The University of the State of New York

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

No. 24-596

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**
The Law Offices of Regina Skyer and Associates, L.L.P., attorneys for petitioners, by Daniel Morgenroth, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their daughter's privately obtained special education services for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which denied its motion to dismiss the parents' due process complaint for lack of subject matter jurisdiction. The appeal must be dismissed. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

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

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student attended a nonpublic school during the 2022-23 school year (second grade) (see Dist. Ex. 5). A CSE convened on January 9, 2023, determined that the student was eligible to receive special education as a student with a speech or language impairment, and developed an IESP for the student with an implementation date of January 30, 2023 (see Parent Ex. B).[1] The January 2023 CSE recommended that the student receive three periods per week of group special education teacher support services (SETSS) and two 45-minute sessions per week of individual speech-language therapy (id. at p. 7).[2]

In an email dated May 22, 2023, the parents contacted the district to request that during the 2023-24 school year the student "receive special education services pursuant to her IESP from the [district] while attending [the nonpublic school]" (Parent Ex. C). The district sent the parents a form dated July 18, 2023 to complete to request that public services be provided at the student's nonpublic school, which the parent signed on July 24, 2023 (Dist. Ex. 3). Beginning in September 2023 and ending in June 2024, the parents paid for the student to receive reading support from a private learning specialist (see Parent Ex. D).

### A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). According to the parents, they were denied the right to meaningfully participate in the educational planning process (id. at p. 2). The parents asserted that the district failed to "fully and timely" evaluate the student, recommend 1:1 special education support services instead of group services, recommend appropriate management needs, supports and services, and create appropriate annual goals (id.). The parents also asserted that the district failed to implement the student's January 2023 IESP during the 2023-24 school year (id.) As relief, the parents sought direct funding for privately obtained SETSS and speech-language services at "the provider's stated rates" for the 2023-24 school year (id. at p. 3).

In a response to the due process complaint notice dated August 29, 2024, the district asserted that it intended to pursue defenses including, among other things, that the IHO lacked subject matter jurisdiction, the parents did not file a request for equitable services by June 1 of the preceding school year as required by Education Law § 3602-c and they failed to provide a 10-day

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[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.

notice notifying the district of the parents' intention to obtain services privately and seek reimbursement from the district (Aug. 29, 2024 Due Proc. Response).[3]

### B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 12, 2024 and concluded the same day (Tr. pp. 1-49). The IHO denied the district's August 28, 2024 motion to dismiss for lack of subject matter jurisdiction and ripeness (Tr. p. 4). In a decision dated October 24, 2024, the IHO indicated that during the impartial hearing, the only disputed issue was the district's failure to implement the services listed in the student's January 2023 IESP, and that the appropriateness of the IESP itself was not in dispute (IHO Decision at p. 4). The IHO found that the parents had timely submitted their June 1 request for equitable services from the district prior to June 1, 2023 (id. at p. 14). The IHO also held that the district failed to provide the student with the services recommended in the student's January 2023 IESP and therefore the student was denied equitable services for the 2023-24 school year despite the timely request (id.).

With regard to the services unilaterally obtained by the parents, the IHO held that the hearing record lacked evidence of the student's goals, how the student's SETSS were individualized to meet the student's unique needs, or evidence of progress (IHO Decision at p. 14). Therefore, the IHO held that the parents failed to meet their burden of proof under a Burlington-Carter analysis (id. at pp. 9, 14). Regarding equitable considerations, the IHO noted that she did not have to reach them because she had determined that the parents had not succeeded in showing the unilateral services were appropriate (id. at p. 14). However, in the alternative the IHO held that that the equitable factors were "mixed" because the district failed to implement its own recommendations but the parents failed to provide the district with a 10-day notice, which she found to be "egregious . . . in light of the fact that they waited until after the school year was over to file for due process," and because the SETSS were delivered individually rather than in a group, "which went beyond what was necessary" (id. at pp. 14-15). The IHO noted that if the parents had met their burden of proof regarding the appropriateness of the SETSS, the IHO would have reduced the provider's hourly rates on those bases, but because the student only received two thirds of the SETSS sessions recommended, the IHO would not find it necessary to reduce the requested reimbursement of $9,380 for the SETSS provided during the 2023-24 school year (id.). With regard to compensatory relief, the IHO held that the district should have provided the student with speech-language services, but failed to do so, and that the parents were unable to locate services from a private speech-language therapist (id. at p. 15). Accordingly, the IHO found the student was entitled to 54 hours of individual compensatory speech-language therapy to be implemented by the district (id.).

## IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in applying the Burlington/Carter analysis to the parents' case, and that the IHO should have used a compensatory education analysis as the "fairest way" to assess whether payment for the private services obtained by the parents should be

[3] The district also attached a prior written notice regarding a more recent CSE meeting and IESP that was developed in January 2024 after an annual review meeting (Aug. 29, 2024 Due Proc. Response).

granted, emphasizing that the term "tuition" as described by the burden of proof statute should not apply to parents seeking funding of private services when a district has failed to provide special education services to a student. In the alternative, if a Burlington/Carter analysis is relied upon, the parents argue that the IHO erred in finding that the evidence in the hearing record failed to establish that the SETSS procured by the parents were sufficiently individualized to meet the student's unique needs. Furthermore, the parents assert that with respect to equitable considerations, the IHO erred in holding that there factors weighing against the parents such as the lack of a 10-day notice and the provision of SETSS in an individual setting instead of group setting; however, the parents note that the IHO ultimately held that she would not have reduced the amount of relief requested and do not appeal from that aspect of her determination.

The district filed an answer with cross-appeal, alleging that the case should be dismissed because the IHO lacked subject matter jurisdiction to hear the parents' implementation claim. The district also argues that the IHO correctly used a Burlington/Carter analysis and that the parents are impermissibly seeking to shift the burden of proof to show the appropriateness of privately obtained services because they were for"particular support services" rather than for "tuition reimbursement." The district asserts that the parents failed to provide sufficient evidence establishing that the SETSS privately obtained by the parents were appropriate for the student. The district further contends that equitable considerations warrant a reduction or a denial of the requested relief because the parents failed to prove that there was any contract between the parents and the private SETSS provider, the parents failed to provide the district with a 10-day notice, and the hourly rate charged by the private provider was excessive.

In an answer to the district's cross-appeal, the parents argue that the IHO was correct in finding that she would have granted full relief under equitable considerations had the parents met their burden of proof. The parents contend that invoices showing payment by the parents are sufficient to establish that there was a financial obligation between the parents and the private SETSS provider. Additionally, the parents assert that IHOs have subject matter jurisdiction over implementation 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 (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]).[4] "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.).[5] 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]).

**VI. Discussion**

Here, the parties have not appealed from those portions of the IHO's decision that determined that the parents were not challenging the adequacy of the January 2023 IESP and that the only disputed issue regarding the district's responsibilities was the implementation of the services therein, that the parents complied with their responsibility to request equitable services prior to June 1, 2023, and the IHO's directive for relief consisting of 54 hours of compensatory individual speech-language therapy for the student to be implemented by the district (IHO

[4] 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]).

[5] 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.

Decision at p. 15).[6] Accordingly, those 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 Matter - Subject Matter Jurisdiction**

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

In their July 2024 due process complaint notice, the parents assert that the district failed to implement the dual enrollment services recommended by the January 9, 2023 CSE during the 2023-24 school year (Parent Ex. A at p. 2). Such a claim is subject to due process. Recently, in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 25-029; Application of a Student with a Disability, Appeal No. 24-601; 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.570; 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).

[6] The only comment I will make regarding the issues that were not or are no longer in dispute is that the January 2023 CSE did not develop speech-language annual goals to further describe or define the student's communication needs (see Parent Ex. B). The hearing record does not indicate whether the student has been evaluated in recent years, accordingly if no such evaluation has taken place, the district is encouraged to do so to determine, together with the parents, which special education services are appropriate, if any, to address her needs.

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 New York Education Law 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]).[7]

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 "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).[8] In addition,

[7] 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]).

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

the New York Court of Appeals explained that student authorized to receive services pursuant to Education Law § 3602–c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[9] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath 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

[9] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 12, 2024 (Parent Ex. A at p. 1), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24).[10]

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]).[11]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the IHO's decision to deny the districts motion to dismiss will not be disturbed.

**B. Unilateral Placement**

Turning next to the parents' request for reimbursement for the private learning specialist, the parents assert on appeal that the IHO erred by applying a Burlington/Carter analysis to this case, and argue that a "compensatory education framework" should be used. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents alleged

[10] On November 1, 2024, the 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]).

[11] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, Appeal No. 23-068; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-121). The guidance document is no longer available on the State's website; but is included with the district's motion to dismiss (Mot. to Dismiss dated 8/28/2024).

that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally obtained private services 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 parents are 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 parents' 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]).[12] 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).

The parents argue in the alternative that even if the Burlington/Carter standard was correctly relied on by the IHO, the IHO's determination that the parents did not meet their burden to show the appropriateness of the unilaterally obtained SETSS, and maintain that the two hours of SETSS the student received during the 2023-24 school year was nevertheless error.

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

[12] 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 Alpha Student Support (Educ. Law § 4404[1][c]).

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.

> 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

Although not in dispute at the appeal stage of this proceeding, a brief discussion of the student's needs provides context for the issue on appeal, namely, whether the unilaterally obtained SETSS the student received during the 2023-24 school year (third grade) were appropriate.

The hearing record contains the student's January 2023 IESP, which reflected then-current teacher reports (Parent Ex. B at p. 1). According to the IESP, teachers described the student as "diligent and kind," who "struggle[d] to decode grade level texts" and that her "ability to comprehend c[ould] be compromised as a result of her decoding challenges" (id.). The IESP indicated that the SETSS the student received supported her "expressive speech differences and struggles with reading/writing" and language (id. at pp. 1, 2). School reports reflected in the January 2023 IESP indicated that the student was at an "[e]nd of first grade level" in English language arts (ELA) and required "support especially with writing and spelling and sometimes on grade level texts the decoding w[ould] get in the way of her comprehending" (id. at pp. 1, 2). In math, the student was at a "2.3" grade level for math "due to language struggles" and reportedly struggled to figure out word problems (id.). According to the IESP, the student benefited when the problem was "broken down for her" and other specific strategies for "tackling word problems" (id. at p. 2). The CSE determined that the student presented with "significant speech and language differences" and the nonpublic school reported that "this speech concern [wa]s pervasive across all content areas" (id. at pp. 3, 4).

Regarding the student's social/emotional needs, the January 2023 IESP indicated that the student was "confident and kind," but at times became emotional, shut down, and put pressure on herself due to her struggles with reading and writing (Parent Ex. B at p. 3). Additionally, the parent reported her concern "about how this 'speech factor' negatively impact[ed] [the student's] social emotional functioning" (id.). There were no concerns regarding the student's physical development reported in the January 2023 IESP (id. at p. 4).

The January 2023 CSE identified strategies to address the student's management needs including access to a laptop with text to speech so she could listen as she decoded and word prediction software for use with lengthier writing tasks, overlearning, multisensory instruction, repetition, letter charts, anchor charts for letters, skywriting, teacher modeling and direct prompting to "tap out" CVC words, preferential seating, and directions presented visually and read aloud (Parent Ex. B at p. 4). The CSE developed annual goals to improve the student's ability to decode grade level text, write a well-developed paragraph, and complete single digit addition problems with regrouping, and recommended that the student receive three periods per week of group SETSS, and two 45-minute sessions per week of individual speech-language therapy (id. at pp. 5-7).

The parent testified that the student struggled with decoding and comprehension, and that she also exhibited delays in math related to solving word problems (Parent Ex. G ¶¶ 2, 4).

### 2. Unilaterally Obtained SETSS

During the 2023-24 school year, the student received approximately two hours per week of individual SETSS while at home "on Zoom," focusing on "[r]eading support using Orton

Gillingham based approach" during the 2023-24 school year (Tr. pp. 14-15, 25; Parent Exs. D; F ¶ 3). The student's SETSS provider, who also referred to herself as a reading specialist, held students with disabilities and childhood education (grades 1-6) professional certificates (Tr. p. 22; Parent Exs. E; F ¶¶ 1, 2). According to the SETSS provider, the student required SETSS "to be on grade level for decoding, comprehension, as well as spelling and writing," and to "keep up in a mainstream setting" (Parent Ex. F ¶ 5).

During sessions, the SETSS provider reported that she "worked on [the student's] reading and writing skills including decoding and writing paragraphs" and that the student "required repetition of what was taught in the classroom" (Parent Ex. F ¶ 7). At the hearing, the SETSS provider testified that she worked with the student "specifically on all things [English language arts] ELA, reading and writing, decoding, encoding, reading expression, [and] reading comprehension" (Tr. pp. 24-25).[13] To measure the student's progress, the SETSS provider testified to using "an Orton-Gillingham-based program called PAF," and she worked with the student through the program levels and that "every so often" she "check[ed] for data with [the student's] proficiency test" (id.). The SETSS provider also testified that she conducted "DRA tests" and informal observations with the student (Tr. p. 27).[14] The SETSS provider described the DRA as "short stories" that the student read aloud while the provider timed her for fluency, followed by questions to check the student's comprehension, which resulted in an "equivalent of where [the student] [wa]s" (Tr. pp. 27-28).

The SETSS provider testified that she developed goals for the student that were "the same pretty much every year," depending on when a certain goal was reached and "keeping up with the . . . current school year with what's at hand" (Tr. pp. 26-27). According to the SETSS provider, the student's goals were based on the student's "psychoeducational evaluation and from speaking with her teachers in school" (Tr. p. 27).[15] The SETSS provider did not generate progress reports, but sent weekly emails to the parents and "when necessary," to the student's teachers, explaining the progress made or what she did with the student (Tr. pp. 28-29). The SETSS provider testified that she "communicated with [the student's] classroom teacher in order to make sure what we work[ed] on during SETSS sessions c[ould] be translated in the classroom and help [the student] make progress in school" (Parent Ex. F ¶ 8).

Additionally, the SETSS provider testified that the student made progress and "required the SETSS recommended by the [district] in order to make progress in the mainstream setting during the 2023-2024 school year" (Parent Ex. F ¶¶ 7, 9). The parent testified that the student made academic and social/emotional progress in SETSS during the 2023-24 school year, and that the provider communicated with the student's teacher to support the student's needs in reading and writing (Parent Ex. G ¶¶ 18, 20).

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[13] The SETSS provider clarified that she did not work on math skills with the student per se, but that at times she assisted the student with breaking down math word problems in order to understand them (Tr. pp. 26, 29).

[14] The acronyms "PAF" and "DRA" were not further explained in the hearing record but are commonly referred to as "Preventing Academic Failure" and the "Developmental Reading Assessment," respectively (see Tr. p. 27).

[15] The hearing record did not include a psychoeducational evaluation of the student, and she did not identify the psychoeducational evaluation she was using (see Parent Exs. A-G; Dist. Exs. 1-3, 5-9).

Although the SETSS provider testified to what academic areas she addressed with the student and gave some general indication of the methodologies she used, overall review of the hearing record supports the IHO's finding that it lacked evidence regarding how the instruction was individualized to the student, therefore, the parents did not meet their burden to prove that the services they unilaterally obtained for the student constituted specially designed instruction to address her unique educational needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). Additionally, it is not possible to ascertain whether the student received special education support in the nonpublic school classroom to enable her to access the general education curriculum or how the SETSS delivered to her supported her functioning in the classroom, even if provided in a separate location in accordance with the IESP developed for her by the district.

Further, the hearing record lacks any meaningful information concerning the student's general education schooling in terms of the instruction and curriculum provided that the special education services privately obtained by the parents were supposed to support. Given that, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general education curriculum so that the student can meet the educational standards that apply to all students, under the totality of the circumstances, the evidence in the hearing record is insufficient to demonstrate that the student's program was appropriate. The program, as a whole, consisted of enrollment at a general education nonpublic school along with the parent's unilaterally-obtained SETSS, with the idea that the specially designed instruction provided should support the student's access to the nonpublic school's curriculum; however, under the circumstances of this matter, the hearing record lacks any meaningful evidence to support such a finding. The only evidence about the student in her general education classroom during the 2023-24 school year was from the SETSS provider's affidavit, which indicated that the student "required repetition of what was taught in the classroom," and, without more detail, that the SETSS provider "communicated with [the student's] classroom teacher in order to make sure what we work[ed] on during SETSS sessions c[ould] be translated in the classroom and c[ould] help [the student] make progress in school" (Parent Ex. F ¶¶ 7, 8).

Additionally, the parent testified that she agreed with the January 2023 CSE's determination that the student was eligible for special education as a student with a speech or language impairment and the recommendation that the student receive two 45-minute sessions per week of speech-language therapy; however, the district did not provide those services to the student and the parent was unable to locate a speech-language therapist to deliver the student's services (Parent Ex. G ¶¶ 7, 8, 11, 12). As discussed above, the student exhibited "expressive speech differences," a "processing issue," and "delays in word retrieval" and although the January 2023 IESP indicated that during the 2022-23 school year the SETSS provider was "remediating" the student's "speech challenges," review of the SETSS provider's testimony regarding the 2023-24 school year did not indicate that she addressed the student's communication needs, nor was there evidence that the nonpublic school was otherwise addressing the student's speech-language challenges (see Tr. pp. 22, 24-25; Parent Exs. B at pp. 1, 2; F).

Therefore, review of the evidence regarding the student's SETSS does not lead me to the conclusion to overturn the IHO's finding that the parent did not meet her burden to show that the services consisted of specially designed instruction to meet the student's unique special education needs (IHO Decision at p. 14).

## VII. Conclusion

As set forth above, the IHO had subject matter jurisdiction to hear the parents' claims. The evidence in the hearing record supports the IHO's finding that the parents failed to meet their burden of proving that the unilateral SETSS provided to the student during the 2023-24 school year were appropriate to meet the student's unique needs. The parents' request for SETSS reimbursement funding for the 2023-24 school year is denied.

I have considered the parties' remaining contentions and find I do not need to address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**April 24, 2025**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**