The University of the State of New York

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

No. 23-165

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which reduced the rate of reimbursement or direct payment sought by her for unilaterally-obtained special education services delivered to her daughter during the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's award of reimbursement or direct funding to the parent. The appeal must be dismissed. The cross-appeal must be sustained and, as explained below, the matter must be remanded 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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. Briefly, the student began receiving speech-language services through Early Intervention and then received services as a preschool student with a disability (Dist. Ex. 4 at pp. 2, 3).

On April 22, 2021, a CSE convened to review the student's educational programing in anticipation of the student's transition to school-age services (see Parent Ex. D; Dist. Ex 4). At the time of the CSE meeting, the parent informed the district the student would be parentally placed in a nonpublic school for the 2021-22 school year (Parent Ex. D at p. 2). Finding the student eligible for special education as a student with a speech or language impairment, the CSE developed an IESP for the student recommending five periods per week of direct, group special education teacher support services (SETSS) in Yiddish and two 30-minute sessions per week of individual speech-language therapy in Yiddish, with an implementation date of September 7, 2021 (Parent Ex. D at pp. 1, 7).[1, 2] In a prior written notice dated April 26, 2021, the district notified the parent that an IESP was developed for the student to provide equitable services, consisting of SETSS and speech-language therapy, because the parent was placing the student in a nonpublic school, at her own expense (Dist. Ex. 3).[3]

On August 31, 2022, the parent executed a contract with Budding Buds LLC (Budding Buds), wherein Budding Buds agreed to "make every effort to implement" five periods per week of SETSS and two 30-minute sessions of speech-language therapy for the student (Parent Ex. G). The parent agreed to pay Budding Buds a rate of $175 per hour for SETSS and $225 per hour for speech-language therapy (id. at p. 2).

In a letter dated September 23, 2022, the parent notified the district that she consented to the services recommended in the student's April 2021 IESP; however, she asserted that she had had no way of implementing those services as she had been unable to locate providers for the recommended SETSS and related services at the district's standard rate (Parent Ex. C). 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 payment from the [district]" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 23, 2022, the parent raised a concern as to the delay in convening a CSE meeting after the April 2021 CSE meeting asserting that it constituted a denial of a free appropriate public education (FAPE) (Parent Ex. A at pp. 1, 2). Initially, the parent requested pendency pursuant to a July 2022 IHO Decision consisting of five periods per week of SETSS and two 30-minute sessions per week of individual speech-language therapy (id. at p. 2). The parent further asserted that the district failed to implement the April 2021 IESP and she has been unable to locate providers on her own, that, without supports, the student's "mainstream placement is untenable," and that the parent located appropriate providers independently for the 2022-23 school year (id. at pp. 2-3). As relief, the parent requested that the

[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 parent filed for due process regarding the 2021-22 school year, and according to a July 2022 IHO decision, the district settled as to the parent's request for SETSS and the IHO found in the parent's favor on her request for funding of speech-language therapy services at a reasonable market rate (see Parent Ex. B).

district fund the student's program as set forth in a July 2022 IHO decision "at the provider's prevailing rate" and provide compensatory education for any services the district failed to deliver to the student pursuant to pendency (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 10, 2023 and concluded that day (Morning Tr. pp. 1-36; Afternoon Tr. pp. 1-11).[4] In a decision dated June 30, 2023, the IHO found that the district failed to implement the IESP which resulted in a denial of FAPE for the 2022-23 school year (IHO Decision at pp. 13-14). The IHO then reviewed whether the rate the parent requested for services was unreasonable (id. at pp. 14-18). The IHO determined that certain factors weighed in the parent's favor, such as the educational director of the agency's testimony as to the breakdown of the costs of the agency to justify the rate, as well as the contract obligating the parent to pay the full amount, the parent's testimony that she attempted to obtain a provider using the district's online resources, and that the parent sent notice and filed a due process complaint notice near the beginning of the school year (id. at pp. 15-16). However, the IHO noted that certain factors, such as "insufficient qualifications of the providing instructor" and how the SETSS were administered—as an individual rather than group services, and with no indication that the instructor provided services in Yiddish as recommended in the IESP, weighed against the parent and warranted a reduction in the award (id. at pp. 16-17). Overall, the IHO reduced the rate for SETSS by 40 percent from the date of the due process complaint notice through January 30, 2023, and by 20 percent from January 31, 2023 through the end of the 2022-23 school year (IHO Decision at pp. 17-18).[5] The IHO awarded direct payment for five periods of SETSS from September 23, 2023 through January 30, 2023 at a rate of $105 per hour and from January 31, 2023 through the end of the 2022-23 school year at a rate of $140 per hour, as well as direct funding for two 30-minute sessions per week of speech-language therapy for the 2022-23 school year at a rate of $225 per hour (id. at pp. 18-19).

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 is presumed and the parties' arguments will not be recited here in detail. Briefly, however, the parent alleges that the IHO erred in reducing the rate for the awarded SETSS.[6] The district does not dispute that the IHO erred in the rate

[4] The hearing took place on the same day, in two parts, with the witness testimony taking place in the morning and closing statements taking place in the afternoon; as the transcripts of the morning and afternoon are not paginated consecutively, they will be referenced as morning and afternoon (Morning Tr. pp. 1-36; Afternoon Tr. pp. 1-11).

[5] Reviewing the IHO's decision, it appears that the IHO intended the rate reduction to be an additional 20 percent reduction for the period after the student's SETSS provider's certification expired; however, the IHO appears to have switched the reduction for the two periods (see IHO Decision at pp. 16-18).

[6] The parent attaches decisions made by the same IHO in other matters, related to other students, which the parent contends show the reductions chosen by the IHO were arbitrary; however, these decisions are not necessary to my analysis in this matter and are not accepted as additional evidence. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order

reduction analysis, arguing instead that the IHO's rationale for reducing the rate should have been applied to find that the parent did not meet her burden of proving that the unilateral services she obtained for the student were appropriate. Additionally, although the district concedes that the IHO's reduction of the award was improper, the district contends that equitable considerations warrant a reduction in the award because the parent's notice to the district of her unilateral placement was late and the parent's testimony on this issue contradicted the documentary evidence.[7]

V. Applicable Standards

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

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

to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

[7] Although the parent requested an extension of time to file an answer to the district's cross-appeal and was granted that extension, the parent did not submit an answer to the cross-appeal.

[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

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilaterally Obtained Services

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. 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 she unilaterally obtained private services from Budding Buds for the student and then commenced due process to obtain remuneration for the services provided by Budding Buds. Accordingly, the issue in this matter is whether the SETSS and speech-language therapy 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 Budding Buds 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 reimbursement from the school district after the IEP 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; 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."]). Accordingly, the parent's request for district funding of the privately obtained SETSS at issue here must be assessed under this framework.

In review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met

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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.).

the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). 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] ["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).

In its answer and cross-appeal, the district asserts that "the IHO failed to make a Prong II ruling" determining whether the SETSS and related services provided by Budding Buds were appropriate and instead the IHO "jumped to [the] question of whether the 'third party SETSS provider selected by [the Parent] should be remunerated with an enhanced rate'" (Answer ¶ 3).

The district contends that the bases the IHO cited as reasons to reduce the rate for reimbursement, specifically the lack of the provider having a bilingual certification or evidence the student's SETSS were provided in Yiddish and the provision of 1:1 SETSS rather than group SETSS do not support a reduction in the rate of reimbursement under a determination as to equitable considerations, but could support a finding that the unilaterally obtained services were not appropriate to address the student's special education needs. The district requests a finding that the unilaterally obtained SETSS and related services were not appropriate to meet the student's special education needs. The district requests in the alternative that in the event it is found that the unilaterally obtained SETSS and related services were appropriate, the matter should be remanded to allow for further development of the hearing record on the rate reduction issue.

Review of the IHO's decision shows that although the IHO referenced the Burlington/Carter standard, the IHO did not make a finding as to the appropriateness of the unilateral services obtained by the parent, focusing instead on whether the "rates w[ere] reasonable and appropriate" (see IHO Decision at pp. 14-15). Accordingly, review of the hearing record and the IHO's decision supports the district's position on this issue as the IHO failed to employ the appropriate legal standard. Moreover, the reasoning employed by the IHO in reducing the rate of funding for the unilaterally obtained services could relate to the overall appropriateness of the services. In particular, while the parent asserted that she intended to "implement the IESP on [her] own" (Parent Ex. C); the hearing record does not entirely support this allegation. Indeed, the November 2021 IESP recommended five periods per week of SETSS in Yiddish as a direct, group service; however, as the IHO noted the service obtained by the parent was an individual service and the hearing record does not identify the language the student was instructed in (compare Parent Ex. D at p. 6, with Parent Ex. F at ¶¶11-12, 17). It is preferable to have the IHO review these factors and make the first determination in light of the appropriate legal standard. As the IHO decision was not made on substantive grounds using the appropriate standard, it must be vacated (see 20 U.S.C. § 1415[f][3][E][i]).

B. Equitable Considerations

Similarly, both the parent and the district disagree with the IHO's determination to reduce the rate of funding or reimbursement of the unilaterally obtained services, albeit for different reasons. The parent contends and the district agrees that the IHO's rate reduction was improper as the reasons the IHO stated for the reduction were not valid reasons for reducing the awarded relief. Nevertheless, the district argues that there were proper bases in the hearing record to reduce or deny reimbursement upon equitable grounds, specifically the parent's September 23, 2022 notice having been sent after the start of the school year and the parent's testimony regarding that notice being inconsistent with the documentary evidence.

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that

reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Additionally, under the federal statute, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Among other factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

I agree with the parties that the IHO's equitable determination to reduce the rate for funding or reimbursement of the unilaterally obtained SETSS during the 2022-23 school year must be set aside as the IHO did not cite proper bases for the reduction, yet it may be that appropriate bases for a reduction or elimination of funding or reimbursement are present in this matter. Accordingly, I will remand the matter for additional determinations of equitable considerations in the event that the IHO determines that the unilaterally obtained services were appropriate to meet the student's needs.

C. Remand

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 failure to assess the parties' respective positions under a Burlington/Carter analysis, particularly with respect to the appropriateness of the unilaterally obtained services, is a remand to continue these proceedings.

Accordingly, the IHO's decision must be vacated, and the matter remanded to the IHO for further proceedings relating to the parent's claims as set forth in the September 28, 2022 due process complaint notice. The IHO must determine whether the parent's unilaterally obtained services were appropriate for the student, and if appropriate, whether equitable considerations weigh in favor of the parent's requested relief of direct funding. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon. Additionally, if the IHO intends to complete the hearing record regarding the reasonableness of the rates charged by Budding Buds, the IHO should seek objective evidence from 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 his analysis and award of relief, the case is remanded to address the parent's claims using the legal standards set forth above to determine whether she is entitled to her requested relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 10, 2023, is vacated in its entirety; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the appropriateness of the parent's unilaterally obtained services for the 2022-23 school year and a weighing of equitable considerations in accordance with this decision.

Dated: **Albany, New York**
November 29, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER