The University of the State of New York

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

No. 24-520

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:
Kerben Law Group, PLLC., attorneys for petitioner, by Janaya S. Kerben, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, 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 services delivered by a specified provider at the requested rates for the 2023-24 school year. The district cross-appeals, asserting that the IHO lacked subject matter jurisdiction. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has received diagnoses of oculocutaneous albinism, and a discoordination disorder (Dist. Ex. 2 at p. 4). On September 14, 2021, the CSE convened, found the student eligible for special education services as a student with a visual impairment, and developed an IESP for the student with an implementation date of September 29, 2021 (see generally Parent Ex. B).[1] The September 2021 CSE recommended that the student receive ten periods per week of direct group special education teacher support services (SETSS) in Yiddish; two 60-minute sessions per week of individual vision education services; three 30-minute sessions per week of individual physical therapy (PT); two 30-minute sessions per week of individual speech-language therapy; and three 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. B at p. 8).[2] In addition, the September 2021 CSE recommended individual paraprofessional services for the student's health, low vision, and coordination disorder (id.). The IESP indicated that the student was "[p]arentally [p]laced in a [n]on-[p]ublic [s]chool" (id. at p. 11).[3]

In a district form, signed by the parent on May 17, 2023, the parent notified the district that she was placing her child in a nonpublic school at her expense and requested that the district provide the student with special education services (Parent Ex. C at p. 1).[4]

On November 13, 2023, the CSE reconvened to develop an IESP for the student for the 2023-24 school year (see generally Dist. Ex. 2). The November 2023 CSE continued to recommend the same frequency and duration of SETSS, vision education services, PT, speech-language therapy, OT, and individual paraprofessional services as the September 2021 IESP (compare Parent Ex. B at p. 8, with Dist. Ex. 2 at pp. 10-11). The November 2023 IESP again noted that the student was parentally placed in a nonpublic school (Dist. Ex. 2 at p. 14).

On September 1, 2023, the parent signed a service contract with a special education teacher for the teacher to deliver 10 periods per week of SETSS to the student at the rate of $195 per hour beginning September 1, 2023 (Parent Ex. D). According to the contract, the parent was financially obligated to pay for the SETSS in the event she was unable to secure funding from the district (id.).

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[1] The student's eligibility for special education as a student with a visual impairment is not in dispute (see 34 CFR 300.8[c][13]; 8 NYCRR 200.1[zz][13]).

[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] District exhibit 3 is a duplicate of parent exhibit B; for the purposes of this decision, parent exhibit B will be used to cite to the September 2021 IESP (see Parent Ex. B; Dist. Ex. 3).

[4] Although the form was signed on May 17, 2023, it appears that it was sent to the district on May 31, 2023 (Parent Ex. C at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent stated that the program and services recommended in the student's September 2021 IESP were appropriate for the 2023-24 school year (id. at pp. 1-2). The parent contended that the September 2021 IESP was the last IESP developed for the student, and the CSE had not developed an IESP for the student in over two years (id. at p. 2). The parent claimed that she was "left with no choice but to locate and secure private providers" to deliver the student's SETSS (id. at p. 3). Additionally, the parent requested that the district provide her with the student's educational files, identifying IESPs, evaluations, communications, pertaining to the student going back to January 1, 2019 (id.).

The parent also asserted that the student was entitled the September 2021 IESP during the pendency of the proceeding, which, according to the parent, consisted of ten 60-minute sessions per week of individual SETSS in Yiddish, two 60-minute sessions per week of individual vision education services, three 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, and three 30-minute sessions per week of individual OT, together with a daily health paraprofessional (Parent Ex. A at pp. 3-4). As relief, the parent sought funding for the SETSS and related services as recommended in the September 2021 IESP for the 2023-24 school year (id. at p. 4).

In a due process response, the district denied the allegations contained in the due process complaint notice, asserted the affirmative defense that the parent failed to comply with the notice requirement for requesting equitable services, and submitted a November 13, 2023 prior written notice of the recommendations contained in the student's November 2023 IESP (Due Process Response).

B. Impartial Hearing Officer Decision

Following a preliminary conference held on August 16, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 12, 2024 and concluded on October 2, 2024 after three total days of proceedings (Tr. pp. 1-93).[5] In a motion to dismiss, dated September 11, 2024, the district argued that the IHO did not have subject matter jurisdiction over the parent's claims and that the claims were not ripe because they were filed prior to the start of the school year (see IHO Ex. I). After arguments from both parties on September 12, 2024, the IHO denied the motion finding that the IHO had subject matter jurisdiction to hear and decide the matter and the claims were ripe for adjudication (Tr. pp. 9, 20-25).

In a decision dated October 3, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year and that the unilateral services obtained by the parent were appropriate; the IHO then reduced the requested rate for the services under equitable considerations (IHO Decision at pp. 2, 5, 7-8). In connection with the provision of a FAPE, the

[5] The IHO issued a prehearing conference summary and order following the prehearing conference.

IHO found that the district failed to implement the student's IESP for the 2023-24 school year, and therefore, failed to sustain its burden that it provided the student with a FAPE (id. at pp. 4-5).

Next, in connection with the SETSS obtained by the parent, the IHO found that the agency provided the student with ten hours per week of SETSS for the 2023-24 school year by a provider "certified by New York State to teach students with disabilities," and found that the relief requested for the SETSS was appropriate (IHO Decision at p. 7). However, the IHO reduced the requested rate for the SETSS provider based upon a report submitted by the district entitled "Hourly Rate for Independently Contracted Special Education Teachers and Related Service Providers" which provided the market rate charged in the district (id.). The IHO found that the appropriate rate for the SETSS was $160 per hour (id.). Accordingly, the IHO indicated he would order the district to directly fund 10 hours of SETSS per week at the rate of $160 per hour for the 2023-24 school year (id. at pp. 7). However, in the ordering clause, the IHO ordered the district to directly fund five hours per week of SETSS for the 2023-24 school year (id. at p. 8).

With respect to the paraprofessional services, the IHO found that the paraprofessional services were appropriate for the student but reduced the requested rate for the services (IHO Decision at p. 7). The IHO found that the rate for the paraprofessional was $75 per hour; however, the IHO noted that there was no evidence in the hearing record as to the actual amount paid to the paraprofessional or that the rate charged for the paraprofessional was consistent with the market rate in the district (id. at pp. 7-8). Therefore, the IHO reduced the rate for the paraprofessional services to $30 per hour and ordered the district to directly fund the cost of the student's paraprofessional services for the 2023-24 school year (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the rate for the SETSS and paraprofessional services and in ordering five hours of SETSS per week for the 2023-24 school year instead of 10 hours per week. The parent contends that the IHO's decision was not based on the complete hearing record and that the IHO relied primarily on the American Institutes for Research October 2023 rate study (AIR report) in reducing the contracted for rates.

Next, the parent argues that the IHO's reduction of the rate for the paraprofessional services was not supported by the hearing record. Again, the parent stated there was no "justification" for the reduction from $75 to $30 per hour and the AIR report did not include information on paraprofessional services.

Additionally, the parent asserts that the IHO "inadvertently" reduced the frequency of SETSS from 10 hours per week to five hours per week. The parent claims that the decision contains language about the 10 hours per week of SETSS but then ordered five hours per week of SETSS without any explanation.

In an answer and cross-appeal, the district generally denies the material allegations contained in the request for review. The district argues that although the IHO correctly reduced the SETSS rate but cross-appeals asserting that the IHO should have further reduced the rate to $125 per hour as set forth in the AIR report. The district argues that the hearing record does not support the awarded rate of $160 per hour for the SETSS. Next, the district asserts that the IHO

correctly reduced the rate for paraprofessional services to $30 per hour. The district also argues that the IHO correctly reduced the amount of SETSS awarded to five times per week. Lastly, the district cross-appeals asserting that the due process complaint notice should be dismissed for a lack of subject matter jurisdiction.

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]).[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

[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.

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

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

VI. Discussion

A. Preliminary Matter

1. Subject Matter Jurisdiction

As a preliminary matter, it is necessary to address the issue of subject matter jurisdiction. In this case, the district raised this argument at the impartial hearing as a basis for dismissing the parent's claims, which the IHO denied. However, even if the district had not raised the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007] [ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

The district argues that that there is no federal right to file a due process claim regarding services recommended in an IESP and that "[s]ervices provided pursuant to an IESP are exempt from the IDEA's FAPE requirement and are instead brought pursuant to [Education Law § 3602-c]" (Answer & Cr.-Appeal ¶ 11). The district further argues that Education Law § 4404 limits due process "to any matter relating to the identification, evaluation or educational placement of the student [with a disability] or the provision of a free appropriate public education to the student or for a matter relating to the discipline of such student" and thus Education Law § 3602-c "explicitly defines what individual due process rights parents of parentally placed students have and does not grant [Education Law §] 4404 due process rights for the purpose of implementation" (id.; quoting Educ. Law 4404[1][a]; [emphasis in the original]). The district argues "under the New York Education Law, there is not, and never has been, a right to bring a complaint for implementation of IESP claims or enhanced rate services" (Answer & Cr.-Appeal ¶ 13; [emphasis in the original]).

Recently in a number of 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. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-558; 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. 24-498; 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 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 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 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]).

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

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider claims related to implementation of an IESP (Answer & Cr.-Appeal ¶ 12). In addition, the district asserts that there has never been a right to due process for claims for implementation of equitable services or for an enhanced rate and that the State Education Department (SED) adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5 to clarify that under Education Law § 3602-c parents who parentally place a student with a disability in a nonpublic school and seek payment for unilaterally obtained services included in the student's IESP are not granted the right to file a due process complaint notice to dispute the implementation of an IESP, including payment for IESP services obtained by the parent (id. ¶ 13).

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

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

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

complaint notices filed on or after July 16, 2024 (id.).[9] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of 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. 909589-24).[10]

The district acknowledges the Order to Show Cause but 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" (Answer & Cr.-Appeal ¶ 14 [emphasis in original]). 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.

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

[10] 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. The IHO would not have known of the actions of the litigants or actions by Supreme Court at the time of the IHO's final decision.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[11]

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 argument seeking dismissal of the parent's claims on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

2. Clarification of SETSS Award

The parent asserts that the IHO "inadvertently" reduced the amount of SETSS in his decision from 10 hours per week to five hours per week. The parent also asserts that the IHO did not explain how the reduced hours would offer the student a FAPE. The district argues that the IHO correctly reduced the SETSS awarded to five hours per week. The district further claims that the parent did not challenge the appropriateness of the IESPs, and that the student would have received an educational benefit from five sessions of SETSS per week on an individual basis.

Here, both the September 2021 and November 2023 IESPs recommend that the student receive 10 periods per week of group SETSS (Parent Ex. B at p. 8; Dist. Ex. 2 at p. 10). At no time during the impartial hearing did the parent seek anything other than 10 periods per week of SETSS and the district did not argue that the 10 hours a week of SETSS that was purportedly being provided to the student was excessive (Tr. pp. 1-93; see Parent Ex. A; see Due Process Response).

In discussing the SETSS, the IHO referenced that the parent entered into a contract with the agency for the provision of 10 hours per week of SETSS for the 2023-24 school year (IHO Decision at pp. 6-7). The IHO found that the "requested relief was appropriate" (id. at p. 7). The IHO indicated he would order the district "to directly fund the costs of ten hours of SETSS services per week at a rate of $160.00 dollars per hour for the 2023-24 school year" (id.). However, in the ordering clause the IHO instead ordered the district to "directly fund SETSS, individual service, five times per week" (id. at p. 8). Other than the reference in the ordering clause to five hours of

[11] 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.

SETSS per week, there is no other mention of five hours of SETSS per week in the decision or in the hearing record, as noted above.

Moreover, the district's argument that the IHO correctly awarded a reduced frequency of SETSS is not supported by the hearing record and was not raised by the district other than in its answer and cross-appeal.

A plain reading of the IHO's order also supports the parent's assertion that the IHO decision contained a typographical error in the ordering clause. Accordingly, I will modify the IHO's decision to fix the typographical error and order the district to fund 10 hours per week of individual SETSS for the 2023-24 school year, upon presentation of proof of delivery of services.

B. Relief

The district does not appeal from the IHO's findings that the district failed to provide the student with a FAPE for the 2023-24 school year and that the unilaterally obtained SETSS and paraprofessional services were appropriate for the student. Accordingly, those findings have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the only issue remaining is whether the IHO correctly reduced the rates awarded for the SETSS and paraprofessional services delivered to the student during the 2023-24 school year on equitable grounds.

1. Equitable Considerations

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"]).

a. SETSS

The parent argues that the IHO erred in reducing rate for the SETSS provider. In connection with the SETSS, the parent contends that the IHO failed to give proper weight to the documentary evidence submitted by the parent and relied on the AIR report submitted by the district. In addition, the parent asserts that the IHO failed to consider that the SETSS provider needed additional materials based on the student's visual impairment and that the AIR report relied on by the IHO did not "encompass bilingual services." Furthermore, the parent contends that with respect to equitable considerations the IHO did not find that the parent failed to provide adequate notice of obtaining the unilateral services or that the parent failed to cooperate with the district.

The district, on the other hand, argues that the IHO correctly reduced the SETSS rate but also that he should have reduced the rate further to $125 per hour. The district asserts that the AIR report supports awarding a rate of $125 per hour for the SETSS. Also, the district asserts that the SETSS provider did not have the proper certification to provide instruction to an eighth-grade student, that the SETSS were provided on an individual basis and not group as recommended in the IESP, and that the SETSS provider did not offer testimony to "justify" the requested rate.

There was no finding by the IHO that the parent failed to cooperate with the district or interfered with the district's effort to deliver services, and the district makes no such allegations on appeal. In the decision, the IHO reduced the awarded rate for SETSS solely because there was "no evidence in the record of special circumstances, unique experience, or specialized materials used for the provision of SETSS" and no evidence that the "rate charged by [the] SETSS [p]rovider [wa]s consistent with the market rate" in the district (IHO Decision at p. 7). The IHO determined that the SETSS delivered by to the student by the SETSS provider were otherwise appropriate, the only remaining basis upon which to potentially reduce or eliminate the parent's requested relief is to determine whether the hourly rate for SETSS was excessive (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"]).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

Here, the hearing includes an objective source for comparing the rate charged by the private provider for the services delivered. Indeed, generally speaking, an excessive cost argument

focuses on whether the rate charged for the service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district offered the AIR report, which was admitted into the hearing record (see generally Dist. Ex. 1).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report, and the district's arguments offer some basis to conclude that the rates charged by the private provider were excessive, but not all of the AIR report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private individual. First the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the Bureau of Labor Statistics is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published. It was not inappropriate for the AIR to use such government-published data in its report. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in Bureau of Labor Statistics data ("May 2023 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm). Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach the district "can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (emphasis added) (Dist. Ex. 1 at p. 4). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees. However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose: they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not

particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the Bureau of Labor Statistics data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district special education teachers. The Bureau of Labor Statistics indicated that in May 2023 data annual salaries for "Special Education Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile.[12] In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the Bureau of Labor Statistics provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and for private industry such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf).[13]

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.[14] When using the Bureau of Labor Statistics data, a calculation leads to the conclusion that the $195 per hour rate for SETSS falls above the 90th percentile of salary for the metropolitan region in which the district is located.

Regarding the reasonableness of the $195 hourly rate that the special education teacher charged the parent, the IHO discussed the AIR report entered into evidence by the district (IHO Decision at p. 7; see Dist. Ex. 1). As explained by the IHO, the report listed "a range of $72.62 - $159.42 for inflation adjusted hourly rates" (IHO Decision at p. 7; Dist. Ex. 1 at p. 18). In this instance, based on the evidence in the hearing record, the IHO found that the SETSS provider received approximately $150 per hour after deducting overhead costs, "which exceeds the 90th

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

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

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

percentile" (IHO Decision at p. 7; Tr. p. 74; Dist. Ex. 1 at pp. 15, 18).[15] Further, the IHO found no evidence in the hearing record of "special circumstances, unique experience, or specialized materials used for the provision of SETSS services during the 2023-[]24 school year" (IHO Decision at p. 7). The IHO found no evidence that the provider's rate was consistent with the market rate charged in the district and it was on this basis that the IHO reduced the provider rate from $195 to $160 per hour (id.).

The parent asserts, on appeal, that the AIR cannot be used as a basis for reducing the rate for SETSS because the report did not identify a rate for a bilingual special education teacher serving a student with a disability. However, prior to finding that there was no evidence of "special circumstances, unique experience, or specialized materials used for the provision of SETSS" the IHO noted that the SETSS provider testified that her rate was based on her experience and to cover costs of materials (IHO Decision at p. 7).

The SETSS provider testified that the rate, in the amount of $195, was based on her certifications has and her 13 years of experience in reading (Tr. p. 70). The SETSS provider is certified to teach students with disabilities (Grades 1-6), bilingual education, and students with disabilities (Birth – Grade 2) (see Tr. p. 70; Parent Exs. E, G). The SETSS provider testified that she had expenses related to instructional materials, manipulatives, courses on students with visual impairments, costs for professional training (Tr. pp. 70-72). Upon further questioning by the IHO, she further broke down the rate stating that she received $150 per hour, after deducting her other expenses in the amount of $45 which consisted of the materials, courses, actual workshops, and materials to actually enlarge the text for the student (Tr. p. 74). However, the SETSS provider did not identify any specific cost or any amount of the service attributable any of the items she identified.

When using the Bureau of Labor Statistics data, similar to the conclusion the IHO reached with respect to the AIR, a calculation leads to the conclusion that the $198.00 per hour rate for SETSS falls above the 90th percentile of salary for the metropolitan region in which the district is located. Although it would be preferable to determine the actual rate paid to the SETSS provider and then compute indirect and fringe benefit costs at a rate of 27.7 percent, the rate pulled from the Bureau of Labor Statistics data, in this instance the SETSS provider is not a company or agency and is not paid a set amount, rather the parent contracted directly with the SETSS provider (see Parent Ex. D). As explained in the SETSS provider's testimony, she guessed as to the amount she received per hour at $150 (Tr. p. 74). Accordingly, there is not a definitive statement as to what the SETSS provider expected to receive solely for delivering services to the student and the $150 per hours does not provide for a reasoned starting point to add on a percentage for indirect and fringe expenses. All of this and the SETSS provider's testimony is taken into account in ordering equitable relief.

Overall, when considering the testimony described above, in which the SETSS provider did not provide a sufficient basis for substantiating the rate charged and identified only

[15] The IHO appears to have treated the SETSS provider as "an agency"; however, the contract signed by the parent was with the provider as an individual (Parent Ex. C; see IHO Decision at pp. 6-7). Nevertheless, the IHO reviewed the provider's testimony as to her costs and how much she received after overhead expenses (Tr. pp. 72-74; see IHO Decision at p. 7).

general categories of indirect costs that factored into the hourly rate charged, the evidence supports the IHO's determination that the parent arranged for services at an excessive cost. Given the discretion afforded an IHO in weighing equitable consideration I find insufficient basis to disturb the IHO's reduction of the rate to be funded by the district to an hourly rate of $160 per hour for the 2023-24 school year.

b. Paraprofessional Services

The parent asserted that the reduced rate for the paraprofessional services was not supported by the hearing record. The parent claims that the IHO did not detail a "methodology" to explain the reduction of the hourly rate from $75 per hour to $30 per hour for the paraprofessional services. The district states that the IHO correctly reduced the rate for the professional services because there was no testimony from the paraprofessional that worked with the student and no evidence about how the rate of $75 was determined other than testimony from the SETSS provider that it was a "market rate."[16] Additionally, the district maintains that the hearing record failed to contain evidence of the paraprofessional's "training, expertise, job function, etc." nor any evidence "of special circumstances, unique experience, or specialized materials" used in connection with the paraprofessional services (id.). Therefore, the district asserts that the IHO properly reduced the rate for the paraprofessional services to a rate not to exceed $30.

The IHO found that although the SETSS provider testified that she charged $75 per hour for the paraprofessional services, the was no evidence of the amount that the paraprofessional was actually paid (IHO Decision at p. 7). Also, the IHO found no evidence in the hearing record of "special circumstances, unique experience, or specialized materials" for the paraprofessional (id. at pp. 7-8). Further, the IHO determined that the hearing record did not include any evidence showing that the rate charged for the paraprofessional services was consistent with the market rate charged in the district (id. at p. 8).

Other than arguing in general that the IHO erred with respect to the reduction of the paraprofessional rate, the parent argues that the district did not submit evidence of "reasonable market rates" as the AIR report does not address paraprofessional services. Therefore, the parent asserts that there was no evidence in the hearing record that the paraprofessional services were excessive.

Furthermore, although the parent argues that there was an oral contract for the paraprofessional services, there is no reliable evidence to support the terms of an oral contract in the hearing record. There is no evidence of the services provided to the student, or the days and times in which the paraprofessional services were provided to the student during the 2023-24 school year (see Parent Exs. A-H). Without a contract in evidence to show that the parent was liable to pay the SETSS provider or an agency controlled by her the rate of $75 per hour for paraprofessional services, or some evidence to show that paraprofessional services were delivered to the student during the 2023-24 school year, such as attendance records, time sheets, or invoices,

[16] The district does not cross-appeal from the IHO's decision regarding the rate of the paraprofessional services.

there is little basis for departing from the IHO's award of $30 per hour for whatever paraprofessional services may have been delivered to the student.

Under IDEA, the district court enjoys broad discretion in considering equitable factors relevant to fashioning relief (Gagliardo, 489 F.3d 105, 112), and the courts have generally accorded similarly broad discretion to IHOs when fashioning equitable relief (L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 (D. Conn. July 7, 2017). The IHO acted within that broad discretion in determining that a reduction from $75 to $30 was appropriate, after he analyzed and weighed the equities based on his review of the hearing record (see also A.P., 2004 WL 763386 at *1 [finding it improper for a court to reduce an award of tuition reimbursement without making any findings that equities weighed against a parent]).

VII. Conclusion

Based upon the foregoing, I find insufficient basis to reverse the IHO's reduction of the SETSS provider's rate to $160 per hour or the reduction of the paraprofessional services rate to $30 per hour. Further, I will modify the IHO's order that the district fund 10 hours per week of SETSS for the 2023-24 school year and fix the IHO's typographical error in the ordering clause from five hours per week of individual SETSS to 10 hours per week of individual SETSS for the 2023-24 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 3, 2024, is modified to the extent that the district is directed to fund 10 hours per week of SETSS for the 2023-24 school year instead of five hours per week.

Dated: **Albany, New York**
January 31, 2025

STEVEN KROLAK
STATE REVIEW OFFICER