The University of the State of New York

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

No. 24-506

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

Appearances:
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

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 denied her request that respondent (the district) fund the costs of her daughter's private special education services unilaterally obtained from Yes I Can Services Inc. (Yes I Can) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that the parent met her burden to prove that the unilaterally obtained services were appropriate for the student for the 2023-24 school year and also asserts that the IHO lacked subject matter jurisdiction over the parent's claims. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

As part of a reevaluation of the student, the district conducted a psychoeducational evaluation on August 10, 2023 (see Dist. Ex. 5). On September 7, 2023, a CSE convened and found the student eligible for special education services as a student with a speech or language impairment (see Parent Ex. B).[1, 2] The September 2023 CSE recommended that the student receive four periods per week of group special education teacher support services (SETSS) together with two 30-minute sessions per week of group speech-language therapy (id. at p. 8).

The parent electronically signed an agreement with Yes I Can on October 19, 2023 (see Parent Ex. D).[3] The agreement indicated that the parent was contracting with Yes I Can for the provision of "Special Education services" (id. at p. 3). A "Rate Reference Sheet" for the 2023-24 school year was attached to the agreement and listed a rate of $200 per hour for SETSS (id. at p. 4).

In a letter to the district dated December 20, 2023, the parent, through her attorney, stated that she consented to the services recommended in the September 2023 IESP but was unable to implement the recommendations at the district's standard rate (Parent Ex. C at p. 2). Therefore, the parent indicated she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment from the [district]" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). The parent stated that the student's pendency lay in the September 2023 IESP which consisted of four periods per week of direct group SETSS and two 30-minute sessions per week of speech-language therapy (id. at pp. 2, 4). The parent alleged that she had been unable to locate SETSS and related services providers to deliver the services mandated in the September 2023 IESP and that the district failed to implement its recommendations (id. at p. 2).

As relief, the parent requested an order that the district "fund the providers located by [p]arent for the 2023-24 school year at the agency's contracted rate" and a bank of compensatory SETSS and related services for those services not provided during the 2023-24 school year (Parent Ex. A at p. 3).

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[1] The hearing record contains two copies of the September 2023 IESP (compare Parent Ex. B, with Dist. Ex. 4). For purposes of this decision, only the parent's exhibit is cited.

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The Commissioner of Education has not approved Yes I Can as a school or agency with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

In a response, the district generally denied the material allegations contained in the due process complaint notice, raised several defenses, and requested that the parent "be ordered to appear at the next scheduled appearance" (Due Process Response).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 4, 2024 (Tr. pp. 1-54).[4] In a decision dated September 26, 2024, the IHO found that the district failed to provide the student with the recommended SETSS and therefore, denied the student a FAPE for the 2023-24 school year, and that the unilaterally obtained services were appropriate, but that any relief requested by the parent should be denied (IHO Decision at pp. 3-7).

In connection with the district's assertion that the parent failed to submit a written request for equitable services prior to June 1, 2023 (i.e., a June 1 defense), the IHO found that the district waived its right to assert such defense (IHO Decision at p. 4). The IHO determined that the district failed to give the parent notice of its intention to assert a June 1 defense "within 10 business days of the hearing date" as required by the prehearing order (id.). Next, the IHO found that the district waived its right to assert the defense because it developed an IESP after the June 1 deadline (id.).

Next, the IHO discussed the appropriateness of the unilaterally obtained services and found that, despite the student not receiving speech-language therapy, the student received educational benefit from the services provided, and therefore, the parent her burden of proof (IHO Decision at p. 5).

The IHO then discussed equitable considerations and addressed the parent's refusal to appear at the impartial hearing (IHO Decision at pp. 6-7). The IHO noted that the district issued a subpoena for the parent to appear at the impartial hearing, which it had authority to do, and stated the reasons for requesting the parent's testimony at the impartial hearing (id.at p. 6). The IHO further indicated that the parent had sufficient notice of the subpoena, did not object to the subpoena, did not appear at the impartial hearing, even after the IHO ordered her to appear, and the parent's attorney did not request an adjournment to secure the parent's appearance (id.). Based on the parent's failure to appear, the IHO found that the "[p]arent obstructed the [district's] ability to present relevant evidence" and drew a "negative inference" against the parent (id. at p. 7). Accordingly, the IHO denied the parent's requested relief (id.).

Additionally, the IHO addressed the issue of rates was persuaded by the district's argument that the $200 hourly rate charged by Yes I Can was excessive and that, had she found the parent entitled to relief, she would have ordered district funding of the services at the lower rate of $125 per hour (IHO Decision at p. 7).

Ultimately, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at p. 8).

[4] The hearing record includes an undated prehearing order "to set firm expectations of the [p]arties to resolve the matter fairly and efficiently" (see IHO Ex. I).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in failing to enforce her own rules with respect to the issuance of a subpoena and that the district did not have the authority to issue a subpoena in this matter. The parent also claims that her testimony would have been irrelevant to the issues at the impartial hearing. Regarding relief, the parent argues that the IHO erred in finding that the hourly rate charged by Yes I Can for the unilaterally obtained services was excessive. As relief, the parent requests an order directing the district to fund unilaterally obtained servcies consisting of four periods of SETSS per week delivered to the student by Yes I Can at the rate of $200 for the 2023-24 school year.[5]

In an answer and cross-appeal, the district responds to the parent's material allegations. As for its cross-appeal, the district alleges that the IHO lacked subject matter jurisdiction over the parent's implementation claim. Next, the district argues that the parent failed to timely request equitable services and the IHO incorrectly found that the district waived the June 1st defense. The district also asserts that the parent failed to demonstrate that the unilaterally obtained services were appropriate for the student and that equitable considerations do not favor an award of relief to the parent.

In an answer to the cross-appeal, the parent argues that the IHO and SRO have jurisdiction over the parent's claims, that the district waived their June 1 affirmative defense by developing an IESP, and the parent met her burden that the unilaterally obtained services were appropriate for the student.

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]).

[5] The parent submits four documents with her request for review as additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Three of the documents submitted by the parent are already included in the hearing record (see IHO Exs. I; III; IV). The fourth document is necessary to complete the hearing record and address the issues on appeal and, therefore has been considered (see Req. for Rev. Ex. 4).

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]).

[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

As a preliminary matter, I will address the district's cross-appeal alleging that the IHO lacked subject matter jurisdiction to address the parent's requested relief.

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 under State law 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. 24-572; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of 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 alone and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[8] Education Law § 3602-c, concerning

[8] This provision is separate and distinct from the State's adoption of statutory language effectuating the federal

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]).

Consistent with the IDEA, Education Law § 4404, concerning appeal procedures for students with disabilities, 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[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] [emphasis added]), 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

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.

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.).[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 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).[11]

The district contends that the injunction does not change the plain meaning of the Education Law and that under the Education Law, "there is not, and never has been, a right to bring a complaint for the implementation of IESP claims or 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]).[12]

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[10] The due process complaint in this matter was filed with the district on July 12, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has 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 (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

[12] 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.

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

Accordingly, the district's cross-appeal seeking a dismissal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

B. Conduct of the Impartial Hearing

Before turning to the substantive issues on appeal, it is necessary to review the IHO's ruling regarding the parent's failure to appear at the impartial hearing.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). In addition, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

After the filing of the due process complaint notice dated July 12, 2024, the district submitted a due process response dated August 2, 2024 (Due Process Response). In its response, the district requested that the parent "be ordered to appear at the next scheduled appearance" and

objected "to any unverified representative of the [p]arent appearing unless they accompany the [p]arent as required by 8 NYCRR 200.5[j][3][vii]" (id. at p. 2).[13]

The prehearing order included in the hearing record states that a "request for subpoena shall be made not less than ten (10) business days prior to the scheduled hearing" (IHO Ex. I at p. 2). The order also states that the "party seeking the subpoena should include as part of its request a statement explaining why the witness/document is relevant to the matter, and why a subpoena is required" (id.).

On August 27, 2024, the district issued a subpoena for the parent to appear at the September 4, 2024 at 9:00 a.m. for the impartial hearing (see IHO Ex. IV). On the same date, the district sent a copy of the subpoena to the IHO as well as parent's attorney (IHO Ex. III). In the evening on September 3, 2024, the parent's attorney emailed the IHO and the district stating his "understanding" that the parent "should not have to appear" for the hearing date (see Req. for Rev. Ex. 4).

At the beginning of the hearing on September 4, 2024, the IHO referenced the district's subpoena for the parent to testify and asked the district to explain why the parent was being requested to testify in the district's "case-in-chief" (Tr. pp. 5, 20). In response, the district's counsel stated that the purpose of the testimony was for the parent to discuss the delayed implementation of the unilateral services for the 2023-24 school year, attempts, if any, to locate alternative providers, any notification to the district in her difficulty in finding providers for the student, and issues pertaining to the parent's submission of a written request for equitable services (Tr. pp. 5-6). Counsel for the district argued that the "parent's appearance [wa]s necessary in order to complete the record related to these factual issues that [we]re critical to determinations under Prongs II and II of the Burlington/Carter analysis" (Tr. p. 6).

The parent's attorney stated that the parent would not be present and that he did not believe that the subpoena was valid because it was not provided in accordance with the prehearing order (Tr. pp. 6-7). Further, the parent's attorney stated that the parent was "presenting a case at her own peril" and could present her case as she wanted (id.). The IHO reserved on making a ruling until after the parties entered their respective evidence into the hearing record (Tr. p. 8).

After entering the party's evidence into the hearing record and reviewing the same, the IHO ordered the parent to appear because "[t]here [we]re some issues or concerns, or topics that the [district] brought up" that were not in the parent's evidence (Tr. p. 20). Next, the IHO inquired whether the parent's counsel could have the parent appear "in the next 10 minutes" (id.). Parent's counsel stated that, because the district did not provide a "valid subpoena," the parent was "not on notice that the parent was needed" and was unable to provide the parent at that time (Tr. pp. 20-21). The IHO stated that the parent's failure to appear despite her directive for the appearance provided the district the ability to "argue . . . whatever relief the [district] believe[d] [wa]s appropriate in light of the parent's inability to appear despite my order" (Tr. p. 21). Ultimately,

[13] The provisions of the State regulations cited by the district states: "The parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities" (8 NYCRR 200.5[j][3][vii]).

the IHO found that an negative inference was warranted against the parent and denied any relief (see IHO Decision at p. 7).

With respect to the notice to the parent, while the district's request for a subpoena was not in compliance with the prehearing order, leading up to the impartial hearing, the parent was twice on notice of the district's request for the parent to appear at the impartial hearing (see Due Process Response; IHO Exs. III-IV; see also IHO Ex. I).

Ultimately, however, putting aside whether the district's request for a subpoena was properly submitted, the IHO had the authority to direct the parent's appearance in this matter. An IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). When the IHO directed the parent to appear during the impartial hearing so that the IHO could complete the hearing record, the parent's counsel did not request an opportunity to try to contact the parent to see if she could appear at the remote hearing or request an adjournment so that he could secure the parent's appearance on another date. (see Tr. pp. 20-21).

In light of the parent's attorney's failure to secure the parent's appearance at the September 4, 2024 impartial hearing or request an adjournment to do so, I do not find that the IHO erred in applying a "negative inference against the Parent" (IHO Decision at p. 7) at least with respect to certain issues related to which the parent's testimony was sought.

C. June 1 Defense

Turning to the district's cross-appeal regarding the June 1 affirmative defense, 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]).

Here, there is no evidence that the parent submitted a request for equitable services on or before June 1, 2023 (see Parent Exs. A-G). However, the IHO found that the district waived the affirmative defense by not timely raising it, and, also, that the district by its actions waived the defense (IHO Decision at p. 4).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring

parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

Here, in the prehearing order included in the hearing record, there is a section entitled "affirmative defenses," which specifically states that, if there was a "known or knowable affirmative defense" including under Education Law § 3602-c, that it "must be articulated and communicated in writing (via [due process response], motion, email, etc.) within ten (10) business days of the scheduled hearing date" (IHO Ex. I at p. 1). The order further states that any affirmative defense not communicated in writing "may be considered waived" (id. at p. 2).

In its August 2, 2024 response to the due process complaint notice, the district asserted that it intended to pursue a defense that the parent failed to comply with the requirement to submit a written request for equitable services on or before June 1 (Due Process Response at p. 1). In finding that the district waived the June 1 defense, it is unclear if the IHO considered the district's response to the due process complaint notice and, if so, whether the IHO interpreted the phrasing of the prehearing order that the defense be raised "within" 10 days of the hearing, to mean that the defense had to be in writing in the 10 business days leading up to the hearing but not before (IHO Decision at p. 4; IHO Ex. I at p. 1).[14] I considered remanding the matter to the IHO to explain her reasoning for finding the defense waived; however, given the other determinations on appeal discussed below, I find it unnecessary in this instance. In the future, should the IHO find that a party waived a defense based on the language in the prehearing order, she is encouraged to further explain her reasoning.

As for the IHO's finding that the district's convening of the CSE in September 2023 and development of an IESP constituted a waiver of the requirement that the parent submit a request for dual enrollment services by June 1, I note that 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

[14] Phrasing of other deadlines in the order is more exact (i.e., "at least three (3) calendar days before the hearing"; "five (5) business days before the scheduled hearing date"; "not less than ten (10) business days prior to the scheduled hearing") (IHO Ex. I).

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]).[15] 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 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.

Based on the foregoing, the convening of the September 2023 CSE to create a new IESP for the student, on its own, does not demonstrate a waiver of the June 1 defense. Accordingly, the IHO erred in deemed the defense waived on this ground. However, as it is unclear if the IHO

[15] 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).

deemed the affirmative defense waived based on the prehearing order in evidence notwithstanding the district's statements in the response to the due process complaint notice, the matter is not settled. Ultimately, however, as noted above, I decline to remand the matter in this instance given that there are other grounds upon which to uphold the IHO's decision to deny the parent's requested relief.

D. Unilaterally Obtained Services

Aside from the June 1 defense, the district does not cross-appeal from the IHO's remaining determinations underlying her finding that the district failed to provide the student with equitable services for the 2023-24 school year. Thus, assuming that the student was entitled to equitable services for the 2023-24 school year, the next issue is whether the unilaterally obtained services were appropriate.

Initially, 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 parent 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, she unilaterally obtained private services from Yes I Can 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 parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[16] 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.

[16] 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 Yes I Can (Educ. Law § 4404[1][c]).

Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate 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 be resolved on appeal, namely, whether the unilaterally obtained SETSS were appropriate to meet the student's needs.

The September 2023 IESP indicated that, at the time it was drafted, the student was attending a general education fifth-grade classroom in a religious nonpublic school and receiving SETSS and speech-language therapy "at school" (Parent Ex. B at p. 1). The IESP included information about the student from a psychoeducational evaluation dated August 10, 2023 and a March 2023 speech-language progress report (Parent Ex. B at pp. 1-2; see Dist. Exs. 5-6).[17] As reported in the September 2023 IESP, the student's cognitive skills were measured in the low average range with working memory to be in the average range and reported to be an area of strength for the student (Parent Ex. B at p. 1). The IESP also reported the results of administration of the Woodcock-Johnson IV Tests of Achievement (WJ-IV) to the student, which yielded average scores on the letter-word identification, math fluency, spelling, and word attack subtests, a low-average score on the sentence reading fluency subtest, a low score on the passage comprehension subtest, and very low scores on the calculation and applied programs subtests (id. at pp. 1-2). In addition, the student attained a broad reading score in the low average range and a broad mathematics score in the very low range (id.).

The IESP reported information from a speech-language progress report that the student presented with "attention span deficits" and "delays in the areas of articulation, expressive language and expressive/receptive language" all of which needed to be addressed for the student to function in school (Parent Ex. B at p. 3). Specific to the student's expressive/receptive language skills, the IESP indicated that the student's deficits limited her ability to use "higher order comprehension skills when reading" or to make inferences or draw conclusions on her own (id.). According to the IESP, the student had a weak vocabulary and had difficulty using context to determine the meanings of unfamiliar words (id.).

In terms of social development, the IESP reported information from the psychoeducational evaluation that the student had "positive interpersonal relationships"; however, according to the parent, the student had difficulty making friends and that peers took advantage of her because she

[17] The IESP indicates that the CSE had before it a March 2023 speech-language progress report (Parent Ex. B at p. 3). The hearing record includes a January 21, 2023 speech-language progress report that includes the same information reported in the IESP (compare Parent Ex. B at p. 3, with Dist. Ex. 6 at p. 3).

was nice (Parent Ex. B at p. 4). Although the parent reported that the student was clumsy and tripped a lot her gross motor skills were within normal limits (id.).

The IESP included a list of resources and modifications to address the student's management needs such as preferential seating, prompting to remain on task, visual cues, graphic organizers, repetition, simplified language, task analysis, and breaks as needed (Parent Ex. B at pp. 4-5).

2. Appropriateness of SETSS Provided by Yes I Can

The Yes I Can associate director testified on direct by affidavit that the student was provided four hours per week of individual SETSS for the 2023-24 school year beginning on October 25, 2023 (Tr. pp. 24, 26; Parent Ex. G ¶¶ 18-19). The student received the SETSS at the nonpublic school she attended both in the mainstream classroom and in a separate location (Parent Ex. G ¶¶ 25, 28). The associate director identified two providers who delivered the student's services, as well as the educational supervisor overseeing their work, and described their qualifications (id. ¶¶ 20-22, 24; see Parent Ex. F). According to the associate director, in addition to delivering the student's services, the providers "prepare[d] for sessions, create[d] goals, wr[o]te progress reports, and me[]t with teachers and parents" (Parent Ex. G ¶ 23).

According to a June 3, 2024 Yes I Can progress report, the student had shown progress in adding and subtracting fractions, solving long division problems, and developing study habits (Parent Ex. E at p. 1). However, the student struggled with staying focused, expressing herself in writing, and test-taking skills (id.). The progress report indicated that the providers used a multi-sensory approach, manipulatives, and positive reinforcement to help the student achieve progress (id.).

To monitor the student's reading levels and progress throughout the school year, Yes I Can used the Fountas and Pinnell assessment (Parent Ex. E at p. 1). The progress report noted that, based on a recent assessment, the student was reading at the end of fourth grade and beginning of fifth grade level (id.). The progress report contained two reading goals targeting the student's ability to use context to confirm or self-correct word recognition and understanding and to read grade level text "with purpose and understanding" (id. at p. 2). The SETS providers used learning worksheets, textbooks, and guided reading to assist the student with the reading goals (id.). The progress report also set forth reading comprehension goals targeting the student's ability to compare and contrast themes, settings, and plots of stories written by the same author and to determine the main idea of a text (id.). The SETSS providers used graphic/semantic organizers and "Think Alouds" to assist the student (id.).

In math, the progress report set forth goals focused on the student's ability to solve multi-step word programs involving fractions and solve two-step word problems using the four operations (Parent Ex. E at p. 3). The SETSS providers used graphic organizers and breaking the problems into smaller steps to assist the student (id.).

The June 2024 Yes I Can progress report also included a description of the providers' work with the student to address social/emotional and language skills (Parent Ex. E at pp. 3-4). The progress report included a social goal targeting the student's ability to check for understanding when information is presented, stay on topic, and link comments to remarks of others (id. at p. 3-

4). Another goal addressed the student's ability to explain her own ideas in a group (id. at p. 4). The report noted that the providers used a "Cognitive Connections" program and a "Social Thinking Program" to assist the student in these goals (id.). Additionally, the progress report described two language goals related to the student's ability to use commas and quotation marks in dialogue and to capitalize words in titles (id. at p. 4). The providers used worksheets, teacher modeling, and visual cues to assist the student in her language goals (id.).

The associate director noted that the student showed "signs of progress," but her academic and social delays warranted the need for continued individual SETSS (Parent Ex. G ¶¶ 30-31).[18] On cross-examination, the associate director testified that Yes I Can was able to offer the student speech-language therapy, but they did not provide it to the student for an unknown reason (Tr. pp. 25-26). The associate director testified that the student would have "definitely" benefitted from speech-langue therapy services for the 2023-24 school year (Tr. p. 32).

In arguing that the IHO erred in finding the unilaterally obtained services to be appropriate, the district argues that the testimony of the Yes I Can associate director failed to describe the student's needs or identify the instruction provided to the student. In addition, the district argues that the Yes I Can progress report contains vague and conclusory information regarding the student's needs, goals, and progress. However, it was the district's obligation to identify the student's needs, not the parent's (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]), and as summarized above, the summary of the student's present level of performance set forth in the IESP are not in dispute. Further, the progress report, identifies specific goals and strategies used with the student that, in many respects, adopt or build upon some of the academic goals and strategies identified in the IESP (compare Parent Ex. E, with Parent Ex. B).

With that said, the hearing record leaves open questions regarding the timing of the services, which did not begin until late October 2023, or the reasons why the parent did not obtain speech-language therapy services for the student. During the impartial hearing he parent's attorney stated that his "understanding" was that the parent was unable to find a provider for speech-language therapy (Tr. pp. 19-20); however, the associate director's testimony tends to contradict

[18] It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

this statement (Tr. pp. 25-26). The parent's testimony may have clarified the record on this point, but as noted above, she did not appear to testify despite the IHO's order that she do so.

Based on the foregoing, the evidence is in equipoise on the issue of the appropriateness of the unilateral services. As the parent carried the burden of proof on the issue of the services, I find that the totality of the evidence in the hearing record does not support the IHO's finding that the unilaterally obtained SETSS provided to the student by Yes I Can during the 2023-24 school year constituted specially designed instruction which addressed the student's unique needs and provided her with educational benefit.

E. Equitable Considerations

Turning to the basis for the IHO's denial of the parent's requested relief, the final criterion for a reimbursement award 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v.

Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO addressed the parent's failure to appear to testify at the impartial hearing as an equitable consideration (IHO Decision at pp. 6-7). At least one court has found that conduct occurring at the impartial hearing may be considered as an equitable consideration (B.D. v. Eldred Cent. Sch. Dist., 661 F. Supp. 3d 299, 317 [S.D.N.Y. 2023]). Accordingly, the parent's failure to appear to testify at the impartial hearing despite the IHO's directive is one factor to be weighed. In addition, the topics which the parent's testimony may have elucidated also relate to equitable considerations. In particular, the district noted that it wished to question the parent regarding, among other things, her communications with the district (see Tr. pp. 5-6). As noted above, there is no evidence in the hearing record that the parent provided written notice to the district requesting that the district provide dual enrollment services to the student for the 2023-24 school year. In addition, the evidence in the hearing record shows that the parent did not provide notice to the district of her intent to unilaterally obtain services from a private company and seek district funding for the costs of such services until December 20, 2023, almost two months after Yes I Can began providing the student SETSS for the 2023-24 school year (see Parent Exs. C at p. 2; G ¶ 19).

Based on these considerations, I find insufficient basis to disturb the IHO's determination that equitable considerations warranted a denial of relief in this instance.

VII. Conclusion

Based on the foregoing, the parent failed to establish the appropriateness of the unilaterally obtained services from Yes I Can during the 2023-24 school year, and there is insufficient basis to disturb the IHO's finding that equitable considerations did not support the parent's requested relief. I have considered the parties' remaining contentions and find them unnecessary to address given the determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 26, 2024, is modified by reversing that portion that found that the parent met her burden to prove that the unilaterally obtained services were appropriate for the student for the 2023-24 school year.

Dated: **Albany, New York**
February 4, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER