The University of the State of New York

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

No. 24-473

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Shehebar Law PC, attorneys for respondents, by Ariel A. Bivas, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to fund the student's private services delivered by Alpha Student Support (Alpha) for the 2023-24 school year. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

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

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

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

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

## III. Facts and Procedural History

A CSE convened on April 27, 2022, found the student eligible for special education as a student with an other health impairment, and developed an IESP for the student with a projected

implementation dated of May 11, 2022 (Parent Ex. B at p. 2). The April 2022 CSE recommended that the student receive three periods per week of direct, group special education teacher support services (SETSS) in Yiddish and two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 10). The April 2022 IESP reflected that for the 2021-22 school year the student was "Parentally Placed in a Non-Public School" (id. at p. 13).

Via a letter dated April 3, 2023, the district notified the parents that it was aware that the parents had placed the student in a nonpublic school and that, if they wished the student to receive special education services from the school district, the parents needed to sign an attached form and return it to the district on or before June 1, 2023 (Dist. Ex. 3 at p. 1). The student's mother signed the form on May 31, 2023; however, the question of when the form was transmitted is an issue in dispute (Dist. Ex. 4).

A CSE convened on October 30, 2023, continued to find the student eligible for special education as a student with an other health impairment, and developed an IESP with a projected implementation date of November 13, 2023 (Dist. Ex. 1). The October 2023 CSE recommended that the student receive three periods per week of direct, group SETSS in Yiddish and two 30-minute sessions per week of individual OT (id. at p. 7). In a prior written notice to the parents, dated October 31, 2023, the district summarized the October 2023 IESP's recommendations (Dist. Ex. 2).[1]

On November 5, 2023, the student's mother entered into a contract with Alpha for the provision of SETSS to the student at a rate of $195 per hour for the 2023-24 school year (Parent Ex. D at p. 3).

**A. Due Process Complaint Notice**

In a due process complaint notice dated May 9, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents asserted that the district failed to provide any of the services recommended in the October 2023 IESP and that, therefore, the parents secured a SETSS provider at an enhanced rate (id. at p. 2). The parents further asserted that the October 2023 IESP constituted the student's pendency program and they were seeking funding for those services through pendency (id.). For relief, the parents requested direct funding/reimbursement for SETSS and the related services recommended in the October 2023 IESP at an enhanced rate and reserved the right to seek compensatory education services for any services that were not provided to the student due to the district's failure to implement services (id. at p. 3).

**B. Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing before an IHO appointed by the Office of Administrative Trials and Hearings (OATH). A status conference was held on June 20, 2024 (Tr.

[1] The October 31, 2023 prior written notice stated that the parents "indicated that [they] were placing [their] child in a non-public school, at [their] own expense, and [we]re seeking equitable services from the [district]" and that "[t]herefore an [IESP] was developed recommending the special education services [their] child will receive" (Dist. Ex. 2 at p. 1).

pp. 1-8). During the status conference, the district notified the IHO and the parents that it would be submitting "a brief on a motion to dismiss" the matter based "on proposed amendments to section 200.5" (Tr. p. 3).[2] The district submitted a motion to dismiss for lack of subject matter jurisdiction dated July 7, 2024 (see SRO Ex. 1).[3] The parents responded to the district's motion to dismiss, arguing that the IHO should deny the district's motion to dismiss (see SRO Ex. 2).[4] Via an interim decision dated July 25, 2024, the IHO denied the district's motion to dismiss, having found that there "is no legal authority in proposed regulatory changes" (July 25, 2024 Interim Decision at p. 3).

An impartial hearing convened on August 1, 2024 and concluded on August 14, 2024, after three days of proceedings (Tr. pp 9-81). In a second interim decision dated September 5, 2024, the IHO noted that he heard oral arguments on August 14, 2024 regarding pendency, determined that the student's then current placement was the October 2023 IESP, and directed the district to fund three periods per week of SETSS in Yiddish and two 30-minute periods of OT in English as the student's pendency program retroactive from the date of the due process complaint notice (May 9, 2024) until the conclusion of the matter (Sept. 5, 2024 Interim IHO Decision at pp. 2-4).

In a final decision dated September 20, 2024, the IHO found that the district failed to prove that it provided the student with a FAPE for the 2023-24 school year (IHO Decision at p. 8). In regard to the district's affirmative defense that it was not obligated to provide equitable services to the student because the parents failed to make a timely request by June 1, the IHO held that the district waived its affirmative defense by its conduct of convening a CSE in October 2023 to create a new IESP for the student and the IHO also credited the mother's testimony that she sent the district notice of the parents' intention to receive special education services from the district for the 2023-24 school year on May 31, 2024 (id. at p. 6). The IHO further held that the parents met their burden of proving that the services provided by Alpha offered the student an educational program which met the student's needs during the 2023-24 school year (id. at pp. 9-10). In balancing equitable considerations, the IHO noted that the "[p]arent confirmed on cross examination that [Alpha] [wa]s paying [p]arent's legal fees" (id. at p. 11). The IHO noted that the exact amount Alpha paid for the parents' legal fees was unknown so he was therefore "left to assume" and found that "an equitable reduction in the amount of $1,000 [was] appropriate" (id.). Although the parents requested that SETSS be funded at $195 per hour, the IHO awarded funding for SETSS at $187 per hour (id.). The IHO held that the student did not receive his mandated one hour of OT per week for the 2023-24 school year and, therefore, awarded the student a bank of 40 hours of compensatory OT to be paid by the district at a reasonable market rate (id. at p. 12).

[2] During the status conference, the IHO noted that "the due process hearing will also be a combined pendency hearing as it appears that [the parties] do not have an agreement for pendency" (Tr. p. 6).

[3] Although the motion papers were not marked or entered into evidence as exhibits during the impartial hearing, they are part of the hearing record on appeal as supplemental documents required to be included in the record by State regulation (8 NYCRR 200.5[j][5][vi]; 279.9[a]). For ease of reference, the district's motion papers will be cited as SRO Exhibit 1 and the parents' response papers will be cited as SRO Exhibit 2.

[4] The parents' response to the district's motion to dismiss is dated July 2, 2024 despite the district's motion to dismiss being dated July 7, 2024 (compare SRO Ex. 1 at p. 3 with, SRO Ex. 2 at p. 1).

## IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in failing to rule on the district's July 7, 2024 motion to dismiss for lack of subject matter jurisdiction. The district further argues that the IHO improperly held that the parents established that they had requested special education services by the June 1 deadline and further erred in holding that the district waived its June 1 defense by convening the CSE in October 2023. The district asserts that the IHO erred in finding that the parents met their burden of proving that the SETSS services provided by Alpha were appropriate to meet the student's unique needs. Regarding the IHO's award of compensatory OT, the district argues that the IHO mistakenly applied a 40-week school year in calculating his compensatory award, and that, instead, the IHO should have used a 36-week school year so the award of compensatory OT should be reduced to 36 hours. In regard to the IHO's balancing of equitable considerations, the district asserts that, because the parents confirmed that Alpha was paying for the parents' attorney's fees, the amount charged by Alpha for the provision of its SETSS should be reduced from the IHO's award of $187 per hour to a rate between $54.12 and $100 per hour.

In an answer, the parents respond to the district's arguments and assert that the IHO's decisions should be affirmed in their entirety. In a reply, the district argues that the parents' answer should be rejected as it does not comply with practice regulations governing appeals before the Office of State Review.[5]

## 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

[5] Here, the parents' answer is 16 pages long, in excess of the 10-page maximum set forth in State regulation (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). While I decline to exercise my discretion to reject the parents' pleading in this instance due to this irregularity (see 8 NYCRR 279.8[a]), the parents' attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to outright reject an answer, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In addition, the parents' attorney is reminded that she was authorized to submit a memorandum of law of up to 30 pages in length (8 NYCRR 279.4[g]; 279.8[b]), but elected not to do so. A memorandum of law may be utilized to further argue the relevant facts in the hearing record and legal authority to support the contentions raised in the answer (8 NYCRR 279.8[d]) but may not be used to circumvent the page limitations.

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]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] 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]).

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[6] 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]).

[7] 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.

## VI. Discussion

### A. Subject Matter Jurisdiction

At the outset, it is necessary to address the district's assertion that the IHO erred in failing to address its motion to dismiss for lack of subject matter jurisdiction. The district's motion to dismiss was based on a notice of proposed rulemaking in May 2024 by the New York State Department of Education (NYSED) to section 200.5 of the regulations of the Commissioner relating to special education due process hearings (SRO Ex. 1 at pp. 2-4). In response to the district's motion to dismiss, the parents' attorney argued that the district's lack of subject matter jurisdiction argument was flawed for many reasons, including that it was based on a proposed regulation that had not yet been adopted (SRO Ex. 2 at p. 1). Contrary to the district's allegation that the IHO failed to rule on the motion, as noted above, the IHO issued an interim decision on July 24, 2024 (July 25, 2024 Interim Decision). The IHO concurred with the parents' position and denied the motion to dismiss (id.). I find no reason to reverse the IHO's decision for the reasons set forth more fully below, and I am not persuaded by the district's additional arguments on appeal relating to NYSED's July 2024 emergency rulemaking to amend 8 NYCRR 200.5.

Similar to its argument in its motion to dismiss, the district also argues on appeal that that there is no federal right to file a due process claim regarding services recommended in an IESP and that neither Education Law § 3602-c, nor § 4404, confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services (Req. for Rev. ¶¶ 5-8). Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law. 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 parents 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]).[8] Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]). Education Law § 4404 concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. 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

[8] 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]).

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

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 (Tr. p. 17; 8 NYCRR 200.5[i][1]).[10] 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).[11]

The district acknowledges the limitations on applicability of the regulation amendments relating to the date of the due process complaint notice and the temporary restraining order but contends that the emergency regulation is a clarification (Req. for Rev. ¶ 6 n.4). Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

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

[10] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in the present matter is dated May 9, 2024, prior to the July 16, 2024 effective date of the emergency regulation (see Parent Ex. A), which regulation has since lapsed.

[11] 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.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[12]

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, the IHO was correct to find that the May 2024 proposed regulation may not be applied as it was never adopted. Further, 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 July 2024 emergency amendment to the regulation may not be deemed to apply to the present matter. Finally, the NYSED memorandum issued in the wake of the emergency regulation, which was 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 appeal seeking reversal of relief granted by the IHO on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parents' claims must be denied.

**B. June 1 Deadline**

The district appeals the IHO's determination that the district waived its June 1 affirmative defense (Req. for Rev. ¶ 9). The IHO based his decision that the district waived its June 1 defense on the student's mother's testimony that she notified the district on May 31, 2023 that the student was privately enrolled and would require the district to provide special education services (IHO Decision at p. 6). The IHO further explained that he reached his determination based on the district having created a new IESP for the student's 2023-24 school year during the 2023-24 school year (id.).

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

During the impartial hearing, the district offered as evidence a written request form seeking dual enrollment services for the student for the 2023-24 school year, which was signed by the student's mother on May 31, 2023 (see Dist. Ex. 4). The document has a facsimile header, reflecting that the document was faxed on June 12, 2023 at 2:08 pm with other documents (the document was page 14 of the fax) (id.). It is not clear from the document who faxed the form and who it was faxed to or what other information was included (id.). The mother identified the form and testified that she had sent it to the district via email on May 31, 2023 (Tr. pp. 66-67). In the answer, the parents' attorney states in a footnote that the letter was emailed from the attorney to the district on May 31, 2023 at 7:11pm and states that the email is attached as additional evidence

[12] For reasons that are not apparent, the guidance document is no longer available on the State's website. A copy is, however, included in the hearing record as an exhibit to the district's motion to dismiss.

(Answer at pp. 4-5 n.1). However, the parents' attorney did not submit any additional evidence with the answer.

The IHO resolved the question of fact regarding the transmittal of the request form in the parents' favor, crediting her testimony. However, in its answer, the parents' attorney contradicts the mother's testimony that she emailed the request for dual enrollment services to the district, indicating instead, that he emailed the notice. Moreover, the hearing record does not include the email sending the June 1 letter, which would be the best evidence of transmittal by email. On the other hand, the hearing record is also not sufficiently developed regarding the purported faxing of the document. Ultimately, it is not necessary to resolve the factual issue because there is another basis to uphold the IHO's determination.

Putting aside the question of timely transmittal of the request for services, as noted above, the IHO also found that the district's convening of the CSE on October 2023 and development of an IESP constituted a waiver of the requirement that the parent submit the request for dual enrollment services by June 1. A district may, through its actions, waive the statutory requirement for the June 1 notice (see Application of the Bd. of Educ., Appeal No. 18-088). The statute itself is not drafted in jurisdictional terms insofar as it creates a June 1 notice requirement but does not specify that a school district is precluded from providing services special education services to a student with a disability if a parent misses the June 1 deadline (Educ. Law § 3602-c[2][a]).[13] However, the Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]).

While actual delivery of services called for by an IESP reflects "clear and unmistakable waiver," it is less clear that the occurrence of a CSE meeting and development of an IESP, without more, constitutes a waiver. This is due, in part, because the district is required to navigate requirements that are in tension with one another. On the one hand, State guidance requires that "[t]he CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools located in the geographic boundaries of the public school" ("Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the

[13] The statute supports a policy of excluding resident students from receiving services under an IESP if parents miss the June 1 deadline, but, read as a whole, does not clearly indicate that school districts are required to bar resident students whose parents have missed the deadline (see Application of a Student with a Disability, Appeal No. 23-032). For example, the statute indicates that "[b]oards of education are authorized to determine by resolution which courses of instruction shall be offered, the eligibility of pupils to participate in specific courses, and the admission of pupils. All pupils in like circumstances shall be treated similarly" (Educ. Law § 3602-c[6] [emphasis added]). The statute suggests that a Board could elect to admit students who have missed the deadline for dual enrollment or refuse to admit such students but should not act in a discriminatory manner by admitting some while rejecting others in similar circumstances. Consistent with this reading, there is State guidance indicating that "[i]f a parent does not file a written request by June 1, nothing prohibits a school district from exercising its discretion to provide services subsequently requested for a student, provided that such discretion is exercised equally among all students with disabilities who file after the June 1 deadline" ("Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements" Follow-Up, at p. 4 [DOH/OCFS/SED Aug. 2019], available at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c" Provision of Special Education Services, VESID Mem. [Sept. 2007] [emphasis added], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students), which appears to require a CSE to develop an IESP for a student placed in a nonpublic school whether or not the parent requests dual enrollment services. In addition, if a student has been found eligible for special education services under IDEA, a CSE must conduct an annual review to engage in educational planning for a student (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; see also Educ. Law §§ 3602-c[2][a], 4402[1][b][2]; 8 NYCRR 200.4[f]). Under these circumstances, a district may be required to develop an IESP for the student rather than awaiting a parent's written request for it to "furnish services" (Education Law § 3602-c[2][a]). Therefore, the occurrence of a CSE meeting and the development of an educational planning document such as an IESP alone does not clearly or unmistakably reflect the district's waiver of the June 1 deadline where it is called upon to convene and engage in special education planning for the student.

Here, while convening the October 2023 CSE to create a new IESP for the student may not have, on its own, constituted a waiver of the June 1 deadline, the language contained in the district's October 31, 2023 prior written notice lends further support to a finding that the district convened the CSE in response to the parents' request for dual enrollment services and, further, that it intended to arrange for delivery of the services recommended in the IESP to the student (see Dist. Ex. 2 at p. 1). Specifically, the October 2023 prior written notice documents that the parents informed the district "that [they] were placing [their] child in a non-public school, at [their] own expense, and [we]re seeking equitable services from the [district]" (id.). The prior written notice further stated that, "[t]herefore, an [IESP] was developed recommending the special education services [the student] will receive" (id. [emphasis added]). In other words, the language identifies that the CSE convened because of the parents' communication to the district of their request for equitable services and not for an independent reason related to the district's obligation to develop an IESP or IEP for the student. Further, the communication from the district to the parents in the October 2023 prior written notice that the student "will receive" the equitable services is without qualification that such receipt would occur only if the district had received a timely written request for services.

Thus, the district's actions in convening the October 2023 CSE and sending the prior written notice described above reflect either a concession that the district received timely notice of the parents' request for the services prior to June 1 or a waiver of the June 1 deadline for such request. Accordingly, the IHO did not err in declining to dismiss the parents' claims based on the district's June 1 affirmative defense.

**C. Unilaterally Obtained Services**

Turning to the merits, I note that neither party appeals the IHO's finding that the district failed to offer a FAPE or equitable services for the 2023-24 school year, that equitable considerations warranted a reduction of the award of funding for unilaterally obtained services (except insofar as the district alleges a further reduction is warranted), and that the student was entitled to an award of compensatory OT services (except insofar as the district challenges the number of hours awarded). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd.

of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Before turning to the district's challenges to the IHO's award of direct funding for the privately-obtained SETSS delivered by Alpha, 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 alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private services from Alpha for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino 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]).[14] 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

[14] 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 Alpha (Educ. Law § 4404[1][c]).

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

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

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

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

### 1. Student's Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to resolved on appeal, namely, whether the SETSS unilaterally obtained by the parents were appropriate to meet the student's needs.

The student's October 2023 IESP indicated that, at the time it was drafted, the student was attending a general education sixth-grade classroom in a nonpublic school (Dist. Ex. 1 at p. 1; see Parent Ex. E ¶ 20). The October 2023 IESP reflected scores from a December 2022 psychoeducational evaluation, carried over from the student's prior IESP, that indicated the student's full-scale IQ was in the average range as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (Dist. Ex. 1 at p. 1). According to the IESP, the student's indices scores on the WISC-V all fell within the average range, with the exception of the verbal comprehension index where the student performed in the low average range (id.). The October 2023 IESP also included results from a 2022 administration of the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH) to the student, which yielded low average scores on the letter-word identification and applied problems subtests and low scores on the passage comprehension, spelling, and calculations subtests (id. at pp. 1-2). As indicated in the IESP, the parents noted that the student was not reading on grade level but was "a fluent reader," and, while he was able to decode, he did not "know the meaning of words" (id. at p. 2). According to the IESP, the parents reported that the student's comprehension was at a "basic literal level," writing was an area of "great weakness" for the student, and the student's writing was at a first or second grade level (id.). The IESP reflected that, with regard to math, the parents stated the student had computational skills but when problem solving he needed prompting to slow down and organize his work (id.). The parents noted that the student's work was sometimes "messy" and if was too difficult, he would give up (id.). According to the IESP, the student had academic deficits and needed continued support, and the parents were concerned that the student lacked "motivation and [wouldn't] apply himself" (id.). The IESP also reflected the parents' concerns regarding the student's ability to make self-to-text connections and analyzing text (id.).

Turning to the student's social/emotional development, the October 2023 IESP reflected the parents' report that the student was helpful, adorable, fun, had a variety of interests, but also their concern that the student did not always "talk about his feelings" (Dist. Ex. 1 at p. 2).

In terms of physical development, the October 2023 IESP indicated that the student was in overall good health and that the parents had reported that he had previously received and benefitted from OT (Dist. Ex. 1 at p. 2). In addition, the IESP noted that the student had difficulty with his fine-motor skills and self-regulation (id.). The student's prior IESP, developed in April 2022, indicated that, at the time it was developed, the student presented with poor sensory motor integration/processing skills that impacted both his classroom performance and behavior (Parent Ex. B at p. 5). According to the April 2022 IESP, the student's gross motor skills were age-appropriate (id.).

The October 2023 IESP included a list of resources and modifications required to address the student's management needs such as redirection, repetition, modeling, small groups, preview/review of vocabulary and questions, work samples, repeated opportunities for practice

and reinforcement of taught skills, comprehension checks and immediate feedback, verbal/visual prompts and cues, peer partnership, and scaffolding (Dist. Ex. 1 at p. 3).

**2. Appropriateness of SETSS Provided by Alpha**

Turning to the SETSS provided by Alpha, the hearing record indicates that the parents signed a contract with Alpha on September 5, 2023 for the provision of SETSS to the student for three periods per week in Yiddish at a rate of $195 per hour (Parent Ex. D at pp. 2-3).

The program director (director) of Alpha testified by affidavit that the student received three hours per week of SETSS during the 2023-24 school year (Parent Ex. E ¶ 14). In his affidavit, the director stated that the student's SETSS provider was "certified by NYS to teach students with disabilities and [was] a bilingual Yiddish provider" (id. ¶ 15).[15] At the impartial hearing, the director stated that Alpha provided services in accordance with the student's October 2023 IESP except that they were unable to implement the SETSS service in a group (Tr. pp. 29, 40). He indicated that, while "the student [was] mandated for group services, [Alpha was] not able to locate a similarly situated group of students," and that the services were provided in a 1:1 setting (Parent Ex. E ¶ 18). The director noted that, during the 2023-24 school year, the student received his SETSS in a resource room, at his mainstream school and goals "were created for the student to work on" and were reviewed quarterly (Parent Ex. E ¶¶ 20-21; see Tr. p. 32). In his testimony by affidavit, the director stated that the student's "progress [was] measured through quarterly assessments, consistent meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes" (Parent Ex. E ¶ 24).

According to the June 20, 2024 Alpha progress report, the student faced "challenges in multiple academic areas," and exhibited "slow processing and frustration in the classroom" (Parent Ex. G at p. 1). The progress report indicated that the student's "reading comprehension remained poor, he had difficulty answering questions about passages beyond basic "wh" questions, and he often asked "questions that most of his peers [could] answer on their own" (id.). The progress report also indicted that the student's reading fluency was poor and that he read slowly, with unsteady pace and rhythm (id. at p. 2). Annual reading goals from the student's October 2023 IESP targeted the student's ability to "make an inference about a text and locate relevant and specific details in text to support analysis," and his "comprehension [skills] by developing and answering questions, retelling stories or sharing key details and identifying characters, settings, major events in a story, or pieces of information in a text " (Dist. Ex. 1 at p. 5). To support the student in reading, the SETSS provider reported using targeted phonics instruction, repeated reading practices, rhythm and pacing exercises, practicing phonics rules with visuals, engaging in choral reading activities to improve fluency, and using guided reading sessions where the student read aloud while the provider offered immediate feedback and support (Parent Ex. G at p. 2). The SETSS provider reported that the student had made some progress in that he had learned to ask for assistance when he did not understand something and had shown improvement in his knowledge of phonics rules (id. at p. 1).

[15] The SETSS provider held a "Students With Disabilities (Birth-Grade 2), Emergency COVID-19" certification that was set to expire at the end of January 2025 (Parent Ex. F).

In terms of writing, the SETSS provider indicated that the student struggled "significantly," worked very slowly and "often [took] much longer than his peers to complete classwork and tests" (Parent Ex. G at p. 2). The SETSS provider noted that the student had difficulty organizing paragraphs and with conveying his ideas coherently (id.). The October 2023 IESP contained a goal for the student to improve his "classroom performance by initiating a task, persevering and completing a task with minimal distractions," in addition to a goal to "improve writing skills by planning and sequencing story ideas by including complex sentences with varied vocabulary, writing mechanics (grammar, correct punctuation, and spelling)" (Dist. Ex. 1 at pp. 4-5). To address the student's writing needs, the SETSS provider used graphic organizers to assist the student to plan and structure his paragraphs, sentence starters and frequent writing practice with immediate feedback (Parent Ex. G at p. 2). The June 2024 progress report indicated that the student had made some progress with his ability to "elaborate on a topic and write a few sentences about it" and demonstrated improved ability to expand on a topic (id.).

In math, the SETSS provider reported that the student had difficulty "understanding and performing multi-digit division, solving problems involving fractions, decimals, and percentages, and applying these concepts to real-world scenarios" (Parent Ex. G at p. 4). Math goals from the October 2023 IESP stated that the student would "improve math problem solving skills by differentiating between relevant and irrelevant information in word problems, expanding his mathematical vocabulary," and also "represent and solve world problems involving four operations using equations, expressions and other learned strategies" (Dist. Ex. 1 at p. 6). To address his difficulty with math skills, the SETSS provider used the following strategies: breaking down complex problems into smaller, more manageable steps; using manipulatives to visually represent mathematical concepts; using a white board to model examples; regular practice with multiplication and division flashcards; and step-by-step guidance (Parent Ex. G at pp. 3-4). The SETSS provider noted that the student had made progress and could perform "one-digit multiplication and division problems with increased speed and accuracy" (id. at p. 4).

The June 2024 Alpha progress report also included information on the student's social/emotional, language, and executive functioning skills (Parent Ex. G at pp. 3-6). The report indicated that to address the student's weaknesses in these areas, the SETSS provider used "social stories and role-playing activities to teach and reinforce appropriate social behaviors"; visual reminders and cues to greet others and express gratitude; picture and sequencing cards to help the student with language; comic books to improve narrative skills and comprehension; interactive games to facilitate instruction and encourage expressive language; and mindfulness exercises, sensory breaks, and personalized organizational tools such as visual schedules and task lists to address frustration caused by executive function difficulties (id.).

In arguing that the IHO erred in finding that the parents met their burden of proving that the SETSS provided by Alpha were appropriate to meet the student's unique needs, the district alleges that there were no measurements of how the student had progressed with his goals and that it was "not clear that any goals were implemented during the school year" (Req. for Rev. ¶ 12). However, as noted above, the hearing record demonstrates that the instruction the student received from the Alpha SETSS provider was aligned with goals identified in the October 2023 IESP. The district also asserts that some of the management needs listed in the October 2023 IESP could not be addressed in individual sessions and that the program director agreed that the student would have benefited from group services. However, the June 2024 student progress report indicated

that "progress had been observed in [the student's] ability to participate more actively in group activities and to initiate greetings with some prompts from his teacher," and "during a group project, [the student] successfully greeted his group members and thanked them after receiving help with a task" (Parent Ex. G at p. 3). Neither the district nor Alpha was able to implement SETSS for the student in a group setting, but review of the evidence in the hearing record reflects that the student was receiving benefit from the individualized SETSS sessions and, as included above, the SETSS provider was working on the student's social/emotional skills.

Based a review of the hearing record, the evidence supports a finding that the parents sufficiently demonstrated that the SETSS offered by Alpha provided the student with instruction specially designed to meet the student's unique needs.

**D. Equitable Considerations**

The final criterion for an award of district funding for unilaterally obtained services is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement 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 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"]).

Here, as noted above, the parents did not cross-appeal the IHO's determination that the hourly rate charged by Alpha was excessive given evidence that the agency was paying the parents' legal fees and that a reduction was warranted.[16] Therefore, the only issue raised by the district is whether a further reduction is warranted. The district argues that the IHO should have reduced the rate awarded to $100 per hour because that was the amount paid directly to the provider with all overhead costs removed.

[16] Although the parents state in their answer that the IHO correctly awarded SETSS at the rate of $195, as noted, the IHO actually reduced the parents' requested $195 per hour rate charged by Alpha to $187 per hour (compare IHO Decision at pp. 11, 13 with, Answer at p. 13).

Among the factors that may warrant a reduction in tuition 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).

The parents' contract with Alpha indicated that the parents were liable to pay Alpha the full amount for all delivered services for the 2023-24 school year if the parents were unable to secure funding from the district or elsewhere (Parent Ex. D at p. 3). The contract stated the hourly rate charged for SETSS was $195 per hour (id.). The director provided an overview of both the agency's rate and its costs related to providing SETSS and indicated that some of the rate was used to pay administrative and overhead costs, as well as for professional trainings on special education teaching methods and research-based teaching strategies offered to their providers (Parent Ex. E ¶¶ 9-12; see Tr. pp. 35-36). The director also indicated that the hourly rate was set taking into account interest on the company's loans, which the director indicated were required given the district's delays in making payments for other students who received services from Alpha (Parent Ex. E ¶ 11). As the IHO noted, the parent testified that Alpha informed her that "they w[ould] be paying for their attorney fees" (Tr. p. 67). The Alpha director indicated that the company paid for legal fees for some students if requested (Tr. p. 37).

During the district's cross-examination, the director confirmed that the range paid to Alpha employees is "typically between $90 per hour to $120 per hour" and that the Alpha employee delivering SETSS services to the student was paid a rate of $100 per hour (Tr. pp. 25, 33).

After taking issue with evidence that Alpha paid the parents' attorney's fees, the IHO stated that he was therefore "left to assume" the amount Alpha paid for the parents' legal fees and reduced the award by $1,000 and awarded funding for the student's SETSS from the requested $195 per hour to $187 per hour (IHO Decision at p. 11). However, the hearing includes an objective source for comparing the rate charged by Alpha for the services delivered. Indeed, generally speaking, an excessive cost argument focuses on whether the rate charged for service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district offered a rate student completed by the American Institutes for Research October 2023 rate study (AIR report), which was admitted into the hearing record (see Dist. Ex. 5).

The AIR report draws data published by the United States Bureau of Labor Statistics (USBLS), 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]). I find that the wage information contained in the data from the USBLS is 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.[17] It was not inappropriate for the AIR to use such government-published data in its report. 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 USBLS 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).[18] 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.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Dist. Ex. 5 at p. 4). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees. However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose: they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district special education teachers. The USBLS indicated that in May 2023 data annual salaries for "Special Education

[17] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data (see https://www.bls.gov/oes/tables.htm); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

[18] The New York wage excerpt shows a mean wage of $117,120 from the USBLS' May 2022 data for the same occupation in the same New York metropolitan region, but because this case relates to the 2023-24 school year, the undersigned has taken judicial notice of the USBLS' data from May 2023, which is closer in time to the events of this case (see Dist. Ex. 5).

Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile.[19] In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and for private industry such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf).[20]

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[21] When using the USBLS data, a calculation leads to the conclusion that the $195 per hour rate for SETSS falls above the 90th percentile of salary for the metropolitan region in which the district is located, using indirect and fringe benefit costs of 27.7 percent. I will take this into account when ordering equitable relief.

The $100 per hour costs for SETSS teacher's hourly wage was within the USBLS data in between the median and 75th percentile. However, the amount of nondirect costs above the teacher's hourly wage is $95.00 per hour or approximately 49 percent of the $195.00 hourly rate charged by Alpha. This falls far above the 27.7 percent in the USBLS data.

When considering the testimony described above, in which Alpha's director identified only general categories of nondirect costs that factored into the hourly rate charged and did not did not present evidence of the actual costs or why such expenses would justify the amount of nondirect costs included in the hourly rate changed, the evidence leads me to the conclusion that the parents arranged for services from Alpha at excessive costs as the district argues and that it is more than what the district should be required to pay. The $100 per hour when adding indirect costs supported by USBLS data would yield a result of approximately $127 per hour in costs.

[19] The 2023 data for the metropolitan area is available in a downloadable Excel format, or the most recent statics offered can be searched using the USBLS Query System for "Multiple occupations for one geographical area" (see https://data.bls.gov/oes/#/home ).

[20] The ECEC covers the civilian economy, which includes data from both private industry and state and local government. One could make an argument that a company like Alpha should fall in one of the different rows of private employers, but it would result in only nominal differences in calculation.

[21] Using 6.5 hours results in approximately 1170 hours of instruction time.

Based on the foregoing, I find that the evidence in the hearing record supports a finding that the district should fund the costs of SETSS for up to three periods per week, at a rate of $127 per hour for the 2023-24 school year, and that the parents unjustifiably contracted for rates that far exceeded that amount.

### E. Compensatory Education

The district does not dispute the IHO's determination that the student should receive compensatory OT, but argues that the IHO's compensatory OT service award of 40 hours was in error in that it appears as though the IHO calculated the compensatory OT award by multiplying the hour per week of OT the student should have received by a 40-week school year instead of a 36-week school year (Req. for Rev. ¶ 13). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, it appears that the IHO intended to award an hour-for-four award of compensatory OT based on the student's need for one hour per week of OT (IHO Decision at p. 12). For most students, a school year spans 10 months (36 weeks) based on 180 instructional days (see Educ. Law § 3604[7]). There is no evidence in the hearing record regarding the school year calendar at the student's nonpublic school, and the IHO did not specify why he calculated relief based on 40 weeks. Accordingly, the evidence in the hearing record supports the district's argument that the IHO's award of 40 hours of compensatory OT services should be reduced to an award of 36 hours of compensatory OT services.

## VII. Conclusion

The IHO had subject matter jurisdiction over the parents' claims and properly denied the district's motion to dismiss. In addition, the parents' claims were not foreclosed based on the

district's assertion of a June 1 affirmative defense. The evidence in the hearing record supports the IHO's conclusion that the SETSS delivered to the student by Alpha during the 2023-24 school year were appropriate to address the student's special education needs and that equitable considerations warrant a reduction in the rates charged by Alpha; however, the evidence in the hearing record supports a further reduction based on equitable considerations. Finally, the IHO's compensatory OT award is modified to be based on a 10-month school year consisting of 36 weeks.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated September 20, 2024, is modified to provide that the district shall directly fund the costs of up to three periods per week of SETSS delivered to the student by Alpha at a rate not to exceed $127 per hour, after the parents present proof of attendance and invoices for the delivery of SETSS to the student during the 2023-24 school year; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated September 20, 2024, is modified to provide that the district shall directly fund 36 hours of compensatory OT services.

**Dated:** **Albany, New York**
**November 22, 2024**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**