The University of the State of New York

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

No. 24-446

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

**Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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, among other things, denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Kinship Resources (Kinship) for the 2023-24 school year and dismissed her due process complaint notice. The district cross-appeals and asserts that the IHO lacked subject matter jurisdiction over the parent's claims. The appeal must be sustained in part. The cross-appeal must be dismissed.

## II. Overview—Administrative Procedures

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

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

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

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

## III. Facts and Procedural History

The student in this appeal was the subject of a recent SRO decision related to the student's placement during the pendency of the impartial hearing proceedings (Application of a Student with a Disability, Appeal No. 24-182). The student was also the subject of State-level administrative

review related to the 2021-22 school year (see Application of a Student with a Disability, Appeal No. 23-010). Accordingly, the student's prior educational history, as relevant to this appeal, was set forth in the prior SRO decisions and will not be repeated at length here.

Briefly, on November 30, 2020, a CSE convened, determined that the student, who was attending a nonpublic school, was eligible for special education as a student with a speech or language impairment, and recommended that she receive five periods per week of direct special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of both individual and group counseling services (Parent Ex. B at pp. 1, 10).[1]

The hearing record includes a letter, dated May 30, 2023, with the subject line "Notice of Residence to School District of Location," which included a consent for the district to provide the student "with all necessary special education and related services" and notification that the student would be parentally placed at a nonpublic school for the 2023-24 school year (Parent Ex. C).

The hearing record includes an additional letter, dated September 4, 2023, in which the parent notified the district that the district had not taken any action to implement the student's recommended SETSS and related services for the 2023-24 school year and that, because of the inaction, she would be forced to contract with private agencies to provide the mandated services and then pursue public funding (Parent Ex. D).

On October 17, 2023, the parent signed a document titled "Service Agreement" on the letterhead of Kinship, pursuant to which Kinship would provide the student, during the 2023-24 extended school year, SETSS and/or related services and supports "included in the last-agreed upon IEP or IESP, or in accordance with [the student's] pendency mandates or an IHO/SRO final decision" (Parent Ex. E).[2, 3]

**A. Due Process Complaint Notice**

In a due process complaint notice, dated November 13, 2023, the parent through an attorney, alleged that the district failed "to develop and implement an appropriate program of services for the [20]23-24 school year," which resulted in a denial of FAPE or equitable services (Parent Ex. A at p. 1).[4] The parent further asserted that the district had not yet provided the student

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

[2] The October 2023 services agreement does not indicate what rate Kinship charged to provide SETSS or related services to the student during the 2023-24 school year (see Parent Ex. E). According to an affidavit of the Kinship administrator, Kinship charged $195 per hour for the student's SETSS (Parent Ex. G ¶ G).

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

[4] The parent's lay advocate, who appeared at the impartial hearings on behalf of the parent, signed the request for review indicating she was affiliated with the law office which drafted the due process complaint notice for the

with the previously mandated SETSS for the 2023-24 school year and left it up to the parent to find providers for the services on her own (id. at p. 2). As relief, the parent requested an order finding the district denied the student a FAPE for the 2023-24 school year; directing the district to implement or fund the recommended SETSS for the entire 2023-24 school year "at enhanced provider's rates"; and directing the district to provide a bank of compensatory SETSS for the hours the student missed due to the district's failure to implement "at enhanced provider's rates" (id.).[5]

### B. Impartial Hearing Officer Decision

An impartial hearing convened on May 20, 2024 and concluded on August 15, 2024 after five days of proceedings (Tr. pp. 59-137).[6, 7] Neither the parent nor the parent's lay advocate was present for the impartial hearing that took place May 20, 2024 (Tr. pp. 59-66). Neither of the parties were present at the impartial hearing held July 13, 2024 (Tr. pp. 123-25). In a decision dated September 5, 2024, the IHO found that district did not meet its burden of proof in this matter and denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 8). The IHO then addressed the appropriateness of the SETSS delivered by Kinship during the 2023-24 school year

parent in this matter (see Req. for Rev. at p. 9; Tr. pp. 1-17, 21-41, 67-122, 126-137; Parent Ex. A). The attorneys for the parent are reminded that all pleadings submitted to the Office of State Review "shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]).

[5] Additionally, the parent requested that the IHO issue an order of pendency to compel the district to implement the student's "current educational placement" for the pendency of the litigation (Parent Ex. A at p. 2). The parent's pendency request indicated that the student's program under pendency was based on the student's November 30, 2020 IESP, which the parent asserted was the last agreed upon IESP and consisted of five hours per week of SETSS; two 30-minute sessions per week of speech-language therapy; three 30-minute sessions per week of OT; and two 30-minute sessions per week of counseling (id.). The CSE convened on December 21, 2021 to review the results of an August 2021 private neuropsychological evaluation and update the student's IESP (Application of a Student With A Disability No. 23-010 at p. 4). The December 2021 CSE recommended seven periods per week of direct SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group counseling services, one 30-minute session per week of individual counseling services, and three 30-minute sessions per week of individual OT (id.). It appears that the parent agreed with the December 2021 IESP, as the parent amended her due process complaint notice in that matter to request an updated pendency order reflecting the recommendations set forth in the December 2021 IESP (id.). It is unclear why the parent represented, in this proceeding, that the November 2020 IESP was the last agreed upon IESP when, at the time she filed her November 13, 2023 due process complaint notice, the December 2021 IESP was more recent.

[6] In addition, a prehearing conference took place on December 13, 2023, pendency hearings took place on December 14, 2023, January 5, 2024, and January 29, 2024; and hearings were held on March 8, 2024, March 28, 2024, April 24, 2024, and May 17, 2024 in which neither the parent nor the parent's lay advocate were present (see Tr. pp. 42-58). A representative for the district was not present for the May 17, 2024 impartial hearing (Tr. pp. 56-58).

[7] During the impartial hearing, the parent entered certain exhibits into evidence in support of her position on pendency; however, at the start of the hearing on the merits, the parent's exhibits were marked with the same letter and number designations that were used to identify the parent's pendency exhibits (see Tr. pp. 24, 36, 77, 80). For clarity in this decision, the parent's exhibits that were entered during the pendency portion of the hearing will be cited as "Pendency" exhibits (Parent Pendency Exs. A-E). According to the transcript, Parent Pendency Exhibit E was only marked for identification purposes, however the district submitted Parent Pendency Exhibit E with the certified hearing record (Tr. pp. 36-37). The hearing record reflects that the exhibit was not admitted into the record nor relied upon by the IHO for her interim order on pendency (see Tr. pp. 1-137; Nov. 15, 2023 Interim Order). Accordingly, Parent Pendency Exhibit E will not be relied upon for purposes of this decision.

and determined that such services were not appropriate, nor did they provide the student with educational instruction that was "specifically designed" to meet her unique special education needs (id. at p. 10). The IHO also addressed equitable considerations of the matter and determined that it was unclear if the parent cooperated with the CSE by providing the district a timely June 1 letter (id.). The IHO determined that there was no evidence to support that the June 1 letter dated May 30, 2023 was actually sent to the district (id. at pp. 10-11).[8] Accordingly, the IHO dismissed the parent's November 2023 due process complaint notice (id. at p. 11).

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

A lay advocate that identified herself as being with the Law Offices of Leonard Ledereich appeals on behalf of the parent, alleging that the IHO erred in determining the SETSS delivered by Kinship during the 2023-24 school year was not appropriate. The parent argues that when assessing a parent's actions in making a unilateral placement, the standard must be whether the parent's actions were appropriate and reasonable at the time the action was taken, not whether the outcomes were most effective. The parent argues that her actions "mirrored" the district's own process and that she was "clearly reasonable in taking actions the [district] t[old] parent[s] to take in such instances for SETSS services – namely finding a qualified special education teacher with the availability to provide SETSS services to the student" (Req. for Rev. ¶ 12). The parent argues she "simply took on the [d]istrict's responsibility of implementing the SETSS services, albeit without the rate limitations that the [d]istrict has imposed upon itself, and the parent successfully implemented the mandated SETSS" (id.).

The parent also argues that the unilaterally obtained SETSS were appropriate because the parent submitted progress reports signed by all of the student's private SETSS providers, which provided an updated snapshot of the student's deficits and included strategies which the providers employed in working with the student. As relief, the parent requests an order finding the unilaterally obtained SETSS were appropriate and directing the district to fund the SETSS at the contracted rate.

The parent also argues she timely sent a June 1 letter to the district and that the IHO erred by finding the equities weighed against the parent. The parent further alleges that even if the parent did not submit a June 1 letter, the student would still be entitled to services under pendency from November 13, 2023, the date of her due process complaint notice, through the end of the proceeding. The parent alleges the district concedes it did not implement the student's services under pendency and requests an order for compensatory pendency services pursuant to the IHO's March 2024 interim order.

In an answer with cross-appeal, the district responds to the parent's allegations, generally argues to uphold the IHO's decision in its entirety, and for its cross-appeal, argues that the parent's requested relief should have been denied on other grounds. In particular, the district alleges that the IHO lacked subject matter jurisdiction over the parent's implementation claim because there is no right under federal law to file a due process complaint notice regarding services recommended

[8] Although the facts of this case address communications that were dated May 30, 2023, the parties and IHO refer to it pursuant to the statutory requirement that such a written request by a parent be made on or before "June 1," thus it is similarly referred to as a "June 1 request" in this decision.

in an IESP; State Education Law does not grant due process rights for the purpose of IESP implementation; and a recently passed emergency regulation clarified that parents never had the right to file for due process for implementation of an IESP. The district further argues that because of the lack of subject matter jurisdiction, the IHO's interim order on pendency should be annulled. In addition, related to pendency, the district argues that since the parent contracted with an agency for the delivery of services, the parent elected to carry the responsibility of ensuring the delivery of stay-put services. The district also alleges there is no allegation it failed to fund the student's SETSS under pendency. Therefore, the district contends it is not responsible for compensatory services under pendency.

## 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]).[9] "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.).[10] Thus, under State law an eligible New

[9] 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]).

[10] 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-

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

As preliminary matters, I will address the district's cross-appeal alleging that the IHO lacked subject matter jurisdiction to address the parent's requested relief and the parent's argument that the IHO erred by finding she did not send a required letter requesting services by June 1, 2023.

#### 1. Subject Matter Jurisdiction

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).

The district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that "[s]ervices provided pursuant to an IESP are exempt from the IDEA's FAPE requirement and are instead brought pursuant to [Education Law § 3602-c]" (Answer & Cr.-Appeal at ¶ 11). The district further argues that Education Law § 4404 limits due process "to any matter relating to the identification, evaluation or educational placement of the student [with a disability] or the provision of a free appropriate public education to the student or for a matter relating to the discipline of such student" and thus Education Law § 3602-c "explicitly defines what individual due process rights parents of parentally placed students have and does not grant [Education Law §] 4404 due process rights for the purpose of implementation" (id.; quoting Educ. Law 4404[1][a]; [emphasis in the original]). The district argues "under the New York Education Law, there is not, and never has been, a right to bring a complaint for

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.

implementation of IESP claims or enhanced rate services" (Answer & Cr.-Appeal at ¶ 13; [emphasis in the original]). Additionally, as it relates to pendency, the district argues that because neither the IHO nor the SRO has subject matter jurisdiction over the claims alleged in the parent's due process complaint notice, the pendency order should be annulled (Answer & Cr.-Appeal at ¶ 4).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan 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]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs who attends a nonpublic school (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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

parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that Education Law § 3602-c does not confer IHOs with jurisdiction to consider claims related to implementation of an IESP (Answer & Cr.-Appeal at ¶ 12). In addition, the district asserts that there has never been a right to due process for claims for implementation of equitable services or for an enhanced rate and that the State Education Department (SED) adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5 to clarify that under Education Law § 3602-c parents who parentally place a student with a disability in a nonpublic school and seek payment for unilaterally obtained services included in the student's IESP are not granted the right to file a due process complaint notice to dispute the implementation of an IESP, including payment for IESP services obtained by the parent (id. at ¶ 13).

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

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

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

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue. Recently 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.).[11] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of Agudath Israel of America v. New York State Board of Regents, (No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[12]

The district acknowledges the Order to Show Cause but contends that the injunction does not change the plain meaning of the Education Law and that under the Education Law, "there is not, and never has been, a right to bring a complaint for the implementation of IESP claims or enhanced rate services" (Answer & Cr.-Appeal ¶¶ 13, 14 [emphasis in original]). 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

[11] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]).

[12] 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. The IHO would not have known of the actions of the litigants or actions by Supreme Court at the time of the IHO's final decision.

> 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]).[13]

However, acknowledging that the question has 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 regardless of the guidance document.

In this case, the parent's due process complaint notice was dated November 13, 2023, well before the July 16, 2024 deadline set forth in the July 2024 emergency regulation. Moreover, the adopted emergency regulation has been stayed through a temporary restraining order issued by Supreme Court, Albany County, and since then the regulation has now lapsed. For the reasons described above, the district's jurisdictional argument is without merit.

**2. June 1 Deadline**

Having decided that the IHO had jurisdiction to address the parent's claims in this matter, I now turn to the district's contention regarding the parent's request for dual enrollment services for the student. Here, the IHO found that the parent failed to notify the district of a request for equitable services prior to June 1, 2023 (IHO Decision at p. 10). The IHO then weighed that finding against the parent as part of her equities determination, indicating that equitable considerations did not support the parent's request for reimbursement for services (id. at pp. 10-11). As explained further below, the June 1 deadline to request dual enrollment services is a threshold issue that should have been addressed at the outset.

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

[13] 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..

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).

As such, 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]).

Here, the representative for the district properly raised the June 1 deadline defense in this matter; neither party alleges the district failed to properly raise the June 1 deadline defense and the parent in her closing brief confirmed that the district representative asserted a June 1 defense (see IHO Ex. I at p. 2).[14]

As it relates to the June 1 deadline, the parties dispute the IHO's factual finding that a letter was not sent, with the parent asserting that the hearing record supports a finding that a request for services was sent to the district prior to the deadline. Review of the IHO's findings shows that the IHO determined that the parent failed to present evidence that she properly notified the district of her request for services during the 2023-24 school year prior to June 1, 2023 (IHO Decision at p. 10). The IHO correctly noted that the parent testified her former attorney submitted a letter dated May 30, 2023 via email prior to June 1, 2023, and that she later testified that she was "cc'd" on the

[14] IHO Exhibit I and IHO Ex. II are not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Exs. I at pp. 1-9; II at pp. 1-11).

email (id.; see Tr. p. 103; Parent Ex. H ¶ 5). The IHO then noted that according to the copy of the letter in evidence, the parent was not copied on the email and there was no proof that the email was actually sent (IHO Decision at pp. 10-11; see Parent Ex. C).[15] Review of the letter shows it was addressed to the "[c]hair of the CSE" and a second district staff member and signed by the parent's representative at that time on her behalf; it does not include any notations indicating it was copied to the parent (Parent Ex. C).[16]

However, in this case the parent testified on cross-examination before the IHO that her prior attorney drafted the letter and included her on the email sent on her behalf to the district (Tr. p. 103). Further, the parent testified that her email was indicated on the letter (Tr. pp. 103-04).[17] Although there could be some consideration that the best evidence the letter was sent to the district via email would have been a copy of the email with the attachment, or testimony by the person who sent the email, the parent's testimony should not have been disregarded so abruptly. The lack of a mark identifying that the letter was copied to the parent does not mean that the parent did not receive a copy of it via email from her attorney. Accordingly, without more, the evidence in the hearing record—i.e., the parent's testimony that she was copied on the letter sent to the district on May 30, 2023—supports a finding that the parent requested services for the 2023-24 school year prior to June 1, 2023. But for the parent's testimony, the district would need to prove a negative (the non-receipt of the parent's request for dual enrollment services) but in this instance the district had ample opportunity to review the contents of the identified district email addresses/accounts proffered by the parent and to present evidence to counter the parent's testimony that the letter was sent by her former attorney and copied to her.

Accordingly, the evidence in the hearing record shows that the parent established that she complied with the requirement to request dual enrollment services from the district prior to June 1, 2023 and the district's defense to the contrary must be rejected.

[15] It appears the IHO used the same argument the district alleged in its post-hearing brief regarding the June 1 deadline and adopted it as her own (compare IHO Ex. II at p. 4, with IHO Decision at pp. 10-11).

[16] The parent offers, as additional evidence, an email dated May 30, 2023 that is purported to be the email that was sent to the district with the parent's June 1 letter attached. Generally, documentary evidence not presented at an impartial hearing may be 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]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 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]). Here, the proposed exhibit is dated prior to the parent's November 13, 2023 due process complaint notice and thus was available at the time of the impartial hearings; accordingly, I decline to consider the parent's additional evidence now on appeal. Moreover, the proposed exhibit is unnecessary to render a decision in this matter.

[17] The parent's email appears in the body of the letter as a means of contact (Parent Ex. C).

**B. Unilaterally Obtained Services**

Prior to reaching the merits of the parties' dispute, the district has not appealed from the IHO's findings that it did not meet its burden that it offered the student a FAPE for the 2023-24 school year; accordingly, such finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

I will next address the parent's argument the IHO erred by finding the private SETSS provided by Kinship during the 2023-24 school year were not appropriate.

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 Kinship 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]).[18] 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

[18] 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 Kinship Resources, LLC (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 Needs**

Although not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal, namely whether the SETSS delivered by Kinship was appropriate to address the student's needs.

According to the November 2020 IESP, the student was eligible to receive special education as a student with a speech or language impairment and was then-currently repeating kindergarten at a nonpublic school, where she received SETSS, speech-language therapy, and counseling services (Parent Ex. B at p. 1). The IESP reflected SETSS provider reports that the student's "language, attention, recall and retention [we]re affecting her academics," and that her lack of confidence made it difficult to determine "where she [wa]s 'holding academically'" (id.). In English language arts (ELA), the IESP indicated that the student had difficulty mastering the letter names and sounds, learning and retaining site words, and did not fully form upper and lower case letters or use inventive spelling (id. at p. 2). Additionally, the student needed to develop age-appropriate skills in sounding out words when reading, reading community signs, and identifying consonant and vowel sounds (id.). Regarding math, the student exhibited difficulty with number to object correspondence, became confused when skip counting by 5s and 10s, and her inattention affected her ability to count correctly (id.). The student became frustrated when she thought work was too difficult for her, and at times acted out when new math concepts were introduced (id.).

With regard to language skills, the November 2020 IESP indicated that the student presented with receptive language, expressive language, and social pragmatic skill deficits (Parent Ex. B at p. 2). According to the IESP, the student exhibited difficulty with "'why' questions, qualitative concepts and analogies," "receptive instructions," perceiving implicit statements, and understanding "abstract concepts" (id.). Expressively, the IESP indicated that the student enjoyed sharing her thoughts and expressed herself "fairly well," but needed to develop skills to provide details and say things another way to be understood (id.). At times, the student came across as "strong and defiant," and became anxious, fearful, and acted out in class (id.).

The OT reports reflected in the November 2020 IESP indicated that the student exhibited below average visual motor skills, decreased visual-perceptual motor skills, and "some sensory difficulties related to her visual, proprioceptive, and auditory system" (Parent Ex. B at p. 2). Further, it was "suspected that [the student] also ha[d] self-regulation difficulties which [we]re negatively impacting her ability to sustain and shift attention" (id. at p. 4). Parent report, reflected in the IESP, indicated that the student "ha[d] issues" with food textures, pencil grasp and forming letters, and mouthing clothing and objects—which the teacher indicated was sensory input that was "soothing" for the student (id.). No gross motor concerns were reported at that time (see id. at pp. 1-4).

The November 2020 IESP indicated that the student presented with social/emotional, behavioral, and attention span deficits, and that she needed to develop age appropriate skills regarding getting started on tasks and activities, completing tasks with the rest of the group,

restraining herself from daydreaming, joining an on-going conversation appropriately, and improving focusing skills (Parent Ex. B at p. 3). The student could become upset and resistant when presented with difficult work, "moody or bossy," and although she had made some improvement, exhibited poor frustration tolerance (id.).

Supports to address the student's management needs recommended in November 2020 included visual, verbal, and gestural cues, repetition, teacher modeling, flash cards, word walls, site word lists, multisensory instruction, tangible rewards, sentence starters, mnemonics, and three lined dotted paper (Parent Ex. B at p. 5).[19] The student's November 2020 IESP recommended that she receive five periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week each of individual and group counseling, and three 30-minute sessions per week of individual OT (id. at p. 10).

On July 6, 2023 the district obtained a speech-language evaluation of the student at the parent's request (Dist. Ex. 4).[20] At that time, the parent expressed concerns regarding the student's academic skills, her poor expressive abilities, and her difficulty paying attention in class (id. at p. 1). The speech-language pathologist conducted a parent and teacher interview, clinical observation, and oral-facial examination, and administered the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) (id. at pp. 1-3). Results of formal and informal assessments indicated that the student presented with "mild receptive/expressive language delay," which "put [the student] at risk for not following and completing class assignments and participating in classroom discussions" (id. at p. 1). Further, the speech-language pathologist reported that the student was "experiencing an adverse educational effect as a result of these delays," and that she "qualifie[d] for services because her speech and language delays negatively affect[ed] her ability to be successful in the general education environment" (id.). According to the speech-language pathologist, the student "would benefit from effective strategies and therapeutic intervention to improve the understanding, use[,] and structure of language in the classroom," and recommended that speech-language therapy "be initiated" (id.).

[19] Additionally, after the student began receiving SETSS from Kinship, on November 6, 2023 the district conducted a psychoeducational evaluation of the student "as per the Impartial Hearing order to conduct assessment of all areas," which noted that a "previous IESP" indicated the student was eligible for special education as a student with an other health-impairment and recommended that she receive seven sessions per week of SETSS, two sessions per week each of speech-language therapy and counseling, and three sessions per week of OT (Parent Ex. G ¶ D; Dist. Ex. 3 at p. 1). During the impartial hearing, the parent's advocate requested production of this IESP; however, it was not included in the hearing record (Tr. pp. 75-76; see Pendency Parent Exs. A-D; Parent Exs. A-H; Dist. Exs. 1-10). The hearing record also included a November 2023 private OT evaluation report, which indicated that the nonpublic school referred the student due to "her school performance and sensory processing" and that the school and parent also had concerns "about deficits in functional performance, fine motor skills, and that [the student] wr[ote] letters and numbers backwards" (Dist. Ex. 5 at p. 1). The occupational therapist concluded that the student "ha[d] delays in visual motor integration, planning, and organization," and that OT was "recommended at th[at] time" (id. at p. 5).

[20] The student's July 2023 speech-language evaluation is on district letterhead, but the evaluation was conducted by a provider from Comprehensive Resources (Dist. Ex. 4 at p. 1).

### 2. SETSS from Kinship

The parent asserts that the November 2020 IESP was the student's educational program in effect at the start of the 2023-24 school year and, accordingly, there was no dispute as to what constituted an appropriate program for the student. The parent testified that, at the start of the 2023-24 school year, the student was entitled to receive five periods per week of SETSS, two 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of counseling, and three 30-minute sessions per week of OT (Parent Ex. H at ¶4). Consistent with that position, the parent entered into an agreement with Kinship for Kinship to deliver "special education teacher services and/or related services and supports included in the last-agreed upon IEP or IESP, or in accordance with [the student's] pendency mandates" (Parent Ex. E at p. 1). According to the Kinship administrator, during the 2023-24 school year the student was entitled to receive five hours per week of SETSS, which Kinship providers began delivering on September 11, 2023 (Tr. pp. 111-12, 114; Parent Ex. G ¶¶ A, C, D; see Parent Ex. H ¶¶ 1, 4). The administrator testified that the student's SETSS sessions lasted "around an hour" depending on the "providers and availability" (Tr. pp. 111-12).[21]

Initially, I note that the November 2020 IESP was not a current measure of what an appropriate educational program would have been for the student for the 2023-24 school year. Pertinently, a review of the hearing record from a prior State-level administrative appeal, involving the same student, shows that the student underwent testing as part of a private neuropsychological evaluation on August 18, 2021, August 17, 2021 and August 26, 2021, which resulted in a private neuropsychological evaluation report (Application of a Student With A Disability No. 23-010, Parent Ex. E).[22] According to the August 2021 private neuropsychological evaluation, given the student's needs the evaluator recommended two hours per day of SETSS, totaling ten hours of SETSS per week, as well as continuation of counseling and speech-language services (Application of a Student With A Disability No. 23-010, Parent Ex. E at p. 5). For those reasons, the parent's assertion that a program consisting of five hours per week of SETSS as a means of implementing the student's November 2020 IESP during the 2023-24 school year is without merit and will not be further considered. Instead, it must be determined if the services provided to the student during the 2023-24 school year met the student's identified needs, which included a need for academic support, as well as needs in the areas of speech-language, OT, and counseling.

[21] There is no indication in the hearing record that the Kinship delivered speech-language therapy services, counseling, or OT to the student during the 2023-24 school year; however, as of November 13, 2023 when the due process complaint notice was filed, the student was entitled to pendency services consisting of SETSS, speech-language therapy, counseling, and OT (see Interim IHO Decision). Additionally, the November 2023 OT evaluation report indicated that the student had been receiving OT "for the past few years" (Dist. Ex. 5 at p. 1). However, the parent testified the student was did not receive OT, speech-language therapy, or counseling services during the 2023-24 school year (Tr. p. 101).

[22] An SRO may, as a matter within his or her discretion, take notice of records before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal. To ensure a complete hearing record regarding this student, to the extent necessary, the hearing record in the prior State-level appeal involving this student will be referenced (e.g., Application of a Student with a Disability, No. 23-010, Parent Ex. E).

On December 11, 2023, the student's SETSS providers prepared a progress report (Dist. Ex. 6). The report indicated that the student was in third grade at the nonpublic school and was "struggling to keep up in class" (id. at p. 1). With regard to reading, the student had achieved "some level of fluency"; however, she "tend[ed] to gloss over unfamiliar words and guess what they sa[id] instead of trying to decode them" (id.). According to the report, the student did not notice when she made errors and therefore did not self-correct, but accurately decoded words when prompted to do so (id.). The SETSS providers reported that the student's understanding of story themes and texts read aloud was at grade level, she answered basic "wh" questions, and made simple inferences/predictions, although she was not able to retell what happened in a story in sequential order (id.). An annual goal for the student was to read grade appropriate text with the use of basic phonics skills (id. at p. 3). As for writing, the student wrote several simple sentences with teacher support, she needed assistance with spelling words she had previously learned, and writing was "a very laborious task for her and every assignment t[ook] her significantly longer than her peers" (id. at p. 2). Additionally, at times, the student's handwriting was illegible, she reversed letters, and wrote very slowly (id. at p. 3). The student's writing annual goals were to write a personal narrative with several complete sentences and write a simple response to a grade appropriate text using proper punctuation (id.). In math, the progress report indicated that the student solved multiple digit addition and subtraction equations; however, it took a lot of effort and time, and she "usually m[ade] many mistakes" (id. at p. 1). The student understood new concepts in a small group setting but had a hard time completing work independently and solving word problems (id.). The SETSS providers reported that the student's overall math skills were below grade level (id.). Annual goals in math were for the student to add and subtract four-digit numbers independently, and to solve addition, subtraction, and multiplication word problems (id. at p. 3).

The December 2023 SETSS progress report indicated that the student had a hard time in a social setting, at times she did not know how to interact with the other girls her age, and family difficulties affected her self-image and her ability to navigate social interactions successfully with confidence (Dist. Ex. 6 at p. 2). To improve social/emotional skills, the student's SETSS providers developed annual goals to improve the student's self-image and ability to talk about her feelings (id. at p. 3). Additionally, the SETSS providers reported that the student's organizational skills were "poor," and she had difficulty transitioning between activities (id.). Annual goals to improve executive functioning skills included that the student would write down her homework and bring it back to school completed, use a sand timer to keep track of time, and "keep her briefcase and school papers organized" (id.). The SETSS providers recommended that the student "continue to receive her current mandate of SETSS," and also "OT and counseling to remediate her fine motor and self-regulation needs" (id.).

On May 8, 2024, the student's SETSS providers prepared a progress report (Parent Ex. F).[23] According to the report the student was still struggling to keep up in class, and was delayed in reading, writing, and math skills (id. at p. 1). In reading, the report reflected that results of the Fountas and Pinnell assessment indicated that the student's reading skills were at "a level Q with 80 [percent] accuracy" and that she needed interventions such as "reminders, modeling, and encouragement to help her gain reading skills in school" (id.). The remainder of the description

[23] The May 2024 progress report was signed by two of the SETSS providers who prepared the student's December 2023 progress report, and an additional SETSS provider (compare Parent Ex. F at p. 3, with Dist. Ex. 6 at p. 3).

of the student's reading skills was the same as the December 2023 progress report (compare Parent Ex. F at p. 1, with Dist. Ex. 6 at p. 1). Reading annual goals included in the report noted that the student would read grade appropriate irregularly spelled words, read with sufficient accuracy and fluency to support comprehension, and read grade-level text with purpose and understanding (id. at p. 2). The description of the student's writing skills was similar to that in December 2023 progress report, adding that the student could come up with ideas to write about for creative writing, and that the SETSS provider focused on the student's handwriting during session activities (compare Parent Ex. F at pp. 1, 2, with Dist. Ex. 6 at p. 2). The May 2024 progress report did not include annual goals for writing (see Parent Ex. F). The May 2024 SETSS providers' description of the student's math skills and her math annual goals were the same as in the December 2023 progress report (compare Parent Ex. F at p. 1, 3, with Dist. Ex. 6 at pp. 1, 2). Further, the May 2024 progress report descriptions and annual goals regarding the student's social/emotional skills and physical development were the same as in the December 2023 progress report (compare Parent Ex. F at p. 2, with Dist. Ex. 6 at pp. 2, 3).

Regarding specially designed instruction, the May 2024 SETSS progress report indicated that "providers use[d] strategies and interventions to help [the student] gain skills" in reading, math, and writing (Parent Ex. F at p. 1). In reading, the progress report reflected that the student needed interventions such as reminders, modeling, and encouragement, that visuals and verbal prompts helped the student gain skills slowly and steadily in math, and that the providers gave the student "encouragement, social skills training, and a lot of praise to help builder her self-image" (id. at pp. 1, 2).

The IHO determined that the May 2024 SETSS progress report provided little information regarding the student's progress and that the testimony of the parent's witnesses were uninformative and not credible. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Based on the above information, regarding the testimony of the Kinship administrator, I defer to the IHO's determination that the testimony was not credible on the point regarding the SETSS provided by Kinship during the 2023-24 school year as the administrator's testimony consisted of general statements regarding the amount of SETSS provided and the rate charged but did not give any information as to the specific work the student was doing during SETSS (see Tr. pp. 110-20; Parent Ex. G). During cross-examination the administrator was asked if he knew what the student was working on during SETSS, to which he responded he was not an educator but based on a "glance[] through the progress reports" he could see the student was working on "math, reading, writing, et cetera" (Tr. p. 117). When specifically asked on cross-examination about progress in adding and subtracting four-digit numbers, the administrator testified "I wouldn't know. I'm not an educator" (id.). Again, when asked on cross-examination if he was aware of specific progress the student has made in solving addition, subtraction, and multiplication word problems, the administrator answered "[n]o" (Tr. p. 119).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). Thus, based on the totality of the circumstances, there is insufficient evidence in the hearing record to support a finding that the unilaterally obtained SETSS provided to the student by Kinship constituted specially designed instruction sufficient to meet the student's identified needs.

Based on the service agreement between the parent and Kinship, Kinship was to provide SETSS and/or related services and supports included in the last-agreed upon IEP or IESP, or in accordance with a pendency mandate or an IHO/SRO final decision (Parent Ex. E). The parties agree that the last-agreed upon IESP was the November 2020 IESP which recommended not only SETSS but also speech-language therapy, OT, and counseling services (see Parent Ex. B). According to the Kinship administrator's affidavit, Kinship was able to provide SETSS, OT, and speech-language therapy (Parent Ex. G ¶ A). There is no evidence Kinship was able to provide counseling services; however, the administrator did include behavior support services (further identified as applied behavior analysis (ABA) services) in his description of the services provided by Kinship (id.). It is unclear from the hearing record why the student only received SETSS from Kinship during the 2023-24 school year when the evidence described above shows that the student had significant areas of need in OT, speech-language therapy, and counseling (see generally Parent Ex. B; Dist. Exs. 3-5). While the parent testified the student did not receive OT, speech-language therapy, or counseling services during the 2023-24 school year, she did not explain why those services were not obtained for the student (Tr. p. 101).

Accordingly, the evidence in the hearing record does not, under the totality of the circumstances, lead me to the conclusion that the unilaterally obtained SETSS was appropriate, in that there is insufficient evidence that the services were specially designed to address the student's identified needs given that the student had areas of need that went unaddressed and there is no evidence that the parent attempted have such services provided to the student during the 2023-24 school year. Accordingly, the parent failed to meet her burden to prove that the service she privately obtained from Kinship provided specially designed instruction that was reasonably calculated to enable the student to receive an educational benefit under the totality of the circumstances.

**C. Relief – Compensatory Education**

The parent argues that the IHO erred by failing to award compensatory education in the areas of speech-language therapy, OT, and counseling services that the student was entitled to pursuant to the student's November 2020 IESP and the IHO's Mach 28, 2024 interim order on pendency. The parent also argues that the district has not implemented pendency services and thus the IHO should have "[a]t the very minimum" ordered full hour-for-hour compensatory services for the pendency period of this matter (Req. for Rev. ¶ 21).

The district argues there is no evidence in the hearing record to support the parent's request for a bank of compensatory education. In the alternative, the district argues that if compensatory

education is awarded, to deny the parent's request for the services to be provided by providers of her choosing and allow it to issue related service authorizations (RSAs) for the compensatory education services.

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

The parent, in her due process complaint notice, requested an order awarding compensatory education in the form of SETSS (Parent Ex. A at p. 2). However, the parent did not seek compensatory SETSS during the hearing, and in her post hearing brief the parent requested a bank of compensatory education services in the areas of speech-language therapy, OT, and counseling instead, which was filed after the both the 2023-24 school year and the evidentiary phase of the proceeding had concluded (IHO Ex. I; see generally, Tr. pp. 1-137; Parent Ex. A at p. 2).[24] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial

[24] It appears that the parent has abandoned her request for compensatory SETSS as the parent does not make such a request in her request for review or post-hearing brief; the parent rather requests for the district to fund the SETSS provided to the student by Kinship during the 2023-24 school year (Req. for Rev. at p. 9; see generally IHO Ex. I).

hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

With respect to relief (as opposed to alleged violations), State and federal regulations require that the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Describing the relief sought in as much detail as possible in the due process complaint notice helps the opposing party and IHO avoid misapprehension of the nature of the case and makes the IDEA's statutory 30-day resolution process more productive for parties who make meaningful efforts to use that dispute resolution mechanism effectively. While an award of relief not explicitly requested in a due process complaint notice may not be barred under some circumstances,[25] a party also should not delay until after the hearing is complete to articulate the relief sought (see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [declining to address the parent's request for compensatory education that was raised for the first time in a post-hearing brief]). Such tactics significantly increase the likelihood that the IHO will lack an appropriate hearing record upon which to render a decision because of the party's delay in voicing the specific relief sought.

In this instance, the parent filed the due process complaint notice after the start of the 2023-24 school year and she should have had some idea of what services she was able to obtain for the student and what services she was seeking compensatory education for; however, the parent only requested SETSS and did not raise other relief until after the conclusion of the hearing. Since the parent only requested compensatory education for speech-language therapy, OT, and counseling in her post-hearing brief and did not raise it as an issue at any point prior to the conclusion of the hearing, the hearing record is underdeveloped in the areas of speech-language therapy, OT, and counseling services.[26] As such, the IHO was correct not to address compensatory education as it relates to speech-language therapy, OT, and counseling services. Accordingly, a denial of compensatory education with respect to the parent's merits claims is appropriate in this matter, and compensatory education is only addressed further below with respect to the district's pendency obligations.

**D. Pendency**

Although the parent is not entitled to funding for unilaterally obtained SETSS because she did not meet her burden of proving the appropriateness of such service, as part of the due process

[25] If it appears that a party is or should be aware of the details of the relief sought and is merely withholding the information to obtain strategic advantage by surprising the opponent at the last minute, such sandbagging is strongly disfavored and may provide a reason to reduce or deny relief when weighing equitable considerations.

[26] As indicated above, the hearing record also included a November 2023 private OT evaluation and OT reports as reflected in the student's November 2020 IESP (see Parent Ex. B; Dist. Ex. 5). The November 2023 private OT evaluation recommended OT services but did not indicate the amount or frequency; the OT reports as reflected in the student's November 2020 IESP also recommended OT and the November 2020 CSE recommended three 30-minute sessions per week of individual OT (Parent Ex. B at pp. 2, 10; Dist. Ex. 5 at p. 5).

complaint notice and on appeal, the parent has also requested that the district provide compensatory education for any services the student was entitled to under pendency but were not delivered to the student.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[27] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school

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

district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The parent argues in her request for review that the district concedes it did not implement services for the entire 2023-24 school year, including pendency services pursuant to the IHO's March 2024 interim order (see Interim Order; IHO Ex. I at p. 6). In its answer with cross-appeal the district argues there is no allegation that the district failed to fund the student's SETSS stay-put services; however, there is no evidence to support this argument, and further there is no evidence to show the district attempted to implement the services pursuant to the IHO's March 2024 interim order on pendency on its own. As indicated above, the district's argument that the IHO nor SRO have subject matter jurisdiction in the present matter must fail.

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

In its answer with cross-appeal, as indicated above, the district did not dispute what constituted pendency, only that neither the IHO nor the SRO had subject matter jurisdiction over the parent's claims and thus the pendency order should be annulled based on the lack of jurisdiction. The district also asserts that the student is not entitled to compensatory pendency services because since the parent contracted with Kinship for the delivery of SETSS, the parent took over responsibility for delivering services to the student for the 2023-24 school year.

However, in the November 13, 2023 due process complaint notice, the parent requested that the student be provided with pendency services pursuant to the November 30, 2020 IESP and made it clear that the parent was asserting a failure to deliver the same services as recommended

in the November 2020 IESP for the 2023-24 school year (Parent Ex. A). Here, the parties proceeded to five hearings on pendency which resulted in an interim order dated March 28, 2024 (Tr. pp. 1-17, 21-50). During the December 14, 2023 pendency hearing, the district representative indicated that there was a pendency implementation form that was signed by a district reviewer on November 15, 2023 in which the district agreed the student's pendency program was based on the student's November 2020 IESP which consisted of five 60-minue sessions per week of direct SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minue session per week in both individual and group counseling services, and three 30-minute sessions per week of individual OT (Tr. pp. 8-9; see Nov. 15, 2023 Pendency Implementation Form). The parent's lay advocate indicated the parent was not accepting the agreement and voiced that the parent would rather have an order by the IHO that was "more enforceable in a state court"; however, the advocate did agree that the amount and frequency of services as recommended in the November 2020 IESP were appropriate (Tr. pp. 10, 14-15).

On January 5, 2024, at the second pendency hearing, the parties again agreed that the student's pendency program was based on the November 2020 IESP (Tr. pp. 24-25). It appeared that at the conclusion of the January 5, 2024 pendency hearing the IHO was going to issue an order based on the parties' agreement (Tr. p. 25); however, the advocate made a request for the IHO to issue an order on pendency directing the district to provide services within 14 days of the interim order and that if the district failed to do so, the parent may choose her own providers regardless of the rate the provider may charge for services (Tr. p. 27). The IHO had concerns regarding not placing a rate for the pendency services and agreed to allow the parties to submit a brief on the case law regarding rates for pendency services (Tr. pp. 28-31, 37-41). It does not appear that briefs were submitted and the IHO issued an order on pendency dated March 28, 2024 ordering the district to provide pendency services based on the November 2020 IESP, which was retroactive to November 13, 2023, the date of the parent's due process complaint notice (Interim Order at pp. 4-5). If the district wanted to object to the student's pendency placement, by asserting that the parent had assumed the responsibility for pendency, the district should have raised this argument in the first instance at the impartial hearing.

Moreover, as indicated above, the student was the subject of a recent SRO decision related to the student's placement during the pendency of this matter and, as noted in that SRO decision, the district agreed that the November 2020 IESP was the basis of the student's pendency and the district did not appeal or cross-appeal any portion of the IHO's interim decision (see Application of a Student With A Disability No. 24-182).

As noted above, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Accordingly, the district was obligated in this instance to deliver the student's pendency services during the course of the proceeding and through the current appeal. Having failed to take any steps during the process of the hearing to challenge the student's pendency placement, the district has an implied agreement as to pendency for the student based on the November 2020 IESP and, under the law, is responsible for the implementation of pendency. The district was required to implement pendency services from the date of the due process complaint notice, November 13, 2023, through the date of this decision. Therefore, under pendency, the district is required to deliver compensatory education services to the student pursuant to the recommendations of the November 2020 IESP, unless the parties otherwise agree.

## VII. Conclusion

The IHO correctly found that the parent did not meet her burden to demonstrate that the unilaterally obtained SETSS were appropriate. However, I find that the district was required to implement pendency services from the date of the due process complaint notice, November 13, 2023 through the date of this decision and, therefore, is required to deliver compensatory education to the student pursuant to the recommendations of the November 2020 IESP unless the parties otherwise agree.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated September 5, 2024 is modified by reversing that portion which denied compensatory education services due to a lapse in the district's obligation to implement pendency services previously agreed to during these proceedings, and

**IT IS FURTHER ORDERED** that the student's placement during the pendency of this proceeding constituted the services listed in the November 2020 IESP and the district was required to provide the student with the services recommended in the November 2020 IESP during the pendency of this proceeding; and

**IT IS FURTHER ORDERED** that unless the parties otherwise agree, the district shall deliver compensatory education services to the student consisting of five periods per week of direct group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minue session per week in both individual and group counseling services, and three 30-minute session per week of individual occupational therapy as computed from the date of the due process complaint notice through the date of this decision (exclusive of 12 month services), less any services actually provided by the district under pendency, which compensatory education shall be utilized prior to November 15, 2026.

**Dated:** **Albany, New York**
**November 15, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**