The University of the State of New York

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

No. 23-112

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO) which denied, in part, her request that respondent (the district) fund the costs of services delivered to her son by Succeed Educational Support Services (Succeed) at a specified rate for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's awarded relief. The appeal must be sustained, the cross-appeal must be sustained and, as explained below, the matter must be remanded to the IHO for further administrative proceedings.

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 Individuals with Disabilities Education Act (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 related to IESPs, 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 of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case will not be recited. Briefly, the CSE convened on December 21, 2021 and developed an IESP for the student with an implementation date of January 13, 2022 (Parent Ex. B at p. 1). At the time of the December 2021 CSE meeting, the student was parentally placed at a nonpublic school (id. at p. 12). The December 2021 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id.).[1] The December 2021 CSE recommended that the student receive three periods per week of direct, group special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in English, and three 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at pp. 1, 9).[2, 3]

On September 1, 2022, the parent signed a contract with Succeed, pursuant to which the parent authorized Succeed to provide "1:1 [s]pecial [e]ducation [s]ervices" to the student for the 2022-23 school year at an unspecified rate and agreed to "pay Succeed's rate of SETSS services delivered for the 2022-2023 school year" (Parent Ex. J at p. 1).

By ten-day written notice dated September 6, 2022, the parent notified the district that she consented to the services recommended in the student's December 2021 IESP; however, she asserted that she had been unable to locate providers for the recommended SETSS and related services at the district's standard rates (Parent Ex. C at p. 2). As a result, she advised the district that she had "no choice but to implement the IESP on [her] own" and seek reimbursement or direct funding from the district (id.). A CSE convened on November 17, 2022 to develop an IESP for the student with an implementation date of December 1, 2022 (Parent Ex. E at p. 1). The November 2022 CSE continued to find the student eligible for special education and related services as a student with a speech or language impairment and recommended that he receive three periods per week of direct, group SESS in Yiddish, two 30-minute sessions per week of individual OT in English, two 30-minute sessions per week of individual speech-language therapy in Yiddish, and one 30-minute session per week of group speech-language therapy in Yiddish (id. at pp. 1, 10).

By second amended due process complaint notice, dated January 30, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) by failing to implement the special education and related services it recommended for the student for the 2022-

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

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] The December 2021 IESP separately listed two 30-minute sessions of individual speech-language therapy and one 30-minute session of individual speech-language therapy (Parent Ex. B at p. 9). There were no apparent differences between the two services as listed on the IESP. It is unclear why the same service was listed separately and not as three 30-minute sessions per week of individual speech-language therapy on the IESP or if it is a typographical error.

23 school year (Parent Ex. D at pp. 2-3).[4] The parent requested pendency based on the December 2021 and November 2022 IESPs (id. at p. 2).[5] As the presenting problem, the parent asserted that neither IESP was implemented by the district and further that she was unable to find providers willing to accept the district's published rates (id.). As a result, the parent alleged she was forced to obtain private providers at their prevailing rates for the 2022-23 school year (id. at p. 3). For relief, the parent requested a finding that the district's failure to implement the recommendations on the two IESPs was a denial of a FAPE for the 2022-23 school year, an order compelling the district to fund the parent's providers at their prevailing rates, and funding for "a bank of compensatory periods of SETSS and related services for the entire 2022-23 school year—or the parts of which were not serviced" (id. at p. 3).[6]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 20, 2023 and concluded on the same day (Tr. pp. 1-12).[7] In a decision dated May 9, 2023, the IHO determined that the district "failed to meet its burden of showing that it provided [the s]tudent with a FAPE for the 2022-23 school year" (IHO Decision at p. 6). The IHO further found that the student was "entitled to the services recommended in the IESPs" and that the district had denied the student "the equitable equivalent of a FAPE for the 2022-23 school year" (id.). The IHO then summarized the "[p]arent's case" and found that the parent was entitled to funding for the SETSS services recommended in the student's IESP for the 2022-23 school year (id. at pp. 6-7). The IHO then addressed equitable considerations and within that discussion, she addressed the appropriateness of the parent's unilaterally obtained services (id. at pp. 7-8). After reviewing the progress reports submitted by the student's providers, the IHO found that although the parent's unilaterally obtained services "may have provided [the s]tudent some benefit, [she had]

[4] The parent filed an initial due process complaint notice on September 6, 2022 and an amended due process complaint notice on November 4, 2022 (see Parent Ex. A; Nov. 4, 2022 Amended Due Process Compl. Not.). The IHO incorrectly listed the date of the second amended due process complaint notice as February 2, 2023 in her summary of the prehearing conference and in her decision (IHO Decision at p. 2).

[5] Both IESPs recommended that the student receive three periods per week of direct, group SETSS provided in Yiddish and two 30-minute sessions per week of individual OT provided in English (compare Parent Ex. B at p. 9, with Parent Ex. E at p. 10). As noted in the second amended due process complaint notice, the IESPs differ in that the December 2021 IESP also recommended three 30-minute sessions per week of individual speech-language therapy provided in Yiddish; and the November 2022 IESP recommended two 30-minute sessions per week of individual speech-language therapy in Yiddish and one 30-minute session per week of group speech-language therapy in Yiddish (id., see Parent Ex. D at p. 2).

[6] The hearing record includes an "[a]cknowledgment of [l]iability" document signed by the parent on April 19, 2023 (Parent Ex. K). In this document, the parent indicated that Succeed charged the rates of $214 per hour for SETSS and $350 per hour for each of speech-language therapy and OT, that she was requesting that the district pay the rates charged by Succeed for the student's services, and that she was liable to Succeed for the full cost of the student's services (id.).

[7] The hearing record reflects that a prehearing conference on the parent's initial due process complaint notice was held on October 12, 2022. A status conference was held on November 9, 2022 (Nov. 9, 2022 Tr. pp. 1-8). A prehearing conference was held on the parent's second amended due process complaint notice on March 9, 2023. The prehearing conferences were not recorded; however, the IHO summarized the conferences in emails sent to the parties on the day the conferences took place. The transcripts for the status conference and the day of the hearing were not paginated consecutively. However, because it is unnecessary to cite to the November 9, 2022 status conference, the transcript cites will not be preceded by the hearing date in this decision.

difficulty finding that [Succeed]'s services, taken as a whole, [we]re reasonably meeting [the s]tudent's needs" (id. at p. 8). Turning to the reasonableness of the parent's requested rates of funding, the IHO noted that the district did not challenge Succeed's rates or introduce any evidence of a reasonable market rate (id.). The IHO found that there was no objective evidence in the hearing record regarding what a reasonable market rate for SETSS should be and therefore she relied on what she described as rates published by the New York State Education Department (NYSED) for special education itinerant teacher (SEIT) services (id.). According to the IHO, the published SEIT rates ranged from $37 to $55 per half-hour and the IHO awarded the parent funding at the rate of $105 per hour for SETSS (id.). With regard to speech-language therapy and OT, the IHO relied on what she described as NYSED's published rates for preschool related services (id.). The IHO awarded the parent funding at what she found was the published rate of $90 per hour for speech-language therapy and for OT (id. at p. 9). The IHO further awarded the parent direct payment for the unilaterally obtained services; however, she did not address the parent's requests for pendency or compensatory education, stating that she had "reviewed [the p]arent's other requests and claims and f[ou]nd them either to be without merit, not supported by the record, not within [her] jurisdiction or beyond the scope of [her] authority" (id.). The IHO ordered the district to fund the SETSS and related services at the specified rates and to make payment upon receipt of the provider's invoices and proof of services (id. at p. 10).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's answer to the cross-appeal is also presumed and, therefore, the allegations and arguments will not be repeated here. The crux of the parties' dispute on appeal is whether the IHO correctly awarded funding for the parent's unilaterally obtained services based on the parent's contractual obligation with Succeed, and whether the IHO correctly reduced the parent's requested rates of funding for her unilaterally obtained services.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Having reviewed the IHO's decision, the parent's appeal, and the district's cross-appeal, this matter must be remanded to the IHO for further proceedings. Specifically, the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims and ordered relief that was not consistent with her other findings. As a result, it is impossible to reach the parties' claims on appeal. Therefore, the IHO's decision must be vacated, and the matter remanded to the IHO for further administrative proceedings utilizing the correct legal analysis.[10]

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

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

[10] The district alleges on appeal that the IHO's use of the term FAPE "likely has little or no practical effect on whether any substantive relief should be awarded in the present matter." Indeed, it does not, but nevertheless the district goes on and raises it due to a speculative claim regarding prevailing party status and attorney fees. Notably, the district did not raise this concern before the IHO, and as the district should know, the administrative hearing officers in a due process proceeding have no jurisdiction to resolve claims over the fee shifting provisions

A. Legal Standard

Review of the hearing record reveals that the parties proceeded to the hearing with the understanding that the underlying matter concerned a request for funding of the student's unilaterally obtained services, with the parent prepared to demonstrate the appropriateness of the private SETSS and related services she obtained for the student and that equitable considerations weighed in favor of her requested relief (Tr. p. 9; Parent Exs. C at p. 2; F-K).

The district representative argued at the impartial hearing that the district was not conceding FAPE because the matter concerned equitable services pursuant to Education Law § 3602-c, which she asserted was different from FAPE; however, the district representative did not contest that the district failed to implement the IESPs at issue and failed to secure providers for the student (Tr. p. 7). Counsel for the parent disagreed that the student was not entitled to a FAPE, but stated that she was "just interested in getting these services funded and implemented . . . by the [d]istrict" (Tr. p. 8). The parent's counsel further argued that the failure to implement the student's program was a denial of a FAPE for the 2022-23 school year, that "the [p]arent's program [wa]s . . . the appropriate one for the student," and that "the equities w[ould] lie in [the parent's] favor" (Tr. p. 9). The parent's proposed exhibits, which included two affidavits in lieu of direct testimony were accepted into evidence without any objections by the district (Tr. pp. 5-6; see Parent Exs. A-K). With respect to the affidavit testimony, the district declined the opportunity to cross-examine the affiants and the IHO stated that she had looked at the affidavits briefly and did not have any questions (Tr. pp. 9-10). The IHO then reviewed the requested relief and stated that it was unnecessary for her to issue a pendency order since the district was not contesting the parent's position on pendency (Tr. pp. 10-11).

Neither party argued that the parent did not have the burden of demonstrating the appropriateness of her unilaterally obtained services, it was the IHO who declined to follow a Burlington/Carter analysis and declared in her decision "this is not a tuition reimbursement case, the [district] has the burden of proof on all issues" (IHO Decision at p. 5; see Tr. p. 5). However, after determining that the parent was entitled to funding for her unilaterally obtained services, in considering equitable considerations, the IHO noted "review of the record in this case raise[d] doubts . . . about the appropriateness of the services provided" (IHO Decision at p. 7).[11] The IHO then reviewed the reports from the student's service providers and found that they were not sufficiently detailed to demonstrate that the services being provided were meeting the student's needs or that the student was making appropriate progress (id. at pp. 7-8). The IHO determined

in IDEA. It is up to the parties to make such arguments in a court of competent jurisdiction. Nevertheless, if the district believes a statement on the record before the IHO on the topic is warranted for purposes of a related judicial proceeding, the IHO should allow the district a very brief opportunity to preserve a concern on the record, even if the IHO lacks the authority to resolve the matter. Similarly, the parent can be afforded a very brief opportunity to respond if it helps to allay concerns over preservation. If appropriate, the IHO may clarify any misinterpretation of her prior statements in the written decision upon remand while being mindful to avoid letting a potential attorney fee dispute cloud or engulf the issues that must be resolved the administrative due process forum.

[11] The IHO incorrectly stated that "[Succeed] ha[d] provided the only evidence . . . regarding the type and cost of services provided to [the s]tudent (IHO Decision at p. 7). However, the hearing record includes the parent's acknowledgment of liability document, which stated the rates charged by Succeed (Parent Ex. K).

that although the student may have received some benefit from the services provided by Succeed, "[she] ha[d] difficulty finding that [Succeed]'s services, taken as a whole, [we]re reasonably meeting [the s]tudent's needs" (id. at p. 8). Accordingly, although the IHO indicated she was not applying the burden of proof to the parent on any issue, she appears to have applied such a burden to the parent to prove the appropriateness of the privately obtained services, yet, it is unclear why she weighed this as an equitable factor. Additionally, notwithstanding the above statement, in reviewing the appropriateness of a direct payment remedy under equitable considerations, the IHO wrote "[a]lthough this is not a tuition reimbursement case, it is analogous to one," further confusing what standard she applied in her decision-making process (IHO Decision at p. 9).

Overall, it is unclear why the IHO made apparent contrary findings in her decision in finding that the Burlington/Carter analysis for tuition reimbursement cases did not apply to this matter and that the case was also analogous to tuition reimbursement cases with respect to a direct payment remedy (compare Tr. p. 5; IHO Decision at p. 5, with IHO Decision at p. 9). The IHO may have reviewed matters similar to the instant case wherein the district failed in its duty to implement special education programs and services for parentally placed students. Certainly, with respect to the district's obligations, this case is akin to the group of matters wherein the district has delegated to parents the obligation to find SETSS providers to implement students' IESPs at acceptable rates. SROs have noted that the procedure utilized frequently by the district in matters of this type is manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards 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" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).

Nevertheless, even if the district had improperly delegated the obligation to implement an IESP to the parent, the parent still would have had to show the appropriateness of the privately obtained services. That is, while districts cannot deliver special education services called for by their educational programming in an unauthorized manner, due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, districts can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under the IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Thus, as a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has

grown into a completely unregulated cottage industry of independent special education teachers that parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place.[12]

Considering the above, the IHO's decision must be vacated as it appears to award funding for unilaterally obtained services that the IHO found to be inappropriate for the student. Additionally, as neither party has appealed from the IHO's finding that the privately obtained services were not appropriate for the student, it would be impossible for me to advance past that portion of the Burlington/Carter framework and address the arguments that the parties make regarding equitable considerations. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the appropriate remedy for the IHO's flawed analysis and inconsistent findings is to remand the matter to continue these proceedings. Accordingly, the IHO's decision will be vacated, and the matter remanded to the IHO for further proceedings relating to the parent's claims as set forth in the January 30, 2023 second amended due process complaint notice. Specifically, the IHO must engage in a determination as to whether the parent's unilaterally obtained services were appropriate for the student such that they would meet the standard applicable under the Burlington/Carter framework, and if it is determined that the services were appropriate, the IHO must then determine whether equitable considerations weigh in favor of the parent's requested relief of direct funding.

As one final matter, although it is not necessary to address the IHO's determinations as to the rates for the privately obtained services, considering the matter must be remanded as discussed above, in order for the IHO to properly address the parties' arguments related to equitable considerations some discussion is warranted. In addressing the reasonableness of the rate charged by Succeed, the IHO found that the affidavit of the supervisor at Succeed did not adequately explain the rate or what the providers were paid, while also acknowledging that the district did not challenge the rates and did not present evidence of a reasonable market rate (IHO Decision at p. 8). The IHO further stated that there was no objective evidence in the hearing record regarding what would be a reasonable market rate (id. at pp. 8-9). At that point, the IHO could have taken steps to ensure that there was sufficient objective information to make a determination as the IHO had the authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5 [j][3][vii]). Instead, the IHO decided that "a more

[12] The State Education Department only permits local educational agencies to contract for the use of teachers and personnel in private settings that have been approved by the Commissioner of Education, and upon such approval the State's rate setting unit routinely addresses the issue of establishing local rates that districts may pay such private entities (see http://www.oms.nysed.gov/rsu/).

objective benchmark to evaluate the fairness" of the providers' rates was to utilize NYSED's rates for State-approved programs (IHO Decision at pp. 8-9).

With regard to her utilization of "publicly available" rates, the IHO improperly relied on published related services rates, which apply to State-approved school age programs serving students with disabilities, and which receive funding pursuant to Article 81 and/or Article 89 of the Education Law; and published SEIT rates for approved preschool special education programs operating pursuant to § 4410 of the Education Law.[13] The student in this matter is school-aged and does not receive services from a State-approved provider.[14] These rates are not illustrative of market rates for unapproved, private providers, reasonable or otherwise. The IHO further erred in utilizing these rates because the rates were not for the same type of services obtained by the parent, they were outside the hearing record, and the amount of the rate was a material fact disputed by the parties.[15] The IHO further compounded this error by failing to advise the parties of her intent to utilize NYSED's published rates for approved preschool and school-age programs and by failing to allow the parties an opportunity to be heard on the issue.

Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon, including questioning the affiants if she has concerns about the contents of the affidavits, rather than making post hoc credibility determinations pertaining to witnesses that did not appear before her at the impartial hearing. Additionally, if the IHO intends to complete the hearing record regarding the reasonableness of the rates charged by Succeed, the IHO should seek

[13] The hyperlink to the web page included in the IHO's decision which purports to show NYSED's "approved rates for SEITs for 2022-23" actually links to NYSED's 2022-23 rates for preschool interim tuition.

[14] State law defines (SEIT) services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Thus, the IHO's attempt to use SEIT services interchangeably with the district's recommended SETSS conflicts with State regulation and policy in that a school district may not deliver a service designed exclusively for preschool students to a school-aged student.

[15] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

objective evidence of the parties and may require the parties to clarify or complete the hearing record with objective evidence of a reasonable rate.

VII. Conclusion

Having determined that the IHO erred in her analysis and award of relief, the case is remanded to address the parent's claims in her second amended due process complaint notice using the legal standards set forth above to determine whether she is entitled to her requested relief.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 9, 2023 is vacated in its entirety; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision.

Dated: **Albany, New York**
October 4, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER