The University of the State of New York

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

No. 24-470

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

Appearances:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tuneria R. Taylor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their due process complaint notice pertaining to the 10-month portion of the 2024-25 school year and limited the student's pendency entitlement to the date of the IHO's decision. The district cross-appeals from that portion of the IHO's decision which ordered it to fund the costs of private special education services obtained by the parent during summer 2024 and which extended the student's pendency entitlement past summer 2024. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter is remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but

is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has a history of hearing impairment and use of bilateral cochlear implants due to sensorineural hearing loss (Parent Ex. J at p. 1; Dist. Ex. 2 at p. 1). During the 2022-23 school year, the student was parentally placed in a second grade nonpublic school class "with peers who [we]re one year younger" and was "assigned a special education teacher to support her" (Parent Ex. J at p. 1; Dist. Ex. 2 at p. 1).

A CSE convened on May 16, 2023, determined that the student was eligible for special education services as a student with deafness, and developed an IESP with a projected implementation date of May 16, 2023 (Dist. Ex. 2 at p. 1).[1] The May 2023 CSE recommended that the student receive 12 periods per week of group special education teacher support services (SETSS) in Yiddish; three 30-minute sessions per week of individual speech-language therapy in Yiddish; one 30-minute session per week of group speech-language therapy in Yiddish; two 30-minute sessions per week of individual hearing education services in Yiddish; and daily, full-time, individual oral transliterator services (id. at p. 10).[2] Additionally, the May 2023 CSE recommended daily, individual hearing assistive technology for the student's use at school during all periods except gym and lunch (id. at p. 11).

The student attended a mainstream nonpublic school during the 2023-24 school year (third grade) (see Parent Exs. K at p. 1; L at p. 1).

Via a letter sent by email to the district on May 21, 2024, the parents, through their attorney, requested that the district develop an IESP for the student for the 2024-25 school year (Parent Ex. D at pp. 1, 2). The parents advised that they would request an impartial hearing seeking pendency and reimbursement for privately-obtained special education services if the district failed to convene a meeting before the school year began or timely implement services (id. at p. 2).

In a letter dated May 30, 2024, the parents advised the district of their intent to place the student in a nonpublic school at their expense and requested that the student's special education services continue to be provided for the 2024-25 school year (Parent Ex. C).

On June 5, 2024, an IHO in a prior proceeding pertaining to the student's May 2023 IESP found that the district failed to offer a free appropriate public education (FAPE) to the student and ordered the district to directly fund/reimburse the parents for the student's private SETSS, speech-language therapy, hearing education services, and oral transliterator services for the 12-month 2023-24 school year (Parent Ex. B at pp. 8, 11-12).

On June 28, 2024, the parents signed a contract with SoundWaves Corp. (SoundWaves) for the provision of two 30-minute sessions per week of individual speech-language therapy and

[1] The student's eligibility for special education as a student with deafness is not in dispute (see 34 CFR 300.8[c][3]; 8 NYCRR 200.1[zz][2]).

[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.

two 30-minute sessions per week of individual hearing education services for the summer 2024 (July 1, 2024-August 30, 2024) (Parent Ex. F at pp. 1-4; see Parent Ex. M ¶¶ 1, 9).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parents alleged that the district denied the student a FAPE for the 2024-25 school year (see Parent Ex. A). Initially, the parents requested pendency services pursuant to the June 5, 2024 IHO decision from the prior proceeding consisting of six hours per week of individual SETSS, two 30-minute sessions per week of individual hearing education services, full-time individual oral transliterator services, and two 30-minute sessions per week of individual speech-language therapy, all in Yiddish, for the summer portion of the 12-month school year; and 12 hours per week of individual SETSS, full-time individual oral transliterator services, and four 30-minute sessions per week of individual speech-language therapy, all in Yiddish, for the 10-month portion of the school year; with all services at the rates charged by the parents' chosen providers (id. at p. 3).

Turning to the substance of the complaint, the parents alleged that the district failed to convene to develop an educational plan or conduct updated assessments in preparation for the 2024-25 school year and failed to arrange for implementation of or offer providers to deliver the student's last agreed upon services (Parent Ex. A at p. 3). As relief, the parents sought funding for the same services as the student's pendency program at "rates charged by the providers the parent chooses" (id. at p. 4). In the alternative, the parents requested compensatory education services at an rates charged by providers chosen by the parent (id.). Finally, the parent requested declaratory findings that the district failed to evaluate the student or fund evaluations with parent-chosen providers and failed to provide a FAPE to the student (id.).

In a due process response dated July 15, 2024, the district advised of its intention to pursue all applicable defenses, including but not limited to that the parents failed to timely send a written request for equitable services pursuant to Educ. Law § 3602-c and failed to notify the district of their disagreement with the offered program and placement pursuant to 20 U.S.C. §1412(a)(10)(c)(iii) (Due Process Resp.).

B. Events Post-Dating the Due Process Complaint Notice

On July 2, 2024, the parents signed a contract with Little Apple Services Agency (Little Apple) for the provision of full-time oral transliterator services, 12 sessions per week of SETSS, and two 30-minute sessions per week of speech-language therapy for the period from July 2, 2024 until June 28, 2025 (Parent Ex. E at p. 1). On July 16, 2024, the parents signed a contract with SoundWaves to continue the student's speech-language therapy and hearing education services for the remainder of the 2024-25 school year (September 5, 2024-June 30, 2025) (Parent Ex. F at pp. 5-6).

C. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 7, 2024 (see Tr. pp. 1-28). During the hearing, the parents' attorney requested pendency pursuant to the June 5, 2024 IHO decision (Tr. pp. 10-11). The

district concurred and the IHO advised that she would include this in her final order (Tr. p. 11). The district rested on the documentary evidence entered into evidence (Tr. p. 11; see Dist. Exs. 1-3). The parents presented documentary evidence, as well as testimony of the SoundWaves administrator, the owner of Little Apple, and the parent (Tr. pp. 14-15, 18-21, 22; Parent Exs. M-O; see Parent Exs. A-L).[3]

In a decision dated September 13, 2024, the IHO separately discussed the summer portion of the 2024-25 school year and the 10-month portion of the 2024-25 school year (IHO Decision at p. 13). The IHO found that the district failed to offer the student a FAPE for summer 2024 as there was no dispute that the student was entitled to summer services and the district failed to develop or implement an individualized education program (IEP) for the student (id. at pp. 13-14). However, the IHO dismissed the parents' claim regarding the 10-month portion of the school year as unripe because, at the time of the due process complaint notice, the district had time to develop an IESP for the student before the school year began (id. at p. 14). Accordingly, the IHO found that, even if the district failed to timely convene a CSE, it would not "yet" have amounted to "a substantive denial of a FAPE" (id.). The IHO also found that any allegation about the district's future failure to implement services was speculative and not yet ripe (id.).

Turning to relief, the IHO found the appropriateness of the unilaterally-obtained services not in dispute because the district did not challenge them and noted, in the alternative, that she would have found all but the oral transliterator's services to be appropriate because the record contained no evidence of the oral transliterator's qualifications or that those services were specially designed to meet the student's needs (IHO Decision at p. 14). In regard to equitable considerations, the IHO indicated that she declined to reduce the agency's contracted rates as the district did not dispute them (id.). However, the IHO determined that the parents obtained more speech-language therapy services (four instead of two sessions) and SETSS (12 instead of six sessions) for summer 2024 than what was necessary for the student in that both SoundWaves and Little Appeal simultaneously delivered the student services during summer 2024 (id.). The IHO awarded funding for speech-language therapy for summer 2024 to SoundWaves but not Little Apple, as she found services provided by Little Apple to be duplicative and excessive in cost, noting that at least 34 percent of Little Apple's overhead, which was incorporated into the rates charged by the agency, was impermissibly applied to loan interest (id.).[4]

With respect to the student's stay put placement during the pendency of the proceedings, the IHO found the student was entitled to the last agreed upon program based upon the June 2024 IHO decision, as agreed to by the parties, "between the filing date of the [due process complaint notice] and the date" of the IHO's decision (i.e., September 13, 2024) (id. at pp. 3-4, 14-15). The IHO found that the student's pendency encompassed only "the student's general program (the services, their frequency, and duration)" but did "not include a specific provider and rate" (id. at p. 15). Thus, as pendency, the IHO ordered the district to fund the following for the period of July

[3] The parents submitted a written closing brief (Parent Ex. P).

[4] The IHO found all other contentions to be unnecessary, without merit, beyond her jurisdiction, or without sufficient basis in the record for a finding, denied any relief not specifically discussed, and dismissed all of the parents' remaining claims, with prejudice (IHO Decision at p. 15).

and August: six periods per week of individual, bilingual SETSS; two 30-minute sessions per week of individual, bilingual hearing education services; two 30-minute sessions per week of bilingual, individual speech-language therapy; and full-time oral transliterator services (id.). As pendency for the period of September 1, 2024 to the date of her decision, September 13, 2024, the IHO ordered the district to fund: 12 periods per week of individual, bilingual SETSS; two 30-minute sessions per week of individual, bilingual hearing education services; four 30-minute sessions per week of individual; bilingual speech-language therapy; and full-time oral transliterator services (id. at p. 15).

As relief, the IHO ordered the district to immediately convene a CSE meeting and develop an IESP for the student for the 2024-25 school year if it had not already done so (IHO Decision at p. 15). In addition, the IHO directed the district to pay Little Apple for delivery to the student of up to six hours per week of SETSS at the rate of $165 per hour and full-time oral transliterator services at the rate of $80 per hour for services provided between July 1 and August 31, 2024, to the extent not already funded through pendency, upon receipt of invoices and session logs corresponding to those dates (id.). The IHO also ordered the district to pay SoundWaves for delivery to the student of up to one hour per week of speech-language services and up to one hour per week of hearing education services at the rate of $300 per hour for services provided between July 1 and August 31, 2024, to the extent not already funded through pendency, upon receipt of invoices and session logs corresponding to those dates (id.). The IHO dismissed, without prejudice, all claims regarding the 10-month portion of the 2024-25 school year as not ripe for adjudication (id. at pp. 15-16).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred by finding their claims pertaining to the 10-month portion of the 2024-25 school year unripe for adjudication. More specifically, the parents allege that the IHO erred in sua sponte raising the defense of ripeness. In addition, the parents assert that the district should have reviewed the student's IEP and IESP by the May 2024 annual review date, or at least before July 1, 2024 and that, therefore, the issue of the district's failure to conduct a timely annual review was ripe for adjudication at the time of the impartial hearing. The parents argue that the IHO's separate consideration of the student's July (summer) and September (10-month) start dates did not rectify the district's failure to timely convene because a school year runs from July 1 to June 30 and the district's track record of noncompliance dating back to 2019-20 made it unreasonable to assume that a CSE would convene and the district would implement services before September 2024. The parents note that they filed their request for equitable services prior to June 1 as required by law. The parents submit that funding for the entire school year is reasonable as the district's failure to convene by May 2024 forced them to commit to paying for a full year of services. In regard to pendency, the parents allege that the IHO erred by limiting the student's pendency entitlement to the date of the IHO's decision as the law requires the district to fund the student's pendency services during the entirety of the proceedings.

As relief, the parents request reinstatement of their claims relating to the 10-month portion of the 2024-25 school year, pendency pursuant to the June 5, 2024 IHO decision for the entirety of the proceedings, and an order directing the district to fund the student's private services for both the summer portion and the 10-month portion of the 2024-25 school year, all at the providers' rates.

In an answer and cross-appeal, the district argues that the IHO correctly dismissed the parents' claims relating to the 10-month portion of the 2024-25 school year without prejudice as unripe and, as an alternative ground for dismissal, argues that the IHO lacked subject matter jurisdiction over implementation claims regarding services recommended in an IESP. The district argues that the IHO erred in finding that the appropriateness of the unilaterally-obtained services was not in dispute and that there is no merit to the parents' contention that the district "waived" arguments relating thereto, noting that the parents carry the burden to show the appropriateness of the unilaterally-obtained services. On that point, the district alleges that the parents failed to meet their burden to prove that services delivered by SoundWaves and Little Apple were specially designed to meet the student's needs. Regarding equitable considerations, the district argues that the IHO correctly found the parents sought excessive services and that rates charged by Little Apple were excessive but argues that the IHO failed to deduct loan interest from the rate awarded for services for summer 2024. The district also argues that the IHO erred by not reducing the rate awarded based on the district's evidence and improperly found the district waived the argument.

The district asks the SRO to vacate the IHO's pendency award beyond summer 2024, arguing that pendency does not attach to a request for equitable services.

In a reply and answer to the cross-appeal, among other things, the parents reiterate that the IHO improperly dismissed their claims relating to the 10-month portion of the 2024-25 school year. The parents argue that the district's argument about subject matter jurisdiction is misplaced as the parents' claims were related, not just to implementation, but also to the district's failure to develop an IEP or an IESP for the student. The parents argue that the appropriateness of unilateral services and claims of excessive cost cannot be raised for the first time on 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

[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]).

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.).[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. Preliminary Matter – Subject Matter Jurisdiction

As a preliminary matter, I must first address the district's cross-appeal alleging that, should the SRO reverse the IHO's dismissal of the parents' claims pertaining to the 10-month portion of the 2024-25 school year, the IHO lacked subject matter jurisdiction to address the parents' requested relief because the parents have no right to due process for claims pertaining to implementation of equitable services. However, here, the parents' claims included allegations other than those related to implementation, including allegations about the district's failure to convene the CSE to engage in educational planning for the student for the 2024-25 school year.

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

[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.

parent or person in parental relation 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]). The district does not argue that these provisions preclude the parents' claims set forth in the due process complaint that the district failed to develop an educational plan or conduct updated assessments in preparation for the 2024-25 school year (Parent Ex. A at p. 3). In fact, the district states in its answer that the Education Law "clearly allow[s] the parent of a parentally-placed student to pursue a due process complaint to seek review of a CSE's program recommendation."

As the July 1, 2024 due process complaint notice sets forth claims other than implementation, including related to the development of an educational plan and the need for updated assessments, over which IHOs and SROs indisputably have jurisdiction, it is not necessary to further discuss, in detail, whether the IHO or an SRO have jurisdiction over claims related to implementation of an IESP.

Nevertheless, even if the parents' sole claims related to implementation of equitable services, the district's arguments mirror the same arguments that have been addressed in a number of recent State-level administrative decisions; and in line with those decisions, at this juncture, there is not a sufficient basis to find a lack of jurisdiction (see, e.g., Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-544; Application of a Student with a Disability, Appeal No. 24-542; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; 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).

B. 2024-25 School Year

1. Ripeness and Equitable Services

Turning to the parents' claims against the district in regard to the 10-month portion of the 2024-45 school year, the IHO found the parents' claim that the district failed to convene the CSE

unripe because the school year had not commenced and the district still had time to convene and develop an educational plan for the student. She therefore held that there was no substantive FAPE denial and the CSE should reconvene to develop a program immediately (IHO Decision at p. 14).

The parents argue on appeal that their claims for the 10-month portion of the 2024-25 school year are ripe because the district should have completed its annual review and made recommendations for the student's educational programming for the 2024-25 school year by May 16, 2024, the date set in the May 2023 IESP for the annual review.[7]

"An issue is ripe for judicial resolution only if it presents 'a real, substantial controversy, not a mere hypothetical question'" (Longway v. Jefferson Cnty. Bd. of Sup'rs, 24 F.3d 397, 400 [2d Cir. 1994], quoting AMSAT Cable Ltd. v. Cablevision of Conn., Ltd. P'ship, 6 F.3d 867, 872 [2d Cir.1993] [internal quotations and citations omitted]). In other words, "a case . . . lack[s] ripeness when it involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all" (AMSAT Cable Ltd., 6 F.3d at 872 [internal quotation marks omitted]).

As an initial natter, the hearing record supports a finding that the parents' claims as asserted in the due process complaint notice were ripe for adjudication in the underlying impartial hearing. Rather than hypothetical, uncertain or contingent events, the parents' claims were based on the district's failure to conduct a timely annual review and recommend services or extended-year services for the student for the 2024-25 school year, events which had already occurred at the time the due process complaint notice was filed and the impartial hearing commenced.

Moreover, the facts of this case make it clear that the district failed to offer the student a FAPE for the 2024-25 school year, whether the student was a 10-month or 12-month student. The last IESP was dated May 2023 and there is no indication that the district attempted to convene a CSE prior to the start of the 2024-25 school year. State guidance directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]), there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 38-39, Office of Special Ed. [updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf).

The district's failure to convene a CSE to develop the student's IEP for summer 2024 is not in dispute given the IHO's final and binding determination that the district failed to offer the student a FAPE for that time period. However, the district's failure to convene the CSE to develop the IESP remains at issue.

[7] As neither party appealed the IHO's finding that the district failed to provide a FAPE for the summer portion of the 2024-25 school year, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992 (S.D.N.Y. March 21, 2013).

Under the IDEA and State regulations, a CSE must meet "at least annually" to review and, if necessary, revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IDEA and State regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations do require that a district have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]).[8, 9]

State Education Law does not specify the timing of a CSE meeting to develop an IESP but provides that a CSE shall develop an IESP "in the same manner" as an IEP (see Educ. Law § 3602-c[2][b][1]). In instances such as the present case, where the district of residence and the district of location are the same, the reasonable expectations are that 1) a CSE will comply with its obligation to conduct a review of the student's special education programming at least annually, and 2) would have an IESP in place at the beginning of the 10-month portion of the school year when the child begins attending school, assuming that a timely parental request for equitable services was made (see Educ. Law § 3602-c[2][a]).

In either event, failure to provide a finalized IEP, or in this case a finalized IESP, before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE or equitable services (see Y.S. v. New York City Dep't of Educ., 2024 WL 4355049, at *18 [S.D.N.Y. Sept. 30, 2024] [rejecting the argument that a failure to have an IEP in place was a per se denial of a FAPE]; Application of a Student with a Disability, Appeal No. 15-099 [finding that the district's failure to finalize an IEP until after the start of the school year contributed to the denial of a FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

In this case, it is undisputed that, on May 21 and May 30, 2024, the parents requested that the district develop an IESP and provide the student with special education services thereunder for the 2024-25 school year (Parent Exs. C; D) and that, in or around May 2024, the CSE should have conducted an annual review of the student's programming (see Dist. Ex. 2 at p. 1). However, there is no indication that, as of August 7, 2024, the date of the impartial hearing, the district had

[8] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

[9] Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

convened a CSE to review and, if necessary, revise the student's IESP (see generally Tr. pp. 1-28). In theory, the district could have convened the CSE in the remaining weeks before the start of the 10-month school year. However, the district did not argue during the impartial hearing, let alone present evidence, that it had scheduled or was in the process of scheduling an annual review (see generally id.).[10]

Notably, in its answer and cross-appeal dated November 26, 2024, filed well after the start of the 10-month school year, the district does not so much as allege that it convened a CSE to develop an IESP or had it in place for the student at the beginning of the 10-month portion of the 2024-25 school year. Therefore, at this juncture there is no reason to conclude that the district developed an IESP for the student in compliance with its obligations. Further, there are no mitigating factors in this matter that would indicate that the procedural violation did not impede the student's right to equitable services, impede the parents' opportunity to participate in the decision-making process, or deprive the student educational benefits (see Y.S., 2024 WL 4355049, at *18 [finding that, despite the lack of an IEP, the student was "incontrovertibly receiving special education services"]). Accordingly, the evidence in the hearing record supports a finding that the district denied the student equitable services for the 10-month portion of the 2024-25 school year (see Application of a Student with Disability, Appeal No. 23-093 [finding that the district denied the student a FAPE where, despite the parties' efforts to conduct a meeting prior to the start of the 2022-23 school year, the district did not have an IEP in place prior to the start of said school year]).

2. Unilaterally Obtained Services

Having determined that the IHO erred by finding that the district only denied a FAPE to the student for the summer portion of the 2024-25 school year because the hearing record supports a finding that the district also denied a FAPE or equitable services to the student for the 10-month portion of the 2024-25 school year, I now turn to the appropriateness of the special education services unilaterally obtained by the parents which, contrary to the IHO's statements, remains the parents' burden to prove even in the absence of any challenges to the services by the district. Here, the timing of the parent's due process complaint notice and the conclusion of the hearing in this proceeding prior to the start of the 2024-25 school year, while presenting claims ripe for adjudication nevertheless did create issues regarding the parent's burden of proof as to the privately-obtained services.

Before turning to the evidence, a discussion of the legal standard to be applied is warranted. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents allege that the district failed to engage in educational planning under the IDEA and the State's dual enrollment statute for the 12-month 2024-25 school year, and, as a self-help remedy, they unilaterally obtained private services from Little Apple and SoundWaves for the student without the consent of the school district officials, then commenced due process to obtain remuneration for the costs thereof. Specific to equitable services under the dual enrollment statute,

[10] The timing of the impartial hearing was unfortunate in that there was still time to inquire and/or remediate the issue while the evidentiary hearing was ongoing, but the beginning of the 10-month school year had already elapsed when the IHO issued her determination and the proceeding concluded.

districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parents' 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]).[11] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak 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 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

[11] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Little Apple and SoundWaves (Educ. Law § 4404[1][c]).

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).

The IHO declined to determine whether the unilaterally-obtained services were educationally appropriate for the student, reasoning that the district did not challenge the appropriateness of said private services (IHO Decision at p. 14). However, the district did not concede the services were appropriate and was not required to explicitly challenge the appropriateness of the unilaterally-obtained services as the parents unilaterally engaged in self-help and carried the burden of production and persuasion on the issue (Educ. Law § 4404[1][c]).[12]

[12] In the future, if the IHO intends to make determinations on the appropriateness of a unilateral placement or services or on equitable considerations based on the presentation of arguments or the lack thereof, a better

The IHO made an alternative determination that, had the district challenged the appropriateness of the unilaterally-obtained services, the IHO would not have found the oral transliterator services appropriate due to lack of evidence of the provider's qualifications or the way in which services were specially designed to meet the student's unique needs (id.). However, that alternative determination, which isolated specific services, did not reflect consideration of the totality of the circumstances. Indeed, the unilaterally-obtained SETSS, speech-language therapy, and hearing services were not considered in the analysis (see id.). As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist., 557 U.S. at 246-47).

While not in dispute, a description of the student's needs provides context to determine, under the totality of the circumstances, whether the program unilaterally obtained by the parents was specially designed to meet the unique needs of the student.

According to the May 2023 IESP, the student had bilateral cochlear implants due to sensorineural hearing loss, and exhibited "significant delays in the areas of reading, comprehension, social, language and math skills" (Dist. Ex. 2 at p. 1). The student was primarily a Yiddish speaker and spoke English as a second language (id. at p. 2). The IESP indicated that the student's vocabulary was poor for her age and that she struggled with receptive language and expressive language due to her hearing loss (id.). In reading, the IESP indicated that the student's performance on the Fountas and Pinnell reading assessment was at a level E and that she could decode 84 words per minute, which was considered to be "a reading delay" (id.). The student struggled to read words containing vowel digraphs and some high frequency multisyllabic words, and had difficulty with phoneme recognition, segmentation, and deletion (id.). The IESP indicated that the student was "generally hesitant to answer questions and need[ed] many prompts and support to answer questions" found in the text, she had difficulty with inferencing and connecting text to everyday life, and she would rather not complete a task than ask for help (id.). Due to her hearing impairment, the IESP indicated that the student struggled to develop "foundational literacy, [and] writing skills" (id. at p. 4). In math, the IESP indicated that the student was "up to par" based on results of an informal assessment; however, she struggled with the "verbal expectations in math, and decoding word problems that contain[ed] vocabulary words she [did not] know" (id. at p. 2). At that time, the IESP indicated that the student interacted with others in a socially appropriate manner, but that she struggled with listening skills, her ability to clarify

approach is to utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before her so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]).

instructions, and at times, missed out on social interactions due to her hearing impairment (id. at p. 3). Physically, the IESP reflected reports that the student presented with "age appropriate fine/gross motor skills" and activities of daily living skills, and that the parent did not have concerns regarding the student's physical development at that time (id.).

In July 2024, the Little Apple administrator testified that the student exhibited significant language and speech delays, executive functioning deficits, difficulty advocating for herself, and attentional deficits and social/emotional delays, which required "pre-teaching and constant review of material" (Parent Ex. N ¶ 6). According to the SoundWaves administrator, as of July 2024 the student demonstrated significant expressive and receptive language delays, poor focusing and memory, executive functioning and social skill deficits, emotional challenges, and lacked foundational knowledge (Parent Ex. M ¶ 7).

With respect to the speech-language therapy and hearing education services provided by SoundWaves, the speech-language pathologist who was the "founder and owner" of SoundWaves (SoundWaves administrator) testified that she provided services to the student during the 2023-24 school year and began delivering services to the student for the 2024-25 school year in July 2024 at the SoundWaves administrator's office, that consisted of two 30-minute sessions per week of individual, bilingual Yiddish speech-language therapy, and two 30-minute sessions per week of individual, bilingual Yiddish hearing education services (Tr. pp. 14-15; Parent Ex. M ¶¶ 1, 8, 9).[13] The SoundWaves administrator testified that she "provide[d] a very complete picture of what a student [who] is deaf and hard of hearing, that uses oral language in a mainstream classroom need[ed]" and that she was "up to date" with the "new technology" and "the new ways to deal with a deaf and hard of hearing student so she c[ould] have the most beneficial educational experience in a mainstream school" (Tr. p. 16).[14]

The progress report information regarding the speech-language therapy and hearing education services the student received from SoundWaves is from the 2023-24 school year (see Parent Ex. K at pp. 1, 8). The SoundWaves administrator testified that she would continue to work on the skills she addressed with the student during the 2023-24 school year into the 2024-25 school year and that she had developed goals for the student that she intended to address with her (Parent Ex. M ¶¶ 7, 8, 15; see Parent Ex. K). According to the SoundWaves administrator, interventions used during both speech-language therapy and hearing education sessions included pre-teaching, review and repetition of learned skills, visual and auditory cues/prompts, and "Listening and Spoken Language (LSL)" strategies such as acoustic highlighting, asking the student what they heard, "auditory sandwich," optimal positioning, parallel talk, wait time, and analyzing listening

[13] The SoundWaves administrator holds a State license as a speech-language pathologist, a certificate as a teacher of students with speech and language disabilities, and a bilingual education extension teacher certificate (Parent Ex. G). In written testimony she stated that she also holds a "public school teacher certificate for the Deaf and Hard of Hearing" (Parent Ex. M ¶ 1).

[14] According to the SoundWaves administrator, the difference between speech-language therapy and hearing education services was the focus on articulation; speech therapy focused on "the oral motor positioning and articulation of words, where [h]earing [e]ducation use[d] auditory training skills" (Parent Ex. M ¶ 10). Additionally, hearing education services also focused on the academic aspects of a student's needs, and instruction and discussion of self-perception, self-knowledge and self-advocacy (id. ¶ 11).

errors (Parent Ex. M ¶ 13). Additionally, the SoundWaves administrator testified that she provided instruction in the use and care of the student's FM unit by teaching the student to take responsibility for the cleanliness and basic maintenance of her hearing amplification equipment, and how to let staff know when her hearing equipment was not working properly or that she was experiencing adverse listening conditions in the classroom (id. ¶ 16). Further, the SoundWaves administrator stated that she would meet with the student's classroom teacher, "special educator, and her oral transliterator" to discuss the student's needs and goals (id. ¶ 17).

Regarding the SETSS, speech-language therapy, and oral transliteration services from Little Apple, the Little Apple administrator testified that on July 1, 2024, Little Apple began delivering two 30-minute sessions per week of individual, bilingual Yiddish speech-language therapy to the student at a Little Apple office, and 12 hours per week of bilingual Yiddish SETSS and full-time, 1:1 oral transliterator services to the student at the nonpublic school, which were to continue during the 2024-25 school year (Tr. pp. 18-20; Parent Ex. N ¶¶ 1, 7, 15).[15]

The progress report information about the SETSS delivered to the student by Little Apple in the hearing record is from the 2023-24 school year (Parent Ex. J at p. 5). The Little Apple administrator testified in July 2024 that the student's "SETSS sessions focus[ed] on decoding long vowel sounds, determining syllables, asking and answering questions from a given text, understanding meaning of phrases and words in texts, solving word problems using addition and subtraction, understanding feelings of others and improving overall language skills" (Parent Ex. N ¶ 12). According to the Little Apple administrator, "[s]ome strategies and interventions used during SETSS sessions include[d]: breaking down complex instructions, [using] visuals to present new vocabulary, flashcards to help increase sight word recognition, pre-teaching of new skills, review and repetition, and breaks for auditory fatigue" (id. ¶ 13).

The progress report information about the speech-language therapy delivered to the student by Little Apple in the hearing record is from the 2023-24 school year (Parent Ex. L at p. 1). In written testimony the Little Apple administrator stated that the student's speech therapy sessions focused on improving her listening skills, word retrieval and phonological awareness, and increasing expressive language and writing skills (Parent Ex. N ¶ 16). According to the Little Apple administrator, "some interventions and techniques" the speech-language pathologist used during the student's sessions included "phonological pins for word memory and retrieval," chunking for sentence memory and modeling, noise in sessions to acclimate the student to perform in noise, and minimizing visual cues to strengthen auditory functioning (id. ¶ 17).

The Little Apple administrator testified that the student's oral transliterator participated in the agency's mandatory yearly training, and that he and another supervisor "regularly visit[ed] the schools where our providers [we]re assigned to work with our clients, to observe and supervise

[15] The Little Apple speech-language therapy provider holds a State license as a speech-language pathologist and a certificate as a teacher of the speech and hearing handicapped (Parent Exs. H; N ¶ 14). The speech-language therapy provider's state license bears a different surname from her later certificate and the provider affidavit (Parent Ex. H). The Little Apple SETSS provider holds students with disabilities (all grades) and childhood education (grades 1-6) professional certificates (Parent Exs. I; N ¶ 10).

them during sessions" (Parent Ex. N ¶¶ 8, 9).[16] Additionally, the Little Apple administrator testified that supervisors "routinely collaborate[d] with each other and our providers," as well as "frequently communicate[d] with our students' classroom teachers and related service providers to facilitate the continuity of transliteration services across all domains" (id. ¶ 9). Review of the evidence shows that the IHO was correct that the hearing record did not contain any other information about the oral transliteration services the student received from Little Apple during summer 2024 or how they were specially designed to meet her needs (IHO Decision at p. 14).

Given the timing of the impartial hearing, the evidence in the hearing record is limited with respect to services that may have been provided to the student during the entirety of the 2024-25 school year. Because the IHO did not directly weigh the appropriateness of the unilaterally-obtained services taking into account the totality of the circumstances, I find that remand is the appropriate course at this juncture. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Therefore, I will remand the case to the IHO to reopen the record and receive additional evidence, consider the services the student has received and the progress the student has made during the 2024-25 school year, and render a determination as to whether the unilaterally-obtained services were appropriate for the student based on the totality of the circumstances.

3. Equitable Considerations

Under the Burlington/Carter framework, the final criterion for an award of funding is that the parents' claim must be supported by equitable considerations. Here, the district alleges the IHO erred in finding that the district did not contest the rates charged by the private providers and argues that, in addition to the IHO's award relating to speech-language therapy that took into account interest on loans incorporated in the rate charged by Little Apple, additional reduction is warranted based on the excessiveness of the costs of services.

With respect to equitable considerations, the IDEA provides that funding may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the

[16] According to the Little Apple administrator, oral transliteration services assist students with hearing impairment "by providing them with clear enunciation and slightly slower speech patterns of the different speakers in the room," either verbatim (transliterating) or paraphrased to improve the visibility and language level of the original message (interpreting) (Parent Ex. N ¶ 3).

private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). Among the factors that may warrant a reduction in funding under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Review of the hearing record reveals that the district did raise the issue of excessiveness of the contracted rates through its cross-examination of the parents' witnesses and its presentation of documentary evidence. Indeed, the district representative questioned the SoundWaves administrator and the Little Apple administrator concerning the respective agency's rates and presented an American Institutes for Research ("AIR") report as evidence of market rates for services (see Tr. pp. 14-15, 19; Dist. Ex. 1). Upon remand, the IHO should reconsider the equitable considerations in light of the analysis in Application of the Department of Education, Appeal No. 24-503, wherein the SRO considered whether a contracted rate for SETSS should be reduced based upon data from the United States Bureau of Labor Statistics (USBLS) contained in an AIR report.[17]

C. Pendency

Finally, both parties contest the IHO's pendency order. The parents contend that the IHO erred in limiting pendency services to the period from July 1, 2024, the date of the parent's due process complaint notice, through September 11, 2024, the date of the IHO's decision, because the law requires the district to fund pendency services for the duration of the proceedings, including any appeals. The district contends that, as a nonpublic school student, the student is not entitled

[17] The IHO found the AIR report to be of little evidentiary value as far as the specific market rates (IHO Decision at p. 6). A review of the AIR report supports the IHO's observation that not all of the report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private individual. However, the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). Upon remand, the IHO may find it appropriate to review wage information contained in the data from the Bureau of Labor Statistics as relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in Bureau of Labor Statistics data ("May 2023 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm). Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

to pendency because nonpublic school students are not automatically entitled to the continuation of equitable services from year to year.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[18] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief, such as irreparable harm, likelihood of success on the merits and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

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

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

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

At the impartial hearing, the parents requested that pendency be based on a June 5, 2024 unappealed IHO decision and the district agreed that the educational program reflected in that decision constituted the last agreed-upon program between the parties (Tr. p. 11). The district asserts in its cross-appeal that the student is not entitled to pendency and requests that the SRO vacate the pendency award beyond summer 2024, representing the portion of the student's school year for which she would be entitled to an IEP. However, I am unpersuaded by the district's argument that a student who has an IESP pursuant to New York State's dual enrollment statute has no right to pendency. Education Law § 3602-c provides for review of IESPs pursuant to § 4404, and Education Law § 4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]; Application of a Student with a Disability, Appeal No. 17-034).

The IHO correctly held that the student was entitled to pendency services based upon the student's last agreed upon program, namely the program set forth in the unappealed June 5, 2024 IHO decision (see Tr. p. 11; IHO Decision at pp. 3-4, 14-15). However, the IHO should have ordered the district to fund the student's pendency services through the conclusion of the proceedings (see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 125 [3d Cir. 2014] [finding that school districts must continue funding a student's pendency placement until final resolution of all IDEA proceedings, including appeals]).. Therefore, the district is ordered to fund the student's pendency services from the date of the due process complaint notice through the conclusion of the proceedings.

In addition, I note that the IHO's order for the CSE to convene to engage in educational planning for the 2024-25 school year is unappealed. If the district has not already done so, it is reminded of its obligation to convene the CSE, and develop the student's IESP for the 2024-25 school year, including recommendations for the amount and type of special education services the student requires, as well as what related services the student requires in order to obtain a reasonably

calculated program to allow the student to make progress in an appropriate special education program in light of her circumstances. Furthermore, I will direct the CSE to convene on or before May 16, 2025 to conduct an annual review of the student's programming and determine, among other things, whether the student requires an IEP, IESP and 12-month services for the 2025-26 school year.

VII. Conclusion

In summary, the district's request for dismissal of the parents' appeal and underlying claims for lack of subject matter jurisdiction is denied. As explained above, I find that the district denied the student equitable services for the 10-month portion of the 2024-25 school year by its failure to convene a CSE to develop an IESP prior to the start of said 10-month portion of the school year. However, I must remand the matter to the IHO for a determination as to whether the unilaterally-obtained services were appropriate for the student for the full 12-month 2024-25 school year based on the totality of the circumstances. Upon remand, the IHO may consider additional evidence and revisit whether the parents met their burden to prove the appropriateness of their unilaterally-obtained services and whether the equities support the parents' request for relief. Finally, as explained above, the student is entitled to pendency services, pursuant to the unappealed IHO decision dated October 18, 2023, from July 1, 2024 until the conclusion of these proceedings.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's September 13, 2024 decision is modified by reversing those portions which dismissed the parents' claims pertaining to the 10-month portion of the school year as unripe, limited the student's pendency entitlement to the date of the IHO's September 13, 2024 decision, determined that the district's failure to convene a CSE to develop an updated IESP prior to the start of the 10-month portion of the 2024-25 school did not amount of the denial of a FAPE and that the appropriateness of the student's unliterally obtained services and equitable considerations were not in dispute for the full 12-month 2024-25 school year;

IT IS FURTHER ORDERED that the district is directed to fund the student's pendency services pursuant to the unappealed June 5, 2025 IHO decision from the date of the due process complaint notice until the conclusion of these proceedings as follows: for summer 2024, six periods of SETSS per week with Yiddish instruction, two 30-minute sessions per week of individual hearing education services with Yiddish instruction, a full-time individual oral transliterator with Yiddish instruction, and two 30-minute sessions per week of speech-language therapy with Yiddish instruction; and for the 10-month portion of the 2024-25 school year, 12 periods of SETSS per week with Yiddish instruction, two 30-minute sessions per week of individual hearing education services, a full-time individual oral transliterator, and four 30-minute sessions per week of individual speech-language therapy in Yiddish;

IT IS FURTHER ORDERED that this matter is remanded to the IHO for further proceedings in accordance with the body of this decision; and

IT IS FURTHER ORDERED that in the event that the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
March 10, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER