The University of the State of New York

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

No. 24-582

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals from the IHO's decision denying its motion to dismiss the parent's due process complaint notice 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

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case will not be recited here in detail. Briefly, a CSE convened on November 4, 2019, 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 November 2, 2019 (see Parent Ex. B).[1] The CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) (id. at p. 5).[2] The CSE noted that the student was in eighth grade and parentally placed in a nonpublic school (id. at pp. 2, 7).

On September 18, 2023, the parent electronically signed an enrollment agreement with EDopt for the delivery of "certain services listed in the attached Schedule A," which, as relevant to this appeal, included special education services ($195.00 per hour, individually; $145.00 per hour, group) for the 2023-24 school year from September 2023 through June 2024 (Parent Ex. C at pp. 1-3).[3]

In a letter to the district dated September 21, 2023, the parent through her lay advocate indicated that the district failed to provide the services mandated for the student during the 2023-24 school year, and that if the district did not assign a provider, she would "be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D).

On December 4, 2023, the CSE convened, continued to find the student eligible for special education as a student with a learning disability, and developed an IESP with a projected implementation date of December 18, 2023, recommending three periods per week of direct, group SETSS (Dist. Ex. 2 at pp. 1, 4-5). The CSE noted that the student was in 12th grade and parentally placed in a nonpublic school (id. at pp. 1, 7). In a prior written notice dated December 4, 2023, the district summarized the CSE's recommendations (Dist. Ex. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated July 14, 2024, the parent, through her lay advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years. 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 November 4, 2019, and that, therefore, the parent secured a provider for the 2023-24 school year at an enhanced rate (id. at pp. 1-2). The parent also alleged the district had not yet developed an updated program of services for the student for the 2024-25 school year and thereby denied the student a FAPE and equitable services for the 2024-25 school year. 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

[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] EDopt is a limited liability corporation that 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).

2023-24 school year by the parent's chosen provider at an enhanced rate (id. at p. 3). The parent also requested an order awarding all related services for the 2023-24 school year as recommended in the student's November 2019 IESP (id.). Further, the parent requested an order directing the district to provide the student with the services and supports recommended in the last program of services developed for the student for the 2024-25 school year (id.). The parent requested that the funding of all services be ordered at her provider's enhanced rates to ensure that she had the capacity to implement the services in a timely and continuous manner (id.).

B. Impartial Hearing Officer Decision

The parent's lay advocate appeared before the IHO for a prehearing conference on August 21, 2024; a representative from the district did not appear (Tr. p. 1-12).[4] By written motion to dismiss dated September 30, 2024, the district alleged that the IHO lacked subject matter jurisdiction to review the parent's claims raised in her due process complaint notice and that the parent's claims were not ripe (IHO Ex. II). The parent's lay advocate opposed the district's motion in her closing statement (see Tr. pp. 47-49).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 7, 2024 and concluded the same day (Tr. pp. 13-55).[5] In a decision dated October 21, 2024, the IHO found that: (1) the district failed to demonstrate that the student was provided a FAPE for the 2023-24 and 2024-25 school years; (2) the parent failed to demonstrate the SETSS provided by EDopt was appropriate to meet the student's special education needs; (3) equitable considerations did not favor the parent and warranted a reduction in the enhanced rate requested for SETSS; (4) the parent's claims for the 2024-25 school year were barred based on the June 1st affirmative defense and (5) denied the district's motion to dismiss for lack of subject matter jurisdiction and ripeness (IHO Decision at pp. 1, 4-5, 8-9, 11).

Regarding the parent's unilaterally obtained-services, the IHO noted that the evidence, taken as a whole, did not meet the Frank G. standard (IHO Decision at p. 5, citing Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). The IHO determined that the witness from EDopt lacked any personal knowledge of the student's needs, the methodologies used, or how progress was assessed, and determined that the lack of evaluative data rendered the contents of the progress report as unpersuasive (IHO Decision at p. 5). The IHO noted that the progress report contained virtually no information regarding the student's academic levels at the start or end of the year and simply discussed some of the student's then-current abilities and goals (id.). The IHO also noted that the parent did not testify as to her observations of the student over the school year or the impact of the private SETSS on his educational functioning (id.).

With respect to the district's motion to dismiss for lack of subject matter jurisdiction, the IHO determined that the district's argument that students parentally placed in nonpublic schools are not entitled to maintain a due process hearing or obtain the relief requested in the due process complaint notice was without merit, and accordingly denied the district's motion (IHO Decision at

[4] The IHO issued a prehearing conference summary and order dated August 21, 2024 (see IHO Ex. I).

[5] The parent did not appear at the prehearing conference or the impartial hearing and did not testify (see Tr. pp. 1-55).

pp. 7-8). The IHO noted that the district argued that the matter should also be dismissed because the parent did not notify the district of an intent to seek services by the first day of June that immediately preceded the school year in question, per Education Law § 3602-c, and found the district's argument to be unproven (id. at p. 7). The IHO found that the CSE created an IESP for the student in December 2023 and was aware the parent was requesting services for the student for the 2023-24 school year (id.).

With respect to the district's motion to dismiss the parent's claims relating to the 2024-25 school year, the IHO denied the motion based on ripeness but, in the alternative, determined that the district persuasively demonstrated ground for dismissal based on the June 1st defense (IHO Decision at p. 9). The IHO noted that even if he found the SETSS provided by EDopt was appropriate, relief would be denied because the parent failed to notify the district of her intent to seek services for the student for the 2024-25 school year by June 1, 2024 (id. at pp. 9-10).

The IHO, in the alternative, addressed equitable considerations and determined they did not favor the parent and would warrant a denial of the requested rate or a reduction of the requested rates to the lowest rate set by the district (IHO Decision at pp. 6-7, 11). The IHO found the parent failed to show the EDopt providers were sufficiently qualified to provide services or to justify the requested enhanced rates for services, and that the parent failed to present any evidence regarding what actions she took to locate a provider at the district approved rates (id. at pp. 6, 11). The IHO also noted that the parent failed to provide any notice to the district regarding the 2024-25 school year and that such failure would support a denial of funding for private services on equitable grounds (id. at p. 11).

Accordingly, the IHO denied the parent's request for funding for the SETSS provided by EDopt to the student during the 2023-24 and 2024-25 school years (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parent, through her lay advocate, argues that the IHO held her to an unreasonable standard to demonstrate that the unilaterally-obtained services were appropriate by incorrectly concluding that the witness from EDopt was an agency representative and not an educational supervisor; mistakenly considering the SETSS provider underqualified; and incorrectly disregarding the student's progress report. The parent also argues the IHO erred in finding that equitable considerations did not favor the parent because she failed to demonstrate any efforts she made to find a provider at the district rate. The parent argues it was the district's obligation to find providers, not the parent. According to the parent, the IHO improperly faulted the parent for sending a ten-day notice after the start of the school year because it was the district's inactions that forced her to take action to find a provider for the student. The parent also argues that her claims for the 2023-24 school year were not barred by the June 1st deadline because the district did not timely raise the affirmative defense.[6] As relief, the parent

[6] The parent also acknowledges that the notice of intention to seek review was not timely filed. The parent explained the cause for the delay and argued that the district was not prejudiced by the parent's untimely filing. State regulation provides that a petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision (8 NYCRR 279.2[b]). The petitioner must also file the "notice of intention to seek review, notice of request for review, request for review, and proof of

requests that an SRO overturn the IHO's decision and order the district to provide the parent the contract rate of $195 for SETSS.

In an answer and cross-appeal, the district argues the parent failed to meet her burden that the SETSS provided to the student during the 2023-24 school year were appropriate. The district also asserts that the parent failed to comply with the June first deadline for the 2023-24 school year and thus the IHO erred in finding to the contrary. The district also argues that equitable considerations favored the district. 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 and that the IHO erred in denying its motion to dismiss. The district also alleges that the parent failed to timely serve the request for review. As relief, the district requests that the parent's request for review be dismissed and its cross-appeal sustained.[7]

The parent submitted a reply arguing the IHO and SRO have subject matter jurisdiction over her claims.

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

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service with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision). Among other things, the "service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]). Here, the district has taken no position on the parent's untimely notice of intention to seek review and was able to timely file the certified record. Under these circumstances, I will exercise my discretion and decline to dismiss the parent's request for review for the failure to timely file the notice of intention to seek review (see 8 NCYRR 279.2[f]).

[7] The district submitted with its answer and cross-appeal additional evidence to be considered on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the additional evidence is a copy of emails sent from the parent's lay advocate to the district relating to the service of the parent's request for review. Since the evidence could not have been offered at the time of the impartial hearing and relates directly to the district's argument regarding timely service of the request for review, I accept the district's additional evidence for consideration, and it will be referred to as SRO Exhibit I and it will be cited as "SRO Ex. I."

(see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual 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]).

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[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

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

VI. Discussion

At the outset, neither party challenged the IHO's finding that the district failed to offer a FAPE or equitable services to the student for the 2023-24 and 2024-25 school years or that the parent failed to timely request services by June 1, 2024 for the 2024-25 school year. Accordingly, these findings have 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, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Preliminary Matters

1. Timeliness of Request for Review

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness. The district argues that the parent served her complete request for review on December 1, 2024, 42 days after the IHO's October 21, 2024 decision.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

Here, although the district asserts the parent had until November 30, 2024 to serve the request for review, November 30, 2024 fell on a Saturday; as a result, State regulations permitted the parent to personally serve upon the district her verified request for review on Monday, December 2, 2024 (see 8 NYCRR 279.11[b]). The district also argues that the request for review was not verified; however, the evidence shows that the parent's lay advocate served the parent's notice of request for review and request for review on November 29, 2024 and then the parent's verification on December 1, 2024 (SRO Ex. I). The request for review was dated November 25, 2024 and the verification was electronically notarized on November 29, 2024 (see Req. for Rev; Parent Verification). Accordingly, the evidence shows that all the necessary pleadings were eventually timely served upon the district, although they were not served simultaneously (see SRO Ex. I). Further, there is no indication that the parent did not read the request for review or that the

verification is somehow not truthful. As such, the district's argument that the parent's request for review was not timely served must be denied.

2. Subject Matter Jurisdiction

As in the motion to dismiss, the district also argues on appeal that there is no federal right to file a due process claim regarding services recommended in an IESP and that the parent never had the right to file a due process complaint notice with respect to implementation of an IESP. Recently in a number of decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-602; 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 parent would not have a right to due process under federal law; 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]).[10]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

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 "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[11] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

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

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

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

Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[12] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

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

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[13]

Consistent with the district's position that there is not and has never been a right to bring a due process complaint for implementation of IESP claims or enhanced rate for services, 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

[12] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [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.

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

> 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]).[14]

However, acknowledging that the question has publicly received new attention from State policymakers, as well as at least one court at this juncture and appears to be an evolving situation, 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. . Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the district's cross-appeal seeking dismissal of the parent's request for review on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

3. June 1 Deadline

I will turn next to the parties' arguments regarding the June 1 requirement. The district argues that the parent failed to timely request services by June 1st for the 2023-24 school year and thus the IHO should have dismissed the parent's claims for such school year based on the June 1 affirmative defense. The parent argues the district did not raise such affirmative defense timely according to the IHO's prehearing conference summary and order.

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at

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

https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Here, the IHO determined that the district raised the June 1st affirmative defense, but failed to cite to the hearing record where such defense was raised (see IHO Decision at p. 7). The IHO also determined that because the CSE created an IESP in December 2023, the district was aware the parent was requesting services for the student for the 2023-24 school year, and "the imposition of a complete dismissal of the action would be inequitable" (id.).

Contrary to the IHO's finding, I am not persuaded that the district timely raised the June 1st affirmative defense during the impartial hearing. The hearing records shows that the district representative did not appear at the prehearing conference held August 21, 2024; however, the IHO read an email from the district representative into the hearing record which indicated the district wanted to schedule a due process hearing; she was not agreeing to pendency; and that she was attaching a motion to dismiss for ripeness regarding the 2024-25 claims (Tr. pp. 2-3). The IHO issued a prehearing conference summary and order which stated:

> Unless raised on the record during a conference, any known or knowable affirmative defense (statute of limitations, Education Law 3602-(c) notice provisions, etc.) must be articulated and communicated in writing (Due Process Response, motion, email, etc.) within ten (10) calendar days of the date of this order. Any affirmative defense(s) not so articulated and communicated will be

> considered waived, and the party will be precluded from raising or proving them at the Due Process Hearing.

(IHO Ex. I at p. 2).[15] There is no evidence that the district communicated in writing within ten days from the date of the prehearing conference summary and order that it was pursuing a June 1st affirmative defense nor did the district's representative indicate in her email that was read into the hearing record by the IHO that she was asserting such defense (see Tr. pp. 2-3; Parent Exs. A-K; Dist. Exs. 2-6; IHO Exs. I-III). Accordingly, the IHO determination that the parent's claims for the 2023-24 school year were not barred by the June 1st affirmative defense is affirmed, albeit on different 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 implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 and 2024-25 school years and, as a self-help remedy, the parent unilaterally obtained private services from EDopt for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.[16] 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;

[15] The hearing record does not include a district response to the due process complaint notice.

[16] As previously discussed herein, the parent has not appealed from the IHO's finding that any claims related to the 2024-25 school year were precluded by the June 1 defense and, accordingly, only the appropriateness of the services the parent unilaterally obtained for the student for the 2023-24 school year is at issue on this appeal.

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[17] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic 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.

[17] 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 EDopt (Educ. Law § 4404[1][c]).

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. Student's Needs

While not in dispute, a discussion of the student's needs provides context for the issue to be resolved, namely, whether EDopt delivered specially designed instruction to the student which addressed his unique needs during the 2023-24 school year.

Regarding the student's academic development, the November 2019 IESP, which was developed during eighth grade, reflected the student's seventh grade final report card grades of 90 (English language arts (ELA)), 70 (math), 65 (science), and 65 (social studies) (Parent Ex. B at p. 1). The IESP noted that according to the teacher report, the student's fluency skills were on grade level, although his overall reading skills including reading comprehension were on a seventh grade level (id. at p. 2). According to the IESP, the student struggled to identify the main idea of the passage and with remembering vocabulary words in ELA and other subjects like history and science (id.). In terms of writing, e.g., the development of ideas, handwriting, and syntax/grammar, the student was functioning on a seventh grade level, struggled with writing grade appropriate sentences and paragraphs, and his written work was often simple and one sentence long (id.). According to the IESP regarding mathematics, in the areas of calculations, application, and problem solving, the student was functioning on a seventh grade level (Parent Ex. B at p. 2). At that time, the IESP reflected that the student was attending a two-year pre-algebra/algebra class, further noting that the class would prepare him for the algebra 1 Regents examination the next school year (id.). The IESP indicated that the student "continued to show complete understanding of learned topics," but noted that he then quickly forgot the steps necessary to solve the same problems (id.). Regarding language development, the IESP reflected that the student communicated and followed directions "on grade level" (id.).

In terms of social/emotional development, according to the November 2019 IESP, the parent reported that the student was "very respectful to adults, and g[ot] along well with his peers" (Parent Ex. B at p. 2). The student had many friends, was very social, was a great help at home, and liked to help out with chores (id.). With respect to physical development, the IESP noted that the student was overall healthy, and that while the parent had no concerns about his physical

development, she stated that he did not like sports; however, he could participate in all physical activities in school (id. at p. 3). The CSE identified the supports and strategies the student benefitted from to address his management needs including the use of flash cards to review new vocabulary or spelling words; use of graphic organizers to help the student organize his ideas when writing an essay and taking notes within the classroom; written assignment read out loud to check for grammatical errors; use of a highlighter to highlight key words in a questions; use of a web for brainstorming story ideas to ensure a lot of details were generated; small group instruction; and preferential seating, along with testing accommodations including extended time, separate location, and on-task focusing prompts (id. at pp. 3, 6).

The December 2023 IESP reflected that the student remained eligible for special education as a student with a learning disability and at the time of the CSE meeting, was in 12th grade at a nonpublic school (Dist. Ex. 2 at p. 1).[18] Reports from the special education teacher, who was the student's SETSS provider, reflected in the IESP indicated that the student had come a long way academically, "struggle[d] less and less, especially with math," and "that [he] [wa]s now almost independent" (id.). In reading, the IESP reflected the special education teacher's report that the student "ha[d] delays with comprehension in terms of setting and description of stories," and that "reading classics [was] challenging" (id.). The IESP indicated that the student's writing had improved using outlines; however, the student "use[d] too many commas" (id.). At the meeting, the regular education teacher stated that "[the student] ha[d] come a long way" and the IESP reflected reports that the student's grades were all above 90 and that he was on track to earn a high school Regents diploma (id.). The IESP noted that there were no physical or social development concerns regarding the student at the time of the meeting (id. at p. 2). Finally, in addition to the testing accommodation of extended time, the CSE identified supports to address the student's management needs including flash cards for new vocabulary or spelling words, graphic organizers, editing checklists to revise grammatical errors, and additional time to complete assignments and assessments (id. at pp. 2, 5).

2. SETSS From EDopt

Turning to the IHO's findings that the "lack of evaluative data" in the EDopt 2023-24 progress report rendered it "unpersuasive," and that the progress report did not reflect the student's academic levels at the start or end of the school year, purportedly to show progress, I first note that it was not the parent's responsibility to evaluate the student and identify his needs (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]) (IHO Decision at p. 5).

[18] The December 2023 IESP noted the parent's failure to respond to the district's attempts to obtain consent to evaluate the student and to attend a CSE meeting to develop the student's IESP for the remainder of the 2023-24 school year (Dist. Ex. 2 at p. 2). Further, the December 2023 IESP reflected that "[u]pdated teacher and progress reports were requested but not made available for the meeting" (id. at p. 1). The attendance page for the December 2023 CSE meeting indicated that the student's EDopt SETSS provider attended the meeting in the role of "[s]pecial [e]ducation [t]eacher" and that a regular education teacher and a school psychologist also attended the meeting (compare Dist. Ex. 2 at p. 7, with Parent Ex. E ¶ 3, and Parent Ex. F at p. 1, and Parent Ex. H at pp. 1-10).

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

Further, review of the progress report supports a conclusion that the SETSS provider identified the student's needs and reported that he made progress as discussed below.

The 2023-24 EDopt progress report reflected that the student's learning challenges included difficulty processing auditory instructions without visual support, but he excelled when given opportunities for hands-on learning and interactive participation in lessons (Parent Ex. F at p. 2). The progress report indicated that the student thrived in a small group setting where visual learning strategies were emphasized and noted that his learning style had been a key focus during SETSS sessions (id.). Regarding the student's levels of academic functioning, the progress report indicated that the student's "reading fluency and vocabulary" were "at grade level" (id. at p. 1). The student was able to effectively identify the main ideas in texts; however, he struggled with comprehending more complex aspects of the narrative, especially when novels involved detailed settings or action scenes (id.). The progress report noted that while the student showed progress, consistent support was essential to prevent regression in his ability to tackle complex reading materials, further noting that without continued support, there was concern that the student "may struggle to keep up with reading comprehension demands, particularly in subjects requiring analysis of classical or intricate works" (id.).

With respect to writing, the progress report reflected that the student "demonstrate[d] strong writing abilities, especially in idea development, spelling, and vocabulary use," further noting that the student's writing flowed well, but he tended to overuse commas and struggled with integrating subordinating conjunctions and dependent clauses (Parent Ex. F at p. 1). The student was working on understanding proper sentence structure and the use of transitional phrases to improve the coherence of his essays (id.). The report indicated that the student's progress in writing had been steady, with his essays becoming more organized and clearer (id.). The report noted that "SETSS ha[d] been helping with transitional phrases, punctuation use, and forming compound complex sentences" (id. at pp. 1-2).

According to the report, in math, the student had made "impressive strides" particularly in algebra II, where he had worked independently to get ahead of his peers (Parent Ex. F at p. 2). The student's self-motivation allowed him to master concepts such as logarithms, radicals, and trigonometric ratios over the summer (id.). The report reflected that the student showed a strong grasp of math word problems and calculations with minimal assistance (id.). The report noted that

while the student's progress was consistent and his enthusiasm for math was evident, he occasionally required support to handle more intricate problems, particularly when translating word problems into algebraic expressions, further noting that SETSS continued to provide necessary guidance to ensure he fully grasped those concepts (id.).

Regarding social/emotional development, according to the progress report, the student had healthy social relationships with his peers and demonstrated respect toward authority figures, was able to follow school rules diligently and manage conflict or academic frustration in a calm, respectful manner, further noting his confidence in social situations was evident, and he seemed well-adjusted to his community environment (Parent Ex. F at p. 3). In terms of physical development, the progress report reflected that the student did not exhibit any physical or mobility issues and that his handwriting, balance, and coordination were appropriate for his age (id.). Review of the progress report shows that EDopt identified the student's special education needs.

Next, regarding the IHO's finding that the parent failed to show how EDopt delivered specially designed instruction to the student, the evidence shows that on September 21, 2023, the student began receiving five hours/periods per week of group SETSS, which continued for the entire 2023-24 school year (12th grade) (Parent Exs. E ¶¶ 1-2; F at p. 1; H).[19] The administrative assistant testified in an affidavit that EDopt SETSS providers were New York State certified special education teachers, and that the student's provider maintained timesheets and progress reports for the student (Parent Ex. E ¶¶ 3-5; see Parent Ex. F).

The SETSS provider opined in the EDopt progress report that the student's SETSS were essential to prevent regression and to ensure that the student continued to meet grade-level expectations, particularly as he navigated the challenges of his final year and prepared for post-graduation opportunities (Parent Ex. F at p. 3).

Regarding specially designed instruction, review of the SETSS progress report shows that it described the supports and techniques used with the student (see Parent Ex. F). For example, to address the student's needs in reading, the SETSS provider used strategies including "rereading passages, creating animated scenarios, and utilizing graphic organizers like Venn diagrams and story maps" (id. at p. 1). According to the progress report, while the student "show[ed] progress, consistent support [wa]s essential to prevent regression in his ability to tackle complex reading materials" (id.). To target the student's needs in writing, the SETSS provider helped him with transitional phrases, punctuation use, and forming compound complex sentences (id. at pp. 1-2). According to the progress report, continued support was vital to maintain this progress and ensure he met his writing goals, particularly as he prepared for graduation (id. at p. 2). The progress report noted that the student's progress in writing had "been steady, with his essays becoming more organized and clear[er]" (id. at p. 1). To meet the student's math needs, the SETSS provider continued to provide necessary guidance to ensure the student fully grasped concepts (id. at p. 2).

[19] The SETSS progress report did not reflect a specific date it was prepared, rather, it was dated "School Semester 2023-24" (Parent Ex. F at p. 1). In the progress report, the SETSS provider opined that the "current support services" were addressing the student's needs; however, as he "approache[d] graduation a slight reduction" in SETSS from five to three hours per week in small groups was recommended (id. at p. 3). Additionally, the student's SETSS were primarily delivered in a group setting, with one individual session documented by the SETSS provider (see Parent Ex. H).

The progress report indicated that the student's progress in math was consistent, and his enthusiasm was evident; however, he still occasionally required support to handle more intricate problems, particularly when translating word problems into algebraic expressions (id.).

According to the progress report, the student "thrived in a small group setting where visual learning strategies [we]re emphasized," and that he benefited significantly from the use of graphic organizers, drawings, and other visual aids to comprehend complex topics, further noting that strategies like story-mapping and scenario visualization had been particularly effective (Parent Ex. F at p. 2). Further, the progress report indicated that the student benefited from structured, repetitive tasks and one-on-one assistance to reinforce learning and prevent misunderstanding (id.). The SETSS provider opined that it was crucial that visual learning strategies and structured, repetitive tasks remained a core focus of the student's academic support plan, further noting those had been instrumental in his progress (id. at p. 3). The progress report noted that the student enjoyed social interactions and had expressed an interest in pursuing an occupational therapy vocation among other things (id. at p. 2).

The progress report included several goals to address the student's needs in reading comprehension, vocabulary, writing, and math (Parent Ex. F at pp. 3-4). In terms of reading and vocabulary development, the progress report reflected goals to target the student's ability to use reading comprehension strategies such as highlighting and note-taking; to improve his ability to analyze narrative settings and action scenes by using story-mapping techniques; and to expand his vocabulary and correctly use 10 new words in context (id. at p. 3). With respect to writing goals, the report included one goal to target the student's ability to improve his use of subordinating conjunctions and dependent clauses in his writing, another goal to use transitional phrases to bridge paragraphs, and one more goal to structure his essays with a clear thesis and at least three supporting details (id. at pp. 3-4). Regarding math goals, the report included several goals to target the student's ability to solve algebraic word problems by translating them into mathematical expressions; to apply financial formulas including interest calculations; and to solve complex trigonometric problems with minimal assistance (id. at p. 4).

A review of the 2023-24 EDopt timesheets does not provide specific details about the content or nature of the group SETSS sessions, although they do reflect the consistent documentation of service dates and times, along with the provider's signature for the entirety of the 2023-24 school year (see generally Parent Ex. H).

In light of the foregoing, the evidence demonstrates that the parent's unilaterally-obtained SETSS delivered to the student by EDopt provided specially designed instruction to meet the student needs, and therefore, was appropriate. In this instance and contrary to the IHO's conclusion, witness testimony was not required to support a finding that the parent met her burden to show that EDopt delivered specially designed instruction to address the student's unique needs during the 2023-24 school year.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In its answer and cross-appeal, the district argues that equitable considerations do not favor the parent because she failed to comply with the 10-day notice provisions and there was no evidence the parent's September 21, 2023 letter to the district was transmitted. However, the district did not raise such argument during the impartial hearing nor presented evidence that the letter was not sent (see Educ. Law § 4404[1][c]; see also R.E., 694 F.3d at 184-85). The hearing record shows the parent signed an enrollment agreement with EDopt for the 2023-24 school year on September 16, 2023 and then in a letter to the district dated September 21, 2023, the parent through her lay advocate advised that the district failed to assign a provider for the services mandated for the student during the 2023-24 school year (Parent Exs. C at pp. 1-2; D). The parent also requested for the district to fulfill the mandate, or she would "be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D).

The parent also argues the IHO erred in determining that equitable considerations did not favor the parent because there was no evidence she attempted to locate providers at the district rate and because there was no evidence that the enhanced rate charged for SETSS was reasonable.

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; 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]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Here, the IHO rather than focusing on whether the rate charged for a service was reasonable, which requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services, he improperly determined that equitable considerations did not favor the parent because she did not present any evidence of the actions she took to secure services at the district rate or any evidence that the SETSS provider was sufficiently qualified to provide services or to justify the requested rates for services (IHO Decision at p. 6). However, this improperly placed the burden on the parent to find a provider rather than the district.

Although the district attempted to make an unreasonable rate argument by entering into the hearing record as evidence, a prior SRO decision, an AIR report dated October 2023 and a related services – independent provider rate schedule; the district does not provide any further argument as to how such documents apply to this matter (see Tr. pp. 24-26; Dist. Exs. 4-6). Other than submitting such evidence, the district did not present any argument during the impartial hearing or in its answer and cross-appeal regarding the reasonableness of the enhanced rate for SETSS. The district representative presented a closing statement during the impartial hearing but did not assert any argument that the rate charged by EDopt for SETSS was unreasonable based off of the evidence presented in the hearing record (Tr. pp. 50-52). Accordingly, the district did not sufficiently challenge the rate of $195 for individual SETSS charged by EDopt and I decline to reduce the rate without an argument by the district explaining why an enhanced rate for SETSS was not reasonable.

In this instance, the hearing record supports a finding that equitable considerations favor the parent. The district did not raise an argument that the parent failed to cooperate in the IESP process or that the rate charged for SETSS was unreasonable, and the evidence shows that the parent, through her lay advocate, provided the district with a 10-day notice on September 21, 2023. As a result, there are no equitable considerations that weigh against the parent's requested relief of direct funding for the cost of the SETSS provided by EDopt to the student during the 2023-24 school year at a rate of $195.

VII. Conclusion

Having found that the evidence in the hearing record supports a determination that the IHO erred by denying funding for the parent's unilaterally-obtained SETSS delivered to the student by EDopt for the 2023-24 school year and that equitable considerations do not weigh against the parent's request for relief, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated October 21, 2024, is modified by reversing those portions which found that the SETSS which were unilaterally obtained by the parent and provided by EDopt to the student for the 2023-24 school year were not appropriate;

IT IS FURTHER ORDERED the district shall fund the costs of up to five hours per week of SETSS delivered to the student by EDopt during the 2023-24 school year at the rate of $195 per hour, upon presentation of proof of delivery of services.

Dated: **Albany, New York**
March 11, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER