The University of the State of New York

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

No. 24-461

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 Toni L. Mincieli, 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 dismissed the parent's claims on the basis that the IHO lacked subject matter jurisdiction to consider them and denied his request that respondent (the district) fund the costs of his son's private services delivered by Future Plus Services, LLC (Future Plus) for the 2023-24 school year. The district cross-appeals, arguing that the IHO erred in finding that the services provided by Future Plus were appropriate. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CSE convened on June 8, 2021 and found the student eligible for special education as a student with a learning disability (Parent Ex. B at p. 1).[1, 2] The CSE developed an IESP for the student with recommendations for five periods per week of direct group special education teacher support services (SETSS) in Yiddish (Parent Ex. B at pp. 1, 5).[3]

There is no evidence in the hearing record as to the student's education between the June 2021 IESP and the 2023-24 school year.

Via a form dated May 18, 2023, the parent informed the district that the student was parentally placed in a nonpublic school at parent expense for the 2023-24 school year and that the parent would be seeking special education services from the district for the upcoming school year (Parent Ex. H).

The parent signed a contract with Future Plus on November 28, 2023 for the provision of five hours of SETSS per week for the 2023-24 school year at a rate of $195 per hour (Parent Ex. C at pp. 1-3).[4] The student's SETSS provider created a progress report dated February 5, 2024 and a progress report dated June 4, 2024 documenting the student's performance in reading, mathematics, writing, language, and social/emotional and behavioral skills (Parent Exs. F, G).

A. Due Process Complaint Notice

In a due process complaint notice dated June 21, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). According to the parent, the CSE "strongly recommend[ed] that [the student] continue in his current placement and program set forth on the IESP dated June 8, 2021" (id. at p. 1). The parent then argued that the district failed to implement the June 2021 IESP and that because the parent was unable to locate a provider at the district rate, the parent secured SETSS at an enhanced rate (id. at p. 2). The parent sought district funding or reimbursement for costs of the student's services at an enhanced rate and an order of pendency based on the June 2021 IESP (id. at p. 3).

---

[1] Parent Exhibit B and District Exhibit 3 are duplicate copies of the June 8, 2021 IESP. For ease of reference, this decision will cite to Parent Exhibit B when referring to the June 2021 IESP. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[4] The contract indicated that the student was entitled to receive funding or reimbursement for five hours per week of SETSS, in English, from the district; however, the hearing record is not clear as to what that statement was based on (Parent Ex. C at p. 1).

The parent also requested an award of compensatory education for any missed SETSS (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 7, 2024 (Tr. pp. 1-37). In a decision dated September 10, 2024, the IHO found that the student was entitled to services pursuant to the June 2021 IESP and because the district did not implement the recommended services, the district denied the student a FAPE (IHO Decision at pp. 7-8). The IHO determined that the student should have received 5 periods of SETSS per week for the 2023-24 school year, but that the IHO lacked jurisdiction to order the parent's requested financial relief (id. at p. 9). The IHO directed the parent to request SETSS at an enhanced rate from the district's Enhanced Rate Equitable Services (ERES) Unit (id. at p. 10). The IHO noted that the executive director of Future Plus testified that Future Plus paid for the parent's legal expenses in the current proceeding and that the district asserted this as an additional reason to deny relief; however, the IHO declined to address this issue given her finding that she did not have jurisdiction over the requested relief (id.). Although the IHO denied the parent's requested relief, the IHO directed the CSE to reconvene within 30 days of the decision to create a new IESP for the student (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in holding that she lacked jurisdiction to award funding for the unilaterally obtained SETSS.[5] In addition, the parent asserts that the IHO already found that the student was entitled to receive five periods of SETSS per week for the 2023-24 school year and that the unilaterally obtained SETSS were appropriate for the student. The parent requests district funding for five periods per week of SETSS at the provider's contracted rates.[6]

The district answers the request for review and cross-appeals from the IHO's finding that the unilaterally obtained SETSS was appropriate. The district first argues that the IHO's dismissal of the requested relief for lack of subject matter jurisdiction should be affirmed. The district then

[5] The request for review does not conform to practice regulations governing appeals before the Office of State Review. The request for review is single-spaced whereas State regulation requires the request for review to be double-spaced (8 NYCRR 279.8[a][2]). In addition, although the parent's attorney endorsed the request for review, he did not set forth his law firm, mailing address, or telephone number as required by State regulation (8 NYCRR 279.7[a]). In addition, the proof of service filed with the request for review does not include language conforming to the requirements of an affirmation (see CPLR 2106). The parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a party's pleading (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements (see, e.g., Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

[6] The parent specifically requests "5 periods of SETSS"; however, it is assumed the parent intended to request funding for five periods of SETSS per week for the 2023-24 school year.

asserts that the hearing record does not support a finding that the unilaterally obtained SETSS were appropriate to meet the student's unique needs and that equitable considerations do not favor awarding the parent any requested relief.

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]).[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

[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 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

As an initial matter, neither party appeals the portion of the IHO's decision which found that the district denied the student a FAPE for the 2023-24 school year (see IHO Decision at p. 8). Accordingly, this finding has become final and binding on the parties and will not be further discussed (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]).

A. Subject Matter Jurisdiction

At the outset, it is necessary to address the issue of subject matter jurisdiction, which the IHO held she lacked, a finding the parent challenges on appeal.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related implementation of equitable services under State law and disputes regarding rates for equitable services, arguments that align with the rationale employed by the IHO in her decision in this matter (see, e.g., Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-499; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate 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.

However, the student did not merely have a services plan developed pursuant to federal law alone, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[9]

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

Education Law § 4404 concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[10] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

[9] 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]).

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

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.).[11] 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).[12]

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.

[11] The due process complaint notice in this matter was filed with the district on June 21, 2024 (Parent Ex. A at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

[12] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (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]).[13]

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.

Finally, the IHO referenced the creation of the district's ERES unit as the avenue the parent may take to obtain the requested relief. However, while a local educational agency may set up additional options for a parent to pursue relief, it may not require procedural hurtles not contemplated by the IDEA or the Education Law (see Antkowiak v. Ambach, 838 F.2d 635, 641 [2d Cir. 1988] ["While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable."]; see also Montalvan v. Banks, 707 F. Supp. 3d 417, 437 [S.D.N.Y. 2023]).

Based on the foregoing, the IHO's dismissal with prejudice on the basis of subject matter jurisdiction must be reversed.

B. Unilateral Placement

Having determined that I have jurisdiction to address the parent's case, the matter next turns to the district's cross-appeal of the IHO's determination that the SETSS services provided by Future Plus were appropriate to meet the student's needs during the 2023-24 school year. Generally, a discussion of the student's needs is necessary to determine the appropriateness of the unilateral services obtained by a parent. However, while the parent in this matter contends that the program recommended in the student's June 2021 IESP should be continued for the 2023-24 school year, as noted above, there is little information in the hearing record for as to what occurred for the student's education between the development of the June 2021 IESP and the 2023-24 school year and there is no way of determining the student's needs at the beginning of the 2023-24 school year (see Parent Exs. A; B).

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

In general, the June 2021 IESP indicated that the student had difficulty with decoding, answering "wh" questions, computing using addition and subtraction, and sustaining attention during lessons (Parent Ex. B at pp. 1-2). Progress reports, written by the student's Future Plus SETSS provider in February 2024 and June 2024 provide some insight as to the services delivered to the student during the 2023-24 school year (Parent Exs. F; G). However, a comparison of the SETSS progress reports with the description of the student from the June 2021 IESP raises significant questions regarding the appropriateness of educational programming the student has been receiving, the accuracy of the information provided in the reports, and, additionally, whether the continuation of what was a three-year old program recommendation at the start of the 2023-24 school year was appropriate.

For example, the June 2021 IESP reflected that the student's then-current academic performance level was "estimated at the[] [fifth] grade across all subject areas," yet the February 2024 progress report, completed almost three years later, noted that the student was writing at the fifth grade level and his math skills were at a third grade level (compare Parent Ex. B at p. 1, with Parent Ex. F at p. 2). The February 2024 progress report documented that the student's "writing abilities [we]re [] at a fifth-grade level," his reading rate was "well below grade-level expectation," he "struggled to decode multi-syllable words" and "found it difficult to read fluently and comprehend text effectively" (Parent Ex. F at p. 2). Nonetheless, the June 2024 progress report, completed just four months later, indicated that the student had made "significant progress in his reading abilities," his reading rate was "closer to the grade-level expectation," he was "more proficient in decoding multi-syllable words," and "more comfortable with reading fluently and comprehending text" (Parent Ex. G at p. 2).[14] According to the June 2024 progress report the student's writing skills were a whole grade level higher than in February 2024, with his writing skills falling at the sixth-grade level, and his math skills at the fourth-grade level, up from a third-grade level in February 2024 (id.).[15] Despite reports of significant progress all but one of the student's goals remained the same (compare Parent Ex. F at p. 2, with Parent Ex. G at p. 2). Accordingly, the information in the hearing record regarding the student's academics is inconsistent—showing a marked decline in the three years prior to the 2023-24 school year and a drastic increase in skills from February to June 2024. As the progress reports and the June 2021 IESP are the only evidence of the student's academic functioning, there is nothing in the hearing record to explain this.

Addressing the SETSS provided by Future Plus, the February 2024 and June 2024 progress reports provide little information on the specially designed instruction used by the SETSS provider (see Parent Exs. F; G). The February 2024 and June 2024 SETSS progress reports noted that the

[14] The June 2024 progress report indicated that the student advanced from a Fountas and Pinnell "level M" in February 2024 to a Fountas and Pinnell "level O" June 2024 and increased his reading rate from 90 words per minute to 115 words per minute (compare Parent Ex. F at p. 1, with Parent Ex. G at p. 1).

[15] With regard to writing, the June 2024 progress report stated that the student had shown progress in his ability to organize his thoughts and maintain a logical flow in his writing and that he was more confident in his ability to express his thoughts in writing (Parent Ex. G at p. 1). With regard to mathematics, the June 2024 progress report indicated the student had become more proficient in multiplication, division, and basic fractions, and his understanding of math vocabulary had improved (id.). The progress report stated that the student was better able to follow multi-step directions and manage complex directions in the classroom (id.). The progress report further stated that the student had become more confident in participating in class discussions and activities (id.).

student received five hours of pull-out SETSS per week, and the executive director of Future Plus testified that the student's SETSS services were "typically provided outside of the classroom" and were "individualized sessions that include[d] a great deal of specialized instruction" (Parent Exs. D ¶ 16; F at p. 1; G at p. 1). The February 2024 and June 2024 progress reports indicated that the provider used "a multisensory approach" and positive reinforcement but did not identify how those strategies were used with this student ((Parent Exs. F at p. 1; G at p. 1). The reports noted a few more specific strategies, such as introducing graphic organizers for writing, use of manipulatives for math, and pre-teaching and visual aids for language skills (Parent Exs. F at pp. 2-3; G at pp. 2-3).

The February 2024 SETSS progress report also noted that positive reinforcement and self-affirmation techniques were used to encourage the student to participate more in the classroom and the June 2024 SETSS progress report noted that those techniques have been effective at building the student's confidence and encouraging his participation—noting specifically that the student has become more confident in participating in class discussions (Parent Exs. F at p. 3; G at p. 3). However, according to the progress reports, the student only received SETSS in a pull-out manner and, accordingly, services were not being provided in the classroom (Parent Exs. F at p. 1; G at p. 1). As the progress report does not indicate how reports of the student's in class performance were obtained and there is no other information in the hearing record as to what occurred in the student's classroom at the nonpublic school, the student's performance in the classroom as reported on the SETSS progress report is questionable.

Further, the executive director testified that the student's progress with SETSS was measured through "quarterly assessments, consistent meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes"; however, none of these documents are included in the hearing record (Parent Ex. D ¶ 17).

Here, where the student appears to be functioning three to five years below grade level academically, the foregoing evidence in the hearing record does not support a finding that the parent met his burden to prove that the services he unilaterally obtained for the student constituted instruction specially designed to address his unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). As noted above, the hearing record, while not robust in this regard, contains some evidence of the student's progress and various strategies and materials the student's providers utilized during their sessions with him. Notably absent from the hearing record, however, is any evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, and how the SETSS were connected to the instruction provided by the nonpublic school. Thus, it is not possible to ascertain whether the provided special education supports actually assisted the student's functioning in the classroom so that he could access the general education curriculum, even if provided in a separate location as indicated in the SETSS progress reports. Accordingly, the hearing record lacks information concerning the student's general education school in terms of the instruction and curriculum provided, which necessitates assessing the unilaterally obtained services in isolation from the student's general education private placement. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access

a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate.

The student's program consisted of enrollment at a general education nonpublic school along with the parent's unilaterally-obtained SETSS, with the idea being that the specially designed instruction provided by the SETSS should support the student's access to the curriculum; however, there was insufficient information in the hearing record to find that the unilaterally-obtained SETSS served this function. As a result, the parent has failed to meet her burden of proving that the services she obtained privately were appropriate for the student under the Burlington-Carter standard and, the IHO erred in her determination that the unilaterally-obtained SETSS provided by Future Plus were appropriate to meet the student's special education needs.

VII. Conclusion

As discussed above, the IHO had subject matter jurisdiction over the parent's claims and, the evidence in the hearing record supports finding that the IHO erred by determining that the SETSS services provided by Future Plus during the 2023-24 school year were appropriate to meet the student's unique needs, those portions of the IHO's decision are reversed.

I have considered the parties' remaining contentions and find that I need not address the in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated September 10, 2024, is modified by reversing that portion which held that the IHO lacked subject matter jurisdiction over the parent's claims; and

IT IS FURTHER ORDERED that the IHO decision dated September 10, 2024, is modified by reversing that portion which held that the evidence in the hearing record established that the SETSS provided by Future Plus were appropriate to meet the student's unique needs.

Dated: **Albany, New York**
December 24, 2024

STEVEN KROLAK
STATE REVIEW OFFICER