The University of the State of New York

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

No. 24-454

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
The Law Offices of Regina Skyer and Associates, L.L.P., attorneys for petitioners, by Daniel Morgenroth, Esq.

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. Petitioners (the parents) appeal from that portions of a decision of an impartial hearing officer (IHO) which, among other things, denied their request that respondent (the district) fund the costs of their daughter's private services delivered by Yes I Can for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the parents demonstrated the private services were appropriate. The appeal must be sustained in part. 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

While the student was in prekindergarten, the CSE convened to develop school age programming for the following school year on June 17, 2022 and found the student eligible for special education as a student with a speech or language impairment (Parent Ex. B at p. 1).[1] The CSE developed an IESP with a projected date for services to begin of September 1, 2022 (id.). The CSE considered a December 2021 speech report, a special education itinerant teacher (SEIT) report, a December 2021 occupational therapy (OT) report, and parent report at the meeting (id. at pp. 1-4).[2] For the 2022-23 school year, the CSE recommended that the student receive five periods per week of direct individual special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT in English (id. at p. 13).[3]

In an email to the district dated May 24, 2023, the parent indicated that she had enrolled the student in a nonpublic school at her own expense and requested that the student's special education services continue for the 2023-24 school year (Parent Ex. C).

The parent signed a contract with Yes I Can on June 21, 2023, seeking SETSS and OT services for the student (see Parent Ex. D).[4, 5]

The student attended a nonpublic school during the 2023-24 school year and received five hours of "special education services" and two 30-minute sessions per week of OT delivered by Yes I Can (see Parent Exs. E; F).

A. Due Process Complaint Notice

In a due process complaint notice dated June 12, 2024, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year and failed to implement the student's IESP (see Parent Ex. A). The parents contended that the student was entitled to pendency services pursuant to the last agreed upon program, the June 17, 2022 IESP, which consisted of five hours per week of SETSS, two 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of OT per week

[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 IESP did not reflect a date of the SEIT report (see Parent Ex. B at pp. 2-4). None of the reports listed in the IESP were entered into the hearing record by the parties (Parent Exs. A-I; Dist. Exs. 1-2).

[3] The CSE recommended that three periods of SETSS be provided in a separate location and two periods of SETSS be provided in the general education classroom (Parent Ex. B at p. 13).

[4] The representative for Yes I Can signed the contract on August 22, 2023 (Parent Ex. D at p. 3). The signatures were electronic (id.). In the listing of services the parents requested Yes I Can provide, the representative from Yes I Can crossed out "Speech Services" and initialed the modification (id.).

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

(id. at pp. 1-2). The parents argued that for the 2023-24 school year, the district: failed to convene a CSE to create either an IEP or IESP; failed to conduct updated evaluations; failed to implement the special education services; and denied the parents the right to meaningfully participate in the educational planning process for the student (id. at pp. 2-3).

As relief, the parents requested direct funding from the district for five periods of SETSS per week, two 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of OT per week, all to be provided by the parents' chosen providers at their stated rate (Parent Ex. A at p. 3). The parents contended that the program was appropriate and there were no equitable considerations that would bar funding (id.).

In a response to the due process complaint notice dated June 27, 2024, the district asserted that it intended to pursue all applicable defenses during the impartial hearing including, among others, that the parents failed to send a written request for equitable services prior to June 1 of the preceding school year and that the parent and that the parent failed to provide the district with a 10-day notice of unilateral placement.

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 18, 2024 (see Tr. pp. 1-39).[6, 7] In a decision dated September 8, 2024, the IHO indicated that "[i]f the IHO had jurisdiction in this matter, the Burlington Carter [s]tandard would guide the analysis," and then went on to find that because the district conceded that it did not timely convene a CSE meeting, develop an appropriate program, or implement the IESP, the district did not offer the student a FAPE (IHO Decision at p. 4).[8] The IHO next determined that there was sufficient evidence to find that the unilaterally obtained services were appropriate, as the parents "presented progress reports, service agreements, and provider testimony" (id.). Lastly, the IHO held that the equitable considerations favored the parents (id.). As to the rate for services, the IHO cited a recent SRO decision with similar facts and the same evidence; and held that based on the district's rate study, the district's rate stands, and the IHO "would have upheld the [d]istrict's rate" (id.).

Turning to the issue of subject matter jurisdiction, the IHO found that IHOs do not have authority to hear issues on implementation of IESPs or provider rates, and dismissed the case with prejudice for lack of subject matter jurisdiction (IHO Decision at pp. 4-5). The IHO pointed to the New York State Department of Education (NYSED) memorandum that discussed an emergency rulemaking promulgated in July 2024, stating that it was a directive to the IHO as the NYSED "is the certifying body which granted the IHO permission to decide these cases" (id.). However, the

[6] It is noted that during the impartial hearing, the IHO verified with the parent's attorney that pendency was not at issue, to which the parent's attorney agreed (Tr. p. 11).

[7] It is noted that the IHO entered three exhibits into the hearing record after the impartial hearing (see IHO Ex. I; II; III). However, two of these exhibits are relating to a different student, who is not the subject of this impartial hearing (see IHO Exs. I; II).

[8] The IHO's decision is not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Decision).

IHO noted that she still retained jurisdictions over issues related to identification, evaluation, and programming (id. at p. 5). The IHO held that the district failed to convene a CSE or create a new IESP or IEP as these facts were not in dispute (id.). The IHO ordered the district to re-evaluate the student in all areas of suspected disability, if the triennial evaluations were more than three years prior to date of the complaint, and for the district to convene a CSE within 30 days of this decision (id. at pp. 5-6).[9]

IV. Appeal for State-Level Review

The parents appeal. The parents contend that the IHO erred by dismissing the case for lack of subject matter jurisdiction as the contention that the parents do not have due process rights is without merit and contrary to the law, specifically Educ. Law §§ 3602-c and 4404. The parents argue that by disallowing jurisdiction in these types of cases, parents will be left without effective redress, and it prevents equal access as required for private school students with disabilities. Moreover, the parents assert that even if, they do not have the right to file a due process complaint notice, the emergency rulemaking states that it only applies to due process complaints filed on or after July 16, 2024 and that the IHO should not have retroactively applied the regulation. The parents also allege that the IHO should not have dismissed their claims "with prejudice" because the doctrine of res judicata would unfairly preclude an action in a different forum would otherwise result.

Additionally, the parents argue that the IHO erred in relying on a recent SRO decision and contend that the requested rate of $200 per hour was reasonable and that rate study relied upon by the district artificially deflates the rate data by using rates from outside of New York City. Further, the parents argue that any rate must include in the reasonable calculation that the SETSS provider agency is seeking a profit. As relief, the parents request that the IHO's subject matter jurisdiction determination be reversed and that the district be directed to fund SETSS at the rate of $200 per hour and OT at the rate of $245 per hour. In the alternative, the parents request that the IHO order regarding subject matter jurisdiction be modified to dismissal "without prejudice."

In an answer with cross-appeal, the district contends that the IHO properly dismissed the case for lack of subject matter jurisdiction as the parent has never had the right to file a due process complaint in this circumstance under NY Education Law. The district argues that the injunction on the regulation has no effect on its core argument that the parent does not have the right to file a due process complaint notice for implementation cases. The district argues that the parents' assertions and arguments in the request for review are without merit.

As for the cross appeal, the district argues that the IHO erred in ordering the district to reconvene a CSE for the 2024-25 school year as there is no evidence that the parent has filed a request with the district for equitable services prior to June 1, 2024 and that the IHO's order directing the CSE to convene is "outside the scope" of the impartial hearing. Further, the district argues that the IHO erred in finding that the parent met her burden to demonstrate that the services

[9] The IHO ordered that during the CSE meeting, the parents shall advise the district the preference of a IESP or IEP, that the CSE shall base its recommendations on the recent evaluative data, the district and parents shall consider goals, programs, and placement, and that the district shall issue a prior written notice that offers a cogent explanation of the program choices (IHO Decision at p. 6).

were appropriate and that equities favor the parent. The district argues that the hearing lacks evidence regarding how the student was functioning or how the alleged progress was measured.

As for equitable considerations, the district argues that the hearing record lacks a 10-day notice of the parent's intent to unilaterally obtain private services at public expense and the lack of such notice should bar any relief. The district also asserts in the alterative that the IHO correctly held that the district rate of $125 should stand. The district contends that the record supports a finding that the requested rates were excessive.

In an answer to the cross-appeal, the parents contend that the IHO correctly ordered the CSE to reconvene for the 2024-25 school year and it was irrelevant whether the parent requested equitable services for the 2024-25 school year because the district has an obligation to convene every year with or without such a parental request. The parents argue that the IHO correctly held that they met their burden to show that the private services they obtained were appropriate and that equitable considerations favored them as they cooperated with the district. The parents assert that the 10-day notice of unilateral placement was not required in this context because the student was parentally placed in a nonpublic school, but to the extent that the requirement applies, the district was "the party responsible for acting to implement the IESP services, [and] cannot reasonably claim it was unaware of its failure to do so." Additionally, the parents contend that the 10-day notice provision should not apply because they were provided not with a procedural safeguards notice. The parents request that the district cross appeal be dismissed.

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]).[10] "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

[10] 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]).

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

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

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset I will address the parents' assertion that the IHO erred by dismissing their claims for lack of subject matter jurisdiction.

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

[11] 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.

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]).

However, the district, in support of the IHO, 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 has stated its position that this is the case in a memorandum in support of a proposed amendment to 8 NYCRR 200.5 and in a recent guidance document.

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.).[12] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[13]

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice and also acknowledges the injunction but contends that parents never had the right to file a due process complaint to request "enhanced rates for equitable services'" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction.

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.

[12] As argued by the parents in their request for review, the due process complaint in this matter was filed with the district on June 12, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]; see IHO Ex. III at pp. 4-5).[14]

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 IHO's 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 was in error and must be overturned.

2. June 1 Defense

Next, similar to its response to the due process complaint notice, the district argues in its cross appeal that "there is no evidence that the [p]arents sought equitable service for the Student for the 2024-25 school year" referencing the parental request provisions in Education Law § 3602-c. The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the

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

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]).

In this case, the district's assertion that there is no evidence that the parents requested dual enrollment services for the 2023-24 school year is false. As noted above, the parents emailed the district a written request for special education services on May 24, 2023, several days before the June 1 deadline (Parent Ex. C). Thus, while the district raised the defense in the response to the due process complaint notice,[15] it failed to rebut the parents' evidence showing that the request for services was timely sent to the district. The district's argument to the contrary lacks any merit.

B. Unilaterally Obtained Services from Yes I Can

I now turn to the district's cross appeals from the IHO's alternative finding that the parents satisfied their burden to show that the SETSS and OT delivered to the student during the 2023-24 school year by Yes I Can were appropriate (IHO Decision at p. 4). Specifically, the district asserts that the evidence in the hearing record does not show how the student was performing at the start of the school year in order to describe the progress she may have made during the school year.

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents 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, they unilaterally obtained private services from Yes I Can 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

[15] A prehearing order dated June 25, 2024 indicated that one of the ways in which the June 1 defense could be permissibly raised was in the due process response.

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]).[16] 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.

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]).

[16] 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 Yes I Can (Educ. Law § 4404[1][c]).

"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. The Student's Needs

While not in dispute, a brief discussion of the student's needs provides context for the issue to be resolved, namely, whether Yes I Can delivered specially designed instruction to the student to address her needs.

The student's June 2022 IESP, developed when she was approximately five years old, indicated that she was bilingual Yiddish speaking (Parent Ex. B at p. 1). Cognitively, the IESP indicated that the student labeled colors, knew basic shapes, distinguished between one and many, and completed patterns, but did not rote count to 20, count using 1:1 correspondence up to 15, make predictions about stories, sequence a series of three pictures, follow multistep directions, and understand/follow spoken directions (id. at pp. 1-2).

According to the IESP, the student and presented with expressive and receptive language, articulation, and oral motor deficits (Parent Ex. B at p. 1). Specifically, the IESP reflected reports that the student had difficulty understanding expanded sentences, making inferences and analogies,

naming objects when the object was described, answering "why" questions, and using adjectives to describe objects (id. at p. 2). Additionally, the IESP indicated that the student's expressive language deficits limited the student "from expressing herself coherently," in that she went "off on a tangent," and had difficulty maintaining a topic with the correct details and repeating a story (id. at p. 1). Further, the student presented with limited vocabulary and word retrieval difficulties (id.). Regarding articulation and oral motor functioning, the IESP indicated that the student presented with tongue protrusion during production of /s/ and /z/, and had difficulty producing the /th/ sound (id.). The IESP also indicated that the student had difficulty adequately managing her saliva and presented with "excessive drooling and decreased strength in her lip, lingual and jaw musculature" (id. at p. 2).

Socially, the June 2022 IESP indicated that the student enjoyed playing with peers, but did not anticipate routines and act accordingly, transition from one activity to another smoothly, focus on a teacher-selected activity for 10 minutes until completion, or on an activity she perceived as difficult (Parent Ex. B at pp. 1, 3).[17] Regarding physical development, the IESP reflected reports that the student jumped in place, and negotiated playground equipment, but that she did not walk downstairs using alternating feet, kick a ball, and exhibit good coordination skills (id. at p. 3). In the area of fine motor skills, the IESP indicated that the student grasped pencils and crayons correctly, used scissors, and strung beads, but did not build a nine-block tower, draw a face with four recognizable features, and complete a 12-piece puzzle (id.). Additionally, OT reports reflected in the IESP indicated that the student exhibited fine motor and visual motor perception deficits, characterized by difficulty grasping a marker that affected her pre-writing skills, exhibiting core and upper extremity weakness and delayed fine motor coordination, and difficulty adequately completing classroom work in a timely manner (id.). Further, the student's deficits limited her from completing puzzles, copying, and participating in tasks that required pictorial instructions (id. at pp. 3-4). According to the IESP, the student needed to work on developing a mature pencil grip, maintaining border integrity when coloring, building with blocks, stringing beads, lacing cards, imitating complex block designs, and completing puzzles (id. at p. 4). The student also exhibited "very poor attention and some impulsivity" and had difficulty following directions (id.). Further, parent report reflected in the IESP indicated that the student had strong sensory needs, that removal of sensory input affected her academics and led to "behaviors" becoming "more physical," and that she was focused on "sensory input" at home (id. at pp. 2, 4).

The June 2022 IESP reflected the supports identified to address the student's management needs, including frequent prompting and redirection, repetition of important information, extra time to develop verbal responses, rephrasing of important information, use of visual aids and manipulatives, small group instruction, opportunities to initiate social interactions, positive reinforcement/encouragement, and sensory breaks (Parent Ex. B at p. 5). Additionally, the IESP indicated that the student needed prompts and scaffolding from teachers in order to grasp instruction, understand the task, and complete her work (id.). Annual goals and short-term objectives for the student included improving her ability to make quantitative comparisons,

[17] Some of the information in the June 2022 IESP about the student's then-present levels of performance was internally inconsistent, such as comments that she "play[ed] cooperatively with peers," and also did "not play cooperatively with peers," and that she was able to "run smoothly" and also that she "r[a]n clumsily with falling" (Parent Ex. B at p. 3). Additionally, the IESP indicated that the student grasped pencils correctly, and also that using a mature pencil grip was an area of need (id. at pp. 3, 4).

increase receptive language skills, use sensory information to successfully interact with people and objects, demonstrate improved play skills, improve cognitive skills, increase communication skills, and maintain focus and attention on an activity for up to 30 minutes (id. at pp. 6-12).

2. Unilaterally Obtained Services

The evidence in the hearing record indicated that Yes I Can delivered five hours per week of individual "special education services" from a special education teacher to the student during the 2023-24 school year at the nonpublic school (Parent Exs. E at pp. 1, 4; H ¶¶ 36, 46).[18] According to the June 2024 SETSS progress report, one of the student's SETSS providers reported that at the start of the school year the student's reading skills were assessed using "the KSEALS," at which time the student's score was "below average" (Parent Ex. E at p. 1).[19] The progress report indicated that the SETSS provider was working on improving the student's ability to isolate and pronounce sounds in all positions of consonant-vowel-consonant words and apply grade-level phonics and word analysis to decode words, and that the student had exhibited progress toward both goals "using Read-Bright Cur[r]iculum and Reading A-Z books and worksheets" (id. at p. 2). In the area of comprehension, the SETSS provider reported that the student worked on maintaining focus on tasks using visuals, which she achieved when 1:1 with the provider but not in the classroom (id. at p. 2). The SETSS provider also used "activating prior knowledge and the Visualizing and Verbalizing approach" to improve the student's ability to retell familiar stories with key details; by the end of the school year the student had learned to retell stories but struggled to organize her thoughts and remember key details (id.). By the end of the school year, the student exhibited "reading readiness" and achieved level D on the Fountas and Pinnell assessment, indicating progress (id. at p. 1). In math, the SETSS provider was working on the student's ability to fluently add and subtract within five, and count to 100 by ones and tens (id. at p. 3). The student achieved the first goal and at the end of the school year was working on adding and subtracting within 10 using manipulative and "ten frames" (id.). Regarding the second math goal, the SETSS provider used manipulatives and visuals with the student, and she learned to count to 100 but struggled with skip counting by 10 (id.).

According to the SETSS provider's June 2023 progress report, the student worked on social annual goals including asking and answering questions to seek help, gain information, or clarify something that was not understood using social stories, role play, and modeling (Parent Ex. E at p. 3). The SETSS provider reported that the student learned to ask for help, but continued to struggle asking to have something explained when she was unable to follow along in the classroom (id.). Another social annual goal was for the student to follow agreed-upon rules for discussions using Michelle Garcia Winner's Social Thinking Program and social stories; the student learned to participate in discussions with prompting, but she struggled to independently join classroom discussions (id. at pp. 3-4). Regarding language annual goals, the SETSS provider reported that the student worked on understanding and following spoken directions, and asking questions related

[18] A supervisor at Yes I Can referred to the 1:1 teaching services as SETSS (Parent Ex. H at ¶ 36).

[19] The associate director of educational services at Yes I Can (director) testified that two staff delivered the student's SETSS during the 2023-24 school year, both of whom were State certified to teach students with disabilities, and who were "trained and experienced in teaching literacy and comprehension to school aged children and adolescents" (Tr. pp. 13-14, Parent Ex. H ¶¶ 24, 38; see Parent Ex. G at pp. 3-4).

to an item, event, or experience (id. at p. 4). The student had learned to follow instructions with the provider but struggled to do so independently in the classroom, and she learned to ask questions with prompting but struggled joining conversations in the classroom or with peers independently (id.). The SETSS provider reported using visual cues, breaking down instructions into smaller steps, teacher modeling and role play to address those annual goals (id.).

Turning to OT, a State licensed occupational therapist from Yes I Can delivered two 30-minute sessions per week to the student during the 2023-24 school year at the nonpublic school (Parent Exs. F at p. 1; G at pp. 1-2; H ¶¶ 39-41). In a January 2024 progress report, the occupational therapist reported that while generally cooperative, the student at times could become difficult to engage in challenging activities that required multi-step directions, her attention and focus were poor, and she had significant difficulty sequencing and following motor directions due to poor motor planning and auditory processing skills (Parent Ex. F at pp. 1, 2, 4). Additionally, the student exhibited sensory processing delays and her sensory system was described as "very dysregulated"; she had "difficulty modulating her arousal level to behave appropriately when over or under stimulated" (id. at pp. 1, 2). According to the progress report, the student had difficulty completing fine motor tasks secondary to poor body awareness, which affected her writing skills and classroom work (id.). In the classroom, the student had difficulty following directions, which the teacher perceived as challenging behavior; she was "very self-directed" and would "do her own thing and seem oppositional" (id.). Results of administration of "The Sensory Profile assessment" indicated the student exhibited "definite difference in the areas of auditory and tactile processing as well as modulation"; resulting in her "overreacting" to environmental stimuli especially in the classroom, which contributed to her distractibility, difficulty processing directions, dysregulation, and "difficult behaviors" (id.). The occupational therapist reported using sensory and reflex integration exercises followed by visual perceptual, fine motor coordination activities, and handwriting practice with the student (id. at p. 2).

Regarding the student's OT annual goals, the occupational therapist reported that the student had made progress toward her goal to form all letters but continued to require cuing, and that with regard to sensory processing, the student was "calmer when sensory input [wa]s provided consistently" (Parent Ex. F at pp. 2-3). The occupational therapist developed new goals for the student to improve her spatial awareness during writing activities and sustain attention in classroom learning activities (id. at p. 3). Due to the student's significant deficits in focus, following directions, motor planning and handwriting, sensory and reflex integration deficits, and struggle to "behave and learn in the classroom setting," the occupational therapist recommended that the student continue to receive two 30-minute sessions per week of individual OT (id.).

The foregoing evidence in the hearing record does not convince me that the parents met their burden under Burlington/Carter to prove that the services unilaterally obtained for the student from Yes I Can, under the totality of the circumstances, specially designed instruction designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). In this case, the services from Yes I Can overlooked significant aspects of the student's educational needs that ultimately affect the adequacy of the services provided as a whole. First, the evidence shows that the SETSS

services were delivered exclusively in a one-on-one setting, yet the student was expected to participate in the general education classroom in the nonpublic school without any additional support.[20] This arrangement raises significant concerns about the appropriateness of the services in meeting the student's educational needs. Furthermore, the evidence showed significant deficits related to the student's eligibility as a student with a speech or language impairment. The evidence showed that student exhibited substantial articulation and oral motor challenges, including drooling, and there is no evidence that Yes I Can provided speech-language therapy for the student during the 2023-24 school year and the evidence does not otherwise explain how these deficits were addressed. Additionally, the testimony of the director indicated that parents are only billed for sessions that the student attends. However, the hearing record lacks any attendance documentation to substantiate what sessions the student attended (see Tr. p. 21). The absence of such records does not convince me of the reliability of the parents' case. These students unaddressed speech language needs and lack of support in the general education environment, when viewed in the totality of the circumstances, weigh against the determination that the services provided by Yes I Can were reasonably calculated to enable the student to receive education al benefit. Accordingly, the IHO's brief alternative statement regarding the adequacy of the unilaterally obtained services from Yes I Can must be reversed.

C. Reevaluation and CSE Meeting

Next, I will address the district's cross-appeal from the IHO's order directing the district to reevaluate the student in all areas of suspected disability, if the triennial evaluation was more than three years prior to the date of the complaint and her order for the district to reconvene a CSE within 30 days of the date of the decision (see IHO Decision at p. 6).

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]); however, an IHO should ensure that equitable relief awarded is designed to remedy an issue that was not raised. 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 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, State and federal regulations require 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, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a

[20] In contrast the student's 2022 IESP called for SETTS both outside of and within the student's general education classroom setting (Parent Ex. B at p. 13).

matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

The district is reminded of its obligations in that generally a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303 [a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The district is similarly reminded that the CSE is obligated by law and regulation to conduct an annual review for the student and there is no evidence that as of the filing of the due process complaint notice in this matter that the CSE has conducted such review since its June 2022 meeting. Moreover, the IESP from that meeting does not indicate when the last time the district conducted an evaluation of the student.[21] Accordingly, while the parent did not seek a reconvene of the CSE as a remedy in this instance, the district nonetheless is required, even absent an order to do so, to fulfill its obligation to convene for the student's annual review in accordance with the aforesaid statutory and regulatory framework.

It was within the IHO's broad authority to order that the district fulfill its obligation to reevaluate the student and convene a CSE meeting as a form of appropriate equitable relief. Thus, I find no reason to disturb the IHO's order that the district shall reevaluate the student and convene a CSE meeting within 90 days to develop the student's educational program.

VII. Conclusion

As set forth above, the IHO erred in concluding that she lacked subject matter jurisdiction to hear the parents' claims. As for the district's cross appeal, as further described above, the

[21] The only reports with a date listed in the present levels of performance was the speech report from December 2021 and a December 2021 OT report (see Parent Ex. B).

evidence does not lead to the conclusion that the 1:1 SETSS and OT services delivered by Yes I Can during the 2023-24 school year were appropriate to support the student under the totality of the circumstances. Accordingly, the parents' request for funding for the costs of the services they unilaterally obtained from Yes I Can must be denied and it is not necessary to reach the issue of whether equitable considerations weigh in favor of the parents, or whether the costs charged by Yes I can were excessive. There is no basis to overturn the IHO's directive to the district to reevaluate the student and reconvene the CSE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated September 8, 2024 is modified by reversing that portion which dismissed the parents' claims with prejudice for lack of subject matter jurisdiction; and

IT IS FURTHER ORDERED that the IHO's decision dated September 8, 2024 is modified by reversing that portion which found in the alternative that the services provided by Yes I Can for the 2023-24 school year were appropriate for the student.

Dated: **Albany, New York**
December 16, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER