The University of the State of New York

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

No. 23-142

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 Sarah M. Pourhosseini, 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 her request to be fully reimbursed for her son's paraprofessional services for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's award of relief to the parent. The appeal must be dismissed. The cross-appeal must be sustained.

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 §§ 3602-c; 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]).[1] 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

[1] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail here. The CSE convened on September 14, 2020, and, finding the student was eligible for special education as a student with an emotional disability, for the 2021-22 school year recommended in an IESP that the student receive speech-language therapy, occupational therapy (OT), counseling, and paraprofessional services for behavior support to be provided in a group (see generally Parent Ex. B).[2]

The student was parentally placed in a religious nonpublic school during the 2022-23 school year (see Parent Ex. A at p. 1). On September 9, 2022, the parent entered into a contract with Limud, Inc. (Limud) to implement services from the September 2020 "IEP meeting" to "whatever extent possible" (Parent Ex. F at p. 1). On November 28, 2022, the parent notified the district that she would locate providers to implement the services listed in the September 2020 IESP and seek reimbursement/direct payment from the district for those services for the 2022-23 school year (see Parent Ex. C). In a due process complaint notice, dated November 28, 2022, the parent alleged that the student had been parentally placed in a private school and that the district failed to convene an "IEP meeting" or offer an IESP or an IEP and thereby did not offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 3, 2023 and concluded on May 31, 2023 after two days of proceedings (April 3, 2023 Tr. pp. 1-28; May 31, 2023 Tr. pp. 1-17). In a decision dated June 9, 2023, the IHO determined that the district had waived its defense that the parent failed to timely request dual enrollment services under State law for the 2022-23 school year (IHO Decision at p. 6). The IHO concluded that the district failed to implement the September 2020 IESP which resulted in a denial of a FAPE for the 2022-23 school year, and that the parent was entitled to direct funding/reimbursement for paraprofessional services for the 2022-23 school year (IHO Decision at pp. 2, 7-9). As relief, the IHO ordered the district to directly fund the cost of the paraprofessional services at the district's standard rate for a total of 180 school days during the 2022-23 school year rather than at the "reasonable market rate" requested by the parent because the IHO found that the parent did not act in good faith in her attempts to locate an "authorized provider" and that the

[2] The September 2020 IESP uses the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]; see also "Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance," Office of Special Educ. Mem. [July 2022], available at https://www.nysed.gov/sites/default/files/special-education/memo/emotional-disability-replacement-term-for-emotional-disturbance.pdf; (see Parent Ex. B at p. 1).

provider did not offer a credible explanation for providing 1:1 paraprofessional services when the student should have been receiving group paraprofessional services (id. at pp. 9-10).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The central issue presented by the parent on appeal is whether the IHO erred in awarding the district's standard hourly rate for the paraprofessional services for the student during the 2022-23 school year.[3] The district cross-appeals arguing that the IHO erred in granting the parent any relief because the parent failed to establish the appropriateness of the unilaterally obtained services and equitable considerations did not weigh in favor of the parent.[4]

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special 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]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such

[3] The parent does not appeal the IHO's denial of "any relief not specifically discussed in [her] decision," i.e., compensatory education services, and therefore, the issue of compensatory education is deemed abandoned and will not be addressed further, and the IHO's determination on that matter is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

[4] The district only argued that the student was not eligible for dual enrollment services under an IESP, but does not otherwise appeal the IHO's finding that it failed to offer the student a FAPE for the 2022-23 school year, and therefore, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d. Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The 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

At the outset, I will address the parties' threshold arguments pertaining to whether the student was entitled to equitable services for the 2022-23 school year under Education Law § 3602-c.

The district did not contest that it recommended services for the student in the September 2020 IESP and that it did not provide services (April 3, 2023 Tr. p. 13).[7] During the impartial

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 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.).

[7] It's not clear whether the representative for the district meant that the district did not provide services during the school year for which the IESP was drafted or merely intended to convey that the district was not providing

hearing, the district argued before the IHO that the parent had an "affirmative obligation" to notify the district that she wanted special education services for the student on or before June 1 of each school year but since the parent failed to do so, the student was not entitled to the services listed in the September 2020 IESP (April 3, 2023 Tr. pp. 11, 13, 25). The district also argued that the parent was not entitled to pendency under a claim for equitable services under Education Law § 3602-c (April 3, 2023 Tr. pp. 8-9).

On appeal the district argued that the IHO erred in finding that the district waived the June 1st defense because it was not listed in the district's response to the due process complaint notice. During the impartial hearing, the parent admitted that she did not notify the district of her request for equitable services prior to June 1, 2022 (May 31, 2023 Tr. p. 5); however, on appeal the parent responds that the failure to comply with the June 1 deadline under Education Law § 3602-c is not "grounds" to deny the student equitable services for the 2022-23 school year (Answer to Cross-Appeal at p. 5). In addition, the parent contends that the district had the burden to demonstrate that the parent complied with the June 1 deadline and failed to meet its burden of proof on this issue (id. at p. 6).[8] The parent also argues that the district failed to timely raise the issue of the June 1 deadline until the first day of the impartial hearing (see April 3, 2023 at p. 12; Answer to Cross-Appeal at p. 7). The parent asserts that the district waived the defense of asserting the failure to comply with the June 1 deadline as the district acknowledged its obligation to provide services to the student (Answer to Cross-Appeal at pp. 7-9). Lastly, the parent argues that she was not informed by the district by April 1 of her obligation to file a request for special education services by June 1 pursuant to a district policy manual (id. at pp. 9-10).

The IHO noted the district's argument that the parent's failure to submit a written request for equitable services on or before June 1 disqualified the student from services (IHO Decision at p. 6). The IHO also acknowledged the parent's argument that the district waived the June 1 deadline and therefore, was barred from raising this as a defense (id.). The IHO found that it was undisputed that the parent failed to request services on or before June 1, 2022 and that the district failed to implement the services recommended in the September 2020 IESP (id.). However, the IHO found that the district "explicitly" stated in its response to the parent's due process complaint notice that the district recommended related services for the student and that specific statement constituted a waiver of the June 1 requirement (id.).

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic

services during the 2022-23 to the student school year because of the June 1st notice issue. Suffice it to say, it is not critical to this proceeding because only the 2022-23 school year dispute was before the IHO.

[8] The parent cites Application of a Student with a Disability, Appeal No. 23-033 for this proposition, but the facts of that case are markedly dissimilar to those here. In that proceeding the district failed to appear at the impartial hearing, it was not raised at all during the impartial hearing process, and the SRO determined that the IHO improperly addressed the June 1 deadline issue because the district failed to raise it during the hearing process. Similarly, Application of a Student with a Disability, Appeal No. 23-036 is raised by the parent but is equally distinguishable because again, the district did not appear in that proceeding and the IHO raised the concern with the parent during the hearing and the matter was remanded for further clarifications.

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]). In this case, there is no evidence in the hearing record showing that the parent complied with the notice requirement on or before June 1, 2022, and on appeal the parent does not even assert that she provided timely notice but merely alleges that the IHO erred in her findings on this point. The manual referenced by the parent to counter the district's argument does not appear in the hearing record. Even if it had, the thrust of the argument is that it would excuse the parent's compliance with the June 1 deadline due to a lack of knowledge of the requirement; however, that would not relieve the parent of the notice obligation under the statute. The Commissioner of Education has previously addressed this issue and determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin). The parent's challenge to the IHO's decision on this basis is without merit.

Contrary to the parent's assertions, the IHO erred in finding that the district waived the June 1 requirement because it filed a response to the parent's due process complaint notice (IHO Decision at p. 6).[9] The district's February 8, 2023 response to the due process complaint notice simply indicated that the district's "IEP" team had met on September 14, 2020 and recommended a program of related services without any further explanation or discussion and that the student is parentally placed in a nonpublic school (Dist. Response to Due Process Compl. Notice at pp. 1-3).[10] Here, the district described what occurred in accordance with the student's IESP in 2020 but

[9] Initially, regarding the district raising the issue of the notice, as noted in prior SRO decisions, the issue of the June 1 deadline fits with other defenses, such as the defense of the statute of limitations, which are required to be raised at the hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). As further noted in prior SRO decisions, the June 1 deadline may be waived; however, the response to the due process complaint notice is not a waiver, especially here where the parties discussed the issue prior to the commencement of the merits portion of the impartial hearing (see e.g., Application of a Student with a Disability, Appeal No. 23-032). Although unclear, the parent appears to raise throughout her papers that the district is obligated to raise all defenses at the "initial" hearing and interprets that to mean solely at the first hearing date before an IHO, but as described in M.G., "initial administrative hearing" means the first-tier administrative hearing that is conducted by an IHO often over the course of several dates, but it does not mean that every defense is automatically waived if a party does not address it on the very first hearing date of the proceeding before the IHO.

[10] When a district receives a due process complaint notice from a parent, it shall, within 10 days of receiving the complaint, send to the parent a response unless a prior written notice was already sent as described below (see 8 NYCRR 200.5[i][iv]; see 34 CFR 300.508[e]). A response to a due process complaint notice is "qualitatively different

did not indicate that it had conducted planning or provided services to the student for the 2022-23 and, accordingly did not "explicitly" waive the defense of the parent's compliance with June 1 notice requirements pursuant to Education Law § 3602-c. Furthermore, as the IHO noted, the parent failed to comply with the notice requirements for requesting equitable services prior to June 1.

Last, the parent's answer to the cross-appeal also contains an allegation that the CSE delayed convening to create an IEP for the student, which would be the type of planning document used by the parent to enroll the student in the public school.[11] However, in the due process complaint notice, the parent made it clear that the student had been placed by the parent in a religious school (Parent Ex. A at p. 1). Throughout the proceeding the parent continued to indicate that she was seeking IESP services for her son at the private school, and there is no evidence of a desire or effort on the part of the parent to place the student in the public school with IEP services. Although the September 2020 IESP recommended the related services of speech-language therapy, counseling services, and OT all in English, as well as group paraprofessional services, however, in this appeal the parent only seeks funding for paraprofessional services and does not seek the English language related services (May 31, 2023 Tr. p. 9; Parent Ex. B at p. 9).[12] The nonpublic school offered "an opt in program for English studies"; however, the parent confirmed that the student did not attend the English program and did "not participate in formal English education" (Parent Ex. B at p. 1). Accordingly, with respect to seeking an IEP and a public school placement, there is no evidence that the parent was anything other than silent since the September 2020 IESP and the student's sixth grade school year in the religious school. Assuming without deciding that the district was obligated to develop a public school IEP for the student but failed to do so, I would not permit the parent to seek IESP services as equitable relief and evade the requirements discussed above.[13] If the parent seeks services pursuant to an IEP and seeks a placement in the public school

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than a federal or state court pleading" and does not require defenses or specific denials of the allegations contained in the due process complaint (see R.B. v. Dep't of Educ., 2011 WL 4375694, at *5-*6 [S.D.N.Y. Sept. 16, 2011]). Furthermore, a response by the district is only required "[i]f the school district has not sent a prior written notice" which has essentially the same information as a school district's due process response (8 NYCRR 200.5[i][iv]; see 34 CFR 300.508[e]).

[11] In the due process complaint notice, the parent alleged that no IEP or IESP had been developed after the September 2020 IESP (Parent Ex. A at p. 2).

[12] A parent remains free to decline the special education services recommended by the district in whole or in part (see, e.g., 34 C.F.R. 300.300[b]).

[13] The United States Department of Education posed the following interpretive guidance:

> If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?
>
> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE

instead of dual enrollment services, the parent may at any time request the CSE to convene and develop a proposed IEP for the student for placement in the public school.

As an alternative argument, the district asserts in its cross-appeal that the IHO erred by granting the parent relief, as she failed to establish the appropriateness of the unilaterally obtained services and because equitable considerations did not favor the parent. The parent argues that she established her burden because the Limud supervisor testified that the student was improving as the paraprofessional was working with the student on behavior interventions (Answer to Cross-Appeal at pp. 3-4).

Assuming for the sake of argument that the parent had complied with the June 1 notice requirement of Education Law § 3602-c, as explained below, the evidence in the hearing record would nevertheless be insufficient to establish the appropriateness of the unilaterally obtained paraprofessional services.

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not develop an IESP for the 2022-23 school year and as a self-help remedy she unilaterally obtained private services from Limud for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Accordingly, the issue in this matter is whether the private services obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Limud upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive

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available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "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. 12 available at https://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). Courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. On the one hand, it is clear that a district violates the IDEA by refusing to convene an IEP meeting when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. V. Lua, 832 F. App'x 493, 496 [9th Cir. 2020]). In another instance, in E.T. v. Board of Education of Pine Bush Central School District, after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"] [emphasis added]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

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 Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this type of framework; namely, given the district's failure to meet its burden to prove that it offered the student appropriate equitable services for the 2022-23 school year under the State's dual enrollment statute, the issue is whether the unilaterally obtained services by the parent from Limud constituted appropriate unilaterally obtained services for the student such that the cost of the services is reimbursable to the parent or, alternatively, payable directly by the district to the provider.

Turning to the standard to apply in assessing the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement or, as in this case, private services must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school or services offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. Of Educ. Of the City Sch. Dist. Of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. Of Educ. Of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [finding that "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. Of Educ. Of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular

> advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Although not in dispute, a brief description of the student's needs is warranted. According to the September 2020 IESP, a 2019 administration of the Stanford-Binet Intelligence Scales, Fifth Edition to the student yielded a full-scale IQ in the low average range (Parent Ex. B at p. 1). The IESP further indicated that the student was administered the Woodcock Johnson Achievement Test in which the student "earned [l]ow scores for all areas of academics" (id.). However, the IESP noted that the achievement test scores "should be interpreted with caution as lack of instruction in an English curriculum [wa]s a factor in these scores" (id.).

According to the September 2020 IESP, the student demonstrated difficulties with focus and sustained attention to task which resulted in "below class level" educational performance, he could be disruptive and confrontational, he wandered off during unstructured times, and he often left the "designated area" without permission (Parent Ex. B at pp. 2-3). A "prior" speech report found that the student had "articulation and expressive language deficits" (id. at p. 2). The September 2020 IESP noted that the student did not currently receive speech-language therapy at the nonpublic school (id.).

Regarding the student's social development, the September 2020 IESP reflected that during a January 2019 psychoeducational evaluation the student demonstrated appropriate socialization skills; however, information from a counseling report indicated that he had social, emotional, and behavioral deficits (Parent Ex. B at p. 3). According to the counseling report, the student was impulsive, struggled to listen to and follow rules, and did not always exhibit empathy towards others (id. at p. 3). Additionally, the student had difficulty focusing in class, sitting still in his seat, finding pleasure in activities, and easily became bored (id.). Information from the teacher's behavior logs included in the IESP showed that the student wandered when going to and from the bathroom and displayed dysregulated behaviors during both structured and unstructured times (id.).

In connection with the student's physical development, information from an OT report reflected in the September 2020 IESP indicated that the student had "attention span, writing and fine motor deficits" (Parent Ex. B at p. 4). The student was found to use an appropriate pencil grasp but showed limited progress with correct letter formation and spacing between letters and words (id.). Further, the student was noted to have difficulty following "muti-step directions" (id.). The September 2020 IESP provided management strategies and interventions to address the

student's needs, including a "highly structured classroom environment," multi-modal instruction, redirection, prompting, visual and verbal cues, modeling, positive reinforcement, and reasonable consequences (Parent Ex. B at p. 4).

Based upon the student's stated needs, the September 2020 CSE recommended a program of related services consisting of one 30-minute session per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group; two 30-minute sessions per week of counseling in a group; and two 30-minute sessions per week of individual OT (id. at p. 9). Additionally, the September 2020 CSE recommended full-time paraprofessional support in a group to address the student's behavioral needs (id.).

The hearing record provided limited information about the student's program at the nonpublic school other than noting in affidavit testimony that the student attended a "mainstream school" (Parent Exs. D ¶ 2; E ¶ 20). The Limud supervisor testified that the agency provides special education support to students with disabilities (Parent Ex. E ¶¶ 9, 10). She testified that Limud provided full-time paraprofessional services to the student for the 2022-23 school year at his nonpublic school and that she "overs[aw] the [p]araprofessional services provider's work" (id. ¶¶ 17-18, 19-20). The Limud supervisor identified by name the paraprofessional who provided the student's services and the provider's qualifications including education and experience (April 3, 2023 Tr. pp. 21-24). The Limud supervisor testified that the student made progress with his paraprofessional services as the provider was working with the student on "implementing behavior interventions including prevention strategies, alternative replacement behaviors, and consequence procedures" (id. ¶ 21). She further testified that due to the student's "social and behavioral delays" he required continued paraprofessional services (id. ¶¶ 21-22).

However, there is no information in the hearing record that speaks to how the paraprofessional fit into the student's program at the nonpublic school, i.e., who developed the behavioral supports identified by the Limud supervisor and monitored the paraprofessional's implementation of those supports, how the paraprofessional supported the student, what, if any, specially designed instruction that was provided to the student at the nonpublic school, or the appropriateness of that support to address the student's behavioral needs. This is particularly relevant here, where it appears that the student was not receiving other special education services and particularly the related services provided for in the September 2020 IESP (see May 31, 2023 Tr. p. 9).

It is clear from the September 2020 IESP that the student required paraprofessional services for behavioral support (see Parent Ex. B). However, the parent must still come forward with evidence that describes the services and the delivery thereof, particularly where, as here, the district has maintained its position that the parent did not meet her burden to prove that the unilaterally-obtained services were appropriate. The hearing record lacks substantive information about the level of services the student received and does not explain how the services from Limud addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing

and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]). As discussed above, the hearing record does not contain testimonial or documentary evidence of what the paraprofessional did to specifically address the student's unique needs and how the services provided by the paraprofessional benefitted the student other than the limited, generic statements that the student showed "signs of progress" with the implementation of behavior interventions by the paraprofessional (see Parent Ex. E ¶ 21).

Consequently, even if the parent had complied with the June 1 deadline for requesting equitable services, the parent's request for the costs of the services from Limud would nevertheless fail because the IHO's reliance on the above mentioned nonspecific and conclusory information regarding the paraprofessional services would warrant reversal of the IHO's finding that the unilaterally obtained services were specially designed to address the student's needs (see IHO Decision at pp. 8-9). Having found, in the alternative, that the parent failed to establish that the unilaterally obtained services were appropriate, it is unnecessary to further address the parent's appeal of the IHO's finding that the district's standard rate for the paraprofessional services was sufficient.[14]

VII. Conclusion

Having found that the parent was not entitled to equitable services in accordance with an IESP because she did not comply with the June 1 deadline under Education Law § 3602-c, the district did not fail to provide appropriate services. In the alternative, the IHO erred in concluding that the parent sustained her burden of demonstrating the appropriateness of her unilaterally-obtained services and the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated June 9, 2023 is modified by reversing that part which found that the district waived the June 1 notice requirement in Education Law § 3602-c; and

[14] I note only that there is no evidence whatsoever in the hearing record that describes the "standard rate" that raised by the parent and awarded by the IHO, much less how it relates to a "reasonable market rate" requested by the parent. Presumably it is less, but there is no evidence to show how much less.

IT IS FURTHER ORDERED that the IHO decision dated June 9, 2023 is modified by reversing that portion which found that the parent met her burden to establish that the paraprofessional services were appropriate to meet the student's needs; and

IT IS FURTHER ORDERED that the IHO decision dated June 9, 2023 is modified by reversing that portion which directed the district to fund paraprofessional services for the 2022-23 school year.

Dated: **Albany, New York**
September 21, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER