on the above, as there is no question that the parent's due process complaint notice included an allegation that the district failed to recommend services for the student for the summer portion of the 2024-25 school year, the district cannot argue that the parent did not properly assert a denial of FAPE for the 2024-25 school year.

[11] The district acknowledged that it was required to have an individualized educational program in effect at the beginning of the school year (Answer & Cr.-Appeal ¶ 7; 34 CFR § 300.232[a]). The district simply is arguing that the beginning of the school year is September 2024.

as a self-help remedy, they unilaterally obtained private services from Mount Resources for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parents' 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]).[12] 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

[12] 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 Mount Resources (Educ. Law § 4404[1][c]).

private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

In this instance, the parent contracted with Mount Resources for delivery of the student's special education services for the 2024-25 school year (see Parent Ex. G). Notably, the contract indicated that Mount Resources intended to provide the student with SETSS or SEIT services, speech-language therapy, and OT for the 2024-25 school year (id. at p. 2). Review of the affidavit testimony of the Mount Resources case coordinator, shows that Mount Resources was providing the student with eight hours per week of SETSS and three 30-minute sessions per week of speech-language therapy; however, neither the agency nor the parent were able to locate an OT provider for the student (Parent Ex. M at ¶¶11, 22; see Parent Ex. L at ¶16). The parent contends that she has submitted sufficient proof to show that the services provided by Mount Resources are

appropriate for the student because the student has been receiving services from Mount Resources since July 2024 and they have submitted treatment plans for the student's services for what, at that time, was the upcoming 2024-25 10-month school year (Req. for Rev. at pp. 6-7; see Parent Exs. I-K). However, the treatment plans do not identify whether the student will in fact receive SETSS, speech-language therapy, or OT going forward. Additionally, while the parents submit an OT treatment plan for the 2024-25 school year and contend on appeal that the plan lays out a schedule for the student "once the provider begins services on September 7th, 2024," the hearing record indicates that the parent was not able to locate an OT provider (Req. for Rev. at p. 7; see Parent Exs. K; L at ¶16; M at ¶22). Overall, considering the totality of the circumstances, there is insufficient evidence included in the hearing record in order to find that the yet-to-be provided SETSS, speech-language therapy, and OT services were appropriate to meet the student's needs for the 2024-25 school year.

C. Pendency & Services

Although the parent has not met her burden of proving the appropriateness of the not yet provided services, the question of relief for the district's denial of a FAPE to the student and denial of pendency services must still be addressed.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[13] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain

[13] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

At the impartial hearing, the district did not dispute the assertion made by the parent's attorney that the student was a 12-month student (Tr. p. 9). Also, the district did not take a position on the issue of pendency (Tr. p. 10).

After the conclusion of the hearing process, the district now asserts in its cross-appeal that the student is not entitled to pendency. However, I am unpersuaded by the district's argument that a student who has an IESP pursuant to New York State's dual enrollment statute has no right to pendency when seeking to challenge the district's implementation of the plan. Section 3602-c provides for review of IESPs pursuant to § 4404, and Education Law § 4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]; Application of a Student with a Disability, Appeal No. 17-034). Even if the student had no right to pendency in an implementation case, this is not an implementation case, as discussed above.

In this case, the student has already received services for the 12-month school year as ordered by the IHO pursuant to pendency. Therefore, the IHO correctly held that the student was entitled to pendency services; however, given the basis of the student's pendency placement, the IHO should have ordered the district to fund those services directly. Additionally, the district is ordered to continue to pay the costs of the pendency services through the date of this decision.[14]

Going forward, I will order the district, to convene the CSE revise the student's IESP within 15 days and determine the amount and type of special education services the student requires as well as what related services the student requires in order to obtain a reasonably calculated program to allow the student to make progress appropriate special education program in light of his circumstances. Furthermore, I will direct the CSE to convene on or before May 1, 2025 to conduct an annual review of the student's programming and determine, among other things, whether the student requires an IEP with 12-month services for the 2025-25 school year.

VII. Conclusion

The district did not offer the student a FAPE for the 2024-25 school year. The parent is entitled to pendency services pursuant to the February 2021 IEP. The district is directed to fund the services obtained by the parent under pendency pursuant to the February 2021 IEP through the date of this decision at the rates contracted to by the parent. Going forward, the district is directed to implement the student's pendency services pursuant to the February 2021 IEP until the CSE reconvenes to recommend a reasonably calculated special education program to enable the student to make appropriate progress in light of the student's circumstances.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's August 30, 2024 decision is modified by reversing those potions which found the March 2022 IESP was appropriate and ordered dismissal of the parent's claims in the due process complaint notice as unripe; and

IT IS FURTHER ORDERED that the district is ordered to fund the student's pendency services, eight periods of SETSS per week, three 30-minute sessions of speech-language therapy per week, and three 30-minute sessions of OT per week, pursuant to the February 2021 IEP through the date of this decision at the rates contracted by the parent; and

[14] It is noted that the counseling services are not part of the student's pendency program. The service was not recommended by the February 2021 IEP, but the March 2022 IESP. The parent has contested the appropriateness of the March 2022 IESP. The student's pendency program is the February 2021 IEP as that is the last agreed upon program; therefore, counseling services are not part of the student's pendency program.

IT IS FURTHER ORDERED that the district shall reconvene the CSE within 15 days of the date of this decision and revise the student's special education programming and issue a new IESP for the remainder of the 2024-25 school year; and

IT IS FURTHER ORDERED that the district shall reconvene the CSE to conduct an annual review of the student's programing not later than May 1, 2025 which includes a determination of whether the student requires 12-month services under an IEP for the 2025-26 school year.

Dated: **Albany, New York**
December 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER