The University of the State of New York

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

No. 24-447

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

Appearances:
Shehebar Law P.C., attorneys for petitioner, by Ariel A. Bivas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Beyond Limits Support Services (Beyond Limits) for the 2023-24 school year. The appeal must be dismissed. The cross appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The CSE convened on April 3, 2019, and created an IEP for school age programming having found the student eligible for special education services as a student with a learning

disability (see Parent Ex. B).[1] The April 2019 IEP had a projected implementation date of September 5, 2019, which chronologically speaking, would be the beginning of the student's kindergarten year. The CSE recommended four periods of direct group special education teacher support services (SETSS) in English-language arts (ELA), four periods of direct group SETSS in math and two 30-minute sessions of speech-language therapy per week (id. at p. 8).[2] The IEP indicated that the student would be placed in community school within the district (id. at p. 13).

The parent, through her attorney, sent a letter dated August 23, 2023 notifying the district of her intent to implement the services of SETSS and speech-language therapy in the April 2019 "IESP" (Parent Pendency Ex. C). The parent noted that she was pursuing direct funding/reimbursement for the services (id.).

The parent thereafter entered into a contract dated September 1, 2023, with Beyond Limits (see Parent Ex. C). The contract indicated that the parent confirmed that she understood that the student was entitled to eight periods of SETSS and two 30-minute sessions of speech-language therapy per week (id. at p. 1). The contract provided that Beyond Limits would "make every effort to implement the recommended services" for the 10-month 2023-24 school year and that the parent would be liable for the full amount of the services delivered, should the parent be unable to secure funding from the district or elsewhere (id. at pp. 1-2). The contract provided that Beyond Limits intended to provide SETSS for the 10-month 2023-24 school year at the rate of $195 per hour (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated October 10, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The due process complaint notice indicated that the student had been parentally placed in a nonpublic religious school. The parent contended that the district failed to implement the April 2019 "IESP" and that the parent was unable to implement the services at the DOE rate (id. at p. 2).[3] The parent then made speculative statements in the due process complaint notice such as if the district asserted that it offered the student a FAPE, the parent would reserve the right to challenge the appropriateness of the program inclusive of "services, programs, classes, staffing

[1] The parent submitted into the hearing record three exhibits during the pendency proceeding on January 25, 2024: the October 10, 2023 due process complaint notice as Parent Ex. A; the April 3, 2019 IEP as Parent Ex. B; and the August 23, 2023 10-day notice as Parent Ex. C, which were admitted (Tr. p. 30). During the substantive part of the hearing on June 20, 2024, the parent entered exhibits marked as Parent Exs. A-F, which were admitted (Tr. p. 70). Parent Exhibits A and B were the same as those previously admitted during the pendency hearing (compare Tr. p. 30 with Tr. p. 69). However, Parent Exhibit C entered during the substantive hearing was the September 1, 2023 parent service contract (Tr. p. 70). For the sake of clarity, the 10-day notice will be referenced to as Pendency Exhibit C; while the service contract will be referenced as Parent Exhibit C. Since, the pendency exhibits A and B are the same, they will be referenced as Parent Exhibits.

[2] The CSE recommended all services in Yiddish (Parent Ex. B at p. 8).

[3] The parties throughout the hearing record erroneously refer to the April 2019 IEP that placed the student in the public school, as an IESP for a parentally placed nonpublic school student; however, it will be referred to as an IEP in this decision (see Parent Ex. B). There is no evidence or assertion in the hearing record regarding whether the CSE has convened since the April 2019 meeting.

ratios, present levels of performance, student participation, accommodations, objectives, and drafted annual goals" (id.). Additionally, the parent argued that she intended to reserve the right to seek compensatory education if services were mandated for the student but were not provided (id.). Further, the parent requested pendency services on the basis of the April 2019 IEP, again mistaking it for an IESP (id. at p. 3). As relief, the parent requested direct funding and/or reimbursement for the private SETSS and the recommended related services that the parent unilaterally obtained at an "enhanced rate" (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 10, 2023 and concluded on August 29, 2024 after eighteen days of proceedings (Tr. pp. 1-98).[4] In a decision dated September 6, 2024, the IHO found that the district did not present any testimony to support that it offered the student a FAPE and did not submit a documentary evidence package (IHO Decision at pp. 8, 11). Further, the IHO determined that there "was absolutely no explanation, let alone a cogent and responsive explanation, for the CSE's program and placement recommendations" (id. at p. 8). Based on these findings, the IHO found that district failed to meet its burden of proof (id.).

Turning to the unilateral placement, the IHO noted that the district contended that the parent's placement was not appropriate and that the parent failed to present any testimony or substantial documentary evidence to support its position that the services were appropriate (IHO Decision at pp. 9-10). The IHO found that the parent's documentary and testimonial evidence failed to establish that the placement was appropriate and was providing the student with specially designed instruction or that the student benefited from the instruction (id. at p. 10). The IHO further held that there was no testimony from the parent to demonstrate why the student missed services or any evidence to substantiate that the requested services were appropriate (id.). Moreover, the IHO held that the parent "failed to provide any explanation for any of the actions that were taken on behalf of the Student" (id.). As such, the IHO found that the parent failed to meet her burden that the unilateral services were appropriate (id.).

The IHO noted that the district failed to raise any issues that would preclude or limit tuition reimbursement, but that the hearing record did not make it clear that the parents cooperated with the CSE and there was no evidence the district provided the parent with timely written notice (IHO Decision at p. 10). Therefore, the IHO determined that equitable factors did not support that parent's claim for reimbursement for SETSS (id.).

The IHO found that the parent has not demonstrated that she was entitled to reimbursement/direct funding for the cost of the unilateral placement or compensatory education relief (IHO Decision at pp. 10-11). The IHO dismissed the due process complaint notice (id. at p. 11).

[4] In the July 31, 2024 pendency order, the IHO noted that the parent was requesting pendency based on April 3, 2019 "IESP", which included four periods of SETSS in ELA, four periods of SETSS in math and two 30-minute sessions of speech-language therapy per week (Interim IHO Decision at p. 3). The IHO found that the April 3, 2019 "IESP" was the student's pendency and ordered the district to implement the program (id. at pp. 3-4). The IHO ordered the program district to provide four periods of SETSS in ELA, four periods of SETSS in math and two 30-minute sessions of speech-language therapy per week from the date of the October 10, 2023 due process complaint notice (id. at p. 4).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred in finding that the parent did not meet her burden that the services obtained were appropriate. The parent argues that the IHO did not point any details to demonstrate how the services were not actually appropriate as the IHO simply rendered a "boilerplate decision" without specific facts. The parent contends that she clearly showed that the unilaterally obtained services were appropriate. Further, the parent asserts that she should be given leeway when unilaterally implementing services for the student. The parent states that she is not challenge the April 2019 IEP, and that she has just implemented those services therein, which demonstrates that the services are appropriate. The parent contends that the evidence demonstrates that the services were appropriate through testimony and a progress report.

Additionally, the parent argues that the IHO erred in finding that equitable factors do not favor her request as there is nothing in the hearing record to demonstrate that the parent did not cooperate with the district. According to the parent, the district only raised the issue of excessive rate regarding equitable considerations, and did not raise the parent's cooperation. Further, the parent asserts that had the IHO failed to find that the parent provided a ten-day notice of unilateral placement, which demonstrates that the parent cooperated with the process.

Lastly, the parent argues that the IHO erred in finding the parent was not entitled to compensatory relief. The district failed to meet its burden as it did not implement the April 2019 IEP and alleges that because the parent was unable to obtained unilateral speech-language therapy services as mandated by the April 2019 IEP, the parent is therefore entitled to recover those services as compensatory education relief. The parent requests the IHO decision be reversed and the SRO award direct funding/reimbursement for eight hours per week of SETSS at the contracted rates and a bank of compensatory hours for speech-language therapy at "reasonable market rates" to be determined by the "implementation unit."[5]

In an answer and cross-appeal, the district contends that the IHO correctly held that the parent failed to meet her burden to show that the unilaterally obtained services from Beyond Limits were appropriate. The district argues the evidence in the hearing record did not sufficiently describe the student's needs or how the unilaterally-obtained services were specifically designed to address those needs. The district contends that the student has specific speech deficits that persisted and affected his social development, but that the parent failed to obtain speech-language services. The district asserts that student needed group SETSS, but only received individual SETSS with an indeterminate amount outside a school setting. Therefore, the district asserts that the IHO properly denied the parent's request and properly held that the services obtained were not appropriate for the student.

In its cross-appeal, the district argues that the IHO should have dismissed the parent's claims for lack of subject matter jurisdiction. The district asserts that neither the SRO nor the IHO have subject matter jurisdiction over an implementation case such as this under Educ. Law §§ 3602-c and 4404. Further, that a recent New York State Department of Education (NYSED)

[5] It appears that in seeking compensatory education at "reasonable market rates" the parent is actually seeking prospective services from a unilaterally selected private speech-language therapist that she may find at some point in the future.

emergency regulation clarified this issue and made a parent's lack of due process rights in this instance "explicit." The district acknowledges that there is a temporary restraining order on the emergency regulation but asserts that this has no effect on the argument and that there has yet to be final adjudication on the merits. The district requests that the parent's claim be dismissed. The district also argues that the IHO's interim decision on pendency should be vacated. The district further contends that the parent has an affirmative obligation to request services each school year and there is no entitlement to pendency in this proceeding.

The district also cross appeals the IHO's finding that equitable considerations do not favor a reduction in the requested SETSS rate. The district asserts that the rate $195 per hour was excessive; noting that $95 per hour was for overhead costs, but that those costs were not specifically identified. The district points to the United States Bureau of Labor Statistics and asserts that those statistics demonstrate that indirect and fringe benefit costs for teachers were 27.7% of a provider's hourly rate. Therefore, as here, when a provider is paid $100 per hour, the indirect costs should be reduced to 27.7% of the hourly rate, the IHO should have awarded no more than $128 per hour.

In response to the district's the cross appeal, the parent asserts that the IHO has subject matter jurisdiction and points to recent administrative decisions regarding that point. Next, the parent argues that the student is entitled to pendency and points to the district's statement that the parent's claims arise out of an IEP, not an IESP, as a reason that the student is entitled to the services under pendency. Regarding equitable considerations, the parent points to the "AIR Report" which the parent says shows that special education teachers can earn as much as $200 per hour. The parent notes that SROs have upheld the rate of $195 per hour and that those decisions are the "best possible evidence" to determine whether the rate was reasonable. The parent argues that the rate of $195 per hour was reasonable as it is within market rate and the provider acted reasonably. The parent asserts that considering an agency's expenses to justify a rate "places a bad precedent on the system" and places the burden on parents "to analyze an agency's books to determine if the financial check out before securing a provider."

V. Applicable Standards

Although a public school IEP had been developed in April 2019 for the student's kindergarten school year, and it is unclear if an IESP has ever been developed for the student, it became clear at the time the parent filed the October 2023 due process complaint notice in this proceeding that the parent had, at some point, parentally placed the student in a nonpublic school and alleged that the district failed to provide special education services to support that placement.[6] A board of education must offer a FAPE to each student with a disability residing in the school

[6] The parties dispute whether the parent's unilaterally obtained services are appropriate in the context of the April 2019 IEP which directed placement in one of the district's community schools. As noted above, the parent indicated she did not disagree with the IEP, yet the parties and the IHO repeatedly throughout the course of the impartial hearing referred to the April 2019 IEP as an IESP (see Interim IHO Decision; IHO Decision; but see Tr. pp. 2, 88; Parent Ex. A; Pendency Ex. C; IHO Exs. I; II;). The pleadings in this appeal make clear that the issue disputed by the parties in this case is over dual enrollment services at the nonpublic religious school. The undeniable fact is that the April 2019 CSE created an IEP, which is now outdated, but since the parties and IHO addressed the dispute as involving equitable services, the case will be addressed under these standards only because the parties' and IHO's misapprehensions of the facts have gone unappealed, except for the IHO's pendency determination.

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]).[7] "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.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

[7] 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]).

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

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

As an initial matter, I will address the district's cross-appeal that the IHO and SRO lack subject matter jurisdiction in this case. Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and tries to craft an argument that the statute distinguishes that parents never had the right to file a due process complaint notice with respect to implementation of dual enrollment services. The district specifically asserts that "there is not, and never has been, a right to bring a complaint for implementation of IESP claims or enhanced rate services" and that the State Education Department expressed in an August 2024 memorandum related to an emergency rulemaking.

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 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 individual needs of a student who attends a nonpublic school (Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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

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

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

> classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]).

Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[9] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained

[9] The due process complaint in this matter was filed with the district on October 10, 2023 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

> 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).[10]

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

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[11]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

[10] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

[11] 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.

2. Pendency

In its cross-appeal, the district argues that the IHO erred by finding that the student was entitled to pendency services in her interim decision dated July 31, 2024 because, according to the district, pendency does not attached to equitable services cases year to year because parents have an affirmative obligation to request services each school year and there is no automatic right to the continuation of services.

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]).[12] 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

[12] 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).

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

In this case, the IHO held that the student's pendency placement was set forth in an April 2019 IESP, suggesting that the IHO believed, in error, that the student had been parentally placed in a nonpublic school. However, as described previously, the CSE offered the student a public school placement in a community school under an IEP, and it is in that setting in which the student is entitled to receive the services pursuant to pendency in accordance with the student's IEP. The district's argument that the student is not entitled to pendency in the nonpublic school is only true insofar as there is no evidence that an IESP has been developed under the dual enrollment statute, either an SRO decision, or unappealed IHO determination, in favor of the parent's unilateral placement has been issued, or that the parties have otherwise agreed to dual enrollment services as pendency. The Second Circuit has made it clear that the district has the "authority to determine how and where the [s]tudents' most-recently-agreed-upon educational program is to be provided during the pendency of the [s]tudents' IEP disputes does not mean that the [p]arents may exercise similar authority" (Ventura de Paulino, 959 F.3d at 537). Thus, the parent in this case does not have the authority to transfer the student's entitlement to pendency under the April 2019 IEP in public school to dual enrollment services in conjunction with nonpublic school placement. Accordingly, the IHO's interim decision finding that the district must fund the student's services as IESP services as pendency must be reversed. The next question to be addressed is whether the services must nevertheless be funded as a unilateral placement in conjunction with the parent's claims on the merits, which is a separate analysis.

B. Unilateral Placement

Initially, I note the IHO found that the district failed to provide an "explanation, let alone cogent and responsive explanation, for the CSE's program and placement recommendations" and that the district failed to meet its burden of proof (IHO Decision at p. 8). But for its subject matter jurisdiction argument, which has been rejected, the district did otherwise offer any evidence or

make any challenges to the IHO's adverse findings. Accordingly, these findings have 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]).

As noted previously, the student was parentally placed in a nonpublic school for the 2023-24 school year and the parent does not seek tuition reimbursement from the district for the cost of the nonpublic 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 Beyond Limits 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, 959 F.3d at 526 [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]).[13] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

[13] 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 Beyond Limits (Educ. Law § 4404[1][c]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

While not in dispute by the parties, a discussion of the student's needs as shown by the available evidence in the hearing record is required to address the issues in this appeal. The hearing record contained two documents that described the student's needs: his April 2019 IEP developed by the district, and a 2024 progress report prepared by the student's SETSS provider (see Parent Exs. B; F).[14]

According to the April 2019 IEP, the student was found eligible for special education as a student with a learning disability and the IEP recommended SETSS for ELA and math, along with individual speech-language therapy (Parent Ex. B at pp. 1, 8). The April 2019 IEP indicated that the student's present levels of performance were developed based on a "Turning Five progress report" (id. at pp. 1-2).

Academically, the April 2019 IEP reported the student "ha[d] a speech problem" that impacted his ability to "communicate with other children" (Parent Ex. B at p. 1). Further, the April 2019 IEP indicated the student was unable to retain information that was taught (id.). According to the April 2019 IEP, the student's cognitive skills were "weak" and he had "difficulty focusing," "following directions without cues," and had a difficult time "responding to open ended questions in conversation" (id.). The April 2019 IEP indicated the student was able to understand directions that involved simple concepts (id.).

In terms of social skills, the April 2019 IEP indicated that student was "closed off and often by himself" and that the student's social development was "very poor" (Parent Ex. B at p. 2). The student's "attention span and receptivity to his environment [was] also quite low" (id.). The April 2019 IEP reported the student was "shy and his articulation difficulties contribute[d] to his lack of socialization" (id.). Moreover, the April 2019 IEP indicated the student could play with toys in an appropriate manner (id.). The parent reported that as the student continued to struggle with his speech, he easily became upset/frustrated if he was asked to repeat himself (id.). The parent also reported that the student "point[ed] to objects as a form of communication due to his speech problems" (id.).

The April 2019 IEP indicated the student's physical development was appropriate for his age, and that he was "able to make a circle or draw a straight line" (Parent Ex. B at p. 2). Further, the April 2019 IEP indicated the student demonstrated "developmentally normal self-help skills" (id.).

There were no management needs identified within the April 2019 IEP, although it indicated that the student's "recommended services" would allow the student "to access the general education curriculum" (Parent Ex. B at p. 2). The April 2019 IEP included a math goal, a reading goal, and a speech goal (id. at pp. 4-6). To address the student's needs, the April 2019 IEP recommended four periods per week of group SETSS for ELA in Yiddish, four periods per week of group SETSS for math in Yiddish, and two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at p. 8).

[14] The hearing record was silent as to what services the student received between the 2019 IEP and the current school year.

Turning to more recent information about the student's needs, the May 2024 progress report indicated the student was in fourth grade and "receive[d] [eight] hours of SETSS" (Parent Ex. F at p. 1). The May 2024 progress report indicated the student required extra time "to find the words he want[ed] to say, both in Yiddish and English," which impacted both his social skills and learning (id.). The May 2024 progress report included that the student shied "away from the other boys and [was] often alone during recess" (id.). The May 2024 progress report also indicated the student demonstrated difficulty "focusing and sustaining attention," that he was "easily distracted," and required "redirect[ion] constantly" (id.).

In math, the May 2024 progress report indicated the student had difficulty with place value, the ability to regroup, and "the mathematical process of rounding" (Parent Ex. F at p. 1). The May 2024 progress report included that the student was able to "add and subtract [two]-digit" math problems and "very simply worded addition and subtraction word problems" that "involve[ed] numbers up to 10" (id.).

The May 2024 progress report indicated that in reading, the student "read[] haltingly" and "in a choppy manner, as decoding English [was] still a struggle" (Parent Ex. F at p. 2). The May 2024 progress report included that the student performed "better" in Yiddish (id.). According to the student's "most recent reading assessment," the student demonstrated skills "more than [two] full grade levels below par" (id.). The May 2024 progress report indicated the student was unable to "read grade level text on his own" and that he required "extensive support to answer even the basic questions and [cannot] handle critical thinking questions at all" (id.).

The May 2024 progress report included that the student demonstrated "a significant word retrieval deficit" and used "poorly constructed" sentences that contained "errors" with "verb tenses and subject-verb agreement" (Parent Ex. F at p. 2). While the student's "handwriting [was] legible," the May 2024 progress report indicated the student used a second-grade vocabulary with "poor" sentence structure and punctuation (id.). According to the May 2024 progress report, the student preferred to engage in individual conversations, was "too shy to socialize with his peers" and "never initiate[d] a conversation" (id.).

2. Unilaterally Obtained SETSS

According to the direct testimony by affidavit of the educational director at Beyond Limits (director), the student "receive[d] special education services" from her agency (Parent Ex. D ¶ 12). Specifically, the director testified in her affidavit that the agency provided eight hours per week of SETSS for the 2023-24 school year (Tr. pp. 87-88; Parent Ex. D ¶ 13).

The director did not provide services to the student, but testified that the student's SETSS provider was "certified by NYS to teach students with disabilities" and was "trained and experienced in teaching literacy and comprehension to school-aged children and adolescents" (Parent Exs. D ¶ 14; E). According to a document included in the hearing record, the provider had certifications to teach early childhood education and students with disabilities from birth to grade two (Parent Ex. E). The early childhood education certificate was issued November 24, 2023, and the students with disabilities certificate was issued December 7, 2023 (id.). According to this document, the provider had previously been issued "emergency" certification to teach both areas in 2021 (id.).

During cross-examination at the impartial hearing, the director stated that for the student in the present case, she "found a provider that was the right fit for" him and that the student had a "severe language retrieval issue" (Tr. p. 85). The director further stated that the student was an English language learner, and the parent wanted the student to be fluent in "English" (id.). The director testified during cross-examination that the student's provider was with her agency for one year, and that "he ha[d] quite a few years of experience working with students" (Tr. pp. 89-90).

The director testified during cross-examination that the agency provided the student with "eight hours of SETSS services per week" on an "individual" basis (Tr. pp. 87-88). The director stated during cross-examination that while the student's "IESP" indicated group service, that was not relevant here because the parent "wanted some of the sessions out of school" so that the parent could witness the sessions (Tr. p. 88). The director further testified that the agency had determined the student needed group sessions, but he did not receive group instruction as the agency was unable to place the student in group (Tr. pp. 88-89). The director stated that the agency was unable to offer group services because the student was the only student the agency had in that age group in that school (Tr. pp. 88-89). The director also acknowledged that the parent "very much wanted" the service out of school and so the student received "some" services in school and "some" services outside of school, both with "[t]he same provider" (Tr. pp. 88-89).

During cross-examination, the director testified that when the agency began to provide services to the student, they conducted "the Fountas [and] Pinnell [a]ssessments for the reading," along with "informal math" and "language assessment[s]" to determine the student's functioning (Tr. p. 91). The director included in her affidavit that the student's provider "prepare[d] for sessions, create[d] goals, and m[et] with teachers and parents" (Parent Ex. D at ¶ 15). The educational director testified in her affidavit that the student's SETSS "[s]ervices [were] typically provided outside of the classroom," were "individualized," and "include[d] a great deal of specialized instruction" (id. at ¶ 16).

To address the student's identified needs, the May 2024 progress report indicated the student was provided with "guided questioning, prompting, and support" and that he "benefit[ted] from preferential seating," "visual aids and manipulatives," "[p]re-teaching and scaffolding," "[c]harts," and "chunked" information (Parent Ex. F at pp. 2-3).

3. Progress

In her direct testimony by affidavit, the director indicated that the student's "progress [was] measured through quarterly assessments, consistent meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes" (Parent Ex. D at ¶ 17). The director testified that the student "show[ed] signs of progress" (id. at ¶ 18). During cross-examination, the director testified that the student's provider "made a tremendous difference in reaching [the student's] goals" (Tr. pp. 85-86). The director testified that she "was very much in touch with the provider" and "review[ed] his session notes" and "progress reports" (Tr. p. 86). The director further stated that she "was in touch with the parent constantly" and provided "her updates on how her child [was] doing," as did the student's provider (Tr. p. 86). The May 2024 progress report indicated the student "made nice progress this year" (Parent Ex. F at p. 3).

In her decision, the IHO indicated that the parents' witness and documentary evidence failed to sufficiently establish that the parents' program was appropriate for the student (IHO

Decision at p. 10). The IHO further expressed concern that the parent did not explain why "services were missed" (id.). The parents argue in their request for review that at no point during the hearing was the issue of missed services raised, nor was there any evidence presented that demonstrated services were missed. The parents also argue that the record demonstrated the program sought on behalf of the student met his needs (id. at pp. 2-3).

First, the parents are correct to a degree that there was no argument, testimony, or evidence in the hearing record that the student missed any SETSS services during the 2023-24 school year. According to the director's affidavit and the May 2024 progress report, the student received eight sessions of SETSS per week (see Parent Exs. D; F). The district did not challenge this information during the hearing or in their pleadings, and there was no documentation included in the record that identified services were missed.

However, in light of the student's needs and his unilaterally obtained services, the April 2019 IEP and May 2024 progress report clearly identified that the student's speech-language delay impacted the student academically and socially (Parent Exs. B at pp. 1, 2; F at pp. 1, 2). The IEP and progress report also indicated the student experienced cognitive delays (Parent Exs. B at pp. 1, 2; F at pp. 1, 2). The student's limited social skills were mentioned repeatedly in both documents, but the SETSS provider did not describe how, if at all, he addressed this area of need. The student's language needs were mentioned multiple times, but the May 2024 progress report's "language" section described only his needs, and did not describe how the provider addressed them (Parent Ex. F at p. 2). The May 2024 progress report offered some indication of the types of strategies the SETSS provider used with the student, although the generic description did not offer a detailed explanation as to how the student was provided with specially designed instruction.

Further, the director clarified during cross-examination that the student was provided with individual SETSS, rather than group sessions as recommended in the April 2019 IEP (compare Tr. pp. 87-89 with Parent Ex. B at p. 9). Additionally, the director testified that her agency only provided the student with "some" of his SETSS in school, while other sessions were provided at home (Tr. pp. 87-89). Given the student's social deficits, the hearing record was silent as to how the student's social needs were addressed during individual SETSS sessions or outside of a school setting and, furthermore, it is clear that Beyond Limits agreed to "make every effort possible" to provide the student's services (Parent Ex. C at p.1), it did not provide any speech-language therapy during the 2023-24 school year.

Neither the May 2024 progress report nor the testimony of the director provided more than generic statements about the student's progress; specifically, they indicated it was "tremendous" and "nice" (Tr. pp. 85-86; Parent Ex. F at p. 3). The SETSS provider did not include goals for the student in the May 2024 progress report, despite the educational director's reference to their existence (Tr. pp. 85-86). The hearing record lacking information about how the student's language and social skills are being addressed, which is particularly concerning as the student did not receive speech-language therapy as recommended and clearly necessary.[15] Nor did the student

[15] Despite the lack of evidence showing that Beyond Limits provided appropriate, necessary services for the student, as described above the parent nevertheless seeks compensatory education in the form of a bank of hours at enhanced market rates or, in other words, future services private providers, which in these circumstances would just an end run around the Burlington/Carter test. As there is no evidence to support such an award and the parent did not meet the burden to show that the unilaterally obtained services were appropriate, I decline to do so.

receive group SETSS as was recommended and acknowledged by Beyond Limits as necessary (Tr. pp. 88-89). Based on the totality of circumstances, I find no reason to overturn the IHO's finding that the parents failed to meet their burden to demonstrate how the program provided educational services specifically designed to meet the student's needs.[16]

VII. Conclusion

The IHO issued an interim decision establishing pendency on the mistaken assumption that the district had offered dual enrollment services to the student in April 2019, but that determination was factually erroneous and must be reversed. Having found that the IHO correctly determined that the parent failed to meet her burden to demonstrate that the unilateral services obtained by the parent were appropriate, the necessary inquiry is at an end. The IHO properly dismissed the parent's due process complaint.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my findings above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision dated July 31, 2024 finding that the student was entitled to dual enrollment services as pendency in accordance with an "April 3rd, 2019 IESP" is reversed.

Dated: **Albany, New York**
December 17, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[16] Although I do not reach the issue of weighing equitable considerations, I note that the IHO erred factually in her decision by stating there was no evidence of a 10-day notice of unilateral placement (IHO Decision at p. 10). A 10-day notice of unilateral placement is in evidence in the hearing record and is dated August 23, 2023 (see Pendency Ex. C).