The University of the State of New York

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

No. 24-436

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

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private paraprofessional services delivered by Upgrade Resources (Upgrade) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found the parent's unilaterally obtained services were appropriate and that equitable considerations warranted full funding, and further asserts a lack of subject matter jurisdiction. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but

is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A Committee on Preschool Special Education (CPSE) convened on February 16, 2021 to develop an individualized education program (IEP) for the student and recommended "continued" services, finding the student eligible for services as a preschool student with a disability (Parent Ex. D at pp. 1, 2, 3, 15). The February 2021 CPSE recommended 10-month services consisting of four hours per week of special education itinerant teacher (SEIT) services in a group of two, delivered in Yiddish, two 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions per week of individual occupational therapy (OT), and 360 minutes per day of a 1:1 aide services, with all services to be provided in a child care location selected by the parent (id. at pp. 1, 15, 16).

On March 22, 2022, a CSE convened to develop an IESP for the student to be implemented on September 8, 2022 (Parent Ex. E at pp. 1, 6, 8). The March 2022 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1).[1] The March 2022 CSE recommended that the student receive three periods per week of direct group special education teacher support services (SETSS) delivered in Yiddish, two 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, with all services to be provided in a separate location, and the support of full-time, daily, individual paraprofessional services for health and allergies (id. at p. 6). The March 2022 IESP indicated that projected date of annual review was March 22, 2023 (id. at p. 1).

On August 31, 2023, the parent electronically signed an agreement with Upgrade (Parent Ex. F at pp. 3-4). The agreement indicated that the parent sought "[s]pecial [e]ducation and/or [r]elated [s]ervices" for the 2023-24 school year, pursuant to "an IEP/IESP," and that the parent would be "liable to pay the Agency the full amount for all [s]ervices delivered by the Agency in the event that the [p]arent was unable to secure funding from the [district]" (id. at p. 1). The agreement included the rates charged by Upgrade for all of the six services it provided and did not specify which of the services the parent had requested (id. at pp. 1-2).

In a letter dated September 7, 2023, the parent advised the district that she disagreed with the removal of the student's SEIT services at the March 2022 CSE and further informed the district that she rejected the March 2022 IEP and would obtain the previously recommended services for the student at the parental placement and would seek public funding for the "special education program and related services" (Parent Ex. C at pp. 2-3).

A CSE convened, on December 8, 2023, to develop an IESP for the student for the remainder of the 2023-24 school year (Parent Ex. B at pp. 1, 16). The December 2023 CSE continued to find the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1). The December 2023 CSE recommended that the student receive five periods per week of direct group SETSS delivered in Yiddish, two 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, two 30-minute

[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]).

sessions per week of individual OT, two 30-minute sessions per week of individual PT, with all services to be provided in a separate location, and full-time, daily, individual paraprofessional services for health and allergies (id. at p. 13).

The hearing record indicates that the student was parentally placed in a nonpublic school for the 2023-24 school year and received privately obtained services, as shown in a November 29, 2023 speech-language therapy progress report, a November 29, 2023 OT progress report, a March 25, 2024 SETSS progress report, and a testimonial affidavit from the educational director at Upgrade (Parent Exs. H; I; J; K).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to recommend an appropriate placement or sufficient services (Parent Ex. A at p. 4). Initially, the parent stated that "[d]ue to the district's failure to implement the most recent IESP" the parent requested an order of pendency to implement the December 8, 2023 IESP (id. at p. 2). The parent further asserted that the March 22, 2022 IESP inappropriately recommended a reduction from four periods of SEIT services to three hours of SETSS (id. at p. 4). The parent also alleged that she never agreed to the reduction and maintained that this reduction was inappropriate (id.). Additionally, the parent argued that if the CSE had timely convened for the 2023-24 school year, the student's delays would have been abundantly clear and the recommendations in the December 8, 2023 IESP would have been in effect at the start of the 2023-24 school year (id.).

Next the parent stated that due to the difficulties in locating a SETSS and related services provider from the district, "or even independently," the parent reserved the right to ask for compensatory SETSS and related services for any periods not provided during the 2023-24 school year, including services missed under pendency (Parent Ex. A at p. 4). As relief, the parent requested a finding that the March 2022 IESP constituted a denial of a FAPE for the 2023-24 school year, a finding that the failure of the CSE to convene in a timely manner was a denial of a FAPE for the 2023-24 school year, a finding that the failure to recommend the continuation of the SEIT program was a denial of a FAPE, and a finding that the failure of the district to recommend an appropriate placement or sufficient services for the student was a denial of a FAPE for the 2023-24 school year (id. at p. 5). The parent further requested that the recommendations on the IEP dated February 16, 2021 be funded at the agency's contracted rate for the 2023-24 school year, and that in the event the parent would be unable to locate service providers, the parent requested a bank of hours of compensatory education to be funded by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 16, 2024 (Tr. pp. 1-44). During a discussion on the record, the parent's attorney stated that contrary to the claims in the July 2, 2024 due process complaint notice, the parent was "not asking for any services in the CPSE IEP," the parent was "just asking for implementation of the 2022 IEP up until December and then the December 2023 IEP" (Tr. pp. 9-11).[2] According to

[2] The parent sought implementation of the March 2022 IESP and the December 2023 IESP.

the parent's attorney's opening statement, the parent had obtained private providers for SETSS, speech-language therapy, OT, and paraprofessional services (Tr. p. 14). The parent requested a bank of hours of compensatory education for unimplemented PT services (Tr. p. 8).

In a decision dated August 30, 2024, the IHO found that the district "failed to support the elimination of special education services" and denied the student a FAPE (IHO Decision at p. 1). The IHO further found that the district did not present evidence that it supplied the student with a provider for SETSS, speech-language therapy, OT, or paraprofessional services for the 2023-24 school year and denied the student a FAPE on an equitable basis (id. at pp. 2, 4). The IHO then determined that the rates charged by Upgrade were reasonable and appropriate (id. at pp. 4-6). In addition, the IHO found that although "the testimony was vague regarding the frequency and duration of [the s]upervisor's discussions about [the s]tudent, the testimony was clear that [the s]tudent received the IESP mandated services, the providers were overseen at [the p]rivate [s]chool by [the s]upervisor, and [the s]tudent's progress toward meeting their goals were reviewed quarterly" (id. at p. 6). The IHO also determined that the contract obligated the parent to pay all fees if she was unsuccessful at a due process hearing, and that the parent had "demonstrated that [the p]rovider's services provide[d] an educational benefit to [the s]tudent" (id.). The IHO found that "[b]ased on the totality of the record before [him]" the rates charged by Upgrade were not unreasonable (id.). With regard to equitable considerations, the IHO found that there was no evidence that the parent failed to cooperate with the district and the parent was entitled to a full award (id. at p. 7).

Next, the IHO determined that the parent's unilaterally obtained paraprofessional services were not appropriate (IHO Decision at p. 7). The IHO found that the hearing record did not include testimony "from a person with direct knowledge of the [p]ara[professional] services [the s]tudent received," that "[n]o information regarding the attendance records or records regarding the service was provided," that the "[s]upervisor's affidavit alone claim[ed] that the services were provided, however, the affidavit d[id] not fully detail the[] basis of knowledge or relay any information regarding the [p]araprofessional services" (id.). The IHO further stated that the only details about academic progress came from the supervisor, who did not directly participate in the services, and that Upgrade had a financial motivation to create the impression of academic progress (id.).

The IHO then determined that the parent was entitled to compensatory education for unimplemented PT services to be delivered by a provider of her choosing at a market rate funded by the district (IHO Decision at p. 8). Lastly, the IHO addressed the district's June 1 affirmative defense and found that the district was obligated to prove that the parent did not request equitable services for the 2023-24 school year and had failed to do so (id.). As relief, the IHO awarded funding at a rate not to exceed $195 per hour for three periods per week of SETSS from September 2023 until December 8, 2023 and five periods per week of SETSS from December 8, 2023 through the end of the 2023-24 school year (id. at p. 9). The IHO further awarded funding for two 30-minute sessions per week of speech-language therapy at a rate not to exceed $300 per hour, and two 30-minute sessions per week of OT at a rate not to exceed $300 per hour (id.). The IHO also ordered the district to fund a bank of hours for the 2023-24 school year equal to two 30-minute sessions per week of PT to be delivered by a provider of the parent's choosing at a market rate set by the district and to expire one year after the date of the IHO's decision (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her request for direct funding of unilaterally obtained paraprofessional services.

In an answer and cross-appeal, the district asserts that the IHO erred in awarding the parent funding for SETSS, speech-language therapy, and OT. The district initially argues that the IHO and SRO lack subject matter jurisdiction to review the parent's claims, and further that the parent failed to request equitable services before June 1, 2023. Next, the district argues that the parent failed to demonstrate the appropriateness of her unilaterally obtained services and that the rates charged by Upgrade were excessive. As relief, the district requests that funding of unilaterally obtained services be denied.

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]).[3] "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.).[4] Thus, under State law an eligible New

[3] 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]).

[4] 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

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

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

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time in its cross-appeal appeal. Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument at the IHO hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-501; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan

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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 alone and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[5]

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

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

[5] 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]).

[6] The district did not seek judicial review of these decisions.

Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In 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

[7] The due process complaint in this matter was filed with the district on July 2, 2024 (Parent Ex. A at p. 8), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

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

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[9]

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

2. June 1 Deadline

Turning to the district's next cross-appeal, the district argues that the IHO erred in rejecting the argument that the parent failed to request special education services for the student for the

[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]).

[9] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SROs in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; thus a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

2023-24 school year by the June 1 deadline in Education Law § 3602-c. The IHO determined that the district failed to prove its affirmative defense (IHO Decision at p. 8).[10]

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]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

[10] The IHO stated in his decision that the parent's representative "argued they did provide timely notice and presented Exhibit D" (IHO Decision at p. 8). Parent's exhibit D is the February 16, 2021 CPSE IEP. The parent provided evidence of a September 2023 letter to the district (Parent Ex. C); however, there is no evidence in the hearing record demonstrating that the parent timely requested equitable services from the district for the 2023-24 school year or that the parent made an allegation that such a notice was provided. It is unclear what the IHO was referencing in his decision, but it appears the statement that notice was provided was made in error.

At the hearing, the district did not offer any documentary evidence or witnesses, however the district raised the June 1 defense in the due process complaint response and in its opening and closing statements (Tr. pp. 12-13, 39, 41-42; IHO Ex. I at p. 1).[11] The parent did not dispute that she failed to request services by the June 1 deadline, rather the parent argued that the district waived the defense of the June 1 deadline through its conduct (Tr. pp. 15, 37-38). The IHO found that the parent did not have a burden to demonstrate that she requested services (IHO Decision at p. 8).

The IHO erred in finding that the parent did not have to demonstrate that she requested services before June 1, 2023.[12] However, I find that the district waived the June 1 defense by sending a December 8, 2023 prior written notice to the parent (IHO Ex. I at pp. 4-5).

A district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[13] However, the Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive

[11] In response to a question from the IHO, the district's representative conceded that from December 2023 through the end of the 2023-24 school year, the district "was aware that the student required services" (Tr. pp. 41-42). The district failed to address this concession in its answer and cross-appeal.

[12] I do not agree with the IHO's analysis. It was incumbent on the parent to show that she made the request for dual enrollment services rather than on the district to prove that an event did not happen (see Mejia v. Banks, et al, 2024 WL 4350866, at *6 [S.D.N.Y. Sept. 30, 2024] [noting that "it [wa]s unclear how the school district could have proved such a negative (or why it would attempt to do so when there was no [10-day notice] letter submitted before the IHO)"]). However, this point is not dispositive in this particular case because of the district's waiver.

[13] The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1 deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

While actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP, without more, constitutes a waiver. This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("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" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. In addition, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone does not clearly or unmistakably reflect the district's waiver of the June 1 deadline where it is called upon to convene and engage in special education planning for the student.

In a December 8, 2023 prior written notice, the district clearly stated that the December 2023 CSE had developed an IESP for the student because the parent had indicated that she would be placing the student in a private school at her expense and was requesting equitable services, and that the IESP would be implemented on December 22, 2023 (IHO Ex. I at p. 5). The prior written notice also explicitly stated that the December 2023 IESP "recommended the special education services [the student] will receive" (id. at p. 4).

Based on the foregoing, although the evidence in the hearing record shows that the parent failed to submit a request for the student to receive dual enrollment services for the 2023-24 school year by June 1, 2023, the district nevertheless waived the deadline through its conduct of sending a prior written notice acknowledging the parent had requested equitable services beginning December 22, 2023 and explicitly stating that those services would be provided to the student. Consequently, the admitted failure of the district to implement equitable services for the student constitutes a denial of a FAPE for the 2023-24 school year.

B. Unilaterally Obtained Services

The district does not otherwise cross-appeal from the IHO's findings that it "failed to support the elimination of special education services," which resulted in a denial of a FAPE and equitable services to the student for the 2023-24 school year (IHO Decision at pp. 1, 4, 9). The district also did not cross-appeal from the IHO's award of compensatory PT services (id. at p. 9).

Accordingly, the IHO's findings and determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained SETSS, speech-language therapy, OT, and paraprofessional services delivered to the student by Upgrade during the 2023-24 school year, and whether equitable considerations favor direct funding of the parent's unilaterally obtained services. Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Upgrade 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; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[14] 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

[14] 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 Upgrade Resources (Educ. Law § 4404[1][c]).

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, 142 F.3d at 129). 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 Rowley, 458 U.S. at 203-04; 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 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

> handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Although not in dispute, a description of the student's needs provides context for the issues to be resolved, namely, whether the parent's unilaterally obtained services were specially designed to address the student's needs.

At the time of the February 16, 2021 CPSE meeting, the student exhibited receptive/expressive language, articulation, oral motor, and academic skill deficits, and was described as fidgety and easily distracted (Parent Ex. D at pp. 1, 3). According to the IEP, the student exhibited sensory processing difficulties, and "often mouth[ed] his shirt, fingers or other objects" (id. at p. 4). The IEP also reflected that the "Office of School Health" determined that the student "require[d] a 1:1 aid[e] to manage [the student's] needs" related to his "eggs, nuts, peas, sesame, and fish allergies" and need for an "EPI Pen" (id. at pp. 1, 5, 15). The CPSE recommended that the student receive full-time 1:1 aide services at his childhood program, and developed annual goals for the paraprofessional to "ensure that [the student] [wa]s not exposed to any foods he is allergic to," to "assist in sharing snack with peers" while ensuring that the student was not given foods he was allergic to, and to separate the student from peers during lunch "if foods [wer]e being served that contain[ed] ingredients" that the student was allergic to (id. at pp. 14, 15). Further, the IEP contained annual goals for the paraprofessional to "check all foods and assist [the student] in understanding what he [wa]s allowed to have and which foods he [could not] have," and that the student would "independently learn which foods he [could] eat but [would] remain under supervision of [the] para[professional] so that no errors occur[ed]" (id. at p. 14).

On March 22, 2022 a CSE convened, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP for the student for implementation during the 2022-23 school year (Parent Ex. E). Although a SEIT report was not available at that time, the March 2022 IESP indicated that the student, who was bilingual Yiddish speaking and was attending pre-k at a nonpublic school, had a "hard time learning the alphabet" and could "count with 1:1 correspondence up to 10" (id. at p. 1). The IESP included strategies to address the student's academic, language, and sensory management needs and annual goals to improve the student's fine motor, focusing, visual motor and bilateral coordination, graphomotor, math, receptive and expressive language, reading, and gross motor skills (id. at pp. 2-5). According to the IESP, the student was attending a nonpublic school and he was "mandated for a Health Para[professional] for seafood/nut allergies and he ha[d] an EPI pen" (id. at pp. 1, 2). Additionally, the IESP indicated that the student "ha[d] sensory issues and he touche[d] everything and put[] things in his mouth" (id. at p. 2). The March 2022 CSE recommended that the student receive three periods per week of direct SETSS delivered in a group in a separate location, and two 30-minute sessions per week each of individual OT, PT, and speech-language therapy also delivered in a separate location (id. at p. 6). As supplementary aids and services/program modifications/accommodations, the CSE recommended that the student receive full time, daily, individual, health paraprofessional services due to the student's allergies (id.).

On December 8, 2023 a CSE convened, determined the student continued to be eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with an implementation date of December 8, 2023 (Parent Ex. B). At the time of the December 2023 CSE meeting, the student was six years old and receiving three hours per week of special education services at the nonpublic school (id. at p. 1). According to the IESP, the student's reading and comprehension skills were at a pre-kindergarten level, as he recognized 10 letters and their sounds, and was working on "mastering the alphabet" (id. at pp. 1-2). The student struggled to differentiate between similar looking letters and read "some" one to two letter sight words (id. at p. 1). The IESP indicated that the student's writing skills were at a pre-kindergarten level, in that he wrote seven letters of the alphabet, formed letters backwards, did not write his name, and had difficulty copying words and letters (id. at p. 2). In math, the IESP reflected that the student's skills were at a kindergarten level; he added single digit numbers using manipulatives with 40 percent accuracy, he compared and ordered single digit numbers in ascending order, and he used a number line to count forward and backward (id.). The student had difficulty with solving single digit subtraction problems, counting coins, telling time on an analog clock, and solving word problems (id.).

Regarding communication skills, the December 2023 IESP indicated that although the student's vocabulary was good and he answered basic questions and identified items, his receptive and expressive language skills were "poor" in that he had difficulty understanding questions and repeating details, missed information provided to him, and exhibited poor sequencing, categorizing, and describing skills (Parent Ex. B at pp. 2-3). According to the IESP, the student struggled with being self-directed and required direct instruction to follow directions (id. at p. 4). Additionally, the present levels of performance of the December 2023 IESP indicated that the student struggled with sensory processing, had difficulty with self-regulation, demonstrated low attention and focusing, required redirection, and further indicated he "touche[d] everything and need[ed] sensory input" (id. at pp. 1, 2, 3, 4). According to the IESP, the student had a visual deficit that made it difficult for him to see accurately and sustain tracking, and which caused difficulty with focusing on academic and ocular motor activities (id. at p. 4). The student also exhibited poor fine motor skills, and although his gross motor skills were described as "average," the student could benefit from "coordination to use his body properly" (id.). While reported to be in "good overall health," the IESP reflected that the student "ha[d] an allergy" (id.).

The December 2023 CSE identified a number of strategies to address the student's management needs, including giving a minimal number of directions or steps at a time; having the student repeat directions; providing visual/picture models of checklists/reminders, regular movement breaks, and frequent, specific praise for on-task behavior; repeating directions; checking frequently for comprehension; providing focused, concrete statements and allowing for extended time for processing and response time; providing directions in multiple forms; modeling responses to verbal/visual prompts and cue cards; and pre-teaching critical information or vocabulary (Parent Ex. B at p. 5). Additionally, the CSE developed annual goals to improve the student's reading, math, handwriting, written language, sensory processing, visual perception, gross motor, ocular motor, receptive and expressive language, and articulation skills (id. at pp. 6-12). The CSE recommended that the student receive five periods per week of direct SETSS delivered in a group in a separate location, and two 30-minute sessions per week each of individual OT, PT, and speech-language therapy delivered in a separate location (id. at p. 13). As supplementary aids and services/program modifications/accommodations, the December 2023

CSE recommended that the student receive full-time, daily, individual, health paraprofessional services due to the student's allergies (id.).

2. Specially Designed Instruction

The IHO found that the evidence in the hearing record lacked progress reports, session notes, annual goals, or other records regarding the paraprofessional services the student received from Upgrade during the 2023-24 school year and, as such, the parent failed to demonstrate that the paraprofessional services delivered by Upgrade were appropriate (IHO Decision at pp. 6, 9). On appeal, the parent argues that the IHO erred in denying reimbursement for the paraprofessional services, as there was "no question that the paraprofessional [wa]s a necessary condition required for [the student] to receive educational benefit in a school setting."

In written testimony, the educational director of Upgrade (director) stated that Upgrade provided the student with daily, full-time paraprofessional services during the 2023-24 school year (Parent Ex. K at ¶¶ 4, 14, 18, 19). According to the director, the student has "severe allergies to peanuts and fish, which [could] trigger life-threatening reactions," and "[h]e may require the immediate administration of an EpiPen in the event of exposure to these allergens" (id. at ¶ 19). The director further testified that "[d]ue to the seriousness of [the student's] condition, it [wa]s crucial that he ha[d] a health para[professional] available to provide vigilant monitoring and rapid responses to ensure his safety" (id.). Additionally, the director testified that the student was "able to remain calm and focused in school because the para[professional] [wa]s ensuring his safety and well-being" (id.). A SETSS progress report dated March 25, 2024 indicated that the student "still struggle[d] with a poor attention span and ha[d] difficulty focusing," that he required "constant redirection" and that he "touche[d] everything and need[ed] continuous sensory input" (Parent Ex. H at p. 1).

The evidence in the hearing record shows that the student required 1:1 paraprofessional services during the 2023-24 school year, a point on which the parties agree (see Parent Exs. B at pp. 1-4, 13; E at pp. 1, 2, 6; H at p. 1). Contrary to the IHO's findings, the parent was not required to produce evidence that the paraprofessional provided the student with specially designed instruction (IHO Decision at pp. 6, 9).

State regulations no longer define the term "paraprofessional," as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see NY Reg, June 25, 2014 at 85-86). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1 [hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58 [a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/ publications/policy/continuum-schoolage-revNov13.pdf).

Based on the above the role of the paraprofessional, to support the student's health and allergy related needs, fits within the definition of either supplementary support personnel but does not require that the provider provide the student with specially designed instruction, only that the student's needs be supported. Additionally, as noted above, the hearing record includes some, albeit scant, information indicating that the student was provided with paraprofessional services during the 2023-24 school year (see Parent Ex. K at ¶¶ 4, 14, 18, 19). Nevertheless, as the IHO correctly noted that there was nothing in the hearing record to describe the supports provided by the paraprofessional in the student's classroom or testimony from a person with direct knowledge of the services (IHO Decision at pp. 4, 7). Accordingly, although the parent argues that the paraprofessional services were directed at monitoring the student's allergies and such a need is reflected on the March 2022 and December 2023 IESPs, there is insufficient documentary or testimonial evidence to show that the paraprofessional services were actually provided to the student during the 2023-24 school year as a way of attending to the student's identified needs. If, as the parent asserts on appeal, there are no session notes or reports, the parent could have testified or had someone from the student's nonpublic school testify as to the services provided to the student. The parent must come forward with evidence that describes the services and the delivery thereof in order to meet her burden. Further, as discussed below, the evidence of the services provided to the student at the nonpublic school, as a whole, do not provide sufficient information to show that the student's needs were appropriately addressed.

The director testified that Upgrade provided the student with three hours per week of SETSS through December 7, 2023, and thereafter provided him with five hours of SETSS per week for the remainder of the 2023-24 school year (Parent Ex. K ¶ 13). According to the director, the student's SETSS provider was State certified to teach students with disabilities, and was "trained and experienced to teach literacy and comprehension to school aged children and adolescents" (id. ¶ 15; see Parent Ex. G at p. 1).

In a progress report, dated March 25, 2024, the student's SETSS provider reported that the student, who was in first grade, received special education services "five times per week" at the nonpublic school and he exhibited delays with language processing, sensory development, focusing/attention, and academic skills (Parent Ex. H at p. 1). According to the report, assessments were conducted to gather data about the student's "performance in each subject domain" (id.). The SETSS progress report indicated that the student presented at a pre-kindergarten level in reading according to a specific "Kindergarten Readiness Packet" (id.). Review of the progress report reflects the accuracy with which the student performed specific reading tasks, such as identifying letters, answering comprehension questions, and retelling a story (see id. at pp. 1-2). The report included five reading annual goals with corresponding short-term objectives for the student to improve phonemic awareness and sound-symbol recognition skills, the ability to ask and answer questions about text, and read "emergent-reader text with purpose and understanding" (id. at pp. 2-3). The SETSS provider reported that she used "various sensory modalities" when working with the student to improve his alphabetic knowledge, comprehension strategies such as retelling cards or a retelling cube, and visualization techniques, and visual prompts to improve reading readiness skills (id. at pp. 1-2, 5).

In the area of writing, the March 2024 progress report indicated that the student's skills were on a pre-kindergarten level; he could "copy all the alphabet presented to him on a worksheet," and had learned to write the numbers 1-10 (Parent Ex. H at p. 4). According to the report, the

student could not write his first or last name, words, or formulate a sentence (id.). Additionally, the progress report indicated that the student's writing was messy, and he required practice to "perfect his letter formation" (id.). Annual goals and short-term objectives for the student were designed to improve his ability to formulate capital and lowercase letters, use phonemic awareness skills to produce words in writing, and tell about an event using some writing" (id. at pp. 4-5). The SETSS provider reported that she used tracing activities and had the student complete alphabet worksheets to improve his writing skills (id.).

Regarding math, the SETSS provider reported that the student was at a kindergarten level and he demonstrated skills such as counting to 100 independently, counting objects with 1:1 correspondence, and adding up to five (Parent Ex. H at p. 1). The student had more difficulty demonstrating understanding of concepts including "heavy or light," identifying whether shapes were two or three dimensional, completing addition problems with numbers five through eight, and understanding word problems (id.). The progress report reflected annual goals and short-term objectives to improve the student's ability to compare the number of objects in two groups, his understanding of the value of two given numerals, and his ability to complete addition and subtraction problems (id. at pp. 3-4). According to the report, the SETSS provider used worksheets, manipulatives such as interlocking cubes, bear counters, the 10 frame, and a number line, broke down word problems into smaller segments, and used retelling, drawing pictures, circling relevant information, and crossing out extra information with the student (id. at p. 3).

In addition to the specific strategies described above, that the SETSS provider used with the student during academic instruction, the progress report also indicated that she used modifications such as consistent breaks, visual interventions, manipulatives, timers, and positive reinforcement with the student (Parent Ex. H at p. 1).

In a progress report dated November 29, 2023, the student's occupational therapist reported that he delivered two sessions per week of OT to the student at the nonpublic school (Parent Ex. J at p. 1; see Parent Ex. G at p. 3). According to the report, the student exhibited "deficient" attention/focusing, sensory regulation, and fine motor skills, as well as developmental and academic concerns (Parent Ex. J at p. 1). The occupational therapist reported attempting to administer standardized testing to the student, but that scores were not obtained "due to poor performance"; however, other assessments administered included parent and school staff interviews, structured tasks, informal testing, reflex testing, handwriting, and a sensory profile (id.). Regarding the student's then-current functioning, the progress report indicated that he had "[o]cular concerns" and "a visual deficit which ma[de] it extremely difficult for [the student] to see accurately and sustain his attention and tracking" (id.). According to the occupational therapist, "[m]ost problems" came from visual deficits and "a lot of visual activities [we]re being implemented as methods" (id.). Additionally, the progress report indicated that the student struggled with attending to academic activities, especially those involving ocular motor table-top tasks, and completing fine motor tasks (id.). The occupational therapist reported that the student also struggled with sensory processing and self-regulation, task completion, and with being self-directed (id. at p. 2).

The occupational therapist developed annual goals with short-term objectives to improve the student's sensory processing, visual perception and/or perceptual motor skills, strength, postural control, balance, motor planning, and ocular motor control (Parent Ex. J at pp. 2-3).

According to the progress report, the occupational therapist used visual tracking and hand coordination worksheets, breaks, repetition, "preparatory and functional activities," verbal and visual cues, redirection, tactile assistance, positive reinforcement, and "chaining strategies" (id. at pp. 1-3). Additionally, the progress report referred to use of "DIR/Floortime Student-Lead Therapy Model" (id. at p. 3).

The student's speech-language pathologist prepared a progress report dated November 29, 2023 (Parent Ex. I; see Parent Ex. G at p. 2). According to the report, the student received two sessions of speech-language therapy per week, and assessments of the student included parent interview, speech sample, structured tasks, and administrations of subtests of the "CELF" (Parent Ex. I at p. 1). The speech-language pathologist reported that although the student's vocabulary was good, and he could answer basic questions and identify items, his receptive and expressive language skills were poor; specifically, the student was "not good at understanding questions," missed information that affected his comprehension, and he had difficulty repeating details, sequencing cards, categorizing, and describing why things go together (id.). Additionally, the progress report reflected that the student had difficulty with focusing and attending in the classroom, he was easily distracted by external stimuli, impatient, and needed refocusing and redirection to attend to tasks (id.).

The speech-language pathologist developed annual goals and short-term objectives to improve comprehension of academic material, increase expressive language skills to an age-appropriate level, improve his ability to sequence, describe, compare, and categorize, increase articulation skills, vary sentence structure and produce grammatically expanded sentences, and demonstrate comprehension of short stories (id. at p. 2). Methods and interventions reported to be used with the student included social stories, role-play, social thinking, sequencing, categorizing, describing, and comparing/contrasting (id.).

Turning to the student's progress with the unilaterally obtained services, 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]).

Review of the private providers' progress reports shows that they reported—in general terms—that the student was making progress (see Parent Exs. H; I; J). Examples included that the SETSS provider indicated the student had made some progress in his ability to self-regulate, and with his overall academic and social/emotional performance (Parent Ex. H at pp. 1, 5). The OT progress report stated that the student was "responding well to treatment and demonstrate[d]

promising gains in several areas of function" (Parent Ex. J at p. 3). According to the speech-language therapy progress report, the student was "progressing on his basic language skills" and "describing objects and making associations" (Parent Ex. I at p. 3).

However, despite the vague statements of progress, review of the evidence shows that in March 2022 the student was "having a hard time learning the alphabet," and by March 2024 during first grade, the student had not yet mastered the alphabet, identifying 19 of 24 uppercase letters and 15 of 24 lowercase letters (compare Parent Ex. E at p. 1, with Parent Ex. H at p. 1). In March 2022 the IESP indicated that the student could already count with 1:1 correspondence, yet the March 2024 SETSS progress report indicated that he had "also improved his ability to count objects with 1:1 correspondence" (compare Parent Ex. E at p. 1, with Parent Ex. H at p. 3). The hearing record does not include information about the instruction the nonpublic school delivered to the student during the remainder of the school day outside of his one hour per day of SETSS, nor is there information describing how the SETSS complements that general education instruction (see Tr. pp. 1-44; Parent Exs. A-K; IHO Exs. I-II).[15]

The foregoing evidence in the hearing record does not support a finding that the parent met her burden under Burlington-Carter to prove that the services she unilaterally obtained for the student constituted specially designed instruction designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). As noted above, the hearing record does not include any evidence of the instruction that the student received while attending the general education nonpublic school. Thus, it is not possible to ascertain whether the student received any special education support in the classroom to enable him to access the general education curriculum or how the SETSS and related services delivered to him supported his functioning in the classroom, even if provided in a separate location in accordance with the IEP and IESP developed for him by the district. Accordingly, the hearing record lacks information concerning the student's general education school in terms of the instruction and curriculum provided, which necessitates assessing the unilaterally obtained services in isolation from the student's general education private placement. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate, as the program, as a whole, consisted of enrollment at a general education nonpublic school along with the parent's unilaterally obtained SETSS, speech-language therapy, OT, and paraprofessional services and when viewed together, with the idea that the specially designed instruction should be designed to support the student's access to the curriculum,

[15] The district also asserts that the hearing record was devoid of evidence "to show the appropriateness of the services as related to the goals in [the s]tudent's latest IESP." However, the evidence in the hearing record shows that the district did not have a current IESP for the student in effect at the start of the 2023-24 school year; as of that time in September 2023, the March 2022 IESP was approximately a year and a half old and the parent would not necessarily be required to show how the unilaterally obtained services related to the March 2022 IESP annual goals (IHO Exs. I-II; Parent Exs. A-K).

there was insufficient information to support such a finding. As a result, the parent has failed to meet her burden of proving that the services she obtained privately were appropriate for the student under the Burlington-Carter standard. Thus, the IHO erred by awarding funding for the parent's unilaterally obtained SETSS, speech-language therapy, and OT services.

VII. Conclusion

Having determined that the IHO erred in finding that the parent's unilaterally obtained services were appropriate and that the hearing record supports the IHO's determination that the parent failed to demonstrate the appropriateness of the paraprofessional services obtained during the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weigh in favor of the parent's request for relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 30, 2024 is modified by reversing those portions which found that the parent met her burden to prove the appropriateness of the unilaterally obtained SETSS, speech-language therapy, and OT and awarded funding for those services.

Dated: **Albany, New York**
December 13, 2024

STEVEN KROLAK
STATE REVIEW OFFICER