**FINDINGS OF FACT AND DECISION**

Case Number: [REDACTED]

Student’s Name: [REDACTED]

School District: N.Y.C. Dept. of Ed. District #

Impartial Hearing Officer: Zeitler, Richard

Date of Filing: February 5, 2024

Hearing Requested by: Parent

Date(s) of Hearing: [REDACTED]

Record Close Date: 08/17/2024

Date of Decision: 08/17/2024

**Names and Titles of Persons Who Appeared [REDACTED]**

**For the Student**

[REDACTED], Parent Representative

[REDACTED], Educational Director for Service Provider Agency

**For the New York City Department of Education**

[REDACTED], Department Attorney

**Background**

On or about February 5, 2024, the Parent, by and through the Parent’s Attorney, filed a due process complaint (DPC) against the New York City Department of Education (DOE or Department) (*See* Ex. A), on behalf of the Student, pursuant to the Individuals with Disabilities Education Act (IDEA or the Act) (*see* 20 U.S.C. § 1415(f)), and the New York State Education Law (*see* Educ. Law § 4401 *et seq*.). The DPC asserts that a free appropriate public education (FAPE) and equitable services have been denied in the implementation of services during the Student’s attendance at a nonpublic school (NPS) for the 2022-2023 school year (*see* Ex. A). Parent now requests that the Department fund the cost of special education services at an enhanced rate for the 2022-2023 school year (*see* Ex. A).

**Procedural History**

The Department did not dispute that the Parent withdrew a prior DPC that was filed in September 2022 for the same issues regarding the same school year, after the DOE “indicated that they would resolve this matter if the Parent agreed to withdraw the complaint” and, “[i]n an attempt to resolve this matter, the Parents withdrew the complaint, only to learn that the D[OE] withdrew the offer[,]” so the instant matter was a refile of that original DPC (see id. at A-4). I issued Orders of Extension on April 16, 2024, and May 6, 2024 (*see* IHO Exs. I and II). The merits hearing was held before me on [REDACTED], wherein all the proposed exhibits were admitted into evidence except D (*see* Exhibits 1 to 3 and A to C and E to H; *see also* Tr. at pp. 7 to 19).[[1]](#footnote-1) The Parent offered the live testimony of the Educational Director for Service Provider Agency while the District offered no witnesses.[[2]](#footnote-2) This decision now follows.

**Findings of Fact and Analysis**

At the hearing, the following was not in dispute. The Student was 7 years old and attended 1st grade at the Private School during the 2022-2023 school year (*see* Ex. A; *see also* Tr. at pp. 32 to 33). The Student has been classified by the Committee on Special Education as a student with a Speech or Language Impairment (*see* Exs. 3-1 and B-1) and in an Individualized Educational Services Program (IESP) developed on April 8, 2021, the CSE recommended, *inter alia*, “Special Education Teacher Support Services (SETSS) . . . Group service . . . 3 [hours] per week . . . [and] 2 [hours] per week’ (*id*. at 3-15 and B-15).[[3]](#footnote-3) The Department did not offer the Parent any specific providers, but Parent found a provider who could administer the SETSS at an enhanced rate (*see* Ex. A).

After considering the evidence, including all the admitted documents and the witness testimony, I make the following findings. All exhibits and testimony described below have been credited, unless otherwise indicated. The weight I afford credited exhibits and testimony is reflected in the analysis.

June 1 Defense

During the DOE’s opening statement, the Department Representative asserted that the Student should be entitled to no services paid for by the DOE because the Parent did not submit a written notice of request for services to the Department by June 1, 2022, as required by Educ. Law § 3606-02 (*see* Tr. at pp. 30 to 31, 53 to 54). I will address this argument first, as it would have the effect of the denying the Parent’s claims, if established.[[4]](#footnote-4)

*Affirmative Defense*

As a threshold matter, I find the District’s argument untimely and unproven. Although not couched as such, the DOE’s argument raises an affirmative defense, as it contains new facts to be established (elements of notice and of a date certain) that would have the effect of denying the Parent’s claims.[[5]](#footnote-5) As the party invoking the defense, the Department had to do more than simply bring it up conditionally in its disclosures and make the assertion in its opening and closing statements. The Department was obligated to *prove* it, like it would any affirmative defense. The DOE Representative, however, offered no witnesses, affidavits, or exhibits to demonstrate how June 1 notices are received from parents, whether a search was made for a specific notice from the Parent here, or whether any notice had been received. In failing to do so, the affirmative defense was not proven, and the parent had no burden to refute an unsupported allegation. I therefore reject the argument for this reason alone.

*Exception to June 1 Statutory Provision*

Even if the DOE properly asserted and proved the affirmative defense, I would still find that, as a matter of law, the June 1 requirement did not pertain to the Student under the circumstances of this case. Educ. Law § 3602-c(2) provides, *inter alia*:

a. 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 or person in parental relation of any such student.  ***Such a request for career education or services to gifted students*** shall be filed with the board of education of the school district in which the parent or person in parental relation of the student resides on or before the first day of June preceding the school year for which the request is made.  ***In the case of education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location on or before the first of June preceding the school year for which the request is made*** . . . provided that where a student is first identified as a student with a disability after the first day of June preceding the school year for which the request is made . . . and prior to the first day of April of such current school year, such request shall be submitted within thirty days after such student is first identified.  For students first identified after March first of the current school year, any such request for education for students with disabilities in the current school year that is submitted on or after April first of such current school year, shall be deemed a timely request for such services in the following school year.

b. (1) For the purpose of obtaining education for students with disabilities, as defined in paragraph d of subdivision one of this section, such request shall be reviewed by the committee on special education of the school district of location, which shall develop an individualized education service program for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program.  ***The committee on special education shall 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.***  Review 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.

(Emphasis added.)

The emphasized language above highlights three important clauses. First, it is noteworthy that (b)(1) begins with “for the purpose of *obtaining* education for students with disabilities . . . .” which places focus on students and their parents, and what they *receive*, rather than the district and what it *gives*. Second, the June 1 notice applies to three categories of students, specifying and separating requests for services for gifted students, career education students, and students with disabilities.[[6]](#footnote-6) Third – and only with respect to students with disabilities – education and services must be administered on an “equitable basis” – meaning *fairly* – but also “as compared to” students with disabilities in public schools, and other NPS students,[[7]](#footnote-7) within the same district. This clearly signals a level of *parity* between services rendered to dual enrollment NPS students and services for public school students with disabilities, who must receive a FAPE under the IDEA.

The Department’s argument necessarily relies upon two assumptions. First, that providing notice is an *annual* obligation and second, that failing to provide a written notice by the June 1 preceding the school year at issue precludes *any* recovery. If a plain reading were applied to only the June 1 clause, it could be argued that the June 1 notice is an absolute and unambiguous obligation, consistent with the doctrine that legal text must be given effect, to the extent possible, as it was written by the legislature.[[8]](#footnote-8) The text, however, offers more than one plain reading. Nothing in § 3602-c(2) explicitly states that the request must be made *every* preceding June 1. There is also nothing in the law that explicitly describes a complete bar to any services as the only consequence for failing to provide the notice. The “first of June preceding” clause therefore can be applied as a precursor to the subsequent sentences (regarding the dates by which notice is to be given for the first year that a student is identified as having a disability), and thus a general description of the obligation to let a district know about a NPS disabled student’s status when the district had no prior knowledge of that student, regardless of whether it is the year that the student was first identified.[[9]](#footnote-9)

Regardless of which reading is applied, the June 1 clause should not be applied without weighing its relationship to the “equitable basis, as compared to” clause, because provisions within the same statute that pertain to the same subject matter are to be read *in pari materia* and must, regardless of any ambiguity, be harmonized. Here, a relationship between the two provisions is evident because the “services” that parents must request by June 1 are the *very same* special education and services that are to be administered “on an equitable basis” when “compared to” students with disabilities in public schools. Application of the June 1 requirement should thus reflect a consideration of its effect on the obligation to ensure that NPS students with disabilities receive services “on an equitable basis” to their public school counterparts.

If students with disabilities receiving a FAPE under the IDEA faced a similar date-certain mandate as in § 3602-c, there would be no discord between the “June 1” and “equitable basis” clauses. This, of course, is not the case. The IDEA’s primary notice provision for parents is the filing of a TDN, and the law expressly allows for *discretionary* reduction or denial of payment when that requirement is violated,[[10]](#footnote-10) not the automatic and complete bar to *any* recovery, as indicated by the Department’s reading of the June 1 provision. This exposes an obvious tension between the two clauses: if NPS students with disabilities are to receive services *comparably* to FAPE-eligible students in public schools, then separating out NPS students whose parents did not file a June 1 notice would no longer be receiving services on an “equitable basis” with public school students. Nothing in the law mandates that only *some* NPS students receive services on an equitable basis, and nothing suggests that students with disabilities must be split into two populations – those who notify by June 1 and those who do not – with the result that students who clearly require services are rejected from any recovery simply because a writing was not submitted. This would be especially egregious when, as discussed more fully below, the district is already aware of those students and their needs. I will not read § 3602-c to exalt form over substance in such a manner, and I conclude that the Department’s preferred reading of § 3602-c raises an ambiguity between the two clauses at issue that must be resolved.

It is understood that “when . . . statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.”[[11]](#footnote-11) Where, however, “an ambiguity exists in a statute, it becomes th[e interpreter]'s duty to construe the statute, as best [one] can, to effectuate the Legislature's intent.”[[12]](#footnote-12) Adjudicators construing the meaning of legislation are “governed by the principle that we must interpret a statute so as to avoid an unreasonable or absurd application of the law”[[13]](#footnote-13) and we must “avoid ascribing a meaning to [a] term that is inconsistent with the statute’s underlying purpose[.]”[[14]](#footnote-14)

Analyzing the *purpose* of each of the two statutory clauses is instructive in determining how their relative application might be reconciled. Education Law § 3602-c was originally enacted in 1963, and its first major amendment, in 1993, pertained to the terminology of “occupational” and “vocational” education and not to students with disabilities.[[15]](#footnote-15) When the law was amended again in 2005, the legislature declared that when “Congress . . . amend[ed] the Individuals with Disabilities in Education Act (IDEA) relating to the provision of special education programs and services, effective June 1, 2005[,]” the “United States Department of Education . . . required states to provide assurance in their application for funding . . . that the state and its local educational agencies will comply with the IDEA.”[[16]](#footnote-16) It was deemed “necessary to enact . . . temporary transitional legislation [§ 3602-c] . . . to assure that New York will be in compliance with the provisions of the amended IDEA in the 2005-2006 school year.”[[17]](#footnote-17) The Governor’s memorandum approving the bill acknowledges that the-then new law was “designed to assure access for all high school students in this State to . . . educational programs for students with disabilities[,]” noting that “[m]any public school districts have long been able to offer a variety of . . . special education programs” while “[n]on-public schools, with smaller enrollments and more limited facilities and fiscal resources, have generally been unable to provide such specialized offerings[.]”[[18]](#footnote-18) The “bill [thus] enable[d] non-public school students to join with our public school students in sharing the benefits from such public programs.”[[19]](#footnote-19)

Subsection 2 of § 3602-c and the two clauses at issue have remained intact since 2005, and despite being labelled “temporary,” the section has been extended eight times.[[20]](#footnote-20) The broader purpose of § 3602-c, which itself furthers the goals of the IDEA, is reflected in the first part of subsection (2): “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 or person in parental relation of any such student.”[[21]](#footnote-21) These “services” include “education for students with disabilities,”[[22]](#footnote-22) the definition of which incorporates Educ. Law § 4401,[[23]](#footnote-23) which itself defines a student with a disability as “a person under the age of twenty-one who is entitled to attend public schools . . . and who, because of mental, physical or emotional reasons can *only* receive appropriate education opportunities from a program of special education.”[[24]](#footnote-24) Any interpretation of § 3602-c therefore must reflect the recognition that students with disabilities must receive “a program of special education” in order for their education to be “appropriate.”

The text of § 3602-c also expressly references the IDEA in two places, the first being the proportionate share of IDEA Part B funds expended with respect to NPS students,[[25]](#footnote-25) and the second being invocation of New York’s IDEA hearing procedures found at § 4404.[[26]](#footnote-26) The breadth of the definitions, the connections to the IDEA and its purposes, and the phrase “*equitable* basis” utilized with respect to services, are all factors supporting an understanding that the legislature envisioned a more generous application of § 3602-c(2), at least on par with services that must be provided to public school students receiving a FAPE under the IDEA, who face no June 1 constraint.

A further indication that the “equitable basis” owed to NPS students is similar to what students receive under a FAPE comes from the SRO, which has supported a reading of § 3602-c that recognizes greater parity between dual enrollment services and IDEA services. Noting that “State law requir[es] that core instruction [be] provided by a school district [that is] performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into[,]”[[27]](#footnote-27) the SRO has found, with respect to New York City, “that the district has engaged in an illegal practice by attempting to contract out for the delivery of instruction by a special education teacher and has encouraged the parents to participate in that process by creating a list of independent SETSS teachers that are not employees of the district.”[[28]](#footnote-28) NPS students still require services under this scheme, so the SRO has determined that even though the DOE should not “deliver special education services . . . in an unauthorized manner . . . they can be made to pay for a privately obtained parental placement [provider], a process that is *essentially the same as the federal process under IDEA*.”[[29]](#footnote-29)

Viewing the “equitable basis” clause through a wider lens does not mean that the June 1 provision has no scope. Indeed, “[i]n the construction of statutes, each word or phrase in the enactment must be given its appropriate meaning.”[[30]](#footnote-30) The requirement that parents of NPS students provide notice carries at least two important purposes: avoiding unfair surprise and resulting prejudice to the Department, and ensuring that the DOE has a fair grasp of the NPS population vis-à-vis its obligation to calculate the expenditure of funds for the following school year. A reconciliation with the “equitable basis” clause must consider these factors.

The degree to which the Department may claim prejudice or surprise has been addressed in at least two documents published by the DOE. When § 3602-c was amended in 2005, the DOE published a guidance memorandum describing its intended application of the law.[[31]](#footnote-31) The memorandum recognized that “Section 3602-c . . . was amended to comply with section 612(a)(1) of IDEA . . . to require the public school district where the nonpublic school is located to provide students with disabilities enrolled in nonpublic elementary and secondary schools by their parents with special education services.”[[32]](#footnote-32) School districts’ obligations listed in the memorandum include:

• “The school district of location *must consult* with nonpublic school representatives . . . during the design and development of special education and related services . . . and *throughout the* school year to ensure that parentally placed nonpublic school *students identified through the child find process can meaningfully participate* in the special education and related services”[[33]](#footnote-33);

• “The school district of location is responsible for child find” which “is the practice method the public school district will develop and implement to identify, locate and ensure the evaluation . . . of students with disabilities who are parentally placed in nonpublic schools”[[34]](#footnote-34);

• “[T]he district of location must conduct a reevaluation at least once every three years of each eligible parentally placed nonpublic school student with a disability” which “is important . . . because [reevaluations] provide current data needed to determine that total number of eligible students . . . used in calculating the proportionate share of funds that must be used on services”[[35]](#footnote-35); and

• “The CSE of the district of location must develop an IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic elementary and secondary schools . . . The IESP *must be reviewed . . . not less than annually*.”[[36]](#footnote-36)

The above action items describe touchpoints that school districts must continually have with nonpublic schools and with the parents or guardians of students with disabilities who attend those schools. The Department retains child find, evaluation, and annual IESP review obligations for each NPS student, meaning that once an IESP is in place, the Department is under a perennial duty, every year, to confirm each student’s status and needs for the following year. It is hard to imagine under these circumstances how the DOE would be surprised or prejudiced about the need for a NPS student’s services without a June 1 notice, at least after the initial year the student was brought to the DOE’s attention. The purpose of notice at that point has diminished. If the Department fails to confirm a student’s status because it did not communicate with the NPS or because it failed to identify, evaluate, or conduct a mandatory annual IESP review of a student with a disability at a NPS, the Department should not thereafter be rewarded for its dereliction by claiming a lack of notice with respect to the students for whom it should have been aware.

The second DOE document is the Standard Operating Procedures Manual, which specifies that a “CSE sends [a] *Request* for Special Education Services form to parents of students with IESPs by *April 1*” *before* parents are to send a notice in “writing to the CSE by June 1 . . . .”[[37]](#footnote-37) This reflects an *expectation* of the Department that parents will have prior notice of the June 1 obligation. I will not hold that an operating manual supersedes a statutory notice requirement; I do, however, find this a strong indication that the DOE itself does not intend the law to deny services to the students of parents or guardians who had no knowledge of the June 1 provision. I note that the Department offered nothing at the hearing to demonstrate that an April 1 notification had been sent to the Parent.

Finally, the New York State Court of Appeals has weighed in on the scope of the word “shall” as used in § 3602-c. In *Bd. of Educ. v. Wieder*,[[38]](#footnote-38) the court considered another provision within the same law, § 3602-c(9), which states that:

Pupils enrolled in nonpublic schools for whom services are provided pursuant to the provisions of this section *shall* receive such services in regular classes of the public school and shall not be provided such services separately from pupils regularly attending the public schools.[[39]](#footnote-39)

The school district in that case argued that (c)(9) “must be read literally as the exclusive vehicle for providing special services to” NPS students with disabilities, and that such services could be provided “only in regular public school classes and programs, and not elsewhere.”[[40]](#footnote-40) The Court disagreed, finding that “this is not a statute that can be read without consideration of its history and context[.]”[[41]](#footnote-41) The Court then held that the “section does *not* mandate that a board can provide special services to private school [disabled] children only in regular classes and programs of the public schools, and not elsewhere.”[[42]](#footnote-42)

In reviewing the State’s statutory and regulatory approach to equitable special education and services, the Court offered three observations. “First, the paramount principle . . . is concern for a [disabled] child’s educational needs, whether in public or private school . . . in a manner that enables them to participate in regular education services when appropriate.”[[43]](#footnote-43) Then, “[s]econd, the statutes and regulations vest in State educational authorities broad responsibility for tailoring programs to a child’s individual needs in the least restrictive environment, considering the appropriateness of the resources of the regular education program.”[[44]](#footnote-44) Finally, “[t]hird, to this end, the authorities have a wide choice of programs and services, including home instruction, itinerant teachers, and counseling and psychological services.”[[45]](#footnote-45) Upon these factors, the Court endorsed a most generous reading of the *entirety* of § 3602-c, not just the subsection at issue: “Education Law § 3602-c . . . as part of the Education Law article pertaining to apportionment of moneys . . . was plainly designed *to increase benefits afforded to* [*disabled*] *children in private schools – not to limit them –* by offering these students access to all of the special programs provided for public school students and by integrating them generally with public school students.”[[46]](#footnote-46) On this finding, the Court rejected the narrow interpretation of the procedural rule proffered by the district, holding instead that § 3602-c should be applied so as to ensure students receive services more broadly (*e.g.*, allowing services at locations other than at public schools) notwithstanding a limiting use of the word “shall” (in “shall receive such services in regular classes of the public school”).

The interpretation of § 3602-c(2) I adopt here follows the same reasoning as applied in *Wieder*. The ambiguity that arises from the tension between the June 1 clause and the equitable basis clause must be resolved in favor of “increasing benefits afforded to [NPS] children . . . not to limit them – by offering these students access to all of the special programs provided for public school students[.]”[[47]](#footnote-47) The effect of the June 1 clause therefore must give way, but only to the extent necessary to ensure that NPS students the district has reason to know of (and especially those for whom the district has already made recommendations) will receive those services similarly to public school students who are entitled to a FAPE.[[48]](#footnote-48) Applying § 3602-c(2) in this manner is also consistent with the definition of “children with disabilities” in the Education Law, *i.e.*, those “who, because of mental, physical or emotional reasons can *only* receive appropriate education opportunities from a program of special education[,]”[[49]](#footnote-49) as well as with DOE’s own guidance memorandum, which states 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 public school students must be made available to nonpublic students*, taking into account the student’s placement in the nonpublic school program.”[[50]](#footnote-50)

If the Department’s approach were to control, I would have to ignore the interrelationship between the two clauses, which, in my opinion, would perpetuate a system that hampers the legislature’s intent to secure services for disabled NPS students, by imposing a hurdle on their parents and guardians that carries the potentially dire consequence of denying services to children who, according to the legislature, can “*only* receive appropriate education opportunities from a program of special education.”[[51]](#footnote-51) The June 1 notice requirement therefore does not extend to students where the Department had already learned of or agreed to provide for a student’s service needs in previous years, or where the parents or guardians requested services in a previous year and the Department was under a continuing obligation to reevaluate the student and annually review their IESP, or at the very least, for students where the DOE recommended services that it thereafter did not implement. This interpretation both resolves the ambiguity inherent between the notice clause and the equitable basis clause, and it comports with the 2004 IDEA amendments that required public school districts to “provide students with disabilities enrolled in nonpublic elementary and secondary schools by their parents with special education services.”[[52]](#footnote-52) I note that nothing in this holding would prohibit me, in the appropriate case, from equitably reducing an award, *e.g.*, when a parent or guardian of a NPS student received and ignored an April 1 notice from the Department, or when a parent or guardian otherwise interfered with the DOE’s ability or efforts to learn of or track a NPS student’s status.

Applying the above to the case before me, I find that the Parent’s claim should not be denied. The Department developed an IESP for the Student, complete with recommended services, meaning that it had past awareness of the Student and the Student’s need for services. Nothing was offered, however, to explain how it conducted an annual review, or why it thereafter failed to implement those services. Thus, even if it had been proven by the DOE that the Parent failed to submit a written request for services by the June 1 preceding the school year in question, there is no dispute that the Department knew of the Student, offered recommendations for services, and then did not provide those services, either directly or through its own contract with at least one provider. On this record, I find, for the reasons stated above, that the June 1 provision did not apply to this Student, for the services at issue in this case. For the forgoing reasons, the June 1 provision of Educ. Law § 3602-c will not disturb my award.

FAPE and Equitable Services

The IDEA and the New York Education Law require school districts to offer a FAPE to each child with a disability residing in their district who requires special education programs or services.[[53]](#footnote-53) A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive IEP or IESP.[[54]](#footnote-54) When the program is developed in New York City, a FAPE requires the DOE to both comply with the procedural requirements set forth in the IDEA, and recommend a placement and program that are reasonably calculated to enable the student to receive educational benefits.[[55]](#footnote-55)

Disputes between a parent and a school district are resolved via an impartial due process hearing, as called for by the IDEA.[[56]](#footnote-56) The remedies available for a school district’s failure to provide appropriate equitable services under dual enrollment is similar to the remedy for a school district’s failure to provide appropriate services under the IDEA.[[57]](#footnote-57) The only limitations on the scope of relief are that it must “be appropriate in light of the purpose of the Act,”[[58]](#footnote-58) and that damage awards are not available under the IDEA.[[59]](#footnote-59) An IHO “may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies.”[[60]](#footnote-60)

FAPE on an Equitable Basis in the Program [ADD ONLY IF P SEEKS A PRIOR PROGRAM]

The Parent is not only asserting a denial of a FAPE and equitable services in the implementation of the program, the Parent is also asserting that the most recent [IEP/IESP] developed in [YEAR] was not appropriate because it reduced [E.G.: 7 hours of SEIT services per week to 5 hours of SETSS per week, and converted half of the Student’s weekly SLT from 1:1 to group] (see [CITE]). It was incumbent upon the Department to establish how this more recent program would have offered the Student a FAPE on an equitable basis. [IF RECENT PROGRAM OFFERED AS ESTABLISING A FAPE/EQUITABLE SERVICES, GO INTO WHETHER IT’S “SELF-FAPE’ng” VIA RECENT EVALS, COGENT ANALYSIS IN IESP, *etc*.] In failing to present any evidence or witnesses, the Department did not prove – in accordance with its burden – that the most recent IEP, as written, recommended a program that was reasonably calculated to enable the Student to receive educational benefits.

The Parent, on the other hand, offered compelling evidence that demonstrates the Student’s academic performance improved under the [OLDER/YEAR] program (see [CITE]). There being no other evidence of a more appropriate program, I find that the [OLDER/YEAR] program[/IEP/IESP] was appropriate for the [SCHOOL YEAR] school year. The next issue is what was implemented for this school year.

FAPE on an Equitable Basis in the Implementation

Under the IDEA and the NY State Education Law, school districts have the burden of proof that a FAPE on an equitable basis has been provided to the student, except that where tuition reimbursement is sought, the parent has the burden of proof with respect to the appropriateness of the parent’s chosen educational placement.[[61]](#footnote-61) I must, therefore, determine whether the Department met its burden to demonstrate that the IESP program was implemented to provide this Student with educational benefits.

The DOE developed the program in evidence and therefore was responsible for implementing services to the Student. It offered no evidence that DOE providers were assigned to the Student, or that the Department otherwise itself contracted for the provision of the IEP services for the 2022-2023 school year, instead leaving it to the Parent to find a provider. It has been held, however, that the Department may not effectively compel the Parent to resort to self-help in obtaining a special education provider.[[62]](#footnote-62) Such a “*de facto* delegation from the district to the parent of the obligation to find a SETSS provider . . . at an acceptable rate is manifestly unreasonable,”[[63]](#footnote-63) and a violation of State law.[[64]](#footnote-64) The DOE thus failed to implement the program, which constitutes a denial of FAPE on an equitable basis.[[65]](#footnote-65) The Department, therefore, will be responsible for the services the Parent obtained for the 2022-2023 school year.

Equitable Award for Failure Provide a FAPE on an Equitable Basis

In determining the relief for the denial of a FAPE on an equitable basis when, as here, the Parent has not paid the provider and seeks direct funding, the State Review Office (SRO) has held that the “matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.[[66]](#footnote-66) Because the Parent had to find the provider on her own and because “caselaw supports reimbursement and direct remedies in a unilateral placement case,” the SRO has determined that the question of whether a SETSS provider should be directly paid is somewhat akin to the *Burlington*/*Carter* framework, which “forecloses any complete disavowal of the parent’s burden of production and persuasion related to the private, unilateral services obtained by the parent.”[[67]](#footnote-67) Thus, in a case such as this, where the central issue is whether a third-party SETSS provider selected by a parent should be remunerated with an enhanced rate over what the Department normally pays, the Parent’s evidence must be scrutinized, consistent with my obligation and equitable authority to ensure that the remedy “be appropriate in light of the purpose of the Act.”[[68]](#footnote-68) The evidence therefore must show that the SETSS providers’ rates are reasonable and appropriate under the circumstances.

The factors that have been found relevant to the reasonableness of a SETSS rate include: (1) the Provider’s explanation of the rate, including its costs and overhead[[69]](#footnote-69); (2) the qualifications of its instructors the value that specialized certification, such as a bilingual extension, adds to instruction[[70]](#footnote-70); (3) whether the Parent directly paid the Provider or is contractually obligated to pay the Provider in the event the Department is not ordered to fund SETSS at the requested rate[[71]](#footnote-71); (4) how the Agency and providing instructor’s “services were specially designed to meet the [S]tudent’s [unique] needs”[[72]](#footnote-72); (5) whether the Agency implements the program exactly as described in the most recent IEP or IESP and, if not, the Parent’s explanation for why the program is not being followed as recommended; and (6) the Parent’s access to, and efforts at, utilizing DOE resources to locate DOE-approved providers.[[73]](#footnote-73) I will therefore determine, in light of these factors, whether the requested rate is unreasonable.[[74]](#footnote-74) Finally, I will consider (7) when the Parent notified the Department of the enhanced rate claim, because this establishes the first date the DOE would have had an opportunity to modify its offered rate for SETSS in light of the Parent’s claims.[[75]](#footnote-75) In deciding the ultimate remedy, however, I am mindful that regardless of any deficiencies in the Parent’s justification for a particular rate paid to a provider, the Department remained obligated to implement or fund the services, as holding otherwise would countenance the denial of FAPE on an equitable basis.

Reasonableness of the Provider’s Rate

*Department’s Rate Evidence*

In support of its position that the Parent’s request for enhance rate services was not reasonable, DOE introduced the report of the American Institute of Research (A.I.R. Report) into evidence (Ex. 1-ii). The Report is based, in part, upon a May 2022 study of the US Bureau of Labor Statistics (BLS) entitled “Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA[,]” which analyzed figures from the New York City metropolitan area, but also from surrounding non-metropolitan areas in New York State, New Jersey and Pennsylvania (*see id*. at 1-4 to 1-5). There is no breakdown, however, that compares the earnings of special educators between New York City and, *e.g.*, Harrisburg, Syracuse, Atlantic City, and many other places that I will take notice do not have a cost of living or service pricing anywhere near as high as they are in New York City. Moreover, the Report makes no distinction between independent contractors and salaried employees. This was clearly understood to be an issue by the Report’s authors, as they accounted for the benefits a salaried employee would receive (*see id*. at 2-5). The BLS numbers also do not reflect any variances in the minimum qualifications of special educators between the states. New York, New Jersey, and Pennsylvania do not necessarily have the same educational and certification/licensure requirements, which could clearly affect the rate of pay someone with each state’s qualifications might expect. With so much room for variation in the factors of geography, qualifications, and pay structure (salaried vs. non-salaried), it is difficult to discern what specific amount the Department concluded is the reasonable rate for SETSS in New York City.

There is more. The Report goes on to use the unreliable BLS numbers to declare what the authors found to be a median New York City special education teacher’s salary, despite having only tri-state regional data. They choose $65,192.00 as their estimated “midpoint” of the BLS salary distribution for New York City (*see id*. at 1-9), describing that amount as “between the 10th and 25th percentiles of the distribution[,]” which was picked “because the labor market from which the BLS salary distributions are derived from include districts that will tend to pay less than NYC” (*id*.). Importantly, however, they do not explain why a number between the 10th and 25th percentiles was the better option, or how their chosen salary in that range more accurately accounts for the differences between the tri-state regional average and New York City. Again, without such information, I cannot discern the precision of the analysis.

Finally, there is no one single amount being listed – let alone recommended as the “reasonable market rate” – in the A.I.R. Report. The appendices list ranges of annual salaries and hourly rates, from $59,620.00 to $167,850.00 (*see id*. at 1-15), and from $71.12 to $200.22 (see id. at 1-18), respectively. The most comprehensive chart (Table A13) lists a distribution of “inflation adjusted hourly compensation” beginning at $77.80 for first year special educators with a bachelor’s degree, up to $163.80 for special educators with a Master’s degree, and eight or more years of experience (when there are additional factors such as differentials and a certain amount of professional development hours) (*see id*. at 1-24). These rates are described as having factored in (1) the maximum benefits DOE salaried special educators can receive (a 35% valuation); (2) an 8.3% adjustment to cover the “indirect costs” associated with and in addition to salary (but not benefits), “such as general maintenance and operating expenses, general office and administrative expenses, [and] general overhead expenses”; and (3) a 4.3% adjustment “for inflation in the NY-NJ-PA metro area” between May 2022 and July 2023 (*id*. at 1-11). It is difficult to see how the DOE could have concluded from the above how this range of circumstance-dependent rates can be distilled to one amount that will carry the title “reasonable” (*e.g.*, the average of the lowest and highest rates from Table A13 is $120.80).

In *Application of a Student with a Disability*, Appeal No. 24-222 (Jul. 5, 2024), the SRO determined that more accurate BLS data for private sector education fringe benefits and incidental costs is 27.7% (id. at pp. 18 to 19) which, when adjusted from 8.3% to 27.7% would make the average hourly rate in Table A13 $142.44, and the highest hourly rate in that table $193.14. This is not that different that amounts, discussed below, that the SROs have upheld as the upper-bound of reasonable rates for special education. The A.I.R. Report will not, therefore, be treated as a definitive source for what a reasonable rate must be for special education services in New York City. That said, it may be viewed as a resource against which I can weigh the Parent’s evidence.

*Parent’s Rate Evidence*

I turn to whether the rates requested by the Parent are reasonable and appropriate under the circumstances. The SETSS’s Provider’s Educational Director testified as follows. The Student received SETSS for the 2022-2023 school year (September 15, 2022 to June 30, 2023) (*see* Ex. ¶ 14). The Agency charged $197.00 per hour for SETSS during the 2022-2023 school year and, of that amount, $100.00 was paid to the Instructor (*see id*. ¶¶ 9 and 16). The Educational Director also described what costs, overhead, and administrative expenses are reflected in the Agency’s hourly rate, including “one-on-one supervision, educational resources and support, professional development and materials, employment taxes, administrative costs, and overhead costs” (*id*. ¶ 10). The supervisor would periodically ”model or observe or provide an instruction or feedback” to the Instructor (Tr. at pg. 42). The Agency’s administrative costs also included “staff and . . . operations that . . . take place on the back end to ensure that [the] company can provide services efficiently to [their] students[,]” such as “an office staff” and their “field staff of clinicians and professionals” (*id*. at pg. 43).

In reviewing the above, I recognize that agencies are businesses, and as such, they are entitled to recoup reasonable costs and earn a reasonable profit for their services. The SRO has lamented the need for a “cottage industry” of service agencies, but also that such an industry would not exist had the DOE committed itself to its obligation to actually implement services, which it did not. Finally, in considering the Agency’s rate, I am mindful that the SRO has provided some guidance as to the upper bound for special education services. It has held that $175.00 per hour is not unreasonable,[[76]](#footnote-76) and even $200.00 per hour under certain circumstances.[[77]](#footnote-77) In 2011, the SRO upheld a $150.00 rate for SETSS,[[78]](#footnote-78) which translates to $214.89 as of November 2024.[[79]](#footnote-79) On this record, therefore, I do not find the Agency’s rate to be *per se* unreasonable. That said, the DOE should not be responsible for paying the Agency for attorneys fees it paid on behalf of the Student, which here was approximately $3,000.00, although the Educational Director was not aware of the exact amount (*see* Tr. at pp. 43 to 44). Whatever amount was paid will be reduced from the award.

The Agency’s explanation for its rate is not the end of the inquiry. As stated above, there are multiple factors that can affect whether the requested rate is reasonable and appropriate under the circumstances of the case before me. I will turn to those factors now. The second reasonableness factor is the qualification of the special education Instructor. The Instructor here does have qualifications, in that the Parent offered into evidence the Instructor’s Initial Certificate for “Students with Disabilities (Grades 1-6)” (*see* Ex. G-1), which on its face was active for the entirety of the 2022-2023 school year (*see id*.). The Student was in 1st grade during the 2022-2023 school year, and thus within the grade-range of the Instructor’s certification; however, the Instructor described the Student’s grade-level learning ability as variable. For example, by the end of the school year, the Student’s literacy, phonics, math were at a 1st grade level (*see* Ex. F-2 to F-3), but comprehension and language abilities were still at a pre-K level (*see id*. at F-2 and F-4 to F-5). The Executive Director reported that, at the beginning of the school year, the Student had read at a pre-K level as well. This means that the Student read at a level below the Instructor’s certification. That said, and given that the Student was able to rise to a 1st grade level in reading by the end of the school year, coupled with the fact that it would be understandably more difficult for any agency to find a special education instructor certified in both pre-K (Birth-Grade 2) and grades 1-6, I will not reduce the award on this relative deficit in the evidence.

Third, the contract in this case properly notified the Parents of their ultimate “responsibility to pay any balance of any fee that is not covered by the NYC Department of Education” and the Agency’s schedule of rates (including SETSS at $197.00 per hour) was incorporated by reference into the contract (Ex. E-3). This weighs in favor of the Parent’s requested rate.

Fourth is the Agency’s approach to how it addressed the Student’s specific needs. The IESP describes the Student’s challenges, including “significant weaknesses in the area of cognitive skills” such as “nam[ing] any shapes” and “identify[ing] any of the numbers 1-5”; he had “receptive language, articulation and expressive language deficits”; he “present[ed] with limitations in being able to learn . . . letters”; he “need[ed] to develop age-appropriate skills in the [] areas of . . . recognizing patterns and being able to repeat them, continuing to work . . . when encountering difficulty[,] and counting by rote” (Exs. 3-2 to 3-4 and B-2 to B-4). Utilizing the “Read Right” program at “the start of the school year . . . [they] introduc[ed] the alphabet, teaching [the Student] how to recognize letters . . . [and] phonic awareness, writing . . . letters . . . and slowly working towards CVC words” (Tr. at pg. 32). The Instructor also applied prompting, redirection, visuals, counting and decomposing numbers strategies in math, direct instruction, multi-sensory teaching techniques, and other manipulatives, interventions, and supports (*see* Ex. F-1 to F-4). On this record, I find that the Agency provided the Student with services specially designed to meet the Student’s unique needs.”[[80]](#footnote-80)

Fifth is the degree to which the Agency adhered to or deviated from the recommended program. Here, it has been determined that the program to be implemented was the IESP developed on April 8, 2021 (*see* Exs. 3 and B). The Instructor provided five hours of 1:1 SETSS a week to the Student (*see* Ex. F ¶¶ 13 to 14), notwithstanding that the IESP recommended group service (*see* Exs. 3-15 and B-15). SROs have held that individual services can be appropriate despite a recommendation of group service when an “IESP contained [no] annual goals related to social interaction with peers,” because a “parent may be afforded some leeway in locating services . . . since identifying an appropriate group setting . . . in [a] private [program] may not have been possible and the district could have avoided this problem by implementing the recommendation for direct group SETSS.”[[81]](#footnote-81) The IESP in evidence contains no such goals (Ex. 3-7 to 3-14 and Ex. B-8 to B-14). This therefore weighs in favor of the Parent’s claims.

The sixth factor regards the Parent’s efforts in attempting to find other providers before resorting to an agency that charged higher rates. The parent did not testify, so there is no evidence of attempts by the Parent to contact providers that may have charged less. This will result in a reduction of the rate, although not significantly, because the Parent had to find an agency due to the DOE failing to provide services, and because the DOE did not prove whether it offered the Student any resources to assist with the search for providers.

The Award

On the totality of the record before me, I find as follows. The reasonableness factors discussed above support the Parent’s request for an enhanced rate, except that there is no evidence in the record regarding the Parents having attempt to obtain services closer to the DOE standard rate. On this record, and given that I am giving this factor relatively less weight, the deficiency in the Parents’ evidence will affect the requested $197.00 per hour rate by only 5%, resulting in an awarded rate of $187.15.[[82]](#footnote-82) I will also order that the overall award for the 2022-2023 school year be reduced by whatever amount the Agency paid for legal services, and that the award be paid only upon direct proof of payment of such legal services, via a retainer agreement, a paid invoice, or other documentation of legal fees paid by the Agency for the benefit of the Parents’ case before me, along with an affidavit attesting to the amount paid for legal services.

Finally, I must decide the first date that an enhanced rate should be imposed. The Parent did not file the DPC until February 5, 2024, meaning that the DOE had no notice of the Parent’s intent to seek enhanced rates under *this* complaint number for the 2022-2023 school year. The DOE, however, did not (at the hearing or otherwise) challenge the Parent’s allegation in the instant DPC that another DPC for these same issues and same school year was filed in September of 2022 and that the instant DPC was filed only because the DOE represented that the prior DPC would be resolved by settlement but then the DOE withdrew their offer (*see* Ex. A-4). Regardless of the circumstances, what is important in this history for the current inquiry is that the DOE was notified in September of 2022 that the Parent wanted services paid at an enhanced rate for the 2022-2023 school year. This is sufficient for me to conclude that the Department had the requisite notice when the 2022-2023 school year began and, as such, the DOE should be responsible for paying the rate I am imposing in this decision for the entirety of that school year. I note that a ten-month school year in New York is 36 weeks.[[83]](#footnote-83)

**Decision and Order**

**It is hereby ordered**, that the New York City Department of Education shall pay the Service Provider Agency for the administration of SETSS, at no more than 5 hours per week, less any amounts paid under pendency, at $187.15 per hour, from the beginning to the end of the ten-month (36-week), 2022-2023 school year (no more than 180 hours total), with such payment to be made within 35 days of a submission to the DOE of any invoices for such services, together with an affidavit attached to each invoice attesting to the provision of the SETSS administered to the Student for the period covered by each invoice, up to the end of the 10-month 2022-2023 school year; and, it is further,

**Ordered**, that the New York City Department of Education shall pay to the Agency or to a provider of the Parent’s choice, for the administration of SLT services, at no more than 1 hour per week, less any amounts paid under pendency, at the DOE’s base rate for the period from the beginning of the ten-month, 2023-2024 school year, to October 12, 2023, and, beginning October 13, 2023, at a reasonable rate consistent with rates the DOE has paid to similarly qualified providers in the six months preceding the date of this decision, for the ten-month, 36-week school year (no more than 36 hours total), with such payment to be made within 35 days of a submission to the DOE of any invoices for such services, together with an affidavit attached to each invoice attesting to the provision of the SLT administered to the Student for the period covered by each invoice; provided that, for any SLT services not utilized, they shall, at the Parents’ election, either be reserved in a bank of up to 36 hours and paid as described herein, in which case such bank shall expire one year from the date of this order, or they shall be provided to the Student in the form of a Related Service Authorization; and, it is further,

**Ordered**, that the total amount awarded under this Case No. in this Findings of Fact and Decision shall be reduced by whatever amount the Service Provider Agency paid in legal fees for the Parent’s legal representation that resulted in this Findings of Fact and Decision, with proof of such payment and the amount paid, in the form of a retainer agreement, or an invoice from attorneys, or other documentation that memorializes the amount paid and payment by the Agency for such legal representation, along with an affidavit signed by a Service Provider Agency official with authority to pay such legal fees and knowledge of the payment(s) made in the instant matter, attesting to the amount actually paid for the Parents’ representation in this case; provided that the DOE shall not be responsible for paying any award in this case until such proof of payment for legal representation and affidavit are submitted to the DOE Implementation Unit.

**So Ordered.**

Dated: August 17, 2024

Richard J. Zeitler, Jr. (signed electronically)

Impartial Hearing Officer

***NOTICE OF RIGHT TO APPEAL***

*Within 40 days of the date of this decision, the parent and/or the Public School District has a right to appeal the decision to a State Review Officer (SRO) of the New York State Education Department under section 4404 of the Education Law and the Individuals with Disabilities Education Act.*

*If either party plans to appeal the decision, a notice of intention to seek review shall be personally served upon the opposing party no later than 25 days after the date of the decision sought to be reviewed.*

*An appealing party's request for review shall be personally served upon the opposing party within 40 days from the date of the decision sought to be reviewed. An appealing party shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. The rules of procedure for appeals before an SRO are found in Part 279 of the Regulations of the Commissioner of Education. A copy of the rules in Part 279 and model forms are available at* http://www.sro.nysed.gov.

**DISTRICT EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| 1 | Hourly Rates for Independently Contracted  Special Education Teachers and Related Service Providers Final Report | 10/2023 | 25 |
| 2 | Occupational Employment and Wage Statistics Report | 05/2022 | 5 |
| 3 | Individualized Educational Services Program | 02/17/2017 | 18 |

**PARENT EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| A | Impartial Hearing Request | 02/05/2024 | 5 |
| B | IESP | 04/08/2021 | 18 |
| C | Due Process Response | 04/03/2024 | 3 |
| D | Prior Written Notice | 10/31/2023 | 4 |
| E | Contract | 09/14/2022 | 4 |
| F | Progress Report | 05/11/2023 | 5 |
| G | Provider Certificate | 05/04/2021 | 1 |
| H | Affidavit of [REDACTED] | 04/09/2024 | 5 |

**IHO EVIDENCE**

|  |  |  |  |
| --- | --- | --- | --- |
| Exhibit | Title | Date | Pages |
| I | Order of Extension | 04/16/2024 | 1 |
| II | Order of Extension 2 | 05/06/2024 | 1 |

**APPENDIX**

|  |  |
| --- | --- |
| **Redacted Information** | **Term Used In FOFD** |
|  | Student |
|  | Parent |
|  | Parent Attorney[/REPRESENTATIVE] |
|  | Department Attorney[/REPRESENTATIVE] |
| N/A | Public School |
|  | Private School |
| Yeled v’Yalda Special Education | Service Provider Agency |
|  | Director of Special Education Services, Service Provider Agency |
|  | Director of Fiscal Special Services, Service Provider Agency |
|  | SETSS Instructor 1 |
|  | SETSS Instructor 2 |
| N/A | Occupational Therapist |
| N/A | Physical Therapist |
| N/A | Speech-Language Therapist |

1. Exs. 1, 2, C, D, E,, F, and H were admitted over objection, and I sustained the objection to D. [↑](#footnote-ref-1)
2. The Transcript shall be denoted as “Tr.” [↑](#footnote-ref-2)
3. The Parent Representative expressed that no related services are being sought in this case (*see* Transcript at pg. 26). [↑](#footnote-ref-3)
4. The analysis described in this part of the “June 1 Defense” section was rejected by the SRO in *Application of a Student with a Disability*, Appeal No. 23-166 (October 3, 2023). I choose not to follow that opinion, which is persuasive authority only as to the matter before me, because it either inadvertently or volitionally did not address three of the central points of the analysis in this decision and in that decision. First, the SRO opinion incorrectly characterizes my statutory construction argument as comparing the IDEA’s consultation process (the development of a school district’s overall services plan for funding special education services equal to the proportionate amount of the school district’s federal funds under Part B of the IDEA), which does not create an individual right in parents of NPS students for services, to the requirement of § 3602-c that school districts review parent requests for services and develop an IESP. This is not where I held statutory ambiguity lies (I only mentioned Part B as an aside); rather, my finding – ignored by the SRO – was that there is ambiguity between the notice provision found at § 3602-c(2)(a) and the substantive right to services found at § 3602-c (2)(b). Second, the SRO recognized but passed on considering or addressing my central argument, when the SRO opinion states, “the exact contours of the ‘equitable basis’ requirement . . . is not unmistakably defined and does not necessarily carry with it all of [the] requirements as a FAPE.” Appeal No. 23-166, *supra*., at pp. 8 to 9. The opinion fails to recognize my argument that a position on this question *can* be taken – namely that equitable basis means “fairness” when read by itself, but then should be considered to mandate something akin to a FAPE when that phrase is coupled with the next clause (“as compared to”) because the students with disabilities being “compared to” are those in public schools and CBST students in private schools, all of whom receive a FAPE. The SRO could have simply chosen not to agree with this reading; instead, the SRO deemed it an unworkable conclusion, which conveniently allowed it to defer dealing with my reasonable attempt to synthesize how FAPE students and equitable service students are treated. The SRO also ignored the conclusion that if there *is* a reasonable reading of “equitable basis, as compared to” that implicates a FAPE or something similar to a FAPE (as described more fully in the analysis in this decision), then there *is* tension with the notice provision of § 3602-c(a), because students who receive a FAPE under the IDEA do not face an automatic loss of all services without written notice. Finally, the SRO failed to address my *Bd. of Educ. v. Wieder*, 72 N.Y.2d 174 (1988) argument, which did not strictly apply the word “shall” in a related provision of 3602-c, in part because “the paramount principle . . . is concern for a [disabled] child’s educational needs” (*id*. at pg. 186). [↑](#footnote-ref-4)
5. *See*, *e.g.*, *Carter v. Eighth Ward Bank*, 33 Misc. 128 (Sup. Ct. N.Y. Cty 1900) (“an affirmative defense can . . . consist only of new matters constituting a defence [*sic*], *i.e.*, [a] new matter which, assuming the complaint to be true, constitutes a defence [*sic*] to it”).  Further, under the IDEA and the NY State Education Law, school districts have the burden of proof that a FAPE has been provided to the student, except that where tuition reimbursement is sought, the parent has the burden of proof with respect to the appropriateness of the parent’s chosen educational placement.  *See* Education Law § 4404(1)(c); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014); and *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 (2d Cir. 2012). [↑](#footnote-ref-5)
6. There are two distinctions to note, however, between students seeking career education services or gifted student services on one hand, and services for students with disabilities on the other. For the former two groups, their parents or guardians notify the district of *residence* by June 1, while the parents or guardians of students with disabilities notify the district of *location*. This reflects differences in funding reimbursement for students with disabilities. The second distinction, and more pertinent to the current analysis, is that parents or guardians do not notify by a June 1 preceding a school year in question if it is the first year that the student is *identified* as a student with a disability. *See* § 3602-c(2)(a). [↑](#footnote-ref-6)
7. For public school students with disabilities whose needs exceed what public schools can provide, the district can enroll them, at public expense, at approved nonpublic schools. *See* 20 U.S.C. § 1412(a)(10)(B). For purposes of this decision, further § 3602-c references to “public schools” and the students who attend them shall include these nonpublic schools and students. [↑](#footnote-ref-7)
8. *See* McKinney's Consolidated Laws of NY, Book 1, Statutes §§ 73 and 92(a). [↑](#footnote-ref-8)
9. This would include students known to have a disability by a family who moved into the district, or public school students with disabilities that are voluntarily placed in a private program within the same district. [↑](#footnote-ref-9)
10. *See* 20 U.S.C. § 1412 (a)(10)(C)(iii) (“[t]he cost of reimbursement . . . ***may*** be reduced or denied . . . if . . . 10 business days . . . prior to the removal of the child from the public school, the parents did not give written notice”) (emphasis added). [↑](#footnote-ref-10)
11. [*People v Jones*, 26 NY3d 730, 733 (2016)](https://plus.lexis.com/document/?pdmfid=1530671&crid=f9b6ef5a-3c7a-44be-b198-e49bd3908989&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5M2T-89H1-F04J-60C9-00000-00&pdcontentcomponentid=9096&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=674k&earg=sr1&prid=2a1f76e4-c79d-4690-8401-af526ede8979). [↑](#footnote-ref-11)
12. *Jericho Water Dist. v. One Call Users Council, Inc.*, 37 A.D.3d 136, 140, 826 N.Y.S.2d 659, 662 (2d Dep’t 2006) (*citing* McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; and [*Matter of Tompkins County Support Collection Unit v Chamberlin*, 99 N.Y.2d 328, 335 [2003]](https://plus.lexis.com/document/?pdmfid=1530671&crid=f27c072d-c71b-48fc-9b97-be2231d56621&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MK7-S3N0-0039-422P-00000-00&pdcontentcomponentid=9092&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=674k&earg=sr9&prid=ca994828-6faa-4d8e-9d9a-81dab97f1540)). [↑](#footnote-ref-12)
13. *Matter of NY State Assn. of Criminal Defense Lawyers v. Kaye*, 96 NY2d 512, 519 (2001) (*citing* *People v. Garson*, 6 N.Y.3d 604, 614 [2006] [internal citation and quotation marks omitted]). [↑](#footnote-ref-13)
14. *Jericho Water Dist. v. One Call Users Council, Inc.*, 37 A.D.3d at 142, 826 N.Y.S.2d at 663 (*citing* McKinney's Cons Laws of NY, Book 1, Statutes §§ 96 and 143; and [*Matter of Tompkins County Support Collection Unit v Chamberlin*, 99 N.Y.2d at 335 [2003]](https://plus.lexis.com/document/?pdmfid=1530671&crid=f27c072d-c71b-48fc-9b97-be2231d56621&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MK7-S3N0-0039-422P-00000-00&pdcontentcomponentid=9092&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=674k&earg=sr9&prid=ca994828-6faa-4d8e-9d9a-81dab97f1540)). [↑](#footnote-ref-14)
15. N.Y. Legislative Service, 1996 N.Y.S.N. 7825, Ch. 301, § 1 (replacing the terms “occupational” and “vocational,” – associated more with “a set of educational options for youth lacking the ability to pursue academic goals” – with “career education,” a phrase that “better describes the educational activities appropriate to preparing individuals for participation in the workforce”). [↑](#footnote-ref-15)
16. N.Y. Legislative Service, 2005 N.Y.S.N. 8936, Ch. 352, §§ 1 and 22. [↑](#footnote-ref-16)
17. *Id*. [↑](#footnote-ref-17)
18. *Governor’s Mem. of Approval*, 974 McKinney’s Session Laws of NY, at 2102; 1974 NY Legis. Ann., at 109 (quoted in *Bd. of Educ. v. Wieder*, 72 N.Y.2d 174, 185 [1988]). [↑](#footnote-ref-18)
19. *Id*. [↑](#footnote-ref-19)
20. N.Y. Legislative Service, 2021 N.Y.A.B. 7120, Ch. 253, § 1. [↑](#footnote-ref-20)
21. *Id*. (emphasis added). [↑](#footnote-ref-21)
22. *Id*. [↑](#footnote-ref-22)
23. *See id*. at § 3602-c(1)(d). [↑](#footnote-ref-23)
24. Educ. Law § 4401(1); *see also* 8 NYCRR § 200.1(zz). [↑](#footnote-ref-24)
25. Educ. Law §§ 3602-c(2-a) and (10). [↑](#footnote-ref-25)
26. Educ. Law §§ 3602-c(2)(b)(1). [↑](#footnote-ref-26)
27. *Application of a Student with a Disability*, Appeal No. 20-115, at pg. 6 (*citing* *Appeal of Sweeny*, 44 Ed. Dept. Rep. 176, Dec. No. 15, 139; and *Bd. of Co-op Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Ctys. v. Univ. of State Educ. Dep’t*, 40 A.D.3d 1349, 1350 (3d Dept. 2007)). [↑](#footnote-ref-27)
28. *Id*. at pg. 7. [↑](#footnote-ref-28)
29. *Id*. at pg. 8 (emphasis added). [↑](#footnote-ref-29)
30. *Colon v. Martin*, 170 A.D.3d 1109, 1111, 97 N.Y.S.3d 311, 314 (2d Dept. 2019) (*citing* McKinney’s Cons. Laws of NY, Book 1, Statutes § 301). [↑](#footnote-ref-30)
31. *See* *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* (Memorandum from James P. DeLorenzo to education stakeholders, September 2007). [↑](#footnote-ref-31)
32. *Id*. at pp. 1 to 2 (emphasis removed). [↑](#footnote-ref-32)
33. *Id*. at Attachment 1, pg. 1 (emphasis added). [↑](#footnote-ref-33)
34. *Id*. at Attachment 1, pg. 2. [↑](#footnote-ref-34)
35. *Id*. at Attachment 1, pg. 3. [↑](#footnote-ref-35)
36. *Id*. at Attachment 1, pg. 4 (emphasis added). [↑](#footnote-ref-36)
37. *See* <https://infohub.nyced.org/docs/default-source/default-document-library/specialeducationstandardoperating proceduresmanualmarch.pdf?sfvrsn=4cdb05a0\_2> (last visited July 31, 2023). [↑](#footnote-ref-37)
38. *See* 72 N.Y.2d 174 (1988). [↑](#footnote-ref-38)
39. *Id.* (emphasis added). [↑](#footnote-ref-39)
40. *Id*. at 184. [↑](#footnote-ref-40)
41. *Id*. at 183 to 184. [↑](#footnote-ref-41)
42. *Id*. at 183. [↑](#footnote-ref-42)
43. *Id*. at 186 (*citing* Educ. Law §§ 4401-a and 4402[2][a], and 8 NYCRR §§ 200.1 and 200.6). [↑](#footnote-ref-43)
44. *Id*. at 186 (*citing* Educ. Law §§ 4401-a, 4402, and 4403). [↑](#footnote-ref-44)
45. *Id*. at 186 (*citing* Educ. Law §§ 4401[2][a] and 4401[2][k]). [↑](#footnote-ref-45)
46. *Id*. at 184 to 185 (emphasis added). [↑](#footnote-ref-46)
47. *Id*. [↑](#footnote-ref-47)
48. I note that in limiting but not obviating the June 1 provision, I am not going as far as setting aside the word “shall” in § 3602-c(2)(a), as the Court appears to have done with § 3602-c(9) in *Wieder*. [↑](#footnote-ref-48)
49. Educ. Law § 4401(1) (as incorporated into § 3602-c[1][d]) (emphasis added). [↑](#footnote-ref-49)
50. *Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities*, *supra*., at Attachment 1, pg. 11 (emphasis added). [↑](#footnote-ref-50)
51. Educ. Law § 4401(1) (as incorporated into § 3602-c[1][d]) (emphasis added). [↑](#footnote-ref-51)
52. *Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities*, *supra*., at Attachment 1, pp. 1 to 2 (emphasis in original). [↑](#footnote-ref-52)
53. *See* 20 U.S.C. § 1412 (a)(1)(A); Education Law §§ 4402(2)(a) and (b)(2). [↑](#footnote-ref-53)
54. 34 C.F.R. § 300.13. [↑](#footnote-ref-54)
55. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). [↑](#footnote-ref-55)
56. 20 U.S.C. §§ 1221e-3, 1415(e)-(f); *see also* Education Law § 4404(1); 34 CFR §§ 300.151- 300.152; 8 NYCRR

    §§ 200.5(h)-(l). [↑](#footnote-ref-56)
57. *See Application of a Student with a Disability,* Appeal No. 20-023, citing *Doe v. E. Lyme Bd. of Educ.,* 262 F. Supp. 3d 11, 27 (D.Conn. 2017). [↑](#footnote-ref-57)
58. *Doe v. East Lyme Bd. of Educ*., 790 F.3d 440, 454 (2d Cir. 2015) (citation omitted). [↑](#footnote-ref-58)
59. *See* *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir.2002). [↑](#footnote-ref-59)
60. *See East Lyme Bd. of Educ.*, 790 F.3d at 454. [↑](#footnote-ref-60)
61. Education Law § 4404(1)(c); *C.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 76 (2d Cir. 2014); *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 (2d Cir. 2012). As explained more fully below, SETSS cases have been treated as a hybrid between unilateral placement theory cases, *see*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 20-115, and pure compensatory education cases. *See*, *e.g.*, *Foster v. Bd. of Educ. Of the City of Chicago*, 611 Fed. App.’x 874, 878-79 (7th Cir. 2015) (compensatory education includes reimbursement for out-out-pocket educational expenses); *see also P. V. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (compensatory education is an appropriate remedy for a denial of FAPE). [↑](#footnote-ref-61)
62. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-068. [↑](#footnote-ref-62)
63. *Id*. [↑](#footnote-ref-63)
64. *See* *Application of a Student with a Disability*, Appeal No. 20-115 (“core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services *that a district* is specifically authorized by law to enter into,” *id*.) (internal citation omitted, emphasis added); *see also* *Application of a Student with a Disability*, Appeal No. 20-087; and *Application of a Student with a Disability*, Appeal No. 20-140. In other words, if the DOE is not directly performing core instruction, it should not then be passing the obligation to contract out that instruction onto the Parent. [↑](#footnote-ref-64)
65. *See Davis v. Wappingers Cent. Sch. Dist.*, 431 Fed. App. 12, 14 (2d Cir. 2011). [↑](#footnote-ref-65)
66. *Application of a Student with a Disability*, Appeal No. 20-115 (*citing E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442, 453 [2d Cir. 2014] [holding that equitable considerations allow for direct payment for tuition where the parents were legally obligated to make payments but had not done so due to a lack of financial resources]). [↑](#footnote-ref-66)
67. *Application of a Student with a Disability*, Appeal No. 20-115 (finding, *inter alia*, the analysis "unworkable to the extent that the SETSS services can be construed as a state-approved option”). [↑](#footnote-ref-67)
68. *East Lyme Bd. of Educ.*, 790 F.3d at 454 (citation omitted). [↑](#footnote-ref-68)
69. *Application of a Student with a Disability*, Appeal No. 20-140 (while “[g]enerally, teachers at a unilateral placement need not be State-certified . . . there must be objective evidence of special education instruction or supports that are specially designed by . . . providers . . . who have reasonable qualifications that are specifically related to the student’s deficits”). [↑](#footnote-ref-69)
70. *Application of a Student with a Disability*, Appeal No. 21-183, at pp. 20-21 (Oct. 29, 2021) (approving compensatory SETSS by a bilingual reading specialist at an even higher rate, not to exceed $200 per hour). [↑](#footnote-ref-70)
71. *See Application of a Student with a Disability*, Appeal No. 21-068 (holding that “it is not appropriate equitable relief . . . to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS” where “there is inadequate proof that the parent has expended any funds to pay for SETSS . . . or is legally obligated to do so”). [↑](#footnote-ref-71)
72. *Application of a Student with a Disability*, Appeal No. 23-166, at pg. 9 (Oct. 3, 2023). [↑](#footnote-ref-72)
73. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-096 (May 26, 2021). [↑](#footnote-ref-73)
74. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-138 at pp. 12-13 (Aug. 11, 2021) (determining that “there is no basis for a finding that the rate of $175 was unreasonable”). [↑](#footnote-ref-74)
75. *See id*. (finding further that, despite the *per se* reasonableness of the rate, a reduction in rate that had been imposed by the IHO was justified where the parent did not provide a ten-day notice (TDN), per 20 U.S.C.

    § 1412[a][10][C][iii] and 34 CFR § 300.148[d][1]). I will contrast this decision, however, to the extent that I do not find a TDN necessary in a NPS services rate case where the parent files a DPC, as it provides the same notice and opportunity for the DOE to address how it provides SETSS to the Student as would a TDN. [↑](#footnote-ref-75)
76. *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 21-138 at pp. 12-13 (Aug. 11, 2021) (determining that “there is no basis for a finding that the rate of $175 was unreasonable”). [↑](#footnote-ref-76)
77. *See Application of a Student with a Disability*, Appeal No. 21-183, at pp. 20-21 (Oct. 29, 2021) (approving compensatory SETSS by a bilingual reading specialist at an even higher rate, not to exceed $200 per hour). [↑](#footnote-ref-77)
78. *See Application of a Student with a Disability*, Appeal No. 11-045 (Jul. 25, 2011). [↑](#footnote-ref-78)
79. *See* U.S. Department of Labor’s Bureau of Labor Statistics, Consumer Price Index Inflation Calculator (found at <https://www.bls.gov/data/inflation\_calculator.htm>, last visited January 2, 2025); *see Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 (2nd Dept. 2009) (judicial notice may be extended to government websites that provide official data that is not challenged and otherwise reliable). [↑](#footnote-ref-79)
80. *Application of a Student with a Disability*, Appeal No. 23-166, at pg. 9 (Oct. 3, 2023). [↑](#footnote-ref-80)
81. *Application of a Student with a Disability*, Appeal No. 23-033, at pp. 12-13 (May 18, 2023). [↑](#footnote-ref-81)
82. Although I do not apply the *Burlington*/*Carter* standard strictly to Educ. Law § 3602-c equitable services cases, I note that if that standard was used, the positive reasonableness factors articulated in this decision would have constituted Prong 2 appropriateness and would have equitably favored a higher rate under Prong 3, while negative reasonableness factors would have constituted Prong 3 equitable considerations in favor of rate reduction, resulting in the same award. [↑](#footnote-ref-82)
83. *See Application of a Student with a Disability*, Appeal No. 23-153 (Aug. 30, 2023), at pg. 25. [↑](#footnote-ref-83)