The University of the State of New York

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

No. 24-503

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., Esq.

The Law Offices of Neal H. Rosenberg, attorneys for petitioners, by Jennifer Teigman, 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') daughter and ordered it to fund the student's privately obtained services from Encore Support Services (Encore) 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 May 23, 2023, found the student eligible for special education as a student with a speech or language impairment, and created an IESP for the student for the 2023-

24 school year (see IHO Ex. I).[1] The May 2023 CSE recommended that the student receive five periods per week of direct, individual special education teacher support services (SETSS) in Yiddish; one 30-minute session per week of group speech-language therapy in Yiddish; and one 30-minute session per week of individual speech-language therapy in Yiddish (id. at p. 7). On July 28, 2023, the parents signed a contract with Encore for the provision of the student's special education services for the 2023-24 school year (Parent Ex. E).[2] Via a letter dated August 23, 2023, the parents notified the district that they had been unable to find a provider through the district and had contracted with Encore for the provision of the student's recommended SETSS services at an enhanced rate (Parent Ex. C). The parents indicated that they would seek funding/reimbursement for enhanced rate SETSS "through a P-3 and enhanced related services" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 13, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Specifically, the parents asserted that the student's May 2023 IESP recommended SETSS and speech-language therapy, but that the district failed to provide these recommended special education and related services to the student for the entirety of the 2023-24 school year (id. at p. 1). The parents requested an order of pendency based on the May 2023 IESP's recommendations and "prospective funding for the continuation of services or an enhanced rate P-3" for the student's special education and related services (id. at p. 2).[3] The district filed a due process response dated July 1, 2024, which included a copy of a prior written notice, but the prior written notice was dated April 4, 2024 and related to an April 2024 CSE meeting.

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 21, 2024 and concluded the same day (Tr. pp. 14-84).[4] After the impartial hearing concluded, the district filed a motion to dismiss the parents' due process complaint notice on the ground that the IHO lacked subject matter jurisdiction (see IHO Decision at p. 2).[5]

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[1] Parents submitted a copy of the May 23, 2023 IESP, but it was missing a page, so the IHO entered the complete May 23, 2023 IESP into the hearing record as IHO Ex. I (compare Parent Ex. B, with IHO Ex. I). The remainder of this decision will reference the May 23, 2023 IESP by using IHO Ex. I.

[2] Encore has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Parents' counsel withdrew the parents' request for an order of pendency during the July 16, 2024 prehearing conference (Tr. p. 4).

[4] A prehearing conference was held on July 16, 2024 (Tr. pp. 1-13).

[5] The hearing record fails to include a copy of the district's motion to dismiss. The IHO is reminded that it is her responsibility to ensure that there is a complete hearing record, which would include copies of any motion papers filed by the parties (see 8 NYCRR 200.5[j][3][vii], [xii]).

In a decision dated September 24, 2024, the IHO initially denied the district's motion to dismiss for lack of subject matter jurisdiction because she determined that the regulation that the district relied upon in support of its arguments only applied prospectively to due process complaint notices filed on or after July 16, 2024 (IHO Decision at p. 2). Next, the IHO found that the district failed to provide the student with a FAPE for the 2023-24 school year by failing to implement the May 2023 IESP (id.).[6] The IHO declined to apply a Burlington-Carter analysis to this case where the parents were alleging that the district failed to implement an IESP, and instead found it appropriate to apply the legal standards used for analyzing a compensatory services request (id. at pp. 4-6).

The IHO held that the parents were entitled to compensatory education relief for the student's unimplemented special education and related services (IHO Decision at pp. 6-7). The IHO discussed the district's submission of the American Institutes for Research rate report (AIR report) to support its claim that the rates charged by Encore were excessive, but concluded that the AIR report was unreliable and the IHO elected not to give it any weight (id. at p. 7). The IHO found that other than referencing the AIR report, the district did not explain why the Encore rates were excessive and failed to assert any basis for reducing the rates (id.). Accordingly, the IHO concluded that the district failed to prove that Encore charged excessive rates and awarded the parents' funding for Encore for the student's speech-language therapy at a rate of $250 per hour and SETSS at a rate of $195 per hour (id.).[7]

In addition, the IHO noted that her determination would be the same if she were to analyze the case under a Burlington-Carter approach (IHO Decision at p. 8). The IHO held that the parents proved that they complied with the June 1 obligation to request dual enrollment services (id.). The IHO further held that the parents demonstrated that the SETSS and speech-language therapy delivered by Encore were appropriate to address the student's special education needs and that equitable considerations favored the parents because there was no claim to the contrary by the district (id. at pp. 8-9). As compensatory relief for the 2023-24 school year, the IHO ordered the district to fund two 30-minute periods per week of speech-language therapy at the rate of $250 and five periods per week of SETSS at a rate of $198 per hour (id. at p. 9). The IHO further ordered the district to reconvene the CSE within 60 days to develop an appropriate program for the student's 2025-26 school year (id.).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in failing to dismiss the parents' claims for lack of subject matter jurisdiction. The district further argues that the IHO erred in failing to reduce the costs awarded for services from Encore as excessive based on the evidence provided by the

[6] During the impartial hearing, the district representative conceded that the district was not contesting that it failed to provide the student with a FAPE for the 2023-24 school year (Tr. p. 33).

[7] It appears the award of SETSS at $195 per hour may have been a typographical error by the IHO, as the parents contracted for SETSS at a rate of $198 per hour and the affidavit from Encore's accounting manager indicated that Encore's "rate for 1:1 special education services is $198 per hour" (compare IHO Decision at p. 9, with Parent Exs. D). The IHO did not otherwise explain the difference and the remainder of this decision will assume that the IHO's intended figure was $198 per hour.

district and the testimony given by Encore's accounting manager who explained the difference between the rates paid to Encore's SETSS and speech-language providers and the overall rates charged by Encore.

In an answer, the parents denied the district's material allegations and contend that the IHO's decision should be affirmed. The parents further submit additional exhibits for consideration on appeal.

In a reply, the district alleges that the parents' additional evidence submitted with its answer should not be considered because it was available at the time of the impartial hearing and is not necessary for an SRO to render a decision.

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]).[8] "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.).[9] Thus, under State law an eligible New

[8] 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]).

[9] 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

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Subject Matter Jurisdiction

At the outset, it is necessary to address the district's assertion that the IHO erred in failing to dismiss the parents' due process complaint notice for lack of subject matter jurisdiction. The district argues on appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to implementation of an IESP.

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. 24-528; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-500; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-431; 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

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.

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 alone, 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]).[10]

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]).

Section 4404 of the Education Law 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 §4404; 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).[11] When faced with the question of the status of students attending nonpublic schools and seeking

[10] 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]).

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

special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.[12]

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

[12] Citing School Dist. of City of Grand Rapids v. Ball, (473 U.S. 378 [1985]), the district argues that the student is not a "part-time public school student." The argument falls flat. I find the fact pattern addressed in Ball – a matter involving whether a school district's shared time and community education programs violated the Establishment Clause of the First Amendment – to be inapposite to the matter at hand. Moreover, as acknowledged by the district, as it must, the Supreme Court in Agostini v. Felton, (521 U.S. 203, 222 [1997]), expressly stated that its subsequent decisions undermined the assumptions upon which Ball relied. In this case, the district very clearly failed to provide the public school special education services called for by the district's own IESP during the 2023-24 school year under the dual enrollment statute, and the parent is seeking equitable relief in the form of unilaterally obtained services from Encore that would be available if successful under the Burlington/Carter analysis.

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.).[13] 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 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).[14]

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.

[13] 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 13, 2024 (Parent Ex. A at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then the emergency regulation has lapsed.

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[15]

Given the implementation date set forth in the text of the amendment to the regulation 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 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.

In this case, the IHO rejected the district's motion to dismiss for lack of subject matter jurisdiction, reasoning that the plain language of the regulation "states that it applies prospectively to [due process complaints] filed on or after July 16, 2024" and that "[t]his amendment was passed after a prior proposed amendment did not" (IHO Decision at p. 2). The IHO opined that the district was "attempting to apply the amended regulation retroactively through public commentary that contradicts the regulation's plain language and has no legal import or significance" (id.). For the reasons set forth above, I find no reason to reverse the IHO's decision to deny the district's motion to dismiss for lack of subject matter jurisdiction and I am not persuaded by the district's arguments on appeal.

B. Excessive Costs

Initially, the district does not challenge the IHO's findings that it failed to offer the student a FAPE for the 2023-24 school year, that the parent could seek compensatory relief instead of employing application of a Burlington/Carter analysis, the alternative finding that the parents demonstrated that the unilaterally-obtained services delivered by Encore were appropriate, and that equitable factor that the parent cooperated with the district. Therefore, these findings have become final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

On appeal, the district asserts that the IHO erred in failing to conclude that Encore had excessive rates. According to the district, the IHO failed to properly consider the AIR report and disregarded the testimony from Encore's accounting manager.

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. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]).

[15] 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; however, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

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). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 v. Dep't of Educ., 471 U.S. 359, 370-71 [1985] [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

During the impartial hearing, the accounting manager testified that Encore pays the SETSS provider, who is an independent contractor, $79 per hour (Tr. p. 62). When questioned why Encore charged $198 per hour for SETSS but only paid the SETSS provider $79 an hour, the accounting manager testified that the remaining $119 per hour accounted for "other directs costs" such a "[t]he supervisor [who] is responsible for monitoring the child's progress," professional development events, training costs, "clinical oversight," educational supplies and resources and administrative costs (Tr. pp. 63-64). The accounting manager testified that Encore pays the speech-language teacher, who is also an independent contractor, $150 per hour although the agency charges $250 per hour for speech-language therapy (Tr. p. 65). In his affidavit, the accounting manager further explained that the rates Encore charges for SETSS and speech-language services also include "rent, administrative salaries, costs for record keeping and financial management, and software" (Parent Ex. D ¶ 3).

The accounting manager testified that the district paid Encore $3,500 during the 2023-24 school year "based on a pendency order" for some of the student's SETSS services at "a rate of $125" per hour (Tr. pp. 66, 68). The district's attorney argued during closing statements that the rates charged by Encore were excessive and cited case law supporting the reduction of excessive rates (Tr. pp. 74-76). The district attorney briefly cited to the AIR report and argued that since Encore accepted SETSS service payments from the district at the rate of $125 per hour during a portion of the 2023-24 school year, the SETSS hourly rate should be reduced to $125 per hour (Tr. pp. 76-77).

The district asserts that by accepting payment for SETSS at $125 per hour, Encore waived its $198 hourly rate for SETSS. However, Encore's mere acceptance of partial payment, without more, did not operate as a waiver by the parents who contracted with Encore for the provision of SETSS at a rate of $198 per hour,[16] which contract indicated that "I remain financially responsible for all services provided to my child by Encore" (Parent Ex. E at p. 1).

However, with respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report and the district's arguments offer some basis to conclude that the SETSS rates charged by Encore are excessive, but not all of the AIR report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like Encore. First, 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 AIR Report 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.

[16] The district's argument that it was an "accord and satisfaction" overlooks several important points of that doctrine. First, the district was not a party to the contract between Encore and the parent. Second the district points to no clear agreement between the parent and Encore or between Encore and the district that the district's payment of $125 per hour to Encore settled the parents' debt for a lesser amount. Partial completion of the parents' existing obligation does not amount to an "accord and satisfaction."

[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, which preceded the 2023-24 school year at issue in this proceeding and would be relevant thereto (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 (Dist. Ex. 3 at p. 2).

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. 2 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 teachers. The USBLS indicated that in May 2023 data annual salaries for "Special Education 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

[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). A larger file with all regions for May 2023, including the New York-Newark-Jersey City metropolitan region is also available (https://www.bls.gov/oes/special-requests/oesm23ma.zip).

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 $198.00 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 accounting manager testified that Encore was paying the independent contractor $79 per hour, which if annualized is $92,430 and that figure approaches the 50th percentile, thus the $79 per hour portion of the rate is not excessive.

Some indirect costs or overhead is reasonable. The district used 35% for overhead costs in its proposed calculations rather than 27.7 percent, and thus I will not penalize the parent or Encore by using less than the 35% proposed by the district in overhead costs in this decision. When added to the salary, this results in $106.65 per hour for SETSS as an equitable remedy when factoring in reasonable overhead costs for the SETSS services.

On appeal, the district argues that the IHO's award of $250 per hour for Encore's speech-language services should be reduced to between $145 to $202.50 per hour. Notably, although the district presented the AIR Report to support its SETSS arguments, the district failed to provide any reliable information from the USBLS regarding speech-language therapist rates for the New York metropolitan region. The district offered document described as its own "Independent Provider Rate Schedule into evidence ranging from $45 to $108 per half hour, with no reliable evidence about how the parents would achieve such rates when obtaining services from private companies on the private market (Dist. Ex. 3). Thus, I do not find the document persuasive. Accordingly, as this hearing record is devoid of any reliable data or arguments by the district regarding the rate Encore charged the parents for speech-language therapy, I decline to reduce the rate for speech-language services from the contracted amount. Therefore, I will not disturb the IHO's award of speech-language services to be paid at Encore's contracted rate with the parents of $250 per hour.

VII. Conclusion

The IHO correctly determined she had subject matter jurisdiction over the parents' claims and properly denied the district's motion to dismiss on that basis. However, the hearing record warrants a reduction in the SETSS rate charged by Encore for the reasons explained above.

[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 a Step Ahead should fall in one of the different rows of private employers, but it would result in only nominal differences in calculation, and the parent did not avail herself of the opportunity to develop the record further regarding the indirect costs beyond that of the teacher's hourly wage

[21] Using 6.5 hours results in approximately 1170 hours of instruction time for students during a school day, and similar to teachers, related services are typically provided to students on a similar schedule during the school day.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 24, 2024, is modified by reversing that portion which directed the district to directly fund the SETSS services from Encore at $198 per hour; and

IT IS FURTHER ORDERED that district shall directly fund the costs of the student's SETSS delivered to the student by Encore during the 2023-24 school year at a rate not to exceed $106.65 per hour, upon the submission of proof of the delivery of the services to the student.

Dated: **Albany, New York**
January 13, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER