The University of the State of New York

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

No. 24-622

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

Appearances:
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 directed respondent (the district) to fund her son's private services delivered by Alpha Student Support (Alpha) for the 2023-24 school year, but at a reduced frequency. 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 March 25, 2021, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student that

recommended the student receive the following: seven periods per week of group special education teacher support services (SETSS) in Yiddish; two 30-minute sessions per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of individual occupational therapy (OT); one 30-minute session per week of individual counseling in Yiddish; and one 30-minute session per week of group counseling in Yiddish (Parent Ex. D at pp. 1, 8-9).[1] There is no evidence in the hearing record regarding the student's education from March 2021 through the 2022-23 school year.

Via an email with letter attached, dated May 30, 2023, the parent, through her attorney, notified the district that the student resided in the district, that the student was going to be parentally placed for the 2023-24 school year, and that the parent was seeking special education services and related services be provided by the district for the 2023-24 school year (see Parent Ex. E). The parent signed a contract with Alpha on September 1, 2023 for the provision of SETSS to the student at a rate of $195 per hour (see Parent Ex. F). On September 5, 2023, the parent, through her attorney, emailed the district a ten day notice, alerting the district that the student was not receiving services pursuant to the March 2021 IESP and that the parent would be seeking reimbursement for independent providers (see Parent Ex. C).

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) and/or equitable services for the 2023-24 school year (see Parent Ex. A). The parent stated "concern[] regarding" the district's delay in convening a CSE meeting to develop a new educational plan for the student for the 2023-24 school year, noting that the March 2021 IESP was "outdated and expired" (id. at p. 2). The parent also alleged that the district had not implemented the March 2021 IESP for the 2023-24 school year and that she was unable to locate SETSS and related service providers on her own accord (id.). The parent invoked the student's right to pendency based on a prior IHO decision dated June 11, 2021, and, as relief, requested an order directing the district to fund the services to which the student was entitled under pendency for the entirety of the 2023-24 school year "at providers' contracted rate[s]" (id. at pp. 2, 3). The parent further requested an award of compensatory education for any missed services (id. at pp. 3, 4).

The district filed a response to the due process complaint notice dated August 1, 2024, generally denying the allegations set forth in the due process complaint notice and asserting several defenses; the district attached a "Supplemental Notice" to its response referring to a CSE meeting that took place on June 22, 2022 and resulted in an IESP (see Dist. Response to Due Process Compl. Not.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 10, 2024 (Tr. pp. 1-40). During the impartial hearing, the district made a motion to dismiss based on subject matter jurisdiction, the parent responded, and the IHO denied

[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]).

the district's motion (Tr. pp. 4-7; see IHO Decision at p. 2).[2] In a decision dated November 8, 2024, the IHO found that the district "failed to implement the IESP, thereby denying the student a [FAPE] on an equitable basis for the 2023-2024 school year" (IHO Decision at pp. 2-4, 7). With respect to the parent's requested relief, the IHO found an analysis of the relief as compensatory education was more appropriate than the Burlington/Carter analysis (id. at pp. 4-6). However, the IHO found that, even if she applied the Burlington/Carter standard, the private services provided to the student were specially designed to meet his unique needs and there were no reasons to deny or reduce the requested relief (id. at p. 7). The IHO ordered the district to fund five periods per week of SETSS at a rate of up to $195 per hour as compensatory relief for the 2023-24 school year (id. at p. 7). The IHO dismissed the parent's requests for speech-language therapy, OT, and counseling services "without prejudice" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in directing the district to fund five periods per week of SETSS instead of the seven periods per week of SETSS that were recommended in the student's March 2021 IESP.[3] The parent argues that the IHO's award of five periods of SETSS per week was "a clear scrivener's error."

In an answer and cross-appeal, the district alleges that the IHO erred in denying its motion to dismiss for lack of subject matter jurisdiction. The district argues that there is no federal right to due process for a claim regarding services recommended in an IESP and that Education Law §§ 3602-c and 4404 limit the types of cases that are subject to due process, which do not include claims related to implementation of equitable services. The district acknowledges that an emergency regulation that would have explicitly limited due process was stayed and enjoined pursuant to a temporary injunction issued by the State Supreme Court, Albany Count, but argues that a State guidance document supports its position. The district request that, in the alternative, the IHO's award of five periods of SETSS per week be modified to seven periods of SETSS per week as it is clear that the IHO made a typographical error.

In a "statement of fact" that appears to be an answer to the cross-appeal, the parent asserts that the IHO correctly denied the district's motion to dismiss.[4]

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

[2] During the impartial hearing, the parent withdrew her request for pendency (Tr. p. 9).

[3] I note that the parent's "statement of fact," which appears to be a request for review does not have a caption identifying the pleading or to what matter the pleading pertains (i.e., it does not identify the underlying IHO case number or the parties' names). For future matters, the parent's attorney should place a caption on pleadings submitted to the Office of State Review to ensure efficient and accurate processing of appeals before the Office of State Review.

[4] The district submits a reply to the answer to the cross-appeal.

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New 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

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

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

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Subject Matter Jurisdiction

At the outset, it is necessary to address the district's assertion that the IHO erred in failing to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction.

Initially, although the IHO and, to some extent, both parties have treated the parent's claims as related to implementation of the student's IESP, review of the due process complaint notice shows that the parent objected to the district's failure to convene a CSE prior to the start of the 2023-24 school year (Parent Ex. A at p. 2). While the due process complaint notice also alleges that the district did not implement services from the March 2021 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 educational plan 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 2023-24 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 district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law, and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[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, 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.

[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.

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

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

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[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, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in this matter is dated July 8, 2024, prior to the July 16, 2024 date set forth in the emergency regulation (see Parent Ex. A). 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 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 and that the preliminary injunction issued by the New York Supreme Court does not change the meaning of § 3602-c, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district that:

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

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[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, the IHO was correct to deny the district's motion to dismiss. Given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the July 2024 emergency amendment to the regulation may not be deemed to apply to the present matter. Further, the NYSED memorandum issued in the wake of the emergency regulation, which was enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes. Accordingly, the district's cross-appeal seeking reversal of relief granted by the IHO on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be dismissed.

[10] On November 1, 2024, the Supreme Court, Albany County, 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. 23-121; Application of a Student with a Disability, Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-0681). The guidance document is no longer available on the State's website; thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

B. Typographical Error

Neither party appeals the IHO's determinations that the district failed to meet its burden to prove that it provided the student equitable services during the 2023-24 school year, that the private services obtained by the parent were appropriate for the student, that no equitable considerations warranted a reduction or denial of the relief sought, and that the student was entitled to an award of district funding of the SETSS provided by Alpha during the 2023-24 school year as compensatory education (IHO Decision at pp. 2-4, 7). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only remaining issue on appeal is the IHO's award of funding for five periods of SETSS per week (see id. at p. 7), rather than the seven per week of SETSS sought by the parent.

A review of the allegations in the parent's appeal, together with the district's answer, reveals that the parties generally agree that the IHO's decision contained an error with respect to the amount of hours per week awarded for SETSS for the student (see Req. for Rev. at p. 2; Answer & Cr.-App. ¶ 7). In support of her argument that the IHO's award contained a typographical error, the parent asserts that the IHO's decision does not refer to five hours of SETSS services at any point and affirms that all evidence entered into the hearing record indicates that the student was receiving seven hours per week of SETSS (Req. for Rev. at p. 2). In an answer, the district states: "As the facts recounted above demonstrate, the IHO, in all probability, made a typographical or inadvertent error by awarding the Parent five periods per week of SETSS instead of the seven periods per week of SETSS" (Answer & Cr.-App. ¶ 7). Both the parent and district request that an SRO correct the typographical error in the IHO's award of SETSS from five hours per week to seven hours per week (Req. for Rev. at pp. 2, 3; Answer & Cr.-App. ¶ 7).

Moreover, the discussion set forth in the body of the IHO's decision suggests that the IHO intended to award the seven hours per week of SETSS (IHO Decision at p. 3). The IHO recited the relief sought by the parent as including seven hours per week of SETSS (id. at p. 2). While referring in the decision to the student's IESP by the wrong date (i.e., June 11, 2021, instead of March 25, 2021), the IHO nevertheless noted the parties agreed the student was entitled to services set forth in the IESP (id. at p. 3, citing Tr. p. 36). The only IESP in evidence is the March 2021 IESP, which provides for the student to receive seven periods per week of SETSS (Parent Ex. D at p. 8). Further, the IHO found that the services provided to the student by Alpha were appropriate without qualification and further found no equitable basis to reduce the relief sought (see IHO Decision at p. 7), and the evidence in the hearing record shows that the parent contracted for and Alpha provided the student with seven periods per week of SETSS (Parent Exs. F; I ¶ 14; see Parent Ex. H at p. 1). Thus, the IHO's discussion suggests that she intended to award district funding for a total seven hours of SETSS per week at a rate of $195 per hour rather than five hours per week (see id.).

Based on the parties' assertions on appeal, neither party disputes that the IHO's award should have been seven hours of SETSS per week rather than the five ordered (see generally Req. for Rev.; Answer). A plain reading of the IHO's order also supports the parties' assertions that the IHO decision contained a typographical error in the ordering clause. In light of the parties' agreement, I will modify the IHO's decision to fix the typographical error.

VII. Conclusion

Given the parties' respective positions, the IHO's order shall be modified in accordance with the parties' agreement as set forth above. The remainder of the IHO's awarded relief will not be disturbed. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 8, 2024, is modified according to the parties' agreement set forth in their respective pleadings on appeal to direct the district to fund seven hours per week of SETSS, bilingually, by a provider of the parent's choosing at a rate of up to $195 per hour for the 2023-24 school year.

Dated: **Albany, New York**
March 31, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER