The University of the State of New York

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

No. 24-487

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

Appearances:
Law Offices of Leonard Ledereich & Associates, attorneys for petitioner, by Pearl Ledereich

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which, among other things, denied her request that respondent (the district) fund the costs of her son's private services delivered by Kinship Resources (Kinship) for the 2023-24 school year. The district cross-appeals, alleging that the IHO lacked subject matter jurisdiction to hear the parent's claims. The appeal must be sustained in part. The cross-appeal must be dismissed.

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 CSE convened on February 15, 2024 and found that the student was eligible for special education as a student with a speech or language impairment (Parent Ex. B at p. 1). At the time of the CSE meeting, the student was parentally placed in a nonpublic religious school, Central United Talmudic Academy, and attended fifth grade (id. at pp. 3,16). The CSE developed an IESP for the student that described the results of a psychoeducational evaluation, teacher reports, and an observation which, among other things, noted that the student was able to communicate very minimally in English (id. at pp. 1-9).[1] The CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) in Yiddish, with related services of one 30-minute session per week of individual speech-language therapy in Yiddish and one 30-minute session per week of group speech-language therapy in Yiddish (id. at p. 13).

A. Due Process Complaint Notice

In a due process complaint notice dated July 10, 2024, the parent, though her attorney alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). According to the parent, the district failed to assign service providers to deliver the services mandated in the student's February 15, 2024 IESP (id.). The parent contended that she was unable to locate providers on her own that would implement the services at the district's set rates (id.). The parent requested a finding that the district failed to offer the student a FAPE for the 2023-24 school year, an order that the district provide "banks of special education services" for all mandated services provided to the student, but not provided directly by the district, at the at the enhanced rates arranged by the parent (id. at p. 1). The parent also sought an order from the IHO that the district provide "banks of special education services" for all services mandated for the 2023-24 school year that the student did not receive, but at enhanced rates charged by providers operating within the student's neighborhood and providing SETSS and related services in Yiddish in order to allow the parent to privately obtain the services (id. at pp. 1-2). At the same time, the parent also requested pendency services to be implemented by the district, asserting that the February 15, 2024 IESP was the student's "then current placement" (id. at p. 2). The district filed a response to the due process complaint notice dated July, 31, 2024 (Due Process Resp. dated July 31, 2024).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 14, 2024 and concluded on August 28, 2024 after two days of proceedings (IHO Decision at pp. 1-101).

On July 12, 2024, the IHO issued scheduling and prehearing directives via e-mail (IHO E-mail dated July 12, 2024). During the impartial hearing, the parent submitted an affidavit from an administrator at Kinship, which indicated that the agency had a provider that was able to provide

[1] The district's response to the due process complaint notice included an attached prior written notice dated February 28, 2024 indicating that the February 2024 CSE had made an initial eligibility determination and that the initial evaluation of the student occurred over the course of December 2023 through February 2024.

bilingual SETSS in Yiddish at the rate of $210 per hour and was able to provide bilingual speech-language therapy at the rate of $350 per hour (see Parent Ex. E ¶¶ 7-8). However, the parent's representative indicated that the services had not yet been provided by Kinship (Tr. p. 8).

During the impartial hearing, the district asserted that the parent's claim should be dismissed because the IHO lacked jurisdiction to hear a dispute over the implementation of services listed in an IESP, and that the costs of the services charged by Kinship were excessive (Tr. pp. 72-75). The parent opposed the district's argument, asserting that if it were accepted, an IESP would be just a "pretty piece of paper," referenced Florence Co. Sch. Dist. Four v. Carter, and argued, "if [public agencies leave] it up to the parent and state and don't care about a child's services, don't care about a child's education placement, they should not be surprised that they will be met with a heavy bill at the end of the day. Private services cost more than doing it within a school agency, within a District agency" (Tr. pp. 81-87). Additionally, the parent argued that the due process complaint notice was filed before the July 16, 2024 date listed in an emergency regulation promulgated on the topic, and that therefore the regulation did not apply (id. at p. 87).

In a decision dated September 20, 2024, the IHO rejected the district's subject matter jurisdiction argument finding that the parent's due process complaint was filed prior to the effective date of the emergency regulation, i.e., July 16, 2024 (IHO Decision at p. 15). As to the merits, The IHO explained that a Burlington/Carter analysis should govern if a parent obtained private services and was seeking reimbursement or funding from a district, but that if a parent had not obtained private services that a compensatory education award would be appropriate (id. at pp. 10-14). The IHO noted that the parties in this case agreed that a compensatory award was appropriate and that the only dispute was as to how it should be implemented (id. at p. 15). The IHO noted that although the parent had chosen a provider, the private services had not yet begun, and that it would be speculative to determine the appropriateness of such services. He found that the record contained no individualized plan for the agency's implementation of the services, there was no credible evidence that the agency would be able to implement the recommended group services, the proposed SETSS provider was not certified for bilingual instruction (id.).[2] Although the IHO found that the district had not provided the services, and that compensatory education would be an appropriate remedy, he found it was not appropriate for the parent to perform an "end run" around the second Burlington/Carter criterion to prove the appropriateness of the private services by ordering a bank of compensatory services at the parent's chosen provider and rate (id.).

The IHO also noted that he would not have ordered services at the Kinship's rate as he found it unreasonable that the same rate was charged for individual and group services, the rate was for bilingual SETSS but the SETSS provider was not a bilingual provider, there was evidence that Kinship inflated the cost it charged the district and might negotiate a lower rate directly with the parent, which would warrant an equitable reduction (id.) The IHO did not find the testimony of the Kinship administrator to be credible (id.).

[2] The IHO stated that in his introductory email to the parties he indicated would not order a provider at the parent's choosing unless the parent established that the proposed services were appropriate (IHO Decision at p.15).

As relief, the IHO ordered the district to provide a bank of compensatory education services through a district provider, as follows: 75 periods of group, bilingual SETSS, 7.5 hours of individual, bilingual SLT and 7.5 hours of group, bilingual speech-language therapy (id. at p. 16).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO erred by ordering the district to provide compensatory education services directly, without imposing any timelines or conditions, instead of allowing the parent to implement the services through a provider of her choice. The parent notes that the IESP required the services to commence on March 7, 2024 and the district did not implement the SETSS and the speech-language therapy services for the student for the 2023-24 school year or even submit evidence that they attempted to implement the services, and the district also did not implement any services pursuant to pendency. Among other things, the parent acknowledges the IHO's discretion in awarding relief and preventing a parent from performing an "end run" around Burlington/Carter, but contends that limiting compensatory services to district providers when the district acknowledges that it caused the problem is a punishment of the parent. The parent argues that the district submitted no evidence to rebut the rate charged by Kinship and that the IHO denied a proposed subpoena to the district's "implementation unit" regarding "market rates." As relief, the parent requests that the district be directed to implement the ordered compensatory education services through a provider chosen by the parent at the provider's rate, upon provision of proper verification of qualifications and services.

In an answer and cross-appeal, the district argues that the SRO should reverse the IHO's finding that she had jurisdiction to address the claims in the due process complaint notice, vacate the IHO's order of relief and dismiss the appeal because neither the IHO nor the SRO have subject matter jurisdiction to hear this implementation claim. The district points to an emergency regulation promulgated in July 2024 and the Education Law to support its argument. In the alternative, if the SRO does not dismiss the parent's claims for lack of jurisdiction, the district requests that the SRO deny the parent's requested relief.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for

services is made (Educ. Law § 3602-c[2]).[3] "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.).[4] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Preliminary Matters - Subject Matter Jurisdiction

As a threshold matter, the district argues that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

[3] 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]).

[4] 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.

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 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. 24-464; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; 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 parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the New York Education Law 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]).[5]

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]).

[5] This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 4404 concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[6] In addition, the New York Court of Appeals has explained that students authorized to receive 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 recently attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[7] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath

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

[7] 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- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on June 6, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[8]

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "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.

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

Given the implementation date set forth in the amendment's text and the temporary suspension of its application, the amendment may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency

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

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

regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Acknowledging that this matter has received new attention from State policymakers and appears to be an evolving situation, I nevertheless must deny the district's request for dismissal of the parent's appeal and underlying claim on jurisdictional grounds.

B. Compensatory Education

Here, there is no dispute that the student was entitled to the services requested as the district representative agreed that the services recommended in the February 15, 2024 IESP were appropriate (Tr. pp. 7-8). Further, there is no dispute that the student did not receive any services from either the district or privately from Kinship during the 2023-24 school year (Tr. p. 25).

The issue here is whether the IHO erred in determining that the district should implement the compensatory education services from the district provider instead of by Kinship at the company's private rates.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). 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"]).

As stated above, the district has not disputed that the student was entitled to the services recommended in the February 15, 2024 IESP; rather, the district agreed they are appropriate (Tr. pp. 7-8). Also, there is no dispute that the student did not receive any services from either Kinship or the district (Tr. pp. 8, 25). Since the student is entitled to these services pursuant to the February 15, 2024 IESP, the district was required to provide them. In its cross-appeal, the district does not challenge the type or amount of compensatory education ordered by the IHO on the grounds that

the award was not aligned with the student's needs or would not serve to place the student in the position he would have occupied but for the district's violations of Education Law § 3602-c. With regard to the parent's challenges to the equitable relief provided by the IHO, the IHO was sufficiently clear that she did not find the Kinship administrator credible. An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).[10] Moreover, as noted by the IHO, such a compensatory education award would provide the student with a remedy for the district's failure to implement equitable services to which he was entitled while preventing any "end run" by the parent in obtaining private services for the student and seeking funding for such services without demonstrating that they were appropriate under a Burlington-Carter analysis (see IHO Decision at p. 15). As a result, the IHO properly ordered the district to provide compensatory education to the student consisting of 7.5 periods of group, bilingual SETSS, 7.5 hours of individual, bilingual speech-language therapy and 7.5 hours of group, bilingual speech-language therapy (id. at p. 16). The district should be provided with the opportunity to comply with the IHO's order to arrange for the delivery of the compensatory education services at Central United Talmudic Academy (or another private or public school site, if the student transitions to a new school). The services in the IESP were designed to support the student's regular instruction in his general education classroom. The sole point raised by the parent with which I agree is that the IHO's order does not clearly state a timeline within which the compensatory education services must begin, which under these circumstances leaves too much discretion to the district. As a matter within my authority to order equitable relief, I will modify the IHO's directive to add a time limit within which the district must initiate the compensatory education services.

VII. Conclusion

As discussed above, the IHO had subject matter jurisdiction over the parent's claim and the district denied the student a FAPE for the 2023-24 school year by failing to implement the services in the student's February 15, 2024 IESP. The IHO correctly ordered the district to provide a bank of compensatory education services through a district provider, as follows: 75 periods of group, bilingual SETSS, 7.5 hours of individual, bilingual speech-language therapy and 7.5 hours of group, bilingual speech-language therapy.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

[10] The parent's criticisms of the IHO's award of relief, in essence, boil down to a belief that the district will refuse to comply with a directive to provide compensatory education relief. However, this is a proceeding in which the student was found initially eligible for special education services, and the parent was already seeking private services shortly after the IESP was developed and hearing record is not sufficiently developed regarding the parties' respective conduct regarding implementation. Should the district fail to comply, the appropriate remedy is for the parent to seek enforcement of the administrative orders. Should the district violate the orders, it may well find itself facing claims that it has acted with deliberate indifference toward the student and his disability.

IT IS ORDERED that the IHO's decision dated September 20, 2024, is modified to require that the compensatory education services directed therein shall be initiated at Central United Talmudic Academy (or the student's current school site) within 30 days of the date of this decision; and

IT IS FURTHER ORDERED that the district shall make such services available at a public school site that the student would otherwise attend if enrolled in the public school if the parent or the nonpublic school is not cooperative with district efforts to provide the compensatory education services to the student at his nonpublic school; and

IT IS FURTHER ORDERED that the district shall document its attempts to provide the compensatory education services to the student within the student's educational records, and complete the services on or before June 30, 2026.

Dated: **Albany, New York**
December 27, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER