The University of the State of New York

The State Education Department
State Review Officer
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No. 24-601

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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, among other things, denied her request that respondent (the district) fund the costs of her daughter's private services delivered by EDopt for the 2023-24 school year, and denied her request for a bank of compensatory education. The district cross-appeals from portions of the IHO's decision, alleging additional grounds for dismissing the parent's due process complaint notice and denying the parent's relief. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CSE convened on June 1, 2018 and developed an IESP for the student (Parent Ex. B at pp. 1, 10). Finding the student eligible to receive special education as a student with a learning disability, the June 2018 CSE recommended that the student receive three periods per week of

direct group special education teacher support services (SETSS) and one 30-minute session per week of individual counseling services (id. at pp. 1, 7).[1]

Included in the hearing record is a letter dated September 18, 2023 that bears the subject line "RE: TEN (10) DAY NOTICE," and begins with the salutation "Dear Chairperson" (Parent Ex. D). The correspondence was from "Prime Advocacy," stated that the advocacy group was duly authorized to reach out on behalf of the parent, and advised the "Chairperson" that the district had failed to assign the student a provider to deliver the student's mandated services for the 2023-24 school year (id.). According to the letter, the parent requested that the district "fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

On that same date, September 18, 2023, the parent entered into an enrollment agreement with EDopt to provide the student with services "[a]s per the last agreed upon IEP/IESP/FOFD" for the 10-month 2023-24 school year (see generally, Parent Ex. C). The document provides a general list of services and rates for those services, most of which include lowered rates for services provided in a group setting (id. at p. 3). SETSS was included as part of those services at rate of $195 (and group rate of $145), as was counseling services for the same amounts (id.).[2] The agreement indicated that the parent would remain financially responsible for service provided, but that EDopt was allowing the parent time to seek funding through the impartial hearing process before being billed for services (id. at p. 2). The agreement further indicated that if the parent's request for funding was denied at the conclusion of a hearing, "EDopt [would] work together with the [parent] to arrange a mutually acceptable payment schedule" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Due Process Compl. Not.).[3] Specifically, the parent alleged that the district failed to develop a special education program for the student prior to the start of the 2023-24 school year, as the last IESP created for the student was from June 2018 (see id. at pp. 1-2). The parent also alleged that the district had not assigned providers to deliver the student's SETSS and counseling services, forcing the parent to retain the services of a private provider at an enhanced rate (id. at p.

[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] Testimony by affidavit later revealed that EDopt was contracted to provide group SETSS services for three hours per week to the student for the 2023-24 school year, and began doing so on October 10, 2023, at a rate of $145 per hour (see Parent Ex. E ¶¶ 2, 7). I also note that, although the parent's contract with EDopt indicated that the agency would provide the student with services "[a]s per the last agreed upon IEP/IESP/FOFD," there is no evidence in the hearing record that indicates that EDopt provided counseling services, despite the parent's advocate claiming they did at various points during the impartial hearing (Tr. pp. 7, 25; Parent Ex. C at p. 3; see IHO Decision at p. 8).

[3] Included in the record as parent's exhibit A is a second due process complaint notice dated September 18, 2023; during the impartial hearing, it was discussed that this complaint was submitted in error (see Tr. pp. 10-17; see also Parent's Ex. A).

2). The parent further alleged that the district did not develop an updated program of services for the student for the 2024-25 school year, denying the student a FAPE and equitable services for that school year (id. at p. 2). The parent sought, among other things, an order for pendency; an order declaring that the district had failed to provide the student with a FAPE and equitable services; an order requiring the district to fund group SETSS three times per week and induvial counseling services for 30 minutes per week for the student for the 2023-24 school year at an enhanced rate; an order for a bank of compensatory education services for any services not provided by the district, at an enhanced rate; an order awarding all related services set forth on the June 2018 IESP; and an order requiring the district to provide the student with services and supports recommended by the CSE in the last program of services developed for the student for the 2024-25 school year at enhanced provider rates. (see id. at pp. 1-3).

B. Impartial Hearing Officer Decision

Prior to the impartial hearing, the IHO, appointed by the Office of Administrative Trials and Hearings (OATH), issued an undated omnibus standing order, setting forth her "firm expectations of the Parties [in order] to resolve the matter fairly and efficiently" (see IHO Ex. I; see also Tr. p. 11). Paragraph 3 of that standing order required the parties to articulate and communicate in writing any affirmative defenses within 10 business days of the scheduled impartial hearing date, and indicated that any affirmative defense not so articulated and communicated nay be considered waived (id. a pp. 1-2).

An impartial hearing convened before the IHO on September 6, 2024 (Tr. pp. 1-31).[4] During the course of the proceedings, a motion to dismiss by the district for lack of summary judgment that was apparently submitted by the district was discussed, and the district argued that the IHO had no jurisdiction regarding the implementation or request for enhanced services, and that this had been clarified in "the August 2024 FAQs" (see Tr. pp. 5, 9-10, 12).[5] The district argued that there had never been a right to file a due process complaint notice for such claims (id. at pp. 9-10). The IHO did not make an explicit ruling on the district's motion at the impartial hearing.

In a decision dated October 23, 2024, the IHO found that the district failed to satisfy its burden to prove that it offered or provided the student equitable services during the 2023-24 school year (see IHO Decision at pp. 3-4). The IHO further found that the progress report from EDopt that was entered into evidence by the parent was not credible, as it was "created by an entity that

[4] The parent submitted a written opening statement (see generally Parent Ex. K).

[5] Copies of the motion papers have not been included with the record on appeal as required by State regulation (see 8 NYCRR 200.5[j][5][d][vi]; 279.9[a]). The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). Here, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]). Further, I note that the district reiterated its arguments regard subject matter jurisdiction on the record during the impartial hearing, and the district has again asserted subject matter jurisdiction arguments on cross-appeal (see Tr. pp. 9-10; Answer and Cross-Appeal at pp. 9-10).

clearly [had] a financial interest in the outcome of the proceeding" (id. at p. 6). The IHO further found the affidavit testimony by the parent's sole witness, an administrator at Adopt, was "self-serving, vague, . . . evasive," and the testimony did not discuss the student's needs or progress and did not state what the witness "did for the agency" (id.). The IHO found that no evidence or testimony had been provided related to the methodology used to evaluate the student since the June 2018 IESP was developed, and no evidence or testimony was provided regarding what EDopt did to ensure that it could meet the student's needs (id.). The IHO found it "incredible that the Student ha[d] the same SETSS needs as they did more than five years ago" (id.). Thus, the IHO found that the parent failed to meet her burden to establish that the unilaterally obtained services were appropriate (see id.). The IHO did, however, order the district to evaluate the student for all known or suspected disabilities within 20 days of the decision (id. at p. 9).

With respect to compensatory education, the IHO found that the parent failed to establish that a deficit was created by the district's failure to provide equitable services and that the requested compensatory education services would address that deficit (IHO Decision at p. 8). The IHO found that the parent failed to present any testimony or evidence to support her request, and thereby did not establish that the student did not receive counseling services for the 2023-24 school year through another provider or the private school she attended (id.). The IHO denied the parent's request for compensatory education counseling services for the 2023-24 school year (id.).

The IHO also dismissed the parent's claims related to the 2024-25 school year with prejudice as the due process complaint notice was filed almost two months prior to the start of the relevant school year, and, as such, the claims were not ripe for adjudication (IHO Decision at pp. 2-3). The IHO did not explicitly rule on the district's motion to dismiss for lack of subject matter jurisdiction, but the decision did include a section titled "Jurisdiction," explaining that the decision was being rendered "pursuant to the IDEA, 20 U.S.C. § 1400 et seq., and its implementing regulations, 34 C.F.R. § 300 et seq., and the New York State Education Law, Educ, Law Art. 89 § 4404 et seq., and its implementing regulations, 8 NYCRR § Part 200" (id. at p. 3).[6]

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that she did not meet her burden to establish the appropriateness of EDopt's SETSS services that were unilaterally obtained and contends that the progress report in evidence shows how EDopt tailored the SETSS program to address all deficits in the student's subject areas, as well as detailed the student's progress under the program. The parent also contends that the IHO was incorrect in finding the progress report to not be credible and in ignoring the content of the progress report. The parent contends that the IHO erred by finding that the parent failed to provide evidence or testimony regarding evaluations of the student for the program implemented by EDopt, as it is the district's burden to evaluate the student. She further contends that the testimony of the EDopt administrator was credible, despite the IHO's findings to the contrary. The parent also notes that the notice of intention to seek review

[6] As the district notes in its answer and cross-appeal, the IHO decision contains some inaccuracies (see Answer & Cr.-Appeal at pp. 3-4). For example, the decision indicates that that the district failed to appear at the impartial hearing, which is incorrect (compare IHO Decision p. 2, with Tr. pp. 1, 4). Additionally, the IHO decision initially indicates that the parent's requested relief was "appropriate (with some modifications)" despite denying the parent's requested relief in its entirety (IHO Decision at pp. 2, 6, 8).

was served two-days late and asks that this not bar her contentions on appeal. The parent asks that the district be required to fund "the contract rate of $195 for the individual services and $145 for group services provided for [SETSS] . . . [and] a bank of compensatory hours for counseling services funded at the provider's rate."

In an answer and cross-appeal, the district contends that the IHO's decision should be reversed due to several alleged inconsistencies and inaccuracies in the written decision.[7] The district also contends that the parent abandoned her request for, and failed to appeal the issue of, pendency. The district further notes that the parent has failed to appeal the dismissal of the parent's claims related to the 2024-25 school year, making the IHO's findings final and binding. The district also contends that the IHO should have dismissed the parent's claims because the parent failed to request equitable services by June 1, 2023, and that the district properly raised this defense. The district argues that, even if the district did not timely raise the June 1 defense, the parent "opened the door to the argument." The district contends that the parent failed to establish that the unilaterally obtained services of EDopt were appropriate and that the IHO's credibility determinations are entitled to deference. The district also contends that equitable factors do not favor the parent, in part because the parent failed to establish that she provided the district with sufficient 10-day notice, and because the parent provided late service of the notice of intention to seek review. The district requests, in the alternative, that this matter be remanded if it is found that the parent met her burden in establishing appropriate unilaterally obtained services. Finally, the district contends that the IHO should have dismissed the due process complaint notice for lack of subject matter jurisdiction.

The parent submits a "verified reply to [the district's] answer and cross-appeal," but for reasons discussed later in this writing, this will not be considered.

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

[7] While the district is correct that there are discrepancies in the IHO's written decision, many of which have been noted earlier in this writing, these inaccuracies are not reversible error and did not directly result in adverse findings against the district.

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]).

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

The district argues 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

[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.

complaint notice regarding IESP implementation. Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2023-24 school year (Parent Ex. A at pp. 1-2). While the due process complaint notice also alleges that the district did not implement services from the most recent IESP during the 2023-24 school year (id.), this is not an instance where there is a timely and current IESP with which both parties agree that the district just failed to implement.

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

In addition, even if this matter did solely involve implementation of the student's IESP during the 2022-23 school year, such a claim is subject to due process. Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify

that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the 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 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]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confer IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.

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 receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd.

[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.

of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]; see also L. Off. of Philippe J. Gerschel v. New York City Dep't of Educ., 2025 WL 466973, at *4-*6 [S.D.N.Y. Feb. 1, 2025]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf).[12] Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[13] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath 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

[12] In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

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

> from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

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

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 previously "conveyed" to the district that:

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

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

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.

Here, while the IHO did not explicitly make a ruling on the district's motion to dismiss for lack of subject matter jurisdiction, the issuance of a decision on the merits, including the portion of the decision titled "Jurisdiction," implicitly means that the IHO did not grant the district's motion

[14] 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]).

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

to dismiss. On appeal, I am not convinced by the district's arguments regarding subject matter jurisdiction for the reasons discussed above, consistent with my previous findings in other matters, as well as with the findings of other SROs, where the same or similar arguments have been raised by the district.

2. Compliance with Practice Regulations and Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal.

Here, the parties are not appealing the IHO's findings that the parent's claims related to the 2024-25 school year were not ripe for adjudication and thus required dismissal; that the district did not meet their burden in establishing that they offered the student equitable services for the 2023-24 school year; that the district was ordered to evaluate the student; and that the IHO did not make a ruling on pendency. Additionally, while the parent requests the student to be awarded with compensatory education services for counseling services, the parent has failed to make any substantive arguments regarding this request for relief (see Req. for Rev. at pp. 3, 11). The request for review must "clearly specify the reasons for challenging the [IHO's] decision," and as the parent has failed to do so with respect to the IHO's compensatory education findings, this appellate request for relief will not be considered (see 8 NYCRR 279.4; see also 8 NYCRR 279.8[c][2] [the request for review shall set forth the grounds for reversal or modification]). Accordingly, the above findings of the IHO 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]).

Additionally, with respect to the contentions of the parties related to the untimely service of the parent's notice of intention to seek review, I will exercise my discretion and review the IHO's decision notwithstanding the parent's failure to timely serve her notice of intention (see NYCRR 279.2[b], [f]).

I also note that the parent's request for review does not conform to practice regulations governing appeals before the Office of State Review. The parent's lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). While I decline to exercise my discretion to reject and dismiss the request for review in this instance, the lay advocate is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents (see 8 NYCRR 279.8[a]). However, as noted above, the parent, through a lay advocate, has also submitted a "verified" reply and answer to the district's cross-appeal. This pleading is similarly signed by the advocate, and despite being described as "verified" by the parent's lay advocate, the pleading contains no verification (8 NYCRR 279.7[b]). These discrepancies are in violation of the practice requirements of Part 279 of State regulations, and, as such, I reject the parent's verified reply and answer to the cross-appeal, which will not be considered (see 8 NYCRR 279.8[a]; see also 8 NYCRR 279.7[b]).

Furthermore, I note that it appears that the parent's advocate served the district by email with consent; however, the affidavits of service filed by the lay advocate are likely inaccurate in that they state that the lay advocate served the district's attorney by personal service at the address

of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or consenting to service by an alternate delivery method, both the method of service used as well as the identification of what papers were served must be accurately set forth in the affidavit of service. It appears that the lay advocate did not understand how to properly draft the affidavit of service, and it is defective.

The reply and answer to the cross-appeal is rejected for the reasons set forth above but I note that it was also untimely filed with the Office of State Review. The parent's lay advocate requested an extension of time to serve the reply and answer to the cross-appeal, which was granted until Monday, January 6, 2025. The affidavit of service accompanying the reply indicates that it was served on that date, but the papers were not filed with the Office of State Review until after business hours on January 9, 2025. State regulation provides that pleadings must be filed within two days after service is complete (see 8 NYCRR 279.4[e]; 279.5[c]; 279.6[b]). In addition, in several unrelated matters in which the parent's lay advocate has appeared, the Office of State Review has written the advocate to inquire as to the status of pleadings for which the advocate requested extensions but did not timely file the papers. In those matters, the lay advocate was warned that, in future matters, an SRO may be less inclined to inquire as of the status of the pleading and may instead exercise discretion to reject the pleading if filed in an untimely manner (see 8 NYCRR 279.8[a]). In this matter, I find the lay advocate's untimely filing of the reply and answer to the cross-appeal to further support the exercise of my discretion to reject the pleading.

B. Education Law § 3602-c and June 1 Defense

Turning to the district's claim that the parent is not entitled to any relief because the IHO erred in her determination that the district waived its Education Law § 3602-c June 1 deadline defense, I note that 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]).

However, the IHO determined, and the district conceded, at the impartial hearing that the district waived such defense because it failed to comply with the IHO's standing order, which required the parties to articulate and communicate affirmative defenses within 10 business days of the scheduled impartial hearing date (IHO Ex. I at pp. 1-2).

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]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Here, the hearing record includes a prehearing standing order of the IHO that set forth her "firm expectations of the Parties" as the matter proceeded through due process (IHO Ex. I). As discussed above, paragraph 3 of that standing order required the parties to articulate and communicate in writing any affirmative defenses within 10 business days of the scheduled impartial hearing date and indicated that any affirmative defense not so articulated and communicated nay be considered waived, precluding them from being raised (id. a pp. 1-2). During the impartial hearing, the district attempted to assert the June 1 defense (Tr. pp. 8-11). However, the parent alleged that the district waived this defense as the district did not provide notice within 10 business days of the impartial hearing of the defense, as per the IHO's standing order (Tr. pp. 8, 10-11). The following exchange between the IHO and the district occurred during the impartial hearing:

> [IHO]: . . . my question to you is, did you review the standing order issued for these cases?
>
> [District]: Yes, I reviewed, and I understand that IHO required within ten days of the hearing –
>
> [IHO]: (Interposing) Did you adhere to that request?
>
> [District]: No, I did not.
>
> [IHO]: Okay. So that issue, you failed to adhere. I'm not going to revisit that.

(Tr. p. 11).

Therefore, the district explicitly conceded that it did not adhere to the IHO's standing order with respect to the June 1 defense. As the IHO provided a clear mandate to the parties in the standing order, which she had the authority to issue, and as the district explicitly conceded that it did not raise the defense in compliance with the prehearing order prior to the impartial hearing, I do not find that the IHO abused her discretion in finding that the district waived the June 1 defense (see Application of a Student with a Disability, Appeal No. 23-217).[16]

C. Unilaterally-Obtained SETSS

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from EDopt for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[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

[16] There is not merit to the district's argument that the parent "opened the door" to the June 1 defense when the lay advocate stated the parent's readiness to testify regarding the issue if the defense was raised (see Tr. pp. 10-11). As the IHO deemed the defense waived, the parent did not present the evidence.

[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]).

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.

> 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).

Initially, I note that the IHO found that the parent failed to meet her burden in establishing that the SETSS provided by EDopt were appropriate because the progress report created by EDopt that was entered into the record as parent's exhibit F and the testimony of the administrator from EDopt were "self-serving, vague, and evasive" (IHO Decision at p. 6; see Parent Ex. E). She noted that EDopt had a financial interest in the outcome of the proceeding, and that there was no evidence or testimony provided by EDopt as to the evaluations it administered to ensure it could address the student's needs or as to the methodology used to evaluate the student (IHO Decision at p. 6). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

I agree with the IHO that the testimony of the EDopt witness offers little by way of relevant evidence regarding the instruction provided to the student during the 2023-24 school year (see Parent Ex. E); however, as the witness's direct testimony was presented solely by affidavit in lieu of live testimony (see 8 NYCRR 200.5[j][3][xii][f]), and there was no cross-examination of the witness (see Tr. p. 22), the IHO could not have assessed the witness's demeanor in order to determine credibility. Further, the witness was not presented with any questions to evade or to avoid by answering in vague terms. As to the "self-serving" nature of the evidence from EDopt, the mere fact that the progress report was completed by the student's teacher should not be used as a basis for disregarding it completely; without a report from the teacher educating the student, it is unclear from where the IHO expected to gather information regarding the services provided by EDopt. Certainly, the fact that the teacher who completed the progress report did not testify at the impartial hearing could be used as a reason for attributing less weight to the submitted and accepted evidence; however, the evidence presented is uncontroverted and should not be outright dismissed.[18] Accordingly, I do not find that the IHO's credibility findings warrant deference and, instead, I will weigh the evidence presented.

[18] It should not be overlooked that the scheme set forth by Congress in the IDEA is one that favors the documentary approach. For example, public school IEPs are to include written descriptions of student needs, written goals and/or objectives, and a written description of the special education services to be provided. Congress also required that periodic written reports regarding the student's progress on annual goals be provided to parents each year at specified frequencies, which reports support and provides context for the next annual review process and revision of the IEP (see 20 U.S.C. § 1414[d][1][A][i][III]). The EDopt progress report in evidence in this case accomplishes similar objectives in that it describes the particular special education services being provided to the student during the relevant time period, describes how the student is performing, and provides this information to the parents. Unlike a public school IEP, the EDopt report is not prepared before the

Further, while the IHO correctly found that the hearing record failed to contain any evidence of evaluations of the student leading up to the 2023-24 school year at issue, the IHO erred in faulting the parent for the lack of evidence of the student's needs. It has been found that it is the district's responsibility to identify the student's needs through the evaluation process and its burden to present evidence regarding the student's needs during the impartial hearing (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]). The IHO cannot shift the responsibility to evaluate the student onto the parent or EDopt, neither of which have that responsibility under IDEA. Consequently, the IHO's findings that the parent's or EDopt's failure to establish the student's needs in this matter, by evaluation or otherwise, weighs against finding that the unilaterally-obtained SETSS was appropriate, is inapposite.

1. Student's Needs

To address the appropriateness of the unilaterally-obtained services, it is necessary to describe the student's needs, and thereafter, to review the instruction delivered to the student to determine if the methods and strategies used constituted specially designed instruction.

The district last developed an IESP for the student on June 1, 2018, when she was nine years old and attending third grade at a private religious school (Parent Ex. B at p. 1). The IESP had a projected implementation date of September 5, 2018 (id. at p. 7). According to the IESP, the student had a full-scale IQ of 83, which fell in the low average range, and, as measured by a standardized achievement test, her decoding and spelling skills were at a beginning second grade level, reading comprehension and math problems solving skills at a mid-second grade level, and math computation and writing skills at an upper second grade level (Parent Ex. B at pp. 1-3). The June 2018 IESP indicated that, as reported by the student's school, learning did not come easily to the student and she was lagging behind her peers academically (id. at p. 3). The school principal reportedly indicated that the student struggled with frustration tolerance and "c[ould] react with aggression when unsettled" (id.). In addition, the student could be manipulative with peers and "instigate inappropriate actions/behaviors in others" (id.). The IESP indicated that on personality tests the student gave many positive, age-appropriate responses, but also a number of negative responses related to disliking school (id.). Still, the IESP indicated that the student had friends in school and the community and exhibited good self-esteem (id.). The June 2018 IESP identified strategies and resources needed to address the student's management needs including repetition and rephrasing, instruction broken down into discrete units of learning, use of graphic organizers, and prompting and cueing when necessary (id. at p. 4). The June 2018 annual goals targeted the student's ability to write short, cogent paragraphs with proper spelling, grammar, punctuation, and capitalization; represent and solve problems involving multiplication and division within 100, and solve two-step word problems involving basic operations; ask and answer questions about key details in a short text; retell stories and demonstrate understanding of the main idea and describe characters, setting, and major events; decode one- and two-syllable words; read text with appropriate accuracy and rate as well as purpose and understanding; determine the meaning of

services are delivered; however meticulous compliance with the IEP procedures is not required of parents when seeking reimbursement for a private unilateral placement under Carter.

unfamiliar words in context; accurately identify feelings and appropriate coping strategies; and demonstrate problem-solving skills when given scenarios of social conflicts (id. at pp. 5-6).

The hearing record lacks any description of the student's educational skills, performance, or program between June 2018 and the 2023-24 school year. An undated EDopt progress report indicates that the student was attending ninth grade in a private religious school for the 2023-24 school year, where she received group SETSS for three hours per week (Parent Ex. F at p. 1). According to the progress report, the student learned best through "a visual and hands-on approach" (id. at p. 3). The progress indicated the student was performing at an eighth-grade level for reading, below the ninth-grade level for writing, and at a seventh-grade level for math (id. at pp. 1, 6). The progress report further indicated that the student demonstrated proficiency in reading grade-level passages and was able to decode words effectively but struggled with higher-order comprehension, particularly when specialized language was used in subjects like biology and global studies (id. at p. 1). The student had difficulty responding to comprehension questions that required analysis and inference and her limited vocabulary hindered her understanding of more complex texts (id.). The progress report noted that the student had difficulty identifying the main idea and understanding complex literary elements (id.). With regard to writing, the progress report indicated that the student demonstrated delays in her writing abilities, particularly in spelling, grammar, and organization (id. at p. 2). The progress report described the student's writing as "simplistic" and noted that it often lacked transitional words which affected the overall flow and coherence of her work (id.). According to the progress report, the student struggled to develop coherent paragraphs (id.). Turning to math, the EDopt progress report stated that the student demonstrated a "strong grasp" of new math concepts when provided with individualized instruction in a small group setting (id.). The progress report noted that the student struggled with more complex math concepts, especially those involving multi-step problems and Regents-style questions (id.). In addition, the student had difficulty retaining math concepts and often required materials to be retaught (id.). The progress report noted that the student exhibited challenges with computation skills which impacted her ability to solve problems accurately (id.).

In terms of social development, the June 2018 EDopt progress report indicated that the student "excel[led] socially, forming positive relationships with both peers and adults" (Parent Ex. F at p. 3). The progress report described the student as well-liked and confident and characterized the student's social development as a strength (id.). The progress report noted that there were no concerns with the student's physical development (id.).

2. Appropriateness of Unilaterally-Obtained SETSS

As noted above, to address the student's needs, EDopt provided the student with group SETSS for three hours per week (Parent Ex. F at p. 1). According to the EDopt progress report, the group setting allowed the student to benefit from peer interaction while receiving the individualized attention necessary to support her academic growth (id.). The EDopt progress report did not include goals for the 2023-24 school, year; however, the hearing record includes EDopt session notes that include weekly goals (Parent Ex. G; see Parent Ex. F). The session note goals targeted the student's ability to solve Regents-style algebra problems; develop and implement effective test-taking strategies; solve word problems; solve and graph equations and inequalities; expand, combine, or simplify polynomials; improve reading comprehension and problem solving

skills in order to solve Regents questions on learned content; and demonstrate proficiency in factoring, solving, and graphing quadratic equations (Parent Ex. G).[19]

With regard to solving Regents-style algebra problems, the session notes indicated the student's SETSS provider worked on solving equations with variables on each side and, when the student struggled to complete problems independently, practiced examples with the student by working the problems out step-by-step on the board (Parent Ex. G at p. 1). The SETSS provider also taught the student how to solve equations on a calculator and to figure out multiple choice Regents questions related to variables (id.). The session notes stated the SETSS provider also instructed the student on sequences, including introducing vocabulary and providing the student with step-by-step practice and breaking complex problems into manageable steps (id. at p. 7). To further address this goal the SETSS provider instructed the student on how to write and solve inequalities by graphing and assisted the student with solving examples using a calculator in order to get partial credit (id. at p. 13). According to the session notes, the SETSS provider also helped the student prepare for the biology Regents by reviewing vocabulary and material (id.).

With regard to developing and implementing effective test-taking strategies, the EDopt session notes indicated the SETSS provider reviewed vocabulary with the student, assisted her with highlighting key words, and made charts with important words for each operation (Parent Ex. G at p. 1). The session notes indicated that answering Regents-style questions was difficult for the student as her reading comprehension was weak and she had difficulty understanding vocabulary (id. at pp. 1, 3, 4, 5). In addition, the student had difficulty remembering science answers and carrying them over to future examples (id. at p. 3). The SETSS provider reviewed vocabulary words with the student, examined their meaning, and provided the student with visuals including diagrams (id. at pp. 3, 4, 5). The SETSS provider also reinforced key concepts, provided the student with additional examples, engaged the student in hands-on activities, and provided repetition and review (id. at pp 1, 7-8).

Turning to the student's ability to solve word problems, the EDopt session notes indicated the SETSS provider taught the student about functions using a slow pace and setting small attainable goals to ensure that the student grasped the lesson and felt accomplished (Parent Ex. G at p. 1). The SETSS provider also delivered instruction in linear equations, how to plot ordered pairs on a graph, and how to write equations from "real word scenarios" (id. at p. 3). The SETSS provider "walked" the student through examples and provided the student with prompts (id. at p. 5). In at least one instance the SETSS provider noted that the student was missing foundational skills that needed to be reviewed (id. at p. 7).

Next, the SETSS provider addressed the student's ability to solve and grasp equations and equalities by providing the student with step-by-step instructions and repeated practice (Parent Ex. G at pp. 3-4). The SETSS provider noted that the student was overwhelmed at times and required positive reinforcement, as well as refocusing as she tended to get distracted (id. at p. 4). According to the session notes, the SETSS provider also instructed the student on expanding, combining, and simplifying polynomial expressions by reviewing terminology, breaking down concepts, and

[19] The session notes included a numerical "rating" at the end of each session goal (Parent Ex. G). The ratings ranged from three to eight and often varied from session to session. The session notes do not include a ratings key or otherwise explain what the numerical ratings mean.

providing real life examples for better understanding (id. at p. 9). The SETSS provider assisted the student through the use of visual aids, color coding, chunking, breaking down complex examples, and providing immediate feedback (id.). In terms of factoring, solving, and graphing quadratic equations, the SETSS provider taught the student three ways to factor, but the student had difficulty grasping the underlying rules which left her confused and unable to complete examples independently (id. at p. 10). According to the session notes, the SETSS provider reviewed previously learned concepts with the student and used graphs, organizers, and charts to help clarify concepts (id. at p. 11).

The EDopt session notes contained one entry related to the student's reading comprehension and problem-solving skills as they related to solving Regents questions (Parent Ex. G at p. 10). The single entry indicated that the SETSS provider practiced vocabulary and terms with the student, reviewed Regents examples, and highlighted important words (id.). The session notes did not describe any instances in which the student's writing deficits were addressed.

The EDopt progress report provided additional information regarding educational strategies employed by the student's SETSS provider (Parent Ex. F). The progress report stated that the student's reading interventions focused on vocabulary enrichment and comprehension strategies and that the student had been working on breaking down complex texts into more manageable parts, using graphic organizers, and practicing summation (id. at p. 2). The progress report indicated that positive reinforcement and group dynamics helped to maintain the student's engagement (id.). According to the progress report, the writing interventions used by the SETSS provider included targeted spelling exercises, grammar lessons, and structured writing prompts to help her organize her thoughts (id.). The progress report noted that the student had also worked on incorporating transition words into her writing to improve the flow of it (id.). The progress report indicated that the student's math instruction focused on using visuals, hands-on experiences and step-by-step guidance to help the student understand and retain mathematical concepts (id.). In addition, the progress report stated the provider highlighted key words and employed the use of a calculator for multi-step problems to support student learning (id. at pp. 2-3). To address the student's frustration in math the SETSS provider gave the student frequent encouragement and structure support (id.).

Turning to the student's progress during the 2023-24 school year, the EDopt progress report noted that, in reading, the student had shown steady progress in decoding and comprehension; in writing, the student had demonstrated incremental progress in her ability to organize her ideas into coherent paragraphs; and in math, the student had made some progress in basic arithmetic and understanding new concepts when taught in a small group setting (Parent Ex. F at pp. 1-3).

Time sheets submitted by the parent suggest that EDopt began providing SETSS services to the student on October 10, 2023, and that the student received, on average, three hours per week of SETSS between October 10, 2023 and June 14, 2024 (Parent Ex. H). In an affidavit dated August 27, 2024, an EDopt administrator confirmed that the agency began providing services to the student on October 10, 2023 and that the services continued throughout the school year (Parent Ex. E ¶ 2). The administrator stated that the student's SETSS provider held a master's degree in special education and was a certified special education teacher (id. ¶ 4). According to the administrator, throughout the 2023-24 school year the SETSS provider maintained timesheets and

progress reports for the student which ensured the accurate tracking of service delivery and student progress (id. ¶ 5).

Overall, the hearing record shows that the SETSS provider was helping the student to prepare for the algebra and biology Regents and the SETSS provider modified instruction, so as to help the student learn the concepts necessary to pass the Regents exams.

Although the EDopt progress report indicated that the student's social development was a strength, it also indicated that the student required encouragement to stay focused during reading when the material was challenging, became frustrated during writing tasks, and became frustrated when she struggled with math concepts, which led to disengagement (Parent Ex. F at pp. 1-3). The EDopt progress note recommended that a behavior plan with positive reinforcement be implemented to address the student's task completion and on-task behavior (id. at p. 4). As noted earlier in this decision, there is no evidence of the student having received counseling during the 2023-24 school year. However, although EDopt did not provide the student with counseling services, the EDopt progress report indicated that the agency recognized the student's frustration related to academics and provided her with positive reinforcement, structured support, breaks, and encouragement to manage her frustration (id. at pp. 1-3).

In light of the above, I find the evidence in the hearing record supports a finding that the parent sustained her burden to prove that the unilaterally obtained SETSS delivered by EDopt were appropriate to address the student's needs. Accordingly, the IHO erred in determining that the parent failed to meet her burden, and that finding must be reversed.

D. 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).

The district contends, among other things, that equitable factors are not in favor of the parent, in part because the parent's alleged 10-day notice entered into the record is insufficient to establish that she complied with the requirement to provide such notice.

The parent submitted into evidence a letter dated September 18, 2023, from Prime Advocacy, stating that, if the district did not assign a provider for the student's services that were mandated in the June 2018 IEP, the parent would be compelled to unilaterally obtain private services at enhanced rates (Parent Ex. D). As the district argues, the letter does not set forth a mailing or email address to which it was purportedly sent and the salutation of the letter broadly reads "Dear Chairperson" (id.). Further, as the district notes, the letter was not accompanied by an email or other documentation of transmittal. However, during the impartial hearing, the district did not object to the parent offering this document into evidence (see Tr. p. 6). Then, after agreeing to the document being entering into evidence, the district did not thereafter deny receipt of the document or raise any other question regarding the reliability or veracity of the document to which the parent could then have had an opportunity to respond. Here, where the IHO did not address the issue of the 10-day notice and the matter was not elaborated upon during the impartial hearing, I decline in the first instance to take up the question of the reliability of the document.

Based on the foregoing, I find no equitable considerations that would warrant a reduction or denial of the relief sought by the parent.

VII. Conclusion

As the IHO erred in finding that the parent failed to meet her burden in establishing the appropriateness of the unilaterally obtained SETSS provided by EDopt to the student, and as no equitable factors would warrant a denial or reduction of funding for such services, the parent is entitled to funding for the services actually provided by EDopt for the 2023-24 school year, starting on October 10, 2023, at the contracted group rate of $145 per hour, for three hours per week.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated October 23, 2024 is modified by reversing those portions which found that the parent did not meet her burden to establish that the unilaterally-obtained SETSS from EDopt were appropriate, and which denied the parent's request for the district to fund the unilaterally-obtained SETSS delivered by EDopt during the 2023-24 school year in its entirety.

IT IS FURTHER ORDERED that the district shall fund the costs of no more than three hours per week of SETSS delivered to the student by EDopt during the 2023-24 school year starting on October 10, 2024 at the contracted group rate of $145 per hour, upon proof of delivery.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER