The University of the State of New York

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

No. 24-510

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Haglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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 son's private services delivered by HLER, LLC, (HLER) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's findings related to its obligation to provide services for the 2023-24 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On July 20, 2017, a CSE convened, found the student eligible for special education as a student with an other health impairment and developed an IESP for the student, recommending eight periods per week of direct, group special education teacher support services (SETSS), two

30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual counseling services (Parent Ex. B at pp. 2, 7).[1, 2] At the time, the student was parentally placed at a nonpublic school (id. at p. 9).

There is no evidence in the hearing record as to the student's education between the July 2017 IESP and the 2023-24 school year.

The parent, through her lay advocate, sent a letter, dated August 23, 2023, notifying the district of her intent to unilaterally obtain services through a private agency at an enhanced market rate due to the district's failure to assign a provider for services mandated for the 2023-24 school year (Parent Ex. D).

The parent signed an enrollment agreement with HLER for the agency to provide services to her son for the 2023-24 school year in accordance with the last agreed upon IEP, IESP, or administrative decision (see Parent Ex. C).[3, 4]

A. Due Process Complaint Notice

In a due process complaint notice dated May 15, 2024, the parent, through her lay advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to develop and implement a program of services for the student (Parent Ex. A). More specifically, the parent asserted that the July 2017 IESP was the last program the district developed for the student and that the district failed to implement it for the 2023-24 school year (id. At pp. 1-2). The parent indicated that if the district did not fulfill its obligations, she would implement all necessary services for the student and seek district funding for those services (id.). As relief, the parent requested a pendency hearing and a declaratory finding that the district denied the student equitable services and a FAPE for the 2023-24 school year (id. at p. 3). In addition, the parent requested an order awarding funding from the district for eight periods per week of SETSS, two 30-minute sessions per week of OT, and two 30-minute sessions per week of counseling services, at an enhanced rate for the 2023-24 school year, as well as a bank of compensatory education services for any mandated services not provided by the district (id.).[5]

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] HLER is not approved by the Commissioner of Education as a school or agency with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

[4] The enrollment agreement was not signed by the agency and does not indicate the date it was signed by the parent (see Parent Ex. C).

[5] In a response to the due process complaint notice dated August 9, 2024, the district asserted that it intended to pursue all applicable defenses during the impartial hearing including that the parent failed to send a written request

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO from the Office of Administrative Trials and Hearings (OATH) on September 19, 2024 and concluded on the same day. A representative from the district did not appear for the impartial hearing. In a decision dated September 23, 2024, the IHO found that the district failed to satisfy its burden that it provided equitable services under Education Law § 3602-c and that the parent failed to satisfy her burden that the SETSS delivered to the student during the 2023-24 school year by HLER were appropriate (IHO Decision at pp. 3, 5).[6] Noting that the student "ha[d] developed and [his] needs may have changed" since the July 2017 IESP, the IHO ordered the district to "immediately" evaluate the student for all known or suspected disabilities (id. at p. 6).

IV. Appeal for State-Level Review

The parent, through her lay advocate, appeals and the district cross-appeals. In her request for review, the parent claims the IHO improperly concluded that the SETSS provided to the student during the 2023-24 school year were inappropriate because the hearing record lacked information as to the student's then-current strengths, weaknesses, and needs.[7] As relief, the parent requests the IHO's decision be reversed and the parent awarded the contracted for rate of $192 per hour for individual SETSS and $144 per hour for group SETSS provided to the student during the 2023-24 school year.

In its answer and cross-appeal, the district claims the IHO properly determined that the SETSS provided to the student during the 2023-24 school year were not appropriate. The district also argues that equitable considerations weighed against the parent's requested relief because of the lack of credible evidence. In the alternative, the district argues that if it is determined that the SETSS provided by HLER were appropriate, for the matter to be remanded for further proceedings to determine the appropriateness of the provider's rate. Additionally, the district argues that the IHO erred by ordering the district to conduct evaluations of the student because the parent did not request such relief in her due process complaint notice. Further, the district argues that the parent's due process complaint notice and subsequent appeal should be dismissed for lack of subject matter jurisdiction.

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for equitable services prior to June 1 of the preceding school year (see Due Process Compl. Notice Response).

[6] The IHO's decision is not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Decision at pp. 1-6).

[7] The parent filed a request for review with the Office of State Review; however, the filing did not include a notice of request for review or an affidavit of services of the request for review as required by State regulation (see 8 NYCRR 279.3; 279.4). Additionally, the request for review is not "signed by an attorney, or by a party if the party is not represented by an attorney" as required by State regulation (8 NYCRR 279.8[a][4]). Although this matter is not being dismissed for failure to comply with the practice regulations, the advocate for the parent is warned that any future failure to comply with the practice regulations may result in rejection of the pleading (8 NYCRR 279.8[a]). Advocate for the parent is advised to review the practice regulations thoroughly and to be diligent in filing any future pleadings.

The parent filed a reply to the district's answer and cross-appeal.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[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 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

[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 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.

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 parent's due process complaint notice for lack of subject matter jurisdiction. The district argues that that there is no federal right to file a due process claim regarding services recommended in an IESP and that neither Education Law § 3602-c, nor Education Law § 4404, confer IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of the Dep't of Educ., Appeal No. 24-503; 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. 24-392; 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 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]).

Education Law § 4404 concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §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).[11] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the

[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.

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 (Tr. p. 17; 8 NYCRR 200.5[i][1]).[12] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[13]

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.

[12] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in the present matter is dated May 15, 2024, prior to the July 16, 2024 effective date of the emergency regulation (see Parent Ex. A), which regulation has since lapsed.

[13] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[14]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, the IHO was correct to find that the May 2024 proposed regulation may not be applied as it was never adopted. Further, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the July 2024 emergency amendment to the regulation may not be deemed to apply to the present matter. Finally, the NYSED memorandum issued in the wake of the emergency regulation, which was enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the district's cross-appeal seeking reversal of relief granted by the IHO on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

B. Unilaterally Obtained Services

The parent appeals from the IHO's determination that she did not meet her burden to show the appropriateness of the unilaterally obtained services. Specifically, the parent asserts that the IHO incorrectly determined that the hearing record lacked evidence regarding the student's current strengths, weaknesses, and needs, the progress report merely restated most of the student's 2017 IESP, including the goals, and that the evidence regarding progress was vague and self-serving.[15]

In this matter, the student has been parentally placed in a nonpublic school and the parent does 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

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

[15] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, while the IHO found aspects of the parent's evidence to be lacking in credibility, based on her related findings and description of the evidence in question, I note that the IHO's credibility findings more accurately described her weighing of the evidence and why she found some of the evidence admitted by the parent to be less than persuasive (IHO Decision at p. 5).

and, as a self-help remedy, she unilaterally obtained private services from HLER 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. 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, 142 F.3d at 129). 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 Rowley, 458 U.S. at 203-04; 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

[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 HLER (Educ. Law § 4404[1][c]).

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 not in dispute, a brief discussion of the student's needs provides context for the issue to be resolved, namely, whether HLER delivered specially designed instruction to the student to address her unique needs during the 2023-24 school year.

According to the March 2017 psychological evaluation, as reflected in the July 2017 IESP, the student, who was almost five years of age at that time, obtained full scale IQ, verbal, and nonverbal scores in the low average range (Parent Ex. B at p. 1). Measures of adaptive behavior

"revealed overall moderately low levels of adaptive functioning," and the IESP reflected that the student had a hard time focusing during group activities, retaining educational concepts, and following directions (id.). Regarding communication skills, the student demonstrated receptive and expressive language deficits and developmental phonological processes that impeded his speech clarity (id.). The student had received a diagnosis of oppositional defiant disorder and according to the IESP was "defiant at home and c[ould] behave in an aggressive manner" (id. at pp. 1, 2). At school, the student reportedly enjoyed playing with a variety of toys, engaged in pretend play, displayed interest in peers, and at times, shared possessions and took turns (id.). Results of an April 2017 OT evaluation reflected in the IESP indicated that the student "present[ed] with a decreased attention span, poor auditory filtering skills, and decreased sensory skills," as well as "significantly decreased sitting tolerance," and "many sensation seeking behaviors" (id. at p. 3). Further, the student exhibited significantly decreased grasping, visual motor, and visual perceptual skills, which had "a significant negative impact on [the student's] ability to function in the classroom and achieve academic success (id.). The July 2017 CSE determined that the supports for the student's management needs should include a multimodal approach to teaching, frequent prompting and redirection, positive reinforcement, sentence repletion/combining/completion activities, additional time to complete tasks, clear expectations, visual cues/scaffolding, simplify directions, teacher modeling, multisensory approach to learning, directions repeated/simplified language, manipulatives, and teacher check-ins (id. at p. 4).

In an undated progress report prepared during the 2023-24 school year (sixth grade), the student's SETSS providers reported that the student was 11 years old, was attending a nonpublic school, and received eight hours per week of SETSS "to address his significant delays in reading, writing, math, and social-emotional development" (Parent Ex. F at p. 1). According to the report, the student struggled with attention, focus, and understanding abstract concepts, which greatly affected his academic performance; without individualized support, he had difficulty processing information and completing tasks (id.). Review of the session notes shows that the SETSS providers identified areas of need that they observed while working with the student, including that the student exhibited deficient reading comprehension skills and grade-level writing skills to develop essays, and that he was also delayed in his "math comprehension skills" (see, e.g., Parent Ex. G at pp. 1, 3, 11, 13, 27).

2. Unilaterally Obtained SETSS

The evidence shows that HLER "offers a range of special education services" including SETSS and OT, and that HLER sent the parent a contract indicating it would provide services "in frequency and duration as listed in the last agreed upon" IESP (Parent Exs. C at p. 1; E ¶1). The parent asserts that the July 2017 IESP was the last agreed upon educational program for the student (Parent Ex. A). The July 2017 IESP included recommendations for SETSS and OT, as well as that the student receive twice weekly individual counseling (Parent Ex. B at p. 7). However, it appears that during the 2023-24 school year, the parent only obtained SETSS for the student (see Parent Ex. E ¶ 2).

The HLER financial department administrator (administrator) testified in an affidavit that HLER delivered SETSS to the student beginning on September 11, 2023 "throughout the entire

school year," with June 5, 2024 as the last date of service according to the SETSS providers' time sheet (Parent Exs. E ¶ 2; H).[17]

The administrator testified that the student had three SETSS providers during the 2023-24 school year, all were State "certified as special education teachers (Parent Ex. E ¶¶ 3, 4). The student's SETSS sessions occurred in both 1:1 and group settings; his 1:1 sessions addressed "his more significant challenges" with reading comprehension and math problem solving and "allow[ed] for personalized instruction, scaffolding, and immediate feedback (Parent Ex. F at p. 1). Further, the progress report indicated that the 1:1 sessions were "essential" as they gave the student the opportunity to work at his own pace without the "added pressure of his peers" (id.). The student also participated in small group sessions to "help him develop social skills and practice academic concepts in a more collaborative environment" (id.). The group setting encouraged peer interactions and provided opportunities to apply skills learned in 1:1 settings to a more dynamic setting (id.). The SETSS providers reported that the student benefitted from repetition and hands-on approaches, and needed scaffolded lesson materials, extra time, visual representations, simplified and repeated instructions, and teacher modeling of tasks (id. at p. 2).

According to the progress report, the student's reading skills were at a fifth grade level, and he "demonstrate[d] some ability to decode multi-syllabic words and sight words but struggle[d] with vowel digraphs, diphthongs, and other more complex reading patterns" (Parent Ex. F at p. 1). The student's reading fluency was delayed, and he struggled reading at grade level with accuracy and speed (id. at pp. 1-2). Additionally, the student's comprehension skills were below grade level, and he had difficulty with higher order thinking questions (id. at p. 2). The SETSS providers reported providing the student with graphic organizers, story maps, chunked readings and metacognitive strategies to understand text, and developed annual goals to improve decoding of unfamiliar multisyllabic words, reading grade level texts with fluency, accuracy, and comprehension, and independently summarizing stories, identifying the main idea and details from informational text (id. at pp. 2, 4).

With regard to writing, the progress report indicated that the student's writing was legible but "inconsistent" in that he struggled with appropriate spacing between letters and words (Parent Ex. F at p. 2). The student wrote simple sentences but had difficulty with punctuation, grammar, and spelling longer or unfamiliar words; his writing was "typically below grade level, lacking clarity, organization, and proper use of tense or singular/plural forms" (id.). The SETSS providers reported using graphic organizers and providing guided practice to construct coherent essays, and that the student was working to improve his essay structure and coherence (id.). Goals for the student included that he improve his ability to write a clear and coherent paragraph with correct capitalization, punctuation, and spelling, and an essay with an introduction, supporting details, and a conclusion, as well as improve his spelling of grade-level words (id. at p. 4).

In math, the progress report indicated that the student was at a fifth grade level, and struggled with double-digit multiplication, division, and working with fractions (Parent Ex. F at pp. 1, 2). He required support to apply number concepts to word problems, and the SETSS

[17] The administrator testified that the student was "entitled to 8 hours per week of SETSS," that HLER "ha[d] the capacity to provide these services," and that the providers "maintained timesheets . . . ensuring accurate tracking of service delivery" (Parent Ex. D ¶¶ 2, 5).

providers reported using visual aids, manipulatives, and task analysis to help the student conceptualize and practice math skills (id. at p. 2). Goals for the student included improving his ability to fluently add and subtract fractions, solve two-step word problems using all operations, and demonstrate understanding of number values and sequences (id. at p. 4).

Regarding social/emotional skills, the progress report indicated that the student was "socially well-adjusted" and formed positive relationships with peers and adults; however, he exhibited impulsive behavior when faced with academic challenges which led to frustration and may result in anxious or overwhelmed behaviors (Parent Ex. F at p. 3). According to the progress report, the student's emotional responses were "managed with reinforcement and behavioral strategies during his SETSS sessions" (id.). Additionally, the progress report indicated that the student's handwriting was legible, although it required improvement in spacing between letters and words (id.). Review of the progress report shows that although the student reportedly made progress, the SETSS providers "strongly recommended that he continue to receive personalized and structured support" in the form of "ongoing SETSS" (id.).

The evidence in the hearing record also contained "Session Notes" dated from the week of October 30, 2023 to the week of June 10, 2024, wherein each of the three SETSS providers prepared weekly notes about what activities they did with the student, the outcomes, and the goals (see Parent Ex. G).[18] Review of the first SETSS provider's session notes shows that the student worked on skills such as making change, identifying equivalent periods of time, using reading comprehension strategies, writing an essay, increasing his ability to deal with his feelings in an age appropriate manner, demonstrating reading readiness, analyzing literary elements, and calculating fractions and decimals (id. at pp. 1-13). The second SETSS provider worked with the student on skills such as making connections to texts, writing responses to what he read, describing characters in a story, demonstrating comprehension of texts, identifying number correspondences, demonstrating reading readiness, using correct capitalization and punctuation, showing understanding of new vocabulary, accurately writing a paragraph, sustaining attention to tasks, and increasing positive engagement with texts (id. at pp. 14-25). As for the third SETSS provider, the progress report indicated that the student worked on "appropriate correspondence associated with each number one through seventy-five," comprehension of number values, and selection of appropriate operational methods to solve multi-step problems (id. at pp. 26-40).

Turning to the parent's appeal, to the extent the IHO faulted the parent for the lack of "independent information" regarding the student's current strengths and weaknesses, it was not the parent's responsibility to evaluate the student and identify his needs (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]). However, the parent still bore the burden of proving that the private school, consisting of the unilaterally obtained special education services, offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). And, as specially designed instruction is defined

[18] Although the sessions notes run through the week of June 10, 2024, the time sheets only include entries up to June 5, 2024 (Parent Exs. G; H).

as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1 [vv]; see 34 CFR 300.39 [b][3]), it is expected that in order to meet her burden, the parent should provide some information regarding the curriculum provided to the student at the nonpublic school and how the student was functioning in the nonpublic school.

Comparison of the July 2017 IESP annual goals—developed when the student was four years old—and the 2023-24 session notes—documenting his receipt of SETSS during his sixth grade school year—shows that, at times, the SETSS providers were continuing to work on the IESP annual goals that addressed skills inconsistent with what the student worked on during the session and his actual skill level (compare Parent Ex. B at pp. 4-5, with Parent Ex. G). For example, the July 2017 IESP included an annual goal for the student to "demonstrate reading readiness by stating the name and sound for each of the twenty-six letters, upper and lower case by matching pictures to sound/symbol letter cards," which was repeated in the sessions notes for the 2023-24 school year for the week of November 13, 2023 with the student rated a "6," yet, at the time, the student was reportedly working on "reading chapters from the independent book" (compare Parent Ex. B at p. 4, with Parent Ex. G at pp. 1).[19] Another 2017 IESP annual goal, identified in the 2023-24 school year session notes, was for the student to "use a combination of drawing, dictating, and writing" to tell about the events in a story in the order in which they occurred; however, the activity description included in the session notes indicated that, at the time, the student was working on writing a coherent essay (compare Parent Ex. B at p. 5, with Parent Ex. G at p. 3). Further, in math, a July 2017 IESP annual goal was designed to improve the student's ability to "identify, write and show the appropriate correspondence associated with each number 0-25," which according to one of the session notes, the student was working on through the week of May 27, 2024—at which point he achieved a rating of "4," yet the activities he engaged in reflected working with all four operations, decimals, and fractions (compare Parent Ex. B at p. 5, with Parent Ex. G at p. 13, 39).[20]

Despite these references to the student's 2017 IESP annual goals, other session notes indicate that the SETSS providers also developed some higher-level skill annual goals for the student (see Parent Ex. G). For example, the SETSS providers developed goals for the student to write a coherent essay with proper introduction and body paragraphs, demonstrate command of the conventions of standard English, read grade level text with purpose and understanding, and show comprehension of number values in regard to fractions such that each successive denominator number represents a lesser value than the one preceding it (Parent Ex. G at pp. 3, 11, 21, 27). Although the IHO found that there was no "credible testimony" as to how HLER "narrowly tailored a program to support [the s]tudent's educational needs," as described above, the

[19] According to the progress report, the student was still working on the reading readiness and letter identification annual goal by the week of February 26, 2024, and his rating continued to be a "6" (Parent Ex. G at p. 19).

[20] In May 2024 the first SETSS provider rated the student's ability to identify numbers 0-25 as a "4" and another SETSS provider rated this skill as an "8" during the same timeframe (Parent Ex. G at pp. 13, 39).

progress report and some of the session notes explained the specially designed instruction HLER delivered to the student (see Parent Exs. F; G).

Nevertheless, overall, the evidence in the hearing record does not support a finding that the parent met her burden to prove that the services she unilaterally obtained for the student constituted appropriate instruction specially designed to address the student's unique educational needs. As noted above, specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1 [vv]; see 34 CFR 300.39 [b][3]). The hearing record, while not robust in this regard, contains some evidence of the strategies and materials the student's providers utilized during their sessions with him for the 2023-24 school year. However, as noted above, the session notes continued to refer back to skills that the student had been working on over five years prior to the start of the 2023-24 school year. Accordingly, there is some question as to the student's functioning in the general education classroom during the 2023-24 school year, which cannot be answered without evidence such as the student's report cards or other evidence explaining how the student was performing with the curriculum being provided. Notably absent from the hearing record, is any evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, or how the SETSS were connected to the instruction provided by the nonpublic school. Due to this lack of information, which should have been in the parent's possession as she placed the student at the nonpublic school, it is not possible to ascertain whether the provided special education supports assisted the student's functioning in the classroom so that he could access the general education curriculum.

Accordingly, the hearing record lacks sufficient information concerning the student's general education school in terms of the instruction and curriculum provided, which supports upholding the IHO's determination that the parent did not meet her burden of proving that the unilaterally obtained services were appropriate.

C. Relief – District Evaluation

The IHO ordered the district to evaluate the student for all known or suspected disabilities (IHO Decision at pp. 5-6). The district cross-appeals such award and argues that the IHO did not have subject matter jurisdiction to address the parent's due process complaint notice and thus it was improper to award any relief. As addressed above, the IHO did have subject matter jurisdiction over the matter and thus the district's argument regarding relief must fail. Additionally, the district argues that the IHO exceeded the scope of the impartial hearing by awarding district evaluations because the parent did not request such relief in her due process complaint notice.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Furthermore, IHOs are "granted broad authority in their handling of the

hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (Warren Consolidated Schs., 106 LRP 70659 [LEA MI 2000]).] Here, although the parent did not request the district to evaluate the student in her due process complaint notice, there is no dispute that the district has not evaluated the student since July 2017 (see generally Parent Exs. A at pp. 1-2; B at pp. 1-10; Due Process Compl. Notice Response). Accordingly, it was reasonable for the IHO to order the district to conduct a reevaluation of the student pursuant to its statutory obligations.

VII. Conclusion

As set forth above, the IHO's determination that the SETSS delivered by HLER during the 2023-24 school year were not appropriate is affirmed. Additionally, the IHO's order of relief consisting of a district reevaluation of the student was proper under the circumstances.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 14, 2025

STEVEN KROLAK
STATE REVIEW OFFICER