The University of the State of New York

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

No. 24-463

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

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya Berger, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied in part her request that respondent (the district) fund the costs of her daughter's private services delivered by Always a Step Ahead Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which awarded funding for counseling services. 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

According to the hearing record, a CSE convened on December 17, 2021, and, finding the student eligible for special education as a student with a learning disability, developed an IESP for the student (Parent Ex. K).[1] The December 2021 CSE recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group (id. at p. 7).[2] The IESP indicated that the student was "Parentally Placed in a Non-Public School" (id. at p. 9).

Turning to the 2023-24 school year at issue in this matter, in an undated letter, the district informed the parent that, if she had placed the student in a nonpublic school at her expense and wanted the student to continue receiving special education services at that school, she was required to sign the form and return it to the district "no later than June 1" (Parent Ex. H). The parent signed the form on May 8, 2023, which also included the name of the nonpublic school the student would attend in September 2023 (id.).

A CSE convened on December 6, 2023, found the student continued to be eligible as a student with a learning disability, and formulated an IESP for the student with a projected implementation date of December 20, 2023 (Parent Ex. B). The December 2023 CSE recommended that the student receive five periods per week of SETSS in a group, and one 30-minute session per week of individual counseling (id. at p. 8).

On May 19, 2024, the parent electronically signed an undated document on the letterhead of Step Ahead, which was stated that she was "aware" of the rates charged by the company for services provided to the student "and that if the [district] d[id] not pay for the services, [she] w[ould] be liable to pay for them" (Parent Ex. C).[3] The document further stated that the parent was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 12/01/2021 & 12/06/2023" (id.).

For the 2023-24 school year, the student attended a nonpublic school and began receiving SETSS from Step Ahead on September 1, 2023, which continued until June 19, 2024 (see Parent Ex. G at pp 1-22). The hearing record indicates that the student began receiving counseling sessions from Step Ahead on December 21, 2023 and continued through June 10, 2024 (id. at pp. 7-21).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 1, 2024, the parent, through her attorney, alleged that the district failed to provide the student a free appropriate public education

[1] 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]).

[2] 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.

[3] Step Ahead is a corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

(FAPE) by failing to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1).[4] The parent indicated that she agreed with the programs recommended in the December 2021 and December 2023 IESPs but had been unable to find providers willing to accept the district's standard rates to deliver the services; however, the parent asserted she found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested an award of funding for five sessions per week of SETSS for the entire 2023-24 school year, and one 30-minute session per week of counseling from December 20, 2023 through June 30, 2024, to be funded at enhanced rates for the 2023-24 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 9, 2024 (Tr. pp. 1-32). In a decision dated September 9, 2024, the IHO found that the district failed to meet its burden to prove it offered the student services on an equitable basis for the 2023-24 school year, that Step Ahead provided the student with specially designed instruction to meet her needs with respect to counseling, but did not provide appropriate SETSS, and that equitable considerations would only partially support the parent's requested relief (IHO Decision at pp. 2, 5-8). With respect to equitable considerations, the IHO found that the parent did not present evidence of 10-day written notice that she was unilaterally obtaining private services for which she would seek public funding, that the parent did not incur a financial obligation until May 19, 2024, when she signed the contract, that one of the student's SETSS providers was not certified to teach the student's grade, and that the student's counseling provider's registration expired on April 30, 2024, prior to the effective date of the contract (id. at pp. 7-8). As a result of these findings, the IHO stated that he would have applied a 10 percent reduction in the award for the contract rate of counseling, would not award the contract rate prior to May 19, 2024, the date the contract was signed, and that, had funding for the private SETSS been ordered, "a reduction in the rate for their services would have been warranted" (id. at p. 8). Ultimately, the IHO determined that, because the student's counseling provider was not registered with the State after April 30, 2024, and since that predated the contract, he would only award a reasonable market rate for counseling services provided through April 30, 2024 (id.).

As relief, the IHO ordered the district to directly fund up to one 30-minute session per week of counseling provided by Step Ahead from December 21, 2023 through April 30, 2024 at a reasonable market rate, as determined by the district's implementation unit (IHO Decision at p. 8). The IHO further directed that payment was subject to the provision of "an invoice for services as well as an affidavit attesting that the services billed were provided" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in determining that her unilaterally obtained SETSS delivered by Step Ahead were inappropriate. The parent further argues that the IHO's reductions in her requested relief based on equitable considerations were improper. As relief, the parent requests funding at the contract rate of $200 per hour for five periods per week of SETSS

[4] The parent originally filed a due process complaint notice on May 23, 2024 (Parent Ex. L).

and funding at the contract rate of $250 per hour for one 30-minute session per week of counseling services for all services delivered by Step Ahead during the 2023-24 school year.

In an answer and cross-appeal, the district alleges that the IHO correctly determined that the parent's unilaterally obtained SETSS were not appropriate. The district further argues that the IHO correctly found that equitable considerations did not favor the parent. The district asserts that the parent failed to provide 10-day written notice to the district of her intention to unilaterally obtain private services and seek public funding and that there was no evidence that the parent incurred a financial obligation to Step Ahead until May 19, 2024. The district also argues that the parent did not testify at the hearing and that there was no corroborating evidence of a financial obligation. The district contends that the IHO correctly found a reduction of 10 percent was warranted for the failure to provide 10-day written notice and that the parent did not have a financial obligation from September 1, 2023 through May 19, 2024. In a cross-appeal, the district first alleges that the parent's implementation claims should be dismissed for lack of subject matter jurisdiction as the parent does not have a right to file a due process complaint notice regarding services recommended in an IESP, and that the IHO erred in finding that the parent's unilaterally obtained counseling services were appropriate.

The parent did not interpose an answer to the district's cross-appeal.

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]).[5] "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

[5] 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]).

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.).[6] 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. Subject Matter Jurisdiction

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

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP (Answer and Cr.-Appeal ¶¶ 8-12).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan

[6] 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.

for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

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

However, the district specifically asserts that "there is not, and never has been, a right to bring a complaint for implementation of IESP claims or enhanced rate services" and that the State Education Department 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 (Answer & Cr.-Appeal at ¶¶ 10-11 [emphasis in the original]).

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.).[7] 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).[8]

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 (Answer & Cr.-Appeal ¶ 11).

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

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

[8] 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]).

> services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[9]

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

B. Unilaterally Obtained Services

The district does not appeal from the IHO's finding that it failed to provide the mandated SETSS and counseling services recommended in the December 2021 and December 2023 IESPs (IHO Decision at pp. 2, 5). The district also has not appealed from the IHO's decision that it failed to offer the student an appropriate educational program for the 2023-24 school year (id. at p. 5). Accordingly, the IHO's findings and determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

The crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained SETSS and counseling services delivered to the student by Step Ahead during the 2023-24 school year, and whether equitable considerations favor direct funding of the parent's unilaterally obtained services. Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under

[9] 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.

the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services 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 SETSS and counseling services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP 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]).[10] 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 such a dispute 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459

[10] 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 services that the parent obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

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

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

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

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

1. Student's Needs

To address the appropriateness of the unilaterally obtained services, it is initially necessary to describe the student's needs, and, thereafter, to review the instruction delivered to the student to determine if the services provided specially designed instruction. A December 2021 IESP reflected that the student was attending a general education first grade class at a nonpublic school (Parent Ex. K at p. 2). The December 2021 IESP indicated that the student's full-scale IQ was 97

as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and she scored in the "average range on the Full Scale, Visual Spatial, Fluid Reasoning, Working Memory, Processing Speed, and Verbal Comprehension Scales"(id.).[11] The IESP also reported that the student "scored within the kindergarten level on all reading, math and writing subtests," and "only math word problems and spelling were within the average range," while her visual-motor and visual-motor recall skills were within the superior range (id. at p. 4). Regarding the student's speech-language development, the IESP stated that the student was able to speak intelligibly in complete, grammatically correct sentences (id. at p. 3). Physically, the student was reported to be in good health and no concerns were noted by the parent (id. at p. 4). Turning to her social-emotional development, the 2021 IESP described the student as "shy, sensitive, [and] well-behaved," with no concerns noted by her parent (id.).

The hearing record indicates that a CSE again convened on December 6, 2023 to develop an IESP for the student as counseling services had been requested (Parent Ex. B at p. 1). The December 2023 IESP reflected that no new testing occurred, but the CSE reviewed a "SETSS Report" (id.). The December 2023 IESP described the student as being "strong in her [reading] comprehension but ha[d] a very hard time with reading fluency and decoding words" (id. at p. 2). Further, the IESP stated that the student was using the Orton-Gillingham reading program, struggled with phonics rules, and needed to be in a "1:1 setting to be taught the material" (id.). The December 2023 IESP stated that the student had good ideas for writing, but, due to her struggles with decoding words, her spelling was very poor, and she had difficulty formulating her thoughts and writing them in a flowing paragraph (id.). The student needed prompting and support to write opinion and explanatory pieces (id.). The December 2023 IESP also indicated that the student understood oral and auditory language but needed additional time to process and answer questions, needed information to be repeated, and when things were rushed, she would shut down (id.).

Turning to the student's social/emotional development, the December 2023 IESP reflected that the student was embarrassed that she struggled to read as she felt everyone was looking at her, and "she just crie[d]," which led to her refusal to read in class (Parent Ex. B at p. 2). The parent stated that she was "extremely concerned" about the student's self-esteem and was requesting counseling as she felt the student's self-esteem had been declining "due to lack of meaningful connections with classmates" (id.). The parent described the student as insecure and unaware of how to be assertive or express herself and noted that she often misinterpreted others' reactions and cried at "perceived slights" (id.). The student was "self-conscious and shy," and the parent also stated that she had a strong sensitivity to sound and cried if she perceived something as "too loud" (id.). While the SETSS report indicated that the student enjoyed coloring and dancing and was "popular amongst her classmates for knowing how to dance and draw well," the parent expressed that, if the student did not acquire needed social skills and boost her self-confidence, she may begin to "struggle with school avoidance and bigger emotional problems like loneliness" (id.).

To address the student's special education needs, the December 2023 CSE recommended five periods of SETSS per week in a group and one 30-minute session of individual counseling

[11] There is a typographical error on the December 2021 IESP evaluation results. The student's full scale IQ as measured by the WISC-V is reported as "Full Scale 97 42 9-103" (Parent Ex. K at p. 2). There appears to be a digit missing from the reported score range.

per week (Parent Ex. B at p. 8). The December 2023 IESP identified strategies to address the student's management needs that included the following: praise and encouragement; repetitive learning opportunities; refocusing prompts and cues when off-task; preferential seating in the classroom near the teacher, and away from windows and doors; multisensory instruction that incorporates visuals and manipulatives; repetition, rephrasing, and/or simplifying of directions and questions; visual illustration and cues, picture support, modeling of tasks, use of manipulatives, and hands-on activities; academic tasks broken down into smaller, manageable steps; differentiated small group instruction in a quiet and structured environment; opportunities for success in class in order to increase her self-confidence; and opportunities to engage in group activities in small increments (id. at p. 4). The December 2023 IESP further identified eight annual goals that focused on the student's ability to improve her rate of reading, improve her spelling and decoding, improve her writing skills, improve her multiplication and division skills, improve her math operations when given a math word problem, express appropriate emotions, communicate wants and needs when upset, and develop appropriate social responses in social situations (id. at pp. 5-7).

2. Appropriateness of SETSS and Counseling Services

Turning to the services from Step Ahead, the only witness who testified at the impartial hearing was the company's secretary who had never met the student and did not supervise or have any contact with the student's providers or parent (Tr. pp. 16-17). Accordingly, the testimonial evidence did not speak to the appropriateness of the private services.

The parent entered an exhibit into the hearing record identified as "attendance records"; however, the document itself does not bear any title or reflect the origin of the document (Tr. p. 7; Parent Ex. G). The document reflects entries indicating the student's name, the SETSS providers' names, the counselor's name, the dates of sessions, as well as the "time in" and "time out" for each session, and the location of the service (i.e., "school") (Parent Ex. G). Each entry also has a space for "note[s]" about the session (id.).

Review of the attendance records shows that two different SETSS providers delivered services to the student for 40-minute or 60-minute sessions occurring with start times varying from day to day from September 1, 2023 through June 19, 2024 (Parent Ex. G at pp. 1-22). The IHO stated that there was no evidence presented to explain the lack of notes accompanying the entries to describe the SETSS delivered prior to March 1, 2024 (IHO Decision at p. 7). Further, the IHO indicated that "the session notes contained generic descriptions of student and the work being done, and were often repetitive" (id. at p. 6). Here, a review of the attendance records, which contained session notes, indicated that from September 1, 2023 until March 1, 2024, one of the SETSS providers reported a brief sentence of what was worked on during some of the SETSS sessions (Parent Ex. G at pp.1-13). Examples include the following: worked on reading fluency and comprehension (September 1, 2023); worked on homophones their and there (October 24, 2023); worked on math, multiplication by 10's table (November 11, 2023); worked on division using a bar model (January 30, 2023); worked on history (February 20, 2024) (id. at pp. 3-13). The December 2023 IESP referenced that the student was using the Orton-Gillingham reading program, but the program was not mentioned in either the session notes in the attendance record or the SETSS progress report (Parent Exs. B at p. 2; G; I).

The parent also presented a SETSS progress report dated May 5, 2024, which detailed more of the student's needs, but did not provide any description of instruction provided by the SETSS teacher (Parent Ex. I). For example, the progress report indicated that the SETSS provider was working on the recommendations for the student listed in the January 1, 2024 IESP and that the student needed "1:1 support" to guide her during writing and in math activities to "reteach her the material in a way that she knows" (Parent Ex. I at p. 2).[12] The progress report set forth goals for the student going forward but, beyond reference to an IESP not in evidence, did not state what goals the student had been working on leading up to the progress report (id. at pp. 1-2).

Review of the attendance records shows that counseling services were delivered to the student for 30-minute or 60-minute sessions beginning on December 21, 2023 and continuing through June 3, 2024 (Parent Ex. G at pp. 7-21). The counselor's session notes described that the student discussed many of her feelings, including a January 4, 2024 note which reflected that the student "complained about how she hates camp and doesn't know how to swim. [S]he also mentioned a classmate who is still mean to her occasionally. [W]e spoke about how to view things differently and the importance of learning how to swim" (Parent Ex. G at p. 8). Other examples from the counselor's session notes indicated that the student was "very street smart," was "good at planning logistics," and her common sense was very "impressive and matur[e]" (id. at p. 10). On February 19, 2024, the counselor listed that the student had worked on identifying worries and combatting them using logic (id. at p. 12). In a progress report dated May 15, 2024, the counselor described the student as "very mature, very articulate and always eager to come out," and that she often complained of her weak self-regulation skills and her "big emotions." (Parent Ex. J at p. 1). She also stated that the student struggled academically and socially which impacted her self-esteem and indicated that the student had not yet met her goals and still reported having many arguments with friends in addition to being shy and jealous of others (id. at p. 2). While the IHO accurately noted that the counselor's session notes from the attendance record were described with more specificity than the SETSS session notes, taking into account the totality of the evidence, the counseling session notes do not make-up for the shortfalls in the evidence relating to the SETSS.

Overall, the totality of the evidence does not support a finding that the parent met her burden under Burlington/Carter for any of the unilaterally obtained services. Although the parent argues that she attempted to implement the program recommended for the student in the December 2021 and December 2023 IESPs, the parent must still come forward with evidence that describes the services and the delivery thereof. Accordingly, I find that the hearing record lacks sufficient evidence to show that the SETSS and counseling services delivered by Step Ahead to the student constituted specially designed instruction sufficient to meet the student's identified needs. As indicated above the only witness who testified on behalf of the parent was the secretary of Step Ahead. Although the session notes provided some information, they did not adequately describe the specially designed instruction used during SETSS and counseling to address the student's identified needs. Without such evidence, I find that the parent did not sustain her burden to demonstrate how the unilaterally obtained SETSS and counseling services provided specially designed instruction to meet the student's unique needs (see L.K. v. Northeast Sch. Dist., 932 F.

[12] A January 1, 2024 IESP was not entered into evidence; the most recent IESP in the hearing record was developed on December 6, 2023, when counseling services were added (see Parent Ex. B).

Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]).

Based upon the foregoing, I find that the IHO correctly determined that the hearing record did not include sufficient evidence to find that the SETSS procured for the student was appropriate and therefore, correctly denied the parent's request for direct funding of her unilaterally obtained SETSS for the 2023-24 school year. I further find that the IHO erred in finding that the parent's unilaterally obtained counseling services were appropriate.[13]

VII. Conclusion

In summary, the parent failed to demonstrate the appropriateness of her unilaterally obtained SETSS and counseling services. In light of these determinations, the IHO erred in finding a portion of the parent's private counseling services were appropriate and erred in awarding direct funding as relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated September 9, 2024 is modified by reversing those portions which found that a portion of the parent's unilaterally obtained counseling services were appropriate and ordered the district to provide direct funding from December 21, 2023 through April 30, 2024.

Dated: **Albany, New York**
November 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] As the Second Circuit has explained, "[t]he first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"; however in this case the IHO appeared to have found the SETSS inappropriate and the counseling partially worthy of reimbursement without considering the totality of the circumstances (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]). This splintering of the IHO's conclusion regarding the appropriateness of the unilaterally obtained services was error.