The University of the State of New York

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

No. 24-434

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 that portion of a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund compensatory speech-language therapy for the student related to the 2023-24 school year. The district cross appeals from those portions of the IHO's decision which rejected the district's arguments to dismiss the parent's claims. The appeal must be sustained. 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

At all relevant times, the student was parentally placed at a nonpublic school (see Parent Exs. B at p. 8; C at p. 11).

The student was four years old as of the initial CSE meeting on February 19, 2023, at which time the CSE determined the student was eligible for school-age special education as a student with a speech or language impairment (see Parent Ex. B at p. 1).[1] The February 2023 CSE developed an IESP, with a projected implementation date of September 7, 2023, and recommended that the student receive two 30-minute sessions per week of group speech-language therapy in Yiddish, and, at the provider's discretion, delivered in a separate location (id. at pp. 5-6).

On April 26, 2023, the parent submitted a district form on which she requested that the district provide special education services to the student under the State's dual enrollment statute during the upcoming 2023-24 school year (Parent Exs. D at pp. 1-2; H ¶ 4).

The CSE reconvened on October 12, 2023 to "fulfill" an IHO order (Parent Ex. C at p. 1). At the time of the October 2023 meeting, the student was almost five years old and attending a nonpublic school for kindergarten (see id. at p. 3). The October 2023 CSE developed an IESP, with a projected implementation date of October 26, 2023, which continued the recommendation that the student receive two 30-minute sessions of group speech-language therapy per week in Yiddish, and, at the provider's discretion, in a separate location (id. at pp. 1, 8-9).

On February 5, 2024, the parent signed a contract with a private speech-language pathologist pursuant to which the speech-language pathologist agreed to provide two 30-minute sessions of speech-language therapy per week during the 2023-24 school year, "consistent" with the student's IESP (Parent Exs. E at p. 1; H ¶ 6; I ¶¶ 1, 5).[2] Under the contract's terms, the parent agreed to be responsible for the cost of services delivered to the student at a rate of $325.00 per hour with "payment . . . due immediately upon invoicing" (Parent Exs. E at p. 1; H ¶¶ 7-8).

Beginning on February 5, 2024, the student received speech-language therapy from the above-referenced provider twice per week for 30 minutes for the remainder of the 2023-24 school year (see Tr. pp. 48-49, 67-68; Parent Ex. I ¶ 5).

A. Due Process Complaint Notice

In a due process complaint notice dated April 8, 2024, the parent, through her attorney, alleged that the district failed to provide the student with a procedurally valid and substantively appropriate program of services for the 2023-24 school year. The parent alleged several violations of the IDEA and the New York State Education Law including that the district failed to provide a procedural safeguards notice and to assign a provider to implement the recommended services for the 2023-24 school year. The parent further alleged that she was unable to secure a provider at the district rates and had no choice but to obtain services, unilaterally, at the provider's enhanced rate. As relief, the parent sought funding of the recommended services for the 2023-24 school year at the provider's enhanced rate, as well as a bank of compensatory services for equitable services the

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

[2] The speech-language pathologist holds New York State licensure and bilingual Yiddish certification (Parent Exs. F; I ¶ 1).

student did not receive due to the district's failure to assign a provider. The parent requested pendency services based on the October 2023 IESP.

B. Impartial Hearing Officer Decision

Following a pre-hearing conference, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-100). Two days of proceedings, June 3, 2024 and June 4, 2024, were devoted to the merits of the parent's claims (see Tr. pp. 15-57). During the June 2024 proceedings, the parent contested only the district's failure to implement the recommended services, not the IESPs' content (see Tr. pp. 37-46, 79-84). The parent presented various exhibits, which the IHO admitted into evidence (see Tr. pp. 32-35; Parent Exs. A-I). The parent herself and the student's speech-language pathologist each testified via affidavit and gave live testimony during the hearing (see Tr. pp. 34-35, 47-52, 61-75; Parent Exs. H-I). The district presented no testimony but did proffer documentary evidence, which the IHO admitted (see Tr. pp. 31-32; Dist. Exs. 4-5). A third hearing date took place on August 5, 2024, to address the parent's outstanding request for services via pendency (Tr. pp. 87-88). During proceedings on August 5, 2024, the district argued that the student, as a student parentally placed at a nonpublic school, was not entitled to a due process proceeding and therefore not entitled to pendency (Tr. pp. 91-92).

The record closed on August 27, 2024, and the IHO issued a decision dated August 28, 2024 (IHO Decision at pp. 1, 14). First, the IHO determined that the student was entitled to pendency based on the October 2023 IESP, the last agreed upon educational program (id. at p. 4). Hence, the IHO ordered that the district fund the services mandated by the October 2023 IESP from April 8, 2024, the date of filing of the parent's due process complaint notice, through August 28, 2024, the date of the IHO's order (id. at p. 8). As for the merits of the parent's claim, the IHO found that, although the district raised the defense of the June 1 deadline, it waived the requirement that the parent make a request for services prior to June 1 by developing an IESP for the 2023-24 school year (id. at p. 7).[3] Thus, according to the IHO, the student was entitled to equitable services, as recommended in the February 2023 and October 2023 IESPs, beginning on September 7, 2023, the implementation date of the February 2023 IESP (id.). The IHO determined that the parent was entitled to relief, under the compensatory education approach, for the district's failure to provide equitable services during the 2023-24 school year (see id. at pp. 6-8).[4] The IHO further determined that the parent's requested rate for private speech-language therapy was reasonable (id. at p. 7). As

[3] The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

[4] The IHO made an alternative determination that the parent would be likewise entitled to relief under the Burlington/Carter framework (IHO Decision at p. 7). In applying the Burlington/Carter three-prong test, the IHO found that the district did not challenge the parent's claim that it failed to implement the recommended services and, therefore, failed to satisfy its burden of proving that it offered the student a FAPE on an equitable basis for the 2023-24 school year (id.). The IHO further found that the parent satisfied her burden of proving that the unilaterally obtained speech-language therapy was appropriate with evidence describing the student's needs, the services provided to the student, the delivery thereof, and the provider's credentials (id.). Finally, the IHO found no equitable factors warranting a denial or reduction of the requested award (id. at pp. 7-8).

relief, the IHO ordered that the district fund, to the extent not already funded through pendency, two 30-minute sessions of speech-language therapy per week, at a rate not to exceed $325.00 per hour, for the 10-month 2023-24 school year (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals and the district cross appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer and cross appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parent contends that, in addition to funding of the cost of speech-language therapy the student received during the 2023-24 school year, the IHO should have awarded a bank of compensatory services for the speech-language therapy not provided to the student due to the district's failure to assign a provider. The district seeks dismissal of the parent's appeal and underlying claim on grounds that the IHO and SRO lack subject matter jurisdiction. Alternatively, the district contends that the IHO applied the incorrect legal standard in reviewing the parent's claim, that the unilaterally obtained speech-language therapy delivered to the student was not appropriate, and that equitable considerations warrant denial and/or reduction of the requested award.

V. Applicable Standards

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

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

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

with disabilities attending public or nonpublic schools located within the school district (id.).[6] Thus, under State law, an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

At the outset, neither party has appealed the IHO's determination that the district waived the defense that the parent failed to request dual enrollment services in writing prior to June 1 and, that, therefore, the student was entitled to equitable services as recommended in the February and October 2023 IESPs, beginning on September 7, 2023. Nor has either party appealed the IHO's determination that the district did not provide the student with equitable services for the 2023-24 school year. Those unappealed determinations have, therefore, 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 (S.D.N.Y. March 21, 2013).

A. Subject Matter Jurisdiction

As a threshold matter, it is necessary to address the issue of subject matter jurisdiction which was raised in the district's cross appeal. The district argues that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

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

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

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

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into

account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

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

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

However, I am mindful that 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 recently attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by

emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[7] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[8]

According to the district, however, the aforesaid rule making activities support is position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

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

[7] 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 in this matter was filed with the district on April 8, 2024 (Parent Ex. A), well before the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

[8] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (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]).[9]

Given the implementation date set forth in the amendment's text and the temporary suspension of its application, the amendment may not be deemed to apply to the present matter. Further, the position set forth in the guidance document 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. Acknowledging that this matter has received new attention from State policymakers and appears to be an evolving situation, I nevertheless must deny the district's request for dismissal of the parent's appeal and underlying claim on jurisdictional grounds.

B. Legal Standard

The district contends that the IHO erred in reviewing the parent's request for relief under a compensatory education approach rather than the Burlington/Carter framework.

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

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

[9] For reasons that are not apparent, the guidance document 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.

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[10] 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).

Although use of the Burlington/Carter framework, for a matter involving an IESP developed pursuant to State Education Law § 3602-c rather than an IEP developed pursuant to the IDEA, is not based on direct authority from the courts, there is also no authority as to what other, more analogous framework might be appropriate when a parent privately obtains special education services that a school district failed to provide and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

With respect to the IHO's reference to the matter being an implementation dispute, rather than an IEP design dispute, the distinction is of little consequence. A district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

[10] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the speech-language therapy that the parent obtained privately (Educ. Law § 4404[1][c]).

The most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already made decisions unilaterally, without input from the district, and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, those cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F., 746 F.3d at 76; R.E., 694 F.3d at 184-85). Treating the requested relief as compensatory education is problematic in that it places the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider, obtained the services, and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

While I acknowledge that the IHO made alternative findings under the Burlington/Carter framework, based on the foregoing, I find that the IHO erred in the legal standard applied to assess whether the parent was entitled to the relief sought.

C. Unilaterally Obtained Services

Turning to the appropriateness of the unilaterally obtained speech-language therapy, the federal standard for adjudicating such a dispute 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

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 at 364; 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, 773 F.3d at 386; 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

Although not in dispute, a brief recitation of the student's needs provides the necessary context to resolve the issue of whether the unilaterally obtained speech-language therapy delivered to the student was appropriate.

The February 2023 IESP reflected results of the Wechsler Preschool and Primary Scales of Intelligence-Fourth Edition, which indicated that the student's overall cognitive skills were in the average range of intellectual functioning (Parent Ex. B at p. 1). Results of the Vineland Adaptive Behavior Scales yielded "[a]dequate" adaptive levels in the areas of communication, daily living skills, and motor skills, and a "[m]oderately [l]ow" adaptive level in the area of socialization (id.). Administration of the Developmental Assessment of Young Children, Second Edition indicated the student demonstrated "average skills" in the areas of cognition, social/emotional, fine motor, and gross motor development, and adaptive behavior (id.).

Additionally, reports reflected in the IESP indicated that the student's physical development was "presenting within normal limits" with no concerns reported at that time (id. at p. 3).

Regarding the student's speech-language skills, the February 2023 IESP indicated that the student presented with below to low average receptive and expressive language skills and reflected concerns about the student's oral motor skills and speech intelligibility (Parent Ex. B at pp. 1-2). According to the IESP, the student was "not interacting with her peers and teachers f[ound] it exceedingly difficult to understand her speech" (id. at p. 2). The IESP further indicated that, when the student tried to express herself, she was not understood, and she rarely participated in discussions or answered questions during instruction (id. at p. 3).

In the area of social/emotional development, the February 2023 IESP indicated that, while the student enjoyed the company of her peers, she did not seek attention from or engage in reciprocal play with them, participate verbally, or respond to direct questions during instruction (id.). Rather, the IESP indicated that the student engaged in parallel play, and did not assert herself socially, express her needs verbally, or initiate play with others, preferring solitary play and needing direct teacher support to engage in interactive play with classmates (id.).[11]

The February 2023 CSE developed two annual goals for the student, one to improve her conversational skills and one to improve her speech intelligibility (Parent Ex. B at pp. 4-5). The CSE determined that speech-language therapy would address the student's management needs and allow her to access the kindergarten curriculum (id.). The CSE recommended that the student receive two 30-minute sessions of group speech-language therapy per week in Yiddish, in a separate location at the provider's discretion (id. at pp. 5-6).

A June 2023 progress report reflected in the October 2023 IESP indicated that, while the student "ha[d] made slight progress in her speech and language abilities," the student continued to exhibit decreased speech intelligibility due to articulation errors and oral structure weakness, and weaknesses in receptive and expressive language skills, including limited vocabulary and ability to use age-appropriate grammatical morphemes and syntactical form (Parent Ex. C at pp. 3-4). According to the IESP, "[p]eers and adults both in and out of the classroom [had] great difficulty understanding [the student] which cause[d] her great frustration" (id. at p. 4).

The October 2023 CSE developed approximately six annual goals, some with corresponding short-term objectives, to improve the student's conversational skills, articulation and oral-motor functioning, and speech intelligibility (id. at pp. 6-8). The October 2023 CSE recommended that the student continue to receive two 30-minute sessions per week of group speech-language therapy, delivered in Yiddish and, at the provider's discretion, in a separate location (id.).

2. Unilaterally Obtained Services

The district contends that the evidence in the hearing record does not support a finding that the unilaterally obtained speech-language therapy was appropriate. In particular, the district

[11] The February 2023 IESP indicated both that the student did not engage in pretend play and that she could engage in elaborate pretend play sessions using symbolic materials appropriately (Parent Ex. B at p. 3).

argues that neither the provider's testimony nor the documentary evidence described, with sufficient specificity, the student's individual needs, the services delivered to student, including methods, strategies, or techniques to address the student's needs, and/or whether such services benefited the student. The district also contends that the record includes no baseline information about the student's needs for the start of the school year. Finally, the district notes that, although the IESPs recommended speech-language therapy in a group setting, the student received individual speech-language therapy.

As explained below, review of the record evidence does not support the district's assertions on appeal or provide a basis to overturn the IHO's finding that the unilaterally obtained speech-language therapy was appropriate (IHO Decision at p. 7, n. 20).

The hearing record includes a progress report dated May 6, 2024 in which the provider described the student as bilingual and presenting with decreased speech intelligibility due to a variety of articulation errors and weaknesses in receptive and expressive language skills (Parent Ex. G at p. 1). Specifically, the provider reported weaknesses in the student's vocabulary, and ability to express her wants and needs and use age-appropriate grammatical morphemes and syntactical form (id.). The provider further reported reduced intelligibility, characterized by articulation and phonological errors, specific phoneme distortions, and misarticulation of various multisyllabic words (id.). According to the report, "peers and adults . . . ha[d] great difficulty understanding [the student] which cause[d] her great frustration" (id.). Finally, the provider reported that the student exhibited oral motor weakness, had decreased awareness of her oral cavity, and had difficulty with range of motion, tongue-jaw dissociation, and jaw stability and strength (id.).

In an affidavit dated May 29, 2024, the provider testified that she began delivering services to the student on February 5, 2024 and anticipated continuing to provide services through the conclusion of the 2023-24 school year (Parent Ex. I ¶ 5). According to the affidavit, the provider delivered two 30-minute sessions per week in which she focused on increasing the student's receptive and expressive language skills including processing, vocabulary, syntax, and morphology, as well as her oral motor and articulation skills (id. ¶ 6). The provider testified that therapy was provided in accordance with the student's October 2023 IESP, inclusive of the goals therein, and that the student had made progress (id. ¶¶ 7, 8). During the hearing, the provider testified that she delivered individual speech-language therapy sessions to the student at her home in the evening (Tr. p. 49).[12]

The parent testified that, prior to contracting with the current provider in February 2024, she called between 5 and 10 other speech-language therapy providers (Tr. pp. 67-68). According to the parent, the student's services were provided at home because her "school didn't have a therapist" (Tr. pp. 70-71). The parent further testified that she did not "make any calls within [her] community" to find another student that the provider could work with at the same time as the student (Tr. p. 74).

[12] Although the student's IESP recommended speech-language therapy to be provided in a group setting, the provider did not deliver services to the student in a group (Tr. pp. 49-50; see Parent Ex. C at p. 8).

As discussed above and contrary to the district's assertion, the provider described the student's needs, which were consistent with the needs identified in her IESPs (compare Parent Exs. B at pp. 1-3; C at pp. 1-4, with Parent Exs. G; I ¶ 6). Regarding the district's assertion that the progress report lacked "baseline information" about student's performance at the beginning of the school year, the provider did not begin delivering services to the student until February 2024, and the May 2024 progress report identified the student's present level of functioning, the prior goals, and the progress the student made toward those goals (Parent Exs. G at pp. 1-2; I ¶ 5).[13] Review of the new goals the provider prepared for the student in May 2024 shows that they aligned with her needs as identified by the provider (see Parent Ex. G at pp. 1-2). In any event, it was not the parent's responsibility to evaluate the student and identify her needs (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). As to the district's assertion that the hearing record lacks evidence of the specially designed instruction delivered to the student, the progress report provided specific examples of what the student was working on, including retelling events, increasing vocabulary within categories such as animals, foods, household items, and vehicles, learning correct oral placement to produce target sounds, repeating sounds and words clearly with visual and verbal prompts, and producing target sounds with models and prompts (Parent Ex. G at pp. 1-2). Finally, review of the student's needs, as described in the IESPs and progress report, suggests that the student would derive educational benefits from individual (versus group) speech-language therapy. Therefore, review of the evidence in the hearing record does not support the district's assertions on appeal or provide a basis to overturn the IHO's finding that the unilaterally obtained speech-language therapy was appropriate (IHO Decision at p. 7, n. 20).

D. Equitable Considerations

Having found that the unilaterally obtained services delivered to the student were appropriate, I will now address the district's contention that equitable considerations weigh against the parent's request for relief.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary

[13] It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

1. 10-day Notice of Unilateral Placement

The district argues that the IHO should have denied or, at least, reduced any award of funding because the record lacks evidence that the parent submitted a timely ten-day notice.

Reimbursement may indeed be reduced or denied if parents do not provide notice, either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they are rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" before the child is removed (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

However, the IDEA also provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504).

In this case, there is no evidence in the hearing record that the parent either submitted a ten-day notice to the district or informed the district of her intent to obtain services, unilaterally, at the October 2023 CSE meeting.[14] Nor did the parent make any argument or allegation during

[14] During the hearing, the parent's counsel argued that the parent "did not need to send a ten-day notice to the [district] because she put them on notice . . . in October that she was searching for a provider" (Tr. p. 82). However, the hearing record lacks evidence, as opposed to argument, to that effect.

the impartial hearing regarding the lack of a procedural safeguards notice. Nevertheless, the parent's due process complaint includes an allegation that the district failed to provide a procedural safeguards notice, and the district presented no evidence to controvert that allegation (Parent Ex. A at p. 1). Therefore, I decline to exercise my discretion to reduce the award of district funding for the unilaterally obtained services based solely on the equitable grounds of absence of a 10-day notice that the parent intended to obtain private services unilaterally and then seek reimbursement or public funding from the district.

2. Excessiveness of Rate

The district further argues that any award of funding for the student's unilaterally obtained speech-language therapy should reflect a rate reduction, as the record evidence does not support the requested rate of $325.00 per hour.

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

In this case, the record evidence establishes the parent's financial obligation to the student's private speech-language pathologist for services rendered at a rate of $325.00 per hour (Parent Exs E; H ¶¶ 7-8; I ¶ 10). The provider testified that her rate is consistent with other service providers of her level of experience in the area and, further, that her rate is appropriate given her limited availability and high demand for her services (Parent Ex. I ¶ 10).

The district argues that the IHO should have reduced the provider's hourly rate to a more reasonable $125.00 without explaining the basis of its position that $125.00 is the appropriate hourly rate. In support, the district presented only an internal "Independent Provider Rate Schedule," which, alone, does not establish reasonable market rates for related services (Tr. pp. 23-24; see Dist. Ex. 4). Despite having done so in other cases, the district presented no market related data or other evidence that controverts the provider's testimony regarding the reasonableness of her rate. In the absence of any reliable documentary or testimonial evidence establishing the excessiveness of the provider's rate, the record lacks a basis upon which to disturb the IHO's award of funding.

E. Compensatory Education Relief

As for the parent's appeal, the only question is whether, in addition to funding of the cost of the speech-language therapy the student received during the 2023-24 school year, the IHO should have awarded a bank of compensatory services for sessions the student missed due to the district's failure to assign a provider. The parent seeks 20 hours of speech-language therapy, at a rate of $325.00 per hour, to compensate for missed sessions between September 1, 2023 through January 31, 2024.

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

The record evidence establishes that the parent began to obtain speech-language therapy for the student from a private therapist on February 5, 2024, approximately 21 weeks after September 7, 2023, the date on which the IHO determined that the student's entitlement to equitable services began (Tr. pp. 48, 67-68; Parent Ex. I ¶ 5).[15] Nevertheless, the IHO inexplicably limited the award of relief to funding of the cost of the private speech-language therapy the student received during the 2023-24 school year (IHO Decision at p. 8). Had the district complied with its obligation to implement the recommended services, the student would have received two 30-minute sessions of speech-language therapy per week between September 7, 2023 and February 5, 2024, which, less a few sessions due to holiday breaks, would have equated to approximately 20 hours (Tr. p. 51; Parent Exs. B at pp. 1, 5-6; C at pp. 1, 8-9). Therefore, an award of 20 hours of compensatory services is necessary to place the student in the position she would have been in had the district fulfilled its obligation.

VII. Conclusion

In summary, the district's request for dismissal of the parent's appeal and underlying claim for lack of subject matter jurisdiction is denied. Rather than applying the compensatory education approach, the IHO should have reviewed the parent's claim under the Burlington/Carter

[15] For purposes of this appeal, the student's entitlement to equitable services beginning on September 7, 2023, the implementation date of the February 2023 IESP, is undisputed. The district's failure to implement the recommended services is likewise undisputed, leaving only the district's due process subject matter jurisdiction defense which was addressed above.

framework. Nevertheless, the hearing record supports the IHO's award of funding of the cost of the unilaterally obtained services. Consistent with the IHO's alternative finding, I find that the parent satisfied her burden of proving that the unilaterally obtained services were appropriate, and I decline to reduce the IHO's award based on equitable considerations. I must modify the IHO's decision, however, to provide compensatory education relief for the equitable services the student did not receive between September 7, 2023 and February 5, 2024 due the district's failure to assign a provider.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated August 28, 2024 is modified to provide, in addition to the relief awarded by the IHO, that, unless the parties shall otherwise agree, the district shall provide the student with compensatory education services, consisting of 20 hours of group speech-language therapy, delivered in Yiddish.

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

JUSTYN P. BATES
STATE REVIEW OFFICER