The University of the State of New York

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

No. 24-528

**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 Limud, Inc. (Limud) for the 2023-24 school year. The parent also appeals from the order of the IHO which directed the district to perform evaluations of the student and for the parent to provide consent. The district cross-appeals from the IHO's decision asserting that the IHO lacked subject matter jurisdiction. The appeal must be sustained in part. The cross-appeal must 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 parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on September 22, 2016, found the student eligible for special education as a student with a learning disability, and formulated an IESP for the student with a projected implementation date of September 22, 2016 (see Parent Ex. B).[1] The CSE recommended that the student receive five periods of direct, group special education teacher support services (SETSS) per week and two 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. B at p. 11).[2] The CSE noted that the student was parentally placed in a nonpublic school (id. at p. 14).

There is no evidence in the hearing record as to the student's education between the September 2016 IESP and the 2023-24 school year.

On May 31, 2023, the parent signed and returned a district form which notified the parent that it was aware that the parent had placed the student in a nonpublic school and that, if she wished for the student to receive special education services from the district, the parent needed to sign an attached form and return it to the district on or before June 1, 2023 (Parent Ex. C).

On September 1, 2023, the parent entered into a contract with Limud to provide the student with five hours per week of group SETSS at a rate of $195 per hour for the 2023-24 school year (Parent Ex. E).[3]

### A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 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 at p. 1). The parent asserted that the district failed to provide and implement a program for the student for the 2023-24 school year, failed to implement the student's program pursuant to the last agreed upon IESP dated September 22, 2016, and that, therefore, the parent secured a SETSS provider for the 2023-24 school year at an enhanced rate (id. at pp. 1-2). As relief, the parent requested an order on pendency and an order directing the district to directly fund the five periods of SETSS per week delivered to the student during the 2023-24 school year by the parent's chosen provider at an enhanced rate (id. at p. 2). The parent also requested an order awarding all related services for the 2023-24 school year as recommended in the student's IESP (id.).

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

### B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 28, 2024, which concluded the same day (Tr. pp. 1-74).

During the impartial hearing, the district made an oral motion for the IHO to dismiss the parent's due process complaint notice on the basis that the parent had no right to file a due process complaint notice to request an enhanced rate for equitable services under Education Law § 3602-c and thus the IHO lacked subject matter jurisdiction over the parent's claims (Tr. pp. 14-19). The IHO denied the district's motion to dismiss (Tr. pp. 22-26).

In a decision dated October 13, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year by failing to implement the student's IESP and that the SETSS delivered by Limud during the 2023-24 school year were not appropriate (IHO Decision at pp. 2, 5).[4] With respect to the IHO's findings, she noted that the parent was relying on an IESP created seven years ago and that the hearing record lacked information as to the student's then-current strengths and weaknesses, goals, and needs (id. at p. 5). Accordingly, the IHO found that the evidence was not credible because there was no explanation as to why the student continued to need the same level of SETSS as recommended in the September 2016 IESP for the 2023-24 school year (id.). The IHO also determined that the testimony of the Limud supervisor was self-serving, vague, and evasive because the progress reports admitted into evidence were created by Limud staff who had a financial interest in the outcome of this matter (id.). Based on her findings, the IHO ordered the district to evaluate the student for all known and suspected disabilities and for the parent to immediately provide consent to all evaluations of the student (id.).

## IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parent claims the IHO improperly concluded that the SETSS provided to the student during the 2023-24 school year were not appropriate because the parent failed to explain why the student required the same level of SETSS as recommended in the September 2016 IESP. The parent argues that the IHO erred by not requesting additional evidence to obtain clarity and the IHO made no reference as to what part of the witness' testimony and progress report was vague and evasive. The parent also claims that the IHO erred by ordering the district to evaluate the student and for the parent to provide consent, arguing that such order was an improper usurpation of the CSE's role and did not serve as an appropriate remediation for the district's denial of a FAPE for the 2023-24 school year. As relief, the parent requests that the IHO's decision be reversed and that the district be ordered to directly pay Limud as requested in her July 2023 due process complaint notice, or, in the alternative, reimburse the parent pursuant to pendency.

The district claims the IHO properly determined that the SETSS provided to the student during the 2023-24 school year were not appropriate. As for its cross-appeal, the district argues that the parent's due process complaint notice should be dismissed for lack of subject matter jurisdiction. The district contends that the parent does not have due process rights for claims

[4] 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).

related to implementation of an IESP. The district asserts that the enjoinment of the proposed amendment has no bearing on its argument because the law makes it clear that a parent has never had due process rights for IESP implementation cases. As relief, the district requests that an SRO dismiss the due process complaint notice with prejudice and annul the relief awarded by the IHO.

## 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]).[5] "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.).[6] Thus, under State law an eligible New

[5] 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]).

[6] 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. 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. In its oral motion to dismiss for lack of subject matter jurisdiction, the district asserted that Education Law § 3602-c did not grant the right to file a due process complaint notice for claims based on implementation, further noting that its motion was based, in part, on a notice of proposed rulemaking posted in May 2024 by the New York State Department of Education (NYSED) for changes to section 200.5 of the regulations of the Commissioner relating to special education due process hearings (see Tr. pp. 14-19). In response to the district's motion to dismiss, the parent's attorney argued that the district's lack of subject matter jurisdiction argument was flawed, in part because the parent filed her due process complaint notice prior to the date the amendment was set to take effect (Tr. pp. 20-21). The parent's attorney also argued that the motion was not timely as it was not made in writing 10-days prior to the impartial hearing pursuant to an order by a prior IHO (Tr. pp. 19-20).[7] The IHO concurred with the parent's position and denied the motion to dismiss (Tr. pp. 24-25). I find no reason to reverse the IHO's decision for the reasons set forth more fully below, and I am not persuaded by the district's additional arguments on appeal relating to NYSED's August 2024 guidance document regarding July 2024 emergency rulemaking to amend 8 NYCRR 200.5.

Similar to its argument in its oral motion to dismiss, 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 § 4404, confers 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 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

[7] There is an undated omnibus docket order included in the hearing record on appeal as a supplemental document. It is unclear if this order is related to this case or was the prior order the parent's attorney referred to during the impartial hearing; however, during the impartial hearing the parent's attorney referenced paragraph nine of the order which involves motion requests (see Tr. pp. 19-20). A review of the omnibus docket order shows that paragraph nine does deal with motion requests (see Omnibus Docket Order ¶ 9).

Disability, Appeal No. 24-499; Application of a Student with a Disability, Appeal No. 24-498; Application of the Dep't of Educ., Appeal No. 24-473; 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 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]).[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]).

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; 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

[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]).

ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[9] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), 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 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]).[10] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State 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,

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

[10] 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 July 8, 2024 prior to the July 16, 2024 effective date of the emergency regulation (see Parent Ex. A), which regulation has since lapsed.

> 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).[11]

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.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[12]

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.

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

[12] 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.

**B. Unilateral Placement**

Turning to the merits of the parties' dispute, the parent appeals from the IHO's finding that the hearing record lacked "independent information as to [the s]tudent's current strengths and weaknesses, goals and [the s]tudent's needs" and did not find the progress reports to be "credible" (IHO Decision at p. 5). The IHO found that the hearing record lacked evidence as to why the student continued to require the same level of SETSS as seven years ago, the testimony and progress reports were "self-serving, vague, and evasive" and that Limud "clearly h[ad] a financial interest in the outcome of the proceeding"; therefore, the IHO found that the unilaterally obtained services were not appropriate.

On appeal, the parent argues that the IHO's rationale for finding the unilaterally obtained services were not appropriate was not supported by the evidence in the hearing record, rather, the parent asserts that she met her burden to show that the private providers identified the student's needs and that the services delivered were specially designed to meet those needs.

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 and, as a self-help remedy, she unilaterally obtained private services from Limud 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]).[13] In Burlington,

[13] 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 Limud (Educ. Law § 4404[1][c]).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see 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 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).

A September 2016 IESP developed when the student was approximately seven years old reflects that the CSE determined the student was eligible for special education as a student with a learning disability, and reports the results of cognitive testing that indicated the student's full scale IQ was in the average range (Parent Ex. B at p. 1). Achievement assessment results reflected in the September 2016 IESP indicated that, at that time, the student exhibited "[a]bove [a]verage" oral discourse comprehension, expressive vocabulary, sentence repetition, alphabet writing fluency, math problem solving, and numerical operations skills, and below average reading and spelling skills (id. at p. 2).[14] According to the IESP, the student exhibited difficulty focusing, was easily distracted and self-directed, and became "overwhelmed when asked to comply with structure" (id. at pp. 5-7). Additionally, the student exhibited visual motor/perception skill deficits, was working on fine motor skills, and received OT services (id. at pp. 7-8). The September 2016 CSE recommended that the student receive five periods per week of group SETSS in a separate location and two 30-minute sessions per week of individual OT in a separate location (id. at p. 11). Although the CSE determined that the student "would benefit from counseling to address social emotional delays," none was recommended (id. at pp. 7, 11). The SETSS progress report prepared in June 2024 reflected that administration of the Gray Oral Reading Tests, Fifth Edition to the student in September 2023 "indicated that her reading fluency, accuracy, and rate were below average for her age and grade, placing her at a 4th-grade reading level" (Parent Ex. F at p. 1). According to the SETSS provider, the student presented with "severe language difficulties, making reading, writing, spelling, and comprehension of text very challenging for her" (id.).[15]

[14] The September 2016 IESP does not indicate when the cognitive and achievement testing was completed but does describe the difficulty the student had participating in that evaluation (see Parent Ex. B at pp. 1-6).

[15] The parent argues the IHO made credibility determinations unsupported by the hearing record and that the Limud supervisor's testimony was credible. 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). A review of the hearing record and the examples cited by the parent do not support her argument that the IHO's credibility determinations should be overturned based on the documentary evidence.

Turning to the issues on appeal, the district's response to the parent's July 7, 2024 due process complaint notice tacitly admits that the student's most recent IESP was dated September 2016, and the hearing record does not indicate that the district has evaluated the student since that time (Parent Ex. D at pp. 1, 3; see Parent Ex. A-H; Dist. Exs. 1-4; IHO Ex. I).[16] Contrary to the IHO alluding that the parent was at fault for relying on an IESP that was more than seven years old and for the lack of "independent information" as to the student's current strengths and weaknesses and needs, courts have held that it was not the parent's responsibility to evaluate the student and identify her 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, review of the hearing record indicates that the same SETSS provider who delivered services to the student during the 2023-24 school year participated in the September 2016 CSE meeting (Parent Exs. B at p. 14; G at ¶20). As the provider did not testify, the hearing record does not provide any further information as to the student's education between the September 2016 IESP and the 2023-24 school year.

Regarding the unilaterally obtained SETSS, during the 2023-24 school year the student was in eighth grade at the nonpublic school and received five hours of SETSS per week "at home" (Parent Exs. F at p. 1; G ¶ 22).[17] The June 2024 SETSS progress report indicated that the student used "audiobooks to lighten the reading load and manage heavy coursework" and a tool known as a word matrix to understand and accurately spell words (Parent Ex. F at pp. 1, 2). With regard to progress, the SETSS provider reported that the student had made "steady gains" in her reading, writing, and spelling skills and "significant strides in her literacy skills"; however, reading remained "a strenuous and time-consuming task" (id. at p. 1). The SETSS provider reported that, as of June 2024, the student could read "many 6th grade level books almost independently" and that her success depended on the content and her background knowledge (id.). The SETSS progress report contained three goals for the student: the first to learn the spelling of one new word family per week by the end of the semester; the second to explore "a new grammar concept each month" by the end of the school year; and the third to explore math, science, or history to discover and integrate new words into her studies, over the next academic term, every two weeks (id. at p. 3).

While the IHO's rationale for finding the unilaterally obtained services were not appropriate may not have been fully supported, review of the evidence in the hearing record supports the IHO's ultimate conclusion on other grounds. Specifically, although the SETSS progress report provided descriptions of assistive technology such as spell check and speech-to-text tools, and methodologies such as Orton-Gillingham, and Structured Word Inquiry, and how those supports and strategies benefit students in general, the report did not specifically indicate that the SETSS provider actually used those devices and methods with this student (see Parent Ex.

[16] Although not sworn testimony, and it is not explained as to why, the district's attorney at the impartial hearing acknowledged that the last time the district developed an IESP for the student was on September 22, 2016 (Tr. pp. 27-28).

[17] The supervisor testified both that the student "receive[d] her services at home" and that the services were delivered "[a]t the provider's home office" (compare Tr. p. 35, with Parent Ex. G ¶ 22).

F at pp. 1-2). The supervisor testified during the hearing that the SETSS provider used Orton-Gillingham and the word matrix from the Structured Word Inquiry program and generally that the student made progress, but did not provide information regarding how those methods were specially designed for the student (Tr. pp. 56-61). The SETSS progress report described how the word matrix was used with the student to improve her spelling; however, it also noted that reading continued to be a primary area of need for the student; yet, according to the progress report, the SETSS provider did not develop any reading goals and the only instructional technique described for reading that was implemented with the student was the use of audiobooks to "lighten the reading load" (Parent Ex. F at pp. 1-3).

Review of the SETSS progress report, under the totality of the circumstances, does not sufficiently describe how the SETSS provider addressed the student's academic and social weaknesses (see Parent Exs. F; G ¶ 27). Further, the hearing record does not include biannual assessments or session notes despite the supervisor's testimony that such documents were developed (Parent Ex. G ¶ 26). Nor did the parent present testimony from the SETSS provider to describe the services delivered to the student during the 2023-24 school year, and the testimony of the Limud supervisor—who did not work directly with the student but testified that she observed an undetermined number of sessions and was in "constant touch with the provider—did not offer any insight into the specific services delivered (Parent Ex. G; see Tr. pp. 34-35, 56). Notably lacking from the evidence is any description of how the SETSS, which were delivered either at the student's or the SETSS provider's home, allowed the student to benefit from her instruction at the nonpublic school, as, absent from the hearing record, is any evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, and how the SETSS were connected to the instruction provided by the nonpublic school.

In summary, taking into account the totality of the circumstances, the evidence in the hearing record does not sufficiently explain how any services that were provided by Limud addressed the student's identified needs in academics and language during the 2023-24 school year. Accordingly, I find that the parent did not meet her burden to show that the SETSS delivered by Limud to the student constituted specially designed instruction sufficient to meet the student's identified needs.

**C. Relief – District Evaluations**

The parent and the district both appeal from the IHO's awarded evaluations as relief for the district's denial of a FAPE to the student for the 2023-24 school year. The IHO ordered the district to evaluate the student "for all known or suspected disabilities" and for the parent to "immediately consent to all evaluations of [the s]tudent" (IHO Decision at p. 5). The parent argues that such an award was an improper usurpation of the CSE's role and contrary to the letter and spirit of the law. The district argues that the IHO did not have subject matter jurisdiction to address the parent's due process complaint notice and thus it was improper for the IHO to award any relief. As addressed above, the IHO did have subject matter jurisdiction over that matter and thus the district's argument regarding relief must fail.

Turning to the parent's appeal, 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, based on the limited information available in the hearing record, it has been at least eight years since the student was last evaluated (see generally Parent Exs. A at pp. 1-2; B at pp. 1-14; D at pp. 1, 3). Although the parent did not request for the district to evaluate the student, the student remains a student eligible for special education and in order to move forward in terms of educational planning for the student and reevaluation of the student should be conducted. Accordingly, it was reasonable for the IHO to order the district to conduct a reevaluation of the student pursuant to its statutory obligations; however, an IHO cannot direct a parent to consent to evaluations. As such, the IHO's order will be modified.

## VII. Conclusion

As set forth above, the IHO's determinations that the district denied the student a FAPE and that the SETSS delivered by Limud during the 2023-24 school year were not appropriate are affirmed. Additionally, it was appropriate to order the district to conduct a reevaluation of the student, but it was improper to require the parent to consent to such an evaluation.

Based upon my above determinations, it is not necessary to address the parties' remaining assertions contained in the appeal and cross-appeal.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated October 13, 2024 is modified by reversing the portion which ordered the parent to consent to district evaluations and the district is directed to begin the process for conducting a reevaluation of the student within ten days from the date of this decision if it has not already done so.

**Dated:** **Albany, New York**
**January 3, 2025**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**