



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-441

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

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her son's unilaterally-obtained special education teacher support services (SETSS) delivered by Yeled v'Yalda, ECC (Yeled) for the 2023-24 school year. The district cross-appeals from the IHO's decision. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

According to the evidence in the hearing record, the student in this case attended a preschool program during the 2021-22 school year and received special education services, which included special education itinerant teacher (SEIT) services, occupational therapy (OT), and

speech-language therapy services (see Parent Ex. B at p. 1). On June 10, 2022, a CSE convened, and finding that the student was eligible for special education as a student with a speech or language impairment, developed an IESP for the student for the 2022-23 school year (kindergarten) (id. at p. 1).^{1, 2} The June 2022 CSE recommended that the student receive five periods per week of individual SETSS (Yiddish), two 30-minute sessions per week of individual speech-language therapy (Yiddish), and two 30-minute sessions per week of individual OT (English) (id. at p. 8). In addition, the June 2022 CSE developed annual goals targeting the student's needs, and recommended strategies to address the student's management needs (id. at pp. 3-6).

By letter dated May 30, 2023, the parent's attorney, on behalf of the parent, informed the district that the student was "entitled to services and special education programming" from the district, and the parent wanted the student to "receive all services that they require via the [district]" (Parent Ex. D at p. 2). The parent's attorney also informed the district that the student was parentally placed in a nonpublic religious school for the 2023-24 school year (id.).³

On June 29, 2023, a CSE conducted the student's annual review and developed an IESP for the student for the 2023-24 school year (see Dist. Ex. 2 at p. 1). Finding that the student remained eligible for special education as a student with a speech or language impairment, the June 2023 CSE recommended that the student receive five periods per week of individual SETSS (Yiddish), two 30-minute sessions per week of individual speech-language therapy (Yiddish), and two 30-minute sessions per week of individual OT (English) (id. at p. 8). The June 2023 CSE also developed annual goals targeting the student's needs, and recommended strategies to address the student's management needs (id. at pp. 4-7).⁴

On August 6, 2023, the parent executed a "Contract Agreement" with Yeled, which was "valid for services starting September 1, 2023 and continue[d] through June 30, 2024" (Parent Ex. E).⁵ According to the contract agreement, Yeled would "do [its] best to provide [the student] with

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 Although not specifically identified as such, it appears from the student's chronological age that the June 2022 CSE convened for the student's transition from receiving preschool special education services under a Committee of Preschool Special Education [CPSE]) to receiving school-age services under a CSE (see Parent Ex. B at p. 1).

³ The parent's attorney sent the notice of residence to the district via email dated May 30, 2023 (see Parent Ex. D at p. 1).

⁴ According to the attendance page of the June 2023 IESP, the parent attended the CSE meeting via telephone (see Dist. Ex. 2 at p. 11).

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

all the services they [we]re entitled to" at a rate of \$198.00 per hour for SETSS and \$250.00 per hour for related services (id.).⁶

In a letter dated August 21, 2023, the parent's attorney, on behalf of the parent, notified the district that although the parent "consent[ed] to all services recommended" in the student's June 2022 IESP, she had no way to implement the recommendations (Parent Ex. C at p. 2). The parent's attorney indicated that the parent had been "unable to locate providers for the SETSS and related services at the [district's] standard rate," and therefore, she would be forced to implement the services recommended in the IESP and "seek reimbursement or direct payment" from the district (id.). The parent's attorney indicted that the student was parentally placed in a nonpublic school for the 2023-24 school year "with his special education program provided on school premises" (id.).⁷

A. Due Process Complaint Notice

By due process complaint notice dated July 3, 2024, the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year because the district had "delay[ed] in convening a new IEP meeting" for the 2023-24 school year (see Parent Ex. A at pp. 1-2). The parent also noted that the student's June 2022 IESP was "outdated and expired," and she had "not received any subsequent [individualized education program (IEP)] or IESP documents and [wa]s uncertain whether there [wa]s a more recent program" (id. at p. 2). As part of the due process complaint notice, the parent sought pendency services for the student consistent with the special education program recommended in the June 2022 IESP, which constituted the last-agreed upon program: five periods per week of individual SETSS (Yiddish), two 30-minute sessions per week of individual OT services (English), and two 30-minute sessions per week of individual speech-language therapy services (Yiddish) (id. at p. 2).⁸ The parent noted that she had been unable to locate any providers to implement the "services recommended" in the June 2022 IESP for the 2023-24 school year at the district's rates, and the student's "parental mainstream placement [wa]s untenable" without such supports (id.). Additionally, the parent indicated that the district had failed to implement the services, and thus, failed to offer the student a FAPE for the 2023-24 school year (id.).

⁶ Notwithstanding that the contract agreement was valid between September 1, 2023 through June 30, 2024, the hearing record is devoid of evidence establishing when Yeled began delivering SETSS to the student (see generally Tr. pp. 1-39; Parent Exs. A-H; Dist. Ex. 1-2).

⁷ The parent's attorney sent the 10-day notice of unilateral placement to the district via email dated August 21, 2023 (see Parent Ex. C at p. 1).

⁸ In a pendency program form, which the parent's attorney completed and executed on the parent's behalf on July 3, 2024, it was noted that the student's June 2022 IESP formed the basis for the student's pendency services (see Parent Ex. A[1] at p. 1). Within the form, the student's pendency services were described as consisting of five periods per week of individual SETSS (Yiddish), two 30-minute sessions per week of individual OT services (English), and two 30-minute sessions per week of individual speech-language therapy services (Yiddish), but the form did not include any information concerning providers or an agency delivering services, or the rates to be paid for such services (id. at pp. 1-2). All pendency services were to be delivered to the student on a 10-month basis (id. at p. 1).

As relief for the alleged violations and as relevant to this appeal, the parent initially reserved her right to seek compensatory educational services in the form of SETSS and related services "for any periods not provided during the 2023-24 school year" (Parent Ex. A at p. 3). The parent also sought an order directing the district to fund the following: the special education program set forth in the June 2022 IESP for the 2023-24 school year "at the provider's contracted rate" and a bank of compensatory educational services "for all services" the student was entitled to receive under pendency "for the entire 2023-24 school year—or the parts of which were not serviced" (id. at p. 3).

B. Impartial Hearing Officer Decision

On August 19, 2024, the parties proceed to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) and completed the impartial hearing on the same day (see Tr. pp. 1-39).⁹ In a decision dated September 4, 2024, the IHO found that it was "undisputed" that the district failed to implement the student's June 2022 IESP for the 2023-24 school year, and therefore, failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 3, 9-10).¹⁰ The IHO examined the evidence pertaining to the parent's unilaterally-obtained SETSS from Yeled, and determined that the hearing record lacked progress reports that were purportedly prepared by the agency on a quarterly basis and the testimonial evidence elicited from Yeled's clinical supervisor was "self-serving" because she represented the agency "who ha[d] a financial interest in the outcome of the proceedings" (id. at p. 10). Overall, the IHO concluded that the hearing record lacked "independent information to support a finding that the Agency Provider and program [we]re appropriate" and thus, the parent failed to sustain her burden of proof (id.).

Turning to the parent's request for compensatory educational services for the 2023-24 school year, the IHO found that the parent was not seeking a specific rate for OT and speech-language therapy services, and she had not provided "evidence regarding how the rate should be calculated" (IHO Decision at p. 10). The IHO also noted that the district had not set forth any position with regard to the appropriate compensatory educational services as a remedy (id. at p. 11). The IHO concluded that the student was entitled to receive compensatory educational services consisting of 36 hours of speech-language therapy services and 36 hours of OT services, which the student had not received during the 2023-24 school year (10-month basis) (id.). The IHO also

⁹ In an interim decision on pendency dated August 23, 2024, the IHO ordered the district to provide the following as the student's pendency services: five 60-minute sessions per week of individual SETSS (Yiddish), two 30-minute sessions per week of individual OT (Yiddish), and two 30-minute sessions per week of individual speech-language therapy services (Yiddish), all retroactive to the date of the due process complaint notice, July 3, 2024 (see Interim IHO Decision at p. 7). The IHO noted in the interim decision that she rejected the district's argument that the student was not entitled to pendency as a dually-enrolled student (id. at pp. 3, 6-7). For clarity, the IHO's interim decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page (i.e., cover page) as page one (id. at pp. 1-10).

¹⁰ The IHO also noted that the hearing record included two IESPs for the student, one dated June 2022 and another dated June 2023; however, the IHO further noted that both IESPs recommended the same special education and related services for the student (see IHO Decision at pp. 9-10).

found that the "rate" for the compensatory educational services would be determined by the district's implementation unit (id.).

In light of the foregoing, the IHO ordered the district to fund the costs of the compensatory educational services (i.e., 36 hours of individual speech-language therapy in Yiddish and 36 hours of individual OT in Yiddish), to be delivered by a provider selected by the parent (see IHO Decision at pp. 11-12). In addition, the IHO ordered that the "bank of compensatory services for [c]ounseling services . . . shall expire in two years and may be provided during the regular school year, during the summer (July and/or August), on weekdays, on weekends, on holidays, or during school vacations" (id. at p. 12).¹¹ The IHO further ordered the district to pay the "licensed or certified provider" selected by the parent within 35 days of the district's receipt of a "valid contract" between the parent and the provider, "attendance sheets which document[ed] the hours of services" delivered to the student, and an "affidavit from [the] provider attesting" to specific information (id.). Finally, the IHO ordered that the district "shall not fund any services provided for herein that ha[d] already been funded under a pendency order or agreement" for the 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by finding that the unilaterally-obtained SETSS from Yeled were not appropriate to meet the student's needs and by denying her request that the district fund the costs of the SETSS delivered during the 2023-24 school year at a rate of \$198.00 per hour.¹²

In an answer, the district responds to the parent's allegations, and generally argues that the IHO properly found that the parent's unilaterally-obtained SETSS were not appropriate. As a cross-appeal, the district contends that the IHO should have dismissed the parent's due process complaint notice for lack of subject matter jurisdiction. Additionally, the district asserts that equitable considerations do not weigh in favor of the parent's requested relief because the parent failed to provide the district with a 10-day notice of unilateral placement. Finally, the district argues that the IHO erred by ordering the district to fund the student's related services pursuant to pendency and by awarding OT and speech-language therapy services as compensatory educational services.¹³

¹¹ To be clear, the parent was not seeking counseling services for the student, and neither the student's June 2022 IESP or the June 2023 IESP included a recommendation for counseling services for the student (see generally Parent Exs. A-B; Dist. Ex. 2).

¹² In the request for review, the parent acknowledges that she had also filed a complaint seeking funding for the costs of the student's IESP services for the 2022-23 school year (see Req. for Rev. at p. 1). However, according to the parent, she had "withdrawn" that complaint "after the [d]istrict offered [her] a resolution for \$175 dollars for SETSS," and she further noted that it was the same SETSS provider who delivered services to the student for the 2022-23 school year and the 2023-24 school year, and the district had "vetted" the SETSS provider "prior to completing the resolution" of the matter initiated for the 2022-23 school year (id. at p. 1 fn.1).

¹³ In the district's declaration of service filed with the answer and cross-appeal, the district indicated that the attorney who had represented the parent at the impartial hearing had agreed to accept service of pleadings on the

The parent did not file an answer to the district's cross-appeal or a reply to the district's answer.

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]).¹⁴ "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.).¹⁵ Thus, under State law an

parent's behalf on September 18, 2024 (see Declaration of Service). However, after serving the attorney with the Notice of Intention to Cross-Appeal on October 4, 2024, the attorney notified the district that they were no longer representing the parent in this matter and provided the district with an email address for the parent to receive correspondence (id.). Subsequently, the parent consented to receiving and accepting service by email of the pleadings in this matter (id.).

¹⁴ 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]).

¹⁵ 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

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

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

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset, it is necessary to address the issue of subject matter jurisdiction, which the district alleges the IHO lacked due to clarifying amendments published by the New York State Department of Education. Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; 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). The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that "neither the SRO nor the IHO ha[ve] subject matter jurisdiction over the claims in the DPC".

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. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-464; 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 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

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.

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.

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]).¹⁶

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

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

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

¹⁶ 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]).

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 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>).¹⁷ 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.*).¹⁸ 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. 909589-24).¹⁹

Consistent with the district's position that "there is not and has never been a right to bring a due process complaint" for implementation of IESP claims or enhanced rate for services and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, 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

¹⁷ In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

¹⁸ The due process complaint in this matter was filed with the district on July 3, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

¹⁹ 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]).

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]).²⁰

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. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

2. Additional Evidence

In support of her request for review, the parent attaches a Yeled "Student Progress Report For Annual Review," dated June 10, 2024, as additional documentary evidence for consideration on appeal (Req. for Rev. Ex. 1 at p. 1). The parent asserts that she "inadvertently failed to provide [her] attorney at the time with the progress report" and that it was "only because of a careless error on [her] part that the progress report was not provided" to the IHO (*id.* ¶ a).

The district objects to the consideration of the additional evidence, arguing that the progress report was available at the time of the impartial hearing and by the parent's own admission in the request for review, its omission at that time of the impartial hearing was due to her own "careless error." The district further contends that admitting the progress report at this juncture would deprive the district of the opportunity to cross-examine witnesses with respect to the progress report.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp.

²⁰ 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 SRO's 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.

2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well-supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Upon review, the parent has not set forth any reason for the failure to produce the Yeled progress report—which was available at the time of the impartial hearing—at the impartial hearing, and as the district contends, to allow its admission at this point subverts the administrative process by depriving the district of an opportunity to cross-examine witnesses about the document. As a result, and in an exercise of my discretion, I decline to admit or consider the Yeled progress report, dated June 10, 2024, on appeal.

B. Unilateral Placement

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 Yeled 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 unilaterally-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]).²¹ 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).

1. Student Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS were appropriate to meet the student's needs. As noted previously, the hearing record includes a June 2022 IESP, as well as a June 2023 IESP (see generally Parent Ex. B; Dist. Ex. 2). Out of an abundance of caution, both IESPs will be reviewed with respect to the student's needs.

According to the June 2022 IESP, the student's intellectual functioning had been measured using the Stanford Binet Intelligence Scales—Fifth Edition (SB-5) (see Parent Ex. B at p. 1).²² The student's performance on the test yielded a verbal intelligence quotient (IQ) that fell within the borderline impaired range, a nonverbal IQ that fell within in the high average range, and a full-scale IQ that fell within the average range of intellectual functioning (id.). With respect to the student's adaptive functioning, the IESP noted that parent responses on the Vineland Adaptive Behavior Scales—Third Edition (Vineland-3) resulted in an adaptive behavior composite score of 73, which fell in the moderately low range (id.). The IESP also indicated that the student attained a composite score in the average range on the Kaufman Survey of Early Academic and Language Skills (K-SEALS) and performed in the average range on the vocabulary subtest, as well as on the receptive and expressive language scales (id.). However, the student performed in the below average range on the K-SEALS in the numbers, letters, and words subtest (id.).

The June 2022 IESP indicated that, at that time, the student attended a preschool program where he was enrolled in a class of 15 students with 2 full-time teachers (see Parent Ex. B at p. 1). As previously noted, the student received SEIT services, OT, and speech-language therapy (id.). Next, the IESP detailed the student's performance on basic readiness skills, specifically noting that the student matched and named basic colors; matched basic shapes and named a triangle and

²¹ 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 Yeled v'Yalda, ECC (Educ. Law § 4404[1][c]).

²² Although the June 2022 IESP included the results of standardized testing, it did not indicate when the testing took place (see Parent Ex. B at p. 1).

square; followed a two-step unrelated direction, but did not follow a two-step related direction; and demonstrated understanding of prepositions such as "in," "on," "under," and "in back" (id.).²³ It was further noted in the IESP that the student unsuccessfully employed a random "trial and error" approach to complete a nesting cup item, and inaccurately identified first and last in a line (id.). According to the IESP, the student's response to "what do you do when" questions indicated that he had good verbal reasoning skills; however, the IESP noted the student did not respond to a simple inference question (id. at pp. 1-2).

With regard to speech and language development, the June 2022 IESP indicated the student was a bilingual Yiddish speaking child who presented with reduced articulation and phonology (see Parent Ex. B at p. 2). According to the IESP, the student's misarticulation of phonemes included deletions, distortions, and substitutions of sounds, and his "[v]ocal hoarseness" contributed to his decreased intelligibility (id.). In addition to articulation difficulties, the IESP noted weaknesses in the student language and oral motor skills (id.). In terms of strengths, the IESP indicated the student was able to identify "common objects among other common objects," "identify common actions among six other common actions," identify common actions in pictures, and name common objects and actions (id.). In terms of weaknesses, the IESP indicated the student lacked counting skills, his concept of numbers was inconsistent, and he lacked basic problem-solving skills (id.). The IESP noted that the student did not name any numbers or letters of the alphabet (id.). According to the IESP, the parent expressed concern regarding his sensory integration and language skills (id.). The IESP described the student as highly anxious and a perfectionist (id.). It was noted that the student had a tantrum when things did not go his way and had difficulty self-regulating and calming down (id.). The student also had difficulty communicating what was bothering him (id.).

Turning to the student's social development, the June 2022 IESP indicated that, according to the student's teacher, he was well behaved, followed classroom routines, and transitioned smoothly from one routine activity to another (see Parent Ex. B at p. 2). The IESP reflected that the student expressed his basic needs and that he sat nicely and responded to questions accurately during circle time, followed classroom directions, and engaged in a variety of activities for an appropriate length of time (id.). The IESP also reflected the parent's concern that the student would not speak to people he did not know well (id.). In terms of physical development, the June 2022 IESP indicated that the student was generally a healthy child and could participate in all school physical activities (id. at p. 3). The IESP noted that the student presented with minor fine motor deficits, but had significant difficulty in multiple areas of sensory processing including processing vestibular input and a mild aversion to textures, seams, and labels (id.). The IESP further noted that the student "[c]ould] touch people and objects to the point of irritation" and that he mouthed non-food items (id.).

In addition to the recommendations for SETSS, OT, and speech-language therapy, the June 2022 CSE recommended the following strategies to address his management needs: small group instruction, focusing on one task at a time, ongoing assessment of skills, prompting and fading procedures, modeling new skills, shaping techniques to develop skills, extended time to complete

²³ In contrast, the June 2022 IESP later indicated that the student could follow two-step related directions, but could not follow two-step unrelated directions (see Parent Ex. B at p. 2).

tasks, and a multisensory instructional model (see Parent Ex. B at p. 3). According to the IESP, the student's speech-language delays made it difficult for him to make progress in all content areas and noted that his fine motor delays, coupled with increased anxiety, impacted his ability to access the curriculum on a grade-level expectancy (id. at p. 4).

Next, a review of the June 2023 IESP reveals that the CSE recounted the student's testing performance on the SB-5, as had been noted in the June 2022 IESP (compare Dist. Ex. 2 at p. 1, with Parent Ex. B at p. 1).²⁴ According to the June 2023 IESP, the student exhibited delays in his cognitive skills, and specifically reflected that, as reported by his SETSS provider, the student had difficulty placing three pictures in sequence, understanding position and direction (prepositions), identifying colors and shapes, and telling or drawing a picture as a solution to a problem (see Dist. Ex. 2 at p. 1). In terms of basic concepts, the IESP indicated the student was unable to sort items by function, identify similarities and differences, group objects based on two criteria, or sort two categories on a chart (id.). According to the IESP, the student also demonstrated delays in play skills, including engaging in role play and imaginary play (id. at p. 2).

In the area of reading, the June 2023 IESP reported that the student's reading and decoding skills were deficient, which limited his phonological awareness (see Dist. Ex. 2 at p. 2). According to the IESP, the student had been "unsuccessful with rhyming words and identifying beginning letter sounds," using age-appropriate vocabulary, and "getting to the point when talking" (id.). The student also had difficulty being understood; reducing the use of short, choppy sentences; and copying simple lines (id.). In terms of reading readiness, the IESP indicated the student had difficulty with auditory discrimination, discriminating between letters and non-letters, and reciting the alphabet (id.).

Turning to mathematics, the June 2023 IESP indicated that significant weaknesses in the student's mathematics readiness skills affected his ability to use ordinal numbers; identify number symbols 1 through 10; name the days of the week; and demonstrate awareness of time, including the concepts yesterday, today, and tomorrow (see Dist. Ex. 2 at p. 2).

With regard to expressive language skills, the June 2023 IESP described the student's skills as deficient, which limited his ability to answer questions as quickly as others (see Dist. Ex. 2 at p. 2). In addition, the IESP noted it was challenging for the student to say what he was thinking or explain what he wanted, engage in conversation, tell the ending of a story, answer an interpretive question, and use complete sentences when speaking (id.). In addition, the student was unable to expand his mean length of utterance (id.). The IESP noted the parent's concern with regard to the student's pre-literacy skills, letter identification, phonemic awareness, and number skills, as well as his expressive language skills, mean length of utterance, and the clarity of his speech (id. at p. 3).

Next, the June 2023 IESP indicated that, according to the SETSS provider's report, the student was "quite timid" and had a hard time expressing his wants and needs (Dist. Ex. 2 at p. 3). The IESP indicated the student required a lot of prompting to join a peer-related activity or speak

²⁴ The June 2023 IESP further noted that a "Psychological evaluation" had been completed on August 25, 2021, suggesting that the SB-5 was administered to the student in or around the same timeframe (see Dist. Ex. 2 at p. 1).

to a friend (*id.*). According to the IESP, due to the student's reserved nature he did not express his feelings or emotions verbally, but instead, he expressed them physically (*id.*). The student frustrated easily and cried when frustrated (*id.*). In addition, the IESP noted the student demonstrated social weaknesses related to his ability to initiate a conversation with peers, participate in cooperative play, and persevere when disappointed (*id.*). The student also had difficulty participating in competitive play and was unable to explain rules to others (*id.*).

According to the June 2023 IESP, the student's SETSS provider's report further indicated the student demonstrated significant weaknesses in prewriting and handwriting skills that affected his ability to perform handwriting activities, including the ability to form letters (see Dist. Ex. 2 at p. 3). The student was also a perfectionist, and had difficulty relaxing while writing (*id.*). As noted in the IESP, the parent expressed concern regarding the student's frustration tolerance and attention span (*id.* at p. 4).

In addition to the recommendations for SETSS, OT, and speech-language therapy, the June 2023 CSE recommended the following strategies to address the student's management needs: modeling and repetition, directions simplified and repeated, visual aids, on-task focusing prompts, small group instruction, peer collaboration, preteaching and reteaching, scaffolded instruction, multisensory approaches, multimodal lessons, evidence-based academic intervention, strength-based instructional approach, documented IESP team collaboration, explicit instruction, mnemonic devices, reciprocal teaching, visual thinking strategies, simplified directions and steps and questions, graphic novels and picture books and cards, chunking text, sentence starters, use of manipulatives, skills and strategy centered small group instruction, positive reinforcement, student roles in the classroom, and opportunities for physically stimulating instruction (see Dist. Ex. 2 at pp. 4-5).

2. Specially-Designed Instruction—SETSS from Yeled

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).

On appeal, the parent argues that the IHO mistakenly concluded that the SETSS were not appropriate. In support, the parent asserts that the district previously vetted the SETSS provider delivering services to the student during the 2023-24 school year, and therefore, there was no question that the SETSS were appropriate. The parent further argues that Yeled's services are "of a very high quality," with "experienced providers," and the district has "entered into multimillion dollar contracts with them to provide services to thousands of students." The parent also points to the testimony elicited from the Yeled educational supervisor, who, according to the parent, "painstaking[ly] detail[ed] how the SETSS addressed [the student's] specific needs as a learner." In addition, the parent notes that the hearing record included evidence of the "methodologies" used with the student, including "flashcards, and manipulatives."

Turning first to the testimony from the Yeled educational supervisor, the hearing record reflects that she identified the student's SETSS providers by name and testified that both providers were certified by New York State to teach students with disabilities and were bilingual in Yiddish

(see Parent Ex. H ¶ 11).²⁵ She further testified that the SETSS providers were trained and experienced in teaching literacy and comprehension to school-age children (*id.*). According to the educational supervisor, the student's progress was measured through assessments, consistent meetings with the provider and support staff, observation of the student in the class, and session notes (*id.* ¶ 16). To assess the student, the educational supervisor testified that the agency used the "SMART assessment," which she characterized as a "formal assessment" divided into several domains (Tr. pp. 18-19). She noted that the SMART assessment was administered at the beginning of the school year in September, and goals "were set according to how [the student] scored in September" (Tr. p. 19). According to the educational supervisor, the SMART assessment touched on skills across the following domains: cognitive, speech-language, social/emotional, fine motor domains, and activities of daily living (ADL) (*id.*). The educational supervisor also testified that Yeled used the SMART assessment following "quarterlies," to determine if the student had met the goals (see Tr. pp. 18-19). She further testified that agency staff also conducted "informal assessments with the teacher and the classroom observations and in one-on-one sessions" (Tr. p. 19).

When asked at the impartial hearing to describe the student at the beginning of the school year, the educational supervisor explained that it was "hard to tell" because he was "an extremely shy reserved student," and it took a while for the agency obtain "proper and clear levels" (Tr. p. 19). She estimated that, at the time, the student was functioning "about a grade level below," but she further noted that he "moved up a lot" by the end of the school year (Tr. pp. 19-20). The educational supervisor characterized the student as being six months behind his peers by the end of the school year, but noted that, due to splinter skills, she "wouldn't put him at a flat score" (*id.* at p. 20). She also testified that the progress report entered into evidence was an accurate representation of what the providers had been working on with the student during the 2023-24 school year, including goals (see Parent Ex. H ¶ 17).²⁶ She further testified that the student had already shown signs of progress with his SETSS providers (*id.* ¶ 18).

Additionally, the Yeled educational supervisor testified that the student only received "special education services" from the agency (see Tr. p. 20). According to her testimony, Yeled delivered five hours per week of SETSS to the student during the 2023-24 school year, which were "typically provided [to the student] outside of the classroom" (Parent Ex. H ¶¶ 10, 15). She also testified that, of the two providers who worked with the student, one provider focused on reading and reading comprehension and the other provider focused on academics, social/emotional skills, and handwriting (see Tr. p. 21). She indicated that the providers split their time with the student based on his needs (see Tr. p. 22). The educational supervisor testified that the providers were

²⁵ The evidence in the hearing record demonstrates that the student's first named SETSS provider held New York State teaching certificates in early childhood education (birth through grade 2), students with disabilities (birth through grade 2), and a bilingual educational extension (see Parent Ex. F at p. 2). The evidence similarly demonstrates that the student's second named SETSS provider held New York State teaching certificates for childhood education (grades 1 through 6), students with disabilities (grades 1 through 6), early childhood education (birth through grade 2), and students with disabilities (birth through grade 2) (*id.* at p. 4). However, the evidence does not reflect that the second named SETSS provider held a bilingual educational extension (*id.*).

²⁶ Contrary to this testimony, the hearing record did not include a Yeled progress report for the student for the 2023-24 school year (see generally Tr. pp. 1-39; Parent Exs. A-H; Dist. Ex. 1-2).

solely responsible for administering SMART assessments, but she would "supervise" and would "get involved with it" (*id.*). In addition, she testified that she, together with the providers, set student goals based on the results of the assessment (*id.*). The educational supervisor also testified that the agency required quarterly progress reports, and the student's Yeled providers drafted the reports (*see* Tr. pp. 22-23). She further confirmed that she reviewed completed progress reports and that student goals were adjusted based on both formal and informal assessments (*see* Tr. pp. 23-24). Turning to educational methodologies, the educational supervisor testified that providers used "worksheets" with the student to practice his writing and "penmanship," noting that the student was "very slow-moving and a very perfectionist kind of personality" (Tr. p. 24). She also testified that, in addition, the providers used "flashcards" to work on the student's sight words, "decoding strategies to help [the student] with fluency," and "manipulatives" to assist the student with mathematics (Tr. pp. 24-25).

With respect to the agency, the educational supervisor described as a "nonprofit agency that provide[d] [s]pecial [e]ducation services to children classified with a disability" (Parent Ex. H ¶ 5). She also noted that Yeled provided a variety of services to students within their "mainstream setting," including SETSS, SEIT services, speech-language therapy, OT, and physical therapy (PT) (*id.*). The educational supervisor further testified that the agency provided "one-to-one specialized teaching and advocacy for students in their settings," the instruction was "individualized," and services were typically provided outside of the classroom (*id.* ¶¶ 6, 15). She also testified that, for the 2023-24 school year, the student received services in his mainstream school (*id.* ¶ 13).

In addition to the Yeled educational supervisor, the parent presented the Yeled director of fiscal special services (director) as a witness at the impartial hearing (*see* Tr. pp. 26-31; Parent Ex. G). The director testified that the agency was providing the student with five hours per week of SETSS during the 2023-24 school year (*see* Parent Ex. G ¶ 4). She further testified that the agency charged \$198.00 per hour for SETSS, and the rate included "one-on[]-one supervision, educational resources and support, professional development and materials, employment taxes, administrative costs and overhead costs" (*id.* ¶¶ 3, 5). At the impartial hearing, she clarified that the agency paid the SETSS providers for this student two different rates: one provider received \$80.00 per hour and the second provider received \$100.00 per hour (*see* Tr. p. 29). She also clarified that some providers were agency employees and some were independent contractors, and in this case, one of the student's SETSS provider was an agency employee (paid \$80.00 per hour) and the other SETSS provider was an independent contractor (paid \$100.00 per hour) (*see* Tr. pp. 30-31).

Overall, a review of the hearing record reveals that the only evidence regarding the special education services delivered to the student by Yeled during the 2023-24 school year was the testimonial evidence from the Yeled educational supervisor and the Yeled director, as summarized above (*see generally* Tr. pp. 1-39; Parent Exs. A-H; Dist. Ex. 1-2). Notwithstanding that the educational supervisor's testimony indicating that the agency conducted an initial assessment of students in September and developed student goals, conducted quarterly updates of student goals, created progress notes in January and sometimes in June, and kept session notes, the hearing record was devoid of such evidence, which, more likely than not, would have included information describing the specially designed instruction Yeled provided to the student during the 2023-24 school year (*see generally* Tr. pp. 1-39; Parent Exs. A-H; Dist. Ex. 1-2). Absent such evidence, the hearing record does not otherwise demonstrate the SETSS delivered by Yeled to the student constituted specially designed instruction sufficient to meet the student's identified needs (*see*

generally Tr. pp. 1-39; Parent Exs. A-H; Dist. Ex. 1-2). As a result, the IHO properly concluded that the parent did not sustain her burden to demonstrate the appropriateness of the unilaterally-obtained SETSS under Burlington/Carter, and the IHO properly denied the parent's request to be reimbursed for such services.

C. Compensatory Educational Services

I will turn next to the district's cross-appeal arguing that the IHO should not have issued a pendency order because a student is not entitled to pendency in disputes brought under the dual enrollment statute. Additionally the district argues that the parent chose to unilaterally obtain private services, Yeled agreed with the parent to provide the related services, the IHO's decision awarding compensatory educational services to the student consisting of 36 hours of OT and 36 hours of speech-language therapy services as an alternative remedy was error.

In this matter, the parent's due process complaint notice included a request for compensatory educational services as relief, in part, for the district's failure to provide "all services" the student was entitled to receive during the 2023-24 school year (10-month basis), including any pendency services not provided to the student (Parent Ex. A at p. 3). At the impartial hearing, the parent's attorney clarified the relief being sought, which included reimbursement or funding for SETSS and a "compensatory bank of hours for the speech-language therapy and [OT]" the student should have received during the 2023-24 year (i.e., for the failure to implement the student's mandated services in the IESP) (Tr. p. 6). Based on either the June 2022 IESP or the June 2023 IESP, the student was recommended to receive two 30-minute sessions per week of individual OT (English) and two 30-minute sessions per week of individual speech-language therapy services (Yiddish) (see Parent Ex. B at p. 8; Dist. Ex. 2 at p. 8). As relief, the IHO noted the parent's request for an unspecified amount of compensatory educational services of speech-language therapy services and OT (see IHO Decision at pp. 10-11).

The IHO further noted, however, that the district did not set forth any position on this issue and the district did not introduce "any evidence regarding the appropriate relief" (IHO Decision at p. 11). Thus, the IHO calculated the compensatory educational services awarded based on the amount of services the student should have received during the course of the 2023-24 school year, on a 10-month basis, and ordered the district to fund a bank of compensatory educational services consisting of 36 hours of individual speech-language therapy services (1 hour per week, 36 weeks) and 36 hours of individual OT services (1 hour per week, 36 weeks), at a rate determined by the district's implementation unit (id. at pp. 11-12). In addition, the IHO clarified that the district was not required to fund "any services provided for herein that ha[d] already been funded under a pendency order or agreement" for the 2023-24 school year (id. at p. 12).

In this case, it appears that the IHO's award of compensatory educational services stemmed from the district's failure to implement the student's mandated related services in the IESP during the 2023-24 school year, but did not, contrary to the district's arguments, relate to the IHO's pendency decision. Since the district failed to raise arguments before the IHO regarding the lack of related services from Yeled, and ignored the parents' request for compensatory education, I decline to overturn the IHO's decision at this juncture. As to the district's argument that the student was not entitled to pendency services because the student was dually-enrolled, to the extent this argument relates to the district's jurisdictional arguments, they have been rejected as without merit

as further described above. To the extent that the district argues that pendency is not permitted because the parent failed submit a request for dual enrollment services prior to June 1, 2023, the district did not assert this defense before the IHO, likely because the parent offered evidence dated May 30, 2023 showing transmission of a request for dual-enrollment services to the CSE (Parent Exhibit D) and, in this instance, the district has waived the defense by failing to raise it below.

VII. Conclusion

Based upon the foregoing, the evidence in the hearing record supports a finding that the IHO correctly determined that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS delivered by Yeled during the 2023-24 school year, and the necessary inquiry is at an end.

I have considered the district's remaining contentions regarding equitable considerations, and find that, given the determinations made herein, there is no need to address them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 December 30, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER