The University of the State of New York

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

No. 24-531

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 cost of her daughter's private services from EdZone, LLC (EdZone) for the 2023-24 school year. The district cross-appeals from the IHO's decision only to the extent that the IHO declined to dismiss the parent's claim for lack of subject matter jurisdiction. The appeal must be sustained. 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

A CSE convened on October 3, 2019, determined the student to be eligible for special education as a student with a learning disability, and developed an IESP with a projected

implementation date of October 14, 2019 (Parent Ex. B at p. 1).[1] The October 2019 CSE recommended that the student receive five periods of group special education teacher support services (SETSS) per week, one 30-minute individual counseling session per week, and various testing accommodations (id. at pp. 6-7).[2]

On May 9, 2023, the parent completed a district form on which she requested that the district provide the student with equitable services for the 2024-25 school year (Parent Ex. E at p. 3).

On June 28, 2023, the parent signed a contract with EdZone, a private educational agency, under which the agency would assign providers to deliver services to the student "in accordance with the last agreed upon IEP/IESP/FOFD" during the 10-month 2023-24 school year (Parent Ex. C at pp. 1-3). Under her contract with EdZone, the parent agreed to be responsible for any fees not covered by the district (see id. at p. 1). The contracted rates were $198.00 per hour for individual SETSS and $148.00 per hour for group SETSS (id. at p. 3).

In a letter dated August 23, 2023, the parent's lay advocate requested that the district assign a provider to deliver the student's "mandated" services during the 2023-24 school year (Parent Ex. D at p. 1).[3] The August 2023 letter indicated that, if the district did not assign a provider, the parent would "be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

During the 10-month 2023-24 school year, the student received individual SETSS through EdZone from September 12, 2023 through June 10, 2024 (see Parent Exs. G at p. 1; I at pp. 1-10).

A. Due Process Complaint Notice

In a due process complaint notice dated July 14, 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 pp. 1-2). Specifically, the parent alleged that the district failed to convene a CSE meeting to review and update the student's educational program in advance of the 2023-24 extended school year (id. at p. 2). The parent further alleged that the district failed to supply providers to implement the services recommended in the student's most recent IESP for the 2023-24 school year and, consequently, the parent had no choice but to retain an agency to provide the recommended services at an enhanced rate (id.). The parent requested pendency based on the student's most recent IESP, developed on October 3, 2019 (see id. at pp. 1, 3, 7). As relief, the parent requested funding of the cost of the SETSS and counseling services provided to the student during the 2023-

[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] The October 2019 CSE recommended testing accommodations tailored to the student's learning disability such as time and a half for tests, directions read and reread, small group settings with minimal distractions, five-minute breaks every 30 minutes, and verbal and gestural prompts (Parent Ex. B at p. 7).

[3] The subject line of the August 2023 letter stated, "TEN (10) DAY NOTICE" (Parent Ex. D at p. 1).

24 school year, at the providers' enhanced rate, along with a bank of compensatory services to make up for any mandated services not provided (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 21, 2024 and concluded the same day (see Tr. pp. 1-21). A district representative initially appeared for the impartial hearing but left due to a scheduling conflict (see Tr. pp. 4-10). The hearing proceeded in the district's absence, and, consequently, the district presented no evidence (see Tr. pp. 10-16). The parent presented various exhibits, most of which the IHO admitted into evidence (see Tr. pp. 11-14; Parent Exs. A-I; K).[4] Among the parent's exhibits was an affidavit of an educational coordinator at EvalCare, a staffing agency "that provides special education teachers and therapists to special education agencies, including [EdZone]" (Parent Ex. F ¶ 1). The parent presented no other witness testimony (see Tr. pp. 15-16).

In a decision dated October 15, 2024, the IHO found that the district undisputedly failed to implement services to which the student was entitled on an equitable basis for the 2023-24 school year (IHO Decision at pp. 4-5). Nevertheless, the IHO denied the parent's request for funding of the cost of the unilaterally obtained SETSS provided to the student during the 2023-24 school year (id. at p. 8).[5] According to the IHO, the parent did not meet her burden of proving that EdZone provided instruction specially designed to meet the student's unique needs (id. at p. 6). The IHO reasoned that the hearing record included "little to no credible, current evidence of [the] [s]tudent's levels of performance at the start of the [2023-24] school year," "as of the date of the [SETSS] progress report," "or [at] any time between October 3, 2019," the date of the student's most recent IESP, and the start of the 2023-24 school year (id.). Thus, according to the IHO, "without a baseline of the [s]tudent's levels of performance at the start of the school year," it was impossible to measure the student's progress during the 2023-24 school year (id.). Moreover, according to the IHO, "without a reliable measure of the [s]tudent's abilities and needs," it was impossible to determine whether the program EdZone provided, a "program recommended four years earlier," was still appropriate to meet the student's needs (id.). The IHO noted that the goals referenced in the SETSS session notes were taken directly from the 2019 IESP; but the hearing record lacked evidence that those goals were still appropriate for the student (id.).[6] According to the IHO, if the

[4] Parent Exhibits A through I and K were admitted into evidence (Tr. p. 14). The IHO excluded proposed Parent Exhibit J as irrelevant (id.).

[5] The parent also requested funding of the cost of counseling services, at the provider's enhanced rate, in her due process complaint notice (Parent Ex. A at p. 3). However, the parent presented no evidence pertaining to unilaterally obtained counseling services at the impartial hearing, nor did the parent request such relief in her request for review (see generally Parent Exs. A-K; Req. for Rev. at pp. 1-9). The parent's claim for funding of the cost of counseling services is therefore deemed abandoned and will not be further addressed.

[6] The IHO further noted that one of the goals borrowed from the 2019 IESP pertained to counseling, a service which EdZone did not provide to the student, reflecting "an inappropriate use of SETSS sessions for which [the] [p]arent [was] attempting to bill [the] [d]istrict" (IHO Decision at pp. 6-7).

goals borrowed from the 2019 IESP were still appropriate, that "show[ed] a lack of progress so many years later," weighing against the appropriateness of EdZone's services (id.).

Although the IHO determined that the parent had not established a right to the requested relief, the IHO addressed the equities "for completeness of the record" (IHO Decision at p. 7). The IHO determined that equitable considerations warranted a 20 percent reduction of the requested award, reasoning that the hearing record lacked evidence that the parent submitted a timely 10-day notice (id.). According to the IHO, the August 2023 letter did not indicate if, when, or how it was sent to the district, and the parent presented no other evidence in that regard (id.). Moreover, according to the IHO, the August 2023 letter expressed the parent's "concern with the lack of implementation of services . . . and stated that [the] [p]arent would be compelled to unilaterally obtain services through a private agency at an enhanced . . . rate;" but "it [did] not indicate that the parent intended to seek public funding for said services" (id.). The IHO further reasoned that the hearing record lacked evidence of the portion of the requested hourly rate, if any, that was paid to the staffing agency and, without an accounting for the use of all requested funds, it would be unreasonable to award the requested funding (id. at 8). Accordingly, the IHO indicated that any award would reflect a "reasonable market rate, as determined by the [district's] Implementation Unit" (id.).[7]

IV. Appeal for State-Level Review

The parent appeals.[8] The district cross-appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parties dispute the following issues: whether the IHO erred in determining that the parent failed to meet her burden of proving that the unilaterally obtained services were appropriate for the student; and whether the IHO erred in determining that equitable consideration warranted a reduction of the requested award. The district also contends that the IHO lacked subject matter jurisdiction and should have dismissed the parent's claim accordingly.

[7] In an apparent contradiction, the IHO's decision also indicated that any award would reflect an hourly rate of $158.00, a 20 percent reduction of the contracted rate of $198.00 for 1:1 SETSS (IHO Decision at p. 7).

[8] I note that the request for review does not conform to practice regulations governing appeals before the Office of State Review. The lay advocate "signed" the request for review (see Req. for Rev. at p. 9). This is not permitted under State regulation, which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]). Furthermore, I note that it appears that the parent's advocate served the district by email with consent; however, the affidavit is likely inaccurate in that it states that the lay advocate served the district by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or consenting to service by an alternate delivery method, both the method of service used as well as the identification of what papers were served must be accurately set forth in the affidavit of service. It appears that the lay advocate did not understand how to properly draft the affidavit of service, and it is defective.

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]).[9] "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.).[10] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual

[9] 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]).

[10] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Subject Matter Jurisdiction

As a threshold matter, it is necessary to address the issue of subject matter jurisdiction which was raised in the district's cross-appeal. The district argues that federal law confers no right to file a due process complaint regarding services recommended in an IESP and New York law confers no right to file a due process complaint regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2023-24 school year (Parent Ex. A at p. 2). While the due process complaint notice also alleges that the district did not implement services from the most recent IESP during the 2023-24 school year (id.), this is not an instance where there is a timely and current IESP with which both parties agree that the district just failed to implement.

As the parent's claims also related to the failure to develop an IESP for the student for the 2023-24 school year, this is not an instance where the parent's claim was solely related to the implementation of an IESP. Accordingly, there can be no dispute that the IHO had jurisdiction to address this aspect of the parent's due process complaint notice.

In addition, even if this matter did solely involve implementation of the student's IESP during the 2022-23 school year, such a claim is subject to due process. In several recent 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. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; 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. 24-564; 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. 24-525; 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 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]).[11]

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 or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

Consistent with the IDEA ,Education Law § 4404, which concerns appeal procedures for students with disabilities, provides that a due process complaint may be presented with respect to

[11] 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]).

"any matter relating to the identification, evaluation or educational placement of the student or the provision of a [FAPE]" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). SROs 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).[12] 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]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), 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.).[13] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath

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

[13] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 14, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

Israel of America v. New York State Bd. of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[14]

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

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

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

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

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

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. Acknowledging that this matter has received new attention from State policymakers and appears to be an evolving situation, I nevertheless must deny the district's request for dismissal of the parent's appeal and underlying claim relating to implementation of the IESP on jurisdictional grounds.

B. Unilaterally Obtained Services

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 engage in educational planning or 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 EdZone for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.

Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[16] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered

[16] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the SETSS that the parent obtained from EdZone (Educ. Law § 4404[1][c]).

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).

As for the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 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).

1. The Student's Needs

Turning to the merits, the following disputed issues remain to be addressed: whether the unilaterally obtained services were appropriate for the student; and whether equitable considerations support the parent's request for relief.[17] First, a review of the information available in the hearing record concerning the student's needs and then-current functioning will provide the background necessary to assess the whether the unilaterally obtained services were appropriate for the student.

The hearing record includes what is apparently the student's most recent IESP, created on October 3, 2019 (Parent Ex. B at p. 1). According to the October 2019 IESP, the student's then-current performance and needs were assessed using the Clinical Evaluation of Language Fundamentals (CELF-5), which evaluated the student's language abilities in morphology, syntax, semantics, and memory (id.). The student's core language score of 105 placed her in the average range (id.). Her performance in subtests varied, with sentence comprehension above average and other areas like recalling sentences and reading comprehension at average levels (id.).

According to the October 2019 IESP, the student exhibited average skills in linguistic development but struggled to meet grade-level expectations, particularly in reading and math, with improvement noted over the course of the year (Parent Ex. B at p. 2). The student exhibited average skills in the areas of recalling sentences, sentence comprehension, following word structure rules, formulated sentences, following directions, reading comprehension, and understanding spoken paragraphs (id.). She was able to sequence events of a visually based story and provide an oral narrative with minimal cues (id.). However, the student required modeling and reminders for sentence structure and punctuation, as well as the use of manipulatives, reteaching, and further explanation in math (id.).[18] The student's ability to focus was another area of concern (id.). According to the October 2019 IESP, the student benefitted from a structured environment and incentives (id.).

According to the October 2019 IESP, the student "appeared to present with some anxiety" (Parent Ex. B at p. 2). The student "tried her best" but would become overwhelmed and shut down

[17] Neither party has appealed the IHO's determination that the student was eligible for equitable services for the 2023-24 school year; the IHO's determination that the district failed to implement the recommended services for the 2023-24 school year; or the IHO's order that district reevaluate the student, convene a CSE, and consider the updated evaluative data in developing a new IESP. Those unappealed portions of the IHO's decision have, therefore, become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992 (S.D.N.Y. March 21, 2013).

[18] The student's math skills were described as "weak," and her writing skills were described as "poor" (Parent Ex. B at p. 2).

"when tasks [were] too hard" (id.). The student was able to respond to questions involving inference and theory of mind (id.). Socially, the student was sensitive, had limited friendships, and required support in social interactions (id.). Counseling was recommended to help her navigate social situations (id.). The student was healthy, displayed adequate motor skills, and presented no concerns in the area of physical development (id. at p. 3).

The October 2019 IESP included classroom management needs such as verbal modeling, encouragement, checks for understanding, and breaks during class to support the student's learning (Parent Ex. B at p. 3). The October 2019 IESP also featured eight annual goals to address the student's needs in the areas of reading, writing, math, and social skills (id. at pp. 3-6).[19]

The hearing record includes testimony by affidavit of an educational coordinator at EvalCare, a staffing agency that supplies providers for EdZone (Parent Ex. F ¶ 1). According to the educational coordinator, the student required individual instruction because she needed customized strategies and resources that could not be provided in a group setting (id. ¶ 7). According to the educational coordinator, individual services allowed for tailored teaching methods and materials that addressed student's specific learning needs (id.).

The educational coordinator testified that the student "was assessed at the beginning of the school year for decoding and reading comprehension" and received "informal assessments for math" (Parent Ex. F ¶ 9). According to the educational coordinator, the student read at a fifth-grade level and struggled with decoding and fluency, "especially with large or unfamiliar words" (id. ¶ 10). The student was able to answer basic comprehension questions but struggled with higher-order comprehension questions (id.). Despite progress, the student still needed ongoing one to one support (id.).

The educational coordinator testified that the student exhibited "significant delays in her writing skills and struggle[d] to answer questions, often saying 'I don't know,' and feeling overwhelmed" (Parent Ex. F ¶ 11). According to the educational coordinator, the student wrote "at about a fifth-grade level and ha[d] trouble expressing her thoughts in complete sentences or paragraphs" (id.). The student's writing was "incomplete, with many errors in spelling, punctuation, and grammar" (id.). The student was unable to "focus or complete writing tasks on her own," requiring consistent one to one help (id.). According to the educational coordination, the student needed continued support to make progress in grade-level writing (id.).

[19] To address her needs in reading decoding and fluency, the student's goal was to read aloud 40 out of 50 words, with prefixes and suffixes, and read a grade-level passage fluently with appropriate intonation and expression (Parent Ex. B at p. 4). To address her needs in reading comprehension the student's goal was to demonstrate comprehension by asking and answering questions about a grade-level story and identifying the main idea and key details of a text (id. at p. 4). To address her needs in the area of writing, the student's goal was to compose an opinion piece with a structured format, including a topic sentence, temporal words, supporting details, and a concluding sentence (id. at p. 5). To address her delays in math, the student's goal was to use manipulatives to solve multiplication expressions (id.). To address the student's social/emotional needs, her goals included utilizing positive self-talk and coping strategies in stressful situations, engaging calmly in activities with minimal prompts, as well as identifying anxiety-producing situations and appropriate coping strategies in counseling sessions (id. at pp. 5-6).

The educational coordinator testified that the student "struggle[d] with math and [was] behind her grade level" (Parent Ex. F ¶ 12). She had difficulty following her teacher, as the teacher's instructions were too fast, and needed one to one help to boost her confidence (id.). The student "often forg[o]t how to solve problems," gave up easily, and required "constant reteaching and step-by-step directions" (id.). The student had difficulty "with basic math operations and complex problems[] like multidigit multiplication and division, as well as fractions and decimals" (id.).

According to the educational coordinator, the student struggled "to follow classroom instructions and complete tasks independently" (Parent Ex. F ¶ 10). The educational coordinator further testified that the student struggled with challenging tasks, often giving up or avoiding them completely (id. ¶ 13).

The hearing record also includes an EdZone progress report dated February 2, 2024 (Parent Ex. G at p. 1). According to the February 2024 progress report, the student's reading, writing, and math skills were delayed (id.). Although she was in seventh grade, she functioned at a fifth-grade level for reading, writing, and math (id.). The student was able to answer inferential questions when a passage was read to her but struggled with decoding, fluency, and comprehension, particularly with higher-order questions (id.). As for her writing skills, the student had difficulty formulating responses, expressing thoughts in writing, and completing assignments independently (id. at p. 2). As for her math skills, the student struggled with basic operations, multidigit multiplication and division, and multistep word problems (id.).

According to the progress report, the student had some social delays, low self-esteem, and struggled with academic frustration (Parent Ex. G at p. 3). She generally followed school rules but, when faced with conflict, the student tended to withdraw, and her academic delays affected her self-esteem (id.).

The progress report described the student as a visual and tactile learner, benefiting from a multimodality approach, repetition, and hands-on learning (Parent Ex. G at pp. 2-3). The progress report, which included goals for the student's math skills, writing skills, and reading comprehension, recommended that the student continue to receive five hours of one-to-one SETSS weekly to address her academic delays (id.).[20]

2. Services from EdZone

In the instant appeal, the parties dispute whether the IHO erred in determining that the parent failed to prove the appropriateness of the services provided to the student by EdZone during the 2023-24 school year. The parent argues that the SETSS provider thoroughly outlined the student's current levels of performance and, while progress need not be demonstrated for unilateral services to be deemed appropriate, the educational coordinator testified that the student did indeed make progress. The parent further argues that the educational coordinator explained how each of the student's IESP goals were addressed; and the district's failure to update the student's IESP was not the parent's fault. On the other hand, the district argues that the hearing record, which lacked

[20] Recommended goals included writing a four-sentence paragraph, identifying main ideas in texts, and solving math problems with accuracy (Parent Ex. G at p. 3).

any baseline information other the 2019 IESP, showed that, despite continued receipt of private services, the student had not progressed or had regressed since 2019.[21] The district further argues that, despite mentioning the student's continued struggles with anxiety and self-esteem, the progress report did not recommend a single goal aimed at reducing those feelings or behaviors, nor did the provider's testimony shed light on how the provider agency addressed those still-identified concerns.

As explained below, the hearing record does not support the IHO's determination that the parent failed to prove the appropriateness of the services provided to the student by EdZone during the 2023-24 school year.

In addition to the affidavit of the educational coordinator and the February 2024 progress report, the parent's hearing presentation included SETSS time sheets, dated from September 13, 2023 to June 10, 2024, and session notes, dated from October 30, 2023 to June 16, 2024.[22] The parent's hearing presentation provided a general overview of the student's SETSS with some information regarding her academic progress.[23]

To address the student's needs in the area of reading, the provider offered one to one guided reading sessions with fifth grade texts (Parent Exs. F ¶ 10; G at p. 1). Strategies included using a relatable book about a girl the student's age to motivated her to finish reading (Parent Ex. F ¶ 10). The provider also used constant prompting and chunking to help the student summarize and understand the text (Parent Exs. F ¶ 10; G at p. 1). The student was working on goals to verbally identify the main idea and key details, read aloud fluently with appropriate intonation and expression, and respond to comprehension questions, given grade-level text (Parent Ex. H at pp. 1-2, 5-9). To address her difficulty with multisyllabic words, her SETSS instruction included learning to break apart words mentally before reading aloud (id. at p. 2). At the time of the February 2024 session note, the student still struggled to answer comprehension questions and verbally identify the main idea and key details, but she was able to read with appropriate intonation and expression (id. at p. 5). The student struggled with reading fluently and made errors with grade-level words, but she was improving with practice (id. at p. 2). At the time of the April and May 2024 session notes, the student was able to self-correct errors but still mispronounced many words (id. at pp. 8-9). The student was able to answer simple questions, such as identifying the characters and their feelings, and was reading more fluently with proper expression and intonation (id.).

[21] The district notes that the provider agency copied three to four-year-old goals, which, according to the district, indicated, at best, very slow progress.

[22] The time sheets indicated that the student received individual SETSS in one-hour increments for a total of 100 sessions over the course of the 2023-24 school year (see Parent Ex. I).

[23] The session notes included rating numbers ranging from four to eight for each goal, but with no key explaining the significance of the ratings (see Parent Ex. H). Overall, based on the rating numbers in the session notes, the student demonstrated little to no progress on her goals, and even regressed in some areas, during the 2023-24 school year. However, the educational coordinator testified that the student was making progress (Parent Ex. F ¶¶ 10, 12).

To address the student's needs in the area of writing, the provider guided the student through the writing process, assisting the student in drafting, editing, and correcting grammar and spelling (Parent Exs. F ¶ 11; G at p. 2). The student was working on goals to write a four-sentence paragraph with proper grammar and compose an opinion piece with a topic sentence, temporal words, supporting detailed sentences, and a concluding sentence (Parent Ex. H at pp. 1, 4, 9). Specifically, the student was working on a personal narrative about her recent trip (id. at p. 1). The student had formulated her ideas but was provided instruction regarding proper punctuation, a topic sentence, an introduction, and a conclusion (id.). As of the January 2024 session note, the student had struggled with a writing assignment on a book that she had read (id. at p. 4). She struggled to produce content and expressed frustration at the difficulty of the task; but, with prompting, the student was able to write an essay (id.). As of the May 2024 session note, the student was able to write a four-sentence paragraph with prompting to use RACE, "which stands for repeat the question, answer the question, cite the response, and explain what it means" (id. at p. 9). The student followed that process but struggled to find the correct response (id.).

To address her needs in the area of math, the student was provided reteaching, step-by-step instructions, cues, prompts, and reinforcement (Parent Ex. G at p. 2). Despite her delays, the student was able to keep up with her seventh-grade math class with the support of individual SETSS and repetition (Parent Ex. F at p. 2). The student was working on goals to divide multidigit numbers, multiply two-digit by two-digit numbers, demonstrate proficiency in her times tables, divide multidigit numbers with decimals, and solve ratio proportionality (Parent Ex. H at pp. 1-6, 8-10). The student was learning to divide long numbers and was beginning to master the rule of PEMDAS, which stands for parenthesis, exponents, multiplication, division, addition, and subtraction (id. at p. 1). At the time of the November 2023 session note, the student required only minimal intervention to solve long division (id.). At the time of the December 2023 session note, the student could divide multidigit numbers but sometimes forgot multiplication, which slowed her down (id. at p. 2). While the student understood how to multiply double digit numbers, she sometimes forgot the multiplication table and benefitted from prompts to go back to the table to get the answer (id. at p. 3). At the time of the January 2024 session note, the student was proficient with the entire multiplication table but sometimes made careless mistakes, which she was able to self-correct (id. at p. 4). As of the June 2024 session note, the student was proficient in her times tables and able to answer questions that required knowledge of the tables (id. at p. 10).

Finally, to address her social/emotional needs, the student was working on a goal to use positive self-talk and coping strategies to handle stress and anxiety in academic settings (Parent Ex. H at p. 2). The student reportedly felt happy and proud when she successfully completed tasks with her SETSS provider (Parent Exs. F ¶ 13; G at p. 3).

The IHO employed a flawed rationale in denying the requested relief. The IHO imposed upon the parent a requirement to present "a reliable measure of the [s]tudent's abilities and needs" and a baseline from which to measure progress (IHO Decision at p. 6). Yet, "it was the district's obligation to evaluate the student and present its view of [her] needs at the impartial hearing" (Application of a Student with a Disability, Appeal No. 18-049; see 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]; A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208, 214 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate although the private school's assessments and reports were alleged to be incomplete or inaccurate, as the fault for such inaccuracy or incomplete assessment of the student's needs lied with the district]).

Moreover, nothing in the IDEA or its State counterpart "requires that an IEP contain 'baseline levels of functioning' from which progress can be measured" (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013]; C.M. v. New York City Dep't of Educ., at *20 [S.D.N.Y. Feb. 14, 2017]). Hence, the IHO erred in holding the parent to an equal or higher standard than that required of the district. Also contrary to the IHO's reasoning, a finding of progress is not required for a determination that a student's unilateral placement is appropriate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[24]

In any event, the parent's hearing presentation described the student's needs and classroom functioning with sufficient detail (see Parent Exs. F ¶¶ 10-13; G at pp. 1-3). As described above, the record evidence indicates that the SETSS provider understood the student's needs and provided specialized instruction to address those needs (see Parent Exs. ¶¶ 10-13; G at pp. 1-3; H at pp. 1-10). Considering the totality of the circumstances, I find that the parent met her burden of proving the appropriateness of the services provided to the student by EdZone during the 2023-24 school year.

C. Equitable Considerations

Finally, the parties dispute whether the IHO erred in determining that equitable considerations warrant a reduction of the requested rate of SETSS funding. The district argues that the IHO correctly found that the hearing record lacked evidence indicating if, when, or how the parent sent the requisite 10-day notice to the district. In that regard, the parent argues that her 10-day notice provided sufficient notice of her intention to seek public funding if the district failed to supply a provider; and she need not prove the date and mode by which the 10-day notice was submitted. The district further argues that the IHO properly determined that any award should be limited to a reasonable market rate due to lack of evidence of the portion of the requested hourly rate, if any, that EdZone pays the staffing agency for its services. In that regard, the parent argues that the educational coordinator's testimony provided sufficient evidence concerning EdZone's fee structure.

Under the Burlington-Carter framework, the final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations (see 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]; 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

[24] While a finding of progress is a relevant factor to be considered in determining whether a unilateral placement is appropriate, it is not dispositive (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

be required."]; 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 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"]). Among the factors that may warrant a reduction or denial of funding of under equitable considerations is whether the parent provided notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).[25] Another factor that may warrant a reduction in funding under equitable considerations is whether the rate charged by the private agency was unreasonable or whether any segregable costs charged by the private agency exceeded the level that the student required to receive a FAPE (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]; 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). However, the Second Circuit Court of Appeals recently explained that the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" "once parents pass the first two prongs of the Burlington-Carter test, (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]).

In this case, the district raised no equitable concerns during the impartial hearing. In fact, due to an apparent scheduling mishap, the hearing proceeded without the district present (see Tr. pp. 4-10). Thus, the district did not contradict the parent's evidence regarding the ten-day notice otherwise present evidence during the impartial hearing due to its own failure to appear. Under the circumstances, and considering the presumption of full reimbursement, the IHO's determination that equitable considerations warrant a reduction of the requested rate of SETSS funding will be overturned.

VII. Conclusion

In summary, the district's request for dismissal of the parent's appeal and underlying claim for lack of subject matter jurisdiction is denied. As explained above, I find that that the parent met

[25] The 10-day notice requirement "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

her burden of proving that the unilaterally obtained services were appropriate; and I find that reduction of the requested award based on equitable considerations is not warranted in this case.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 15, 2024, is modified by reversing those portions which determined that parent failed to meet her burden of proving the appropriateness of the services provided to the student by EdZone during the 2023-24 school year and that equitable considerations warrant a reduction of the requested rate of funding; and

IT IS FURTHER ORDERED that the district shall fund the cost of the student's SETSS for the 2023-24 school year, at the contracted rate of $198.00 per hour, by direct payment to EdZone.

Dated: **Albany, New York**
March 28, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER