



The University of the State of New York

The State Education Department
State Review Officer
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No. 23-166

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 Department of Education

Appearances:

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

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 daughter by Budding Buds LLC (Budding Buds) at a specified rate for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent met her burden to prove that the services delivered by Budding Buds were appropriate. 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 programming 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

For all periods of time relevant to this appeal, the student was attending a religious nonpublic school at the parent's expense (see Parent Exs. B at pp. 1, 9; E at pp. 1, 10). A CSE convened on February 28, 2022, and formulated an IESP for the student with a projected implementation date of March 14, 2022 that recommended six periods per week of group special education teacher support services (SETSS) in Yiddish (see Parent Ex. B at pp. 1, 7). In a contract

dated August 31, 2022, the parent arranged for Budding Buds, a private agency, to "implement" the student's IESP by delivering SETSS and occupational therapy (OT) to the student at specified rates (Parent Ex. I). The CSE reconvened on September 28, 2022 and added two 30-minute sessions of OT to the student's IESP (compare Parent Ex. E at pp. 1, 7, with Parent Ex. B at p. 7).¹

In an amended due process complaint notice, dated September 28, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) "for the 2022-23 school year" (see Parent Ex. D).² The parent asserted that the district failed to implement the September 2022 IESP, that the parent had been unable to locate providers using the district's "online resources," and that the parent "had located appropriate services providers independently . . . at their prevailing rate" (id. at p. 2). For relief, the parent sought district funding for the costs of the services delivered by the private providers "at their prevailing rate" and compensatory services "for the entire 2022-23 school year – or the parts of which were not serviced" (id. at p. 3). The parent also invoked pendency, asserting that the student's pendency placement lay in the September 2022 IESP (id. at p. 2).

By letter dated September 29, 2022, the parent stated her agreement with the recommendations of the September 2022 CSE but indicated she had been unable to locate providers at the district's "standard rate" and, therefore, intended to "implement the IESP on [her] own" and seek funding for the costs of the services from the district that she privately obtained for the student (Parent Ex. F at p. 2).³

An impartial hearing before the Office of Administrative Trials and Hearings (OATH) convened on March 20, 2023 (see Tr. pp. 1-43).⁴ In a decision dated June 30, 2022, the IHO determined that the district failed to implement the September 2022 IESP, which denied the student a FAPE for the 2022-23 school year (IHO Decision at pp. 11-12). Next, the IHO went on to examine whether the SETSS provider's rate was "reasonable and appropriate under the circumstances" (id. at pp. 12-13). The IHO found that factors relevant to this analysis included, "the Provider's explanation of the rate . . . ; the value that specialized certification, such as a bilingual extension, adds to instruction; the Parent's efforts to locate a [district]-approved SETSS provider from a list provided by the [district] to the Parent; and whether the Parent directly paid the Provider or is contractually obligated to pay the Provider in the event the Department is not ordered to fund SETSS at the requested rate" (id. at p. 13 [internal footnotes omitted]). The IHO

¹ The hearing record contains duplicative copies of the September 2022 IESP (compare Parent Ex. E, with Dist. Ex. 1). For purposes of this decision, only the parent exhibit is cited.

² The original due process complaint notice was also dated September 28, 2022 (Parent Ex. A).

³ In a previous letter dated September 28, 2022, the parent had stated her agreement with the February 2022 IESP (Parent Ex. C). The September 29, 2022 letter that referenced the September 2022 IESP was described as an "updated" notice (Parent Ex. F at p. 1).

⁴ According to the IHO, conferences with the parties took place on January 11, 2023 and February 22, 2023 (IHO Decision at p. 1; IHO Scheduling Order). The hearing record does not include a transcript or written summary of either conference (see 8 NYCRR 200.5[3][xi] [A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer]). In a written clarification of the hearing record, the IHO indicated that, despite reference in the decision to the January 11, 2023 date as a prehearing conference, it was actually a settlement conference, and that the status conference was not transcribed.

found that the evidence in the hearing record showed that the rate was justified, the parent had a financial obligation to pay for the services, the parent had attempted to identify a provider at the district rate, and the district did not respond to the parent's ten-day notice or due process complaint notice "with an offer of a better rate for services" (id. at p. 14). However, the IHO found that other factors, including the qualifications of the instructor (in terms of grade level certification and bilingual qualifications) and the manner in which SETSS had been delivered (as a 1:1 service instead of group) for the 2022-23 school year warranted a 35 percent reduction in the rate to be awarded (id. at pp. 14-16). The IHO found that the hearing record supported an award of district funding for OT at the amount requested (id. at p. 16).

Based on the foregoing, from the first day of the 10-month school year through September 27, 2022, the IHO ordered the district to fund any services delivered at the district's standard rate (IHO Decision at p. 16). For the remainder of the school year, the IHO ordered the district to pay the agency for the provision of no more than six periods per week of SETSS at a reduced rate amounting to 65 percent of the rate requested and for the provision of no more than 60 minutes per week of OT at the rate requested, less any services already paid pursuant to pendency (id.).

IV. Appeal for State-Level Review

Both parties challenge the IHO's decision. 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, the parent's reply and answer to the cross-appeal, and the district's reply to the answer to the cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The following issues presented on appeal by the parties:

1. whether the parent met her burden to demonstrate that the private services delivered to the student by Budding Buds were appropriate to address the student's needs;
2. whether equitable considerations weighed in favor of the parent's request for district funding of the costs of the privately obtained services; and, if so,
3. whether the IHO erred in reducing the rate to be paid by the district for the SETSS delivered to the student by the private provider.

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]).⁵ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁶ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding 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

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 implement the student's IESP for the 2022-23 school year and as a self-help remedy she unilaterally obtained private services from Budding Buds 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 parent is entitled to public funding of the costs of the private services.⁷ "Parents who are dissatisfied with

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

⁶ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](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 State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Budding Buds for the student (Educ. Law § 4404[1][c]).

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 [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 County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [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."]).

As the IHO found, the parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, 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 (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; 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).

Neither party appeals the IHO's determinations that the district failed to implement the September 2022 IESP (see IHO Decision at pp. 11-12). Accordingly, 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]). The next issue to be considered is the appropriateness of the student's private services from Budding Buds.

A. Unilaterally-Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes 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).

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student in the IESPs, which is not in dispute (see Parent Exs. B; E).⁸

Review of the hearing record indicates that, when the February 2022 CSE convened, the student was attending second grade at the nonpublic school (Parent Ex. B at p. 1). According to the September 2022 IESP the student exhibited attention, executive function, auditory processing, and visual spatial delays, which caused her to struggle in the classroom (Parent Ex. E at pp. 1, 3).

With respect to her reading skills, the IESP identified that the student was able to read CVC word fluently but struggled reading CVC-E words and other long vowel combinations, blends, and

⁸ The description of the student in the February and September 2022 IESPs is almost identical (compare Parent Ex. B at pp. 1-3, with Parent Ex. E at pp. 1-3); for purposes of this summary, the later developed IESP will be relied upon unless otherwise noted.

digraphs and demonstrated poor reading comprehension even when material was presented orally (Parent Ex. E at p. 1). The student could spell CVC words but struggled with more complicated phonics rules (id.). In writing, the student reversed letters, formed letters that were not always legible, rarely formulated one sentence, and wrote in a disorganized manner that lacked clarity due, in part, to her attention delays (id. at p. 2). In math, the student had made progress and could compute simple addition and subtraction exercises but only completed examples "by rote instruction," had not yet mastered an understanding of number place values, and struggled with math word problems (id.). In language, the student demonstrated good articulation but had "difficulty expressing her thoughts in a complete logical sentence," at times responded to discussions with off-topic comments, and struggled following teacher directions (id.).

With respect to the student's social development, the September 2022 IESP indicated that the student had some friends but often got into conflicts with and acted aggressively towards peers and, according to teachers, often behaved in an inappropriate manner (Parent Ex. E at p. 3). The IESP noted that the student's academic struggles had begun to affect her social relationships (id.). The physical development portion of the IEP noted that the student "still require[d] OT support to address sensory processing difficulties" (id.).⁹

The September 2022 IESP reflected the parent's input that the student's "focusing difficulties [we]re affecting everything" (Parent Ex. E at p. 2). The student's SETSS provider recommended that the student continue in a general education classroom setting but indicated that the amount of support that the student was receiving at the time (four 60-minute sessions of SETSS per week) was "not adequate" (id. at pp. 1, 2).

The September 2022 IESP recommended management strategies and interventions to address the student's needs, including constant redirection and refocusing, visuals, prompting, complex tasks broken down, verbal cueing, and modeling (Parent Ex. E at p. 3).

2. Services from Budding Buds

As summarized above, the September 2022 IESP identified several of the student's needs with respect to her attention, academic abilities, language skills, and social development, but there is sparse evidence in the hearing record that demonstrates how the contracted agency addressed the student's needs.

The contract with Budding Buds indicated that the agency would "make every effort to implement" the six weekly sessions of SETSS and two 30-minute sessions of OT recommended in the student's IESP "with suitable qualified providers" (Parent Ex. I at p. 1). The educational director from Budding Buds testified by way of affidavit that the agency provided the student with six hours per week of SETSS and two 30-minute sessions per week of OT for the 2022-23 school year (Parent Ex. H ¶¶ 3, 11). The director indicated that the services began around September 13, 2022 (Tr. p. 25). The director named the provider of the OT and stated that the individual was licensed by the State as an occupational therapist (Parent Ex. H ¶ 13; see Parent Ex. J at p. 1). The director also identified, by name, the provider of the SETSS and indicated that she held State

⁹ The February 2022 IESP, which had not included a recommendation for OT services, noted that the student had received OT during the 2020-21 school year but, as she made limited progress, the services had been discontinued (Parent Ex. B at pp. 3, 7).

certification to teach students with disabilities and was "trained and experienced to teach literacy and comprehension [t]o school aged children and adolescents" (Parent Ex. H ¶ 12). For this provider, the hearing record includes a document indicating that the provider held an initial certification in early childhood education and to teach students with disabilities ages birth through second grade (Parent Ex. J at p. 2). The director acknowledged that the provider was not certified to teach third grade, which was the student's grade for the 2022-23 school year at issue, but noted that the student's academic functioning was lower at approximately a "late first grade" level (Tr. p. 16). As the IHO observed, there is no evidence in the hearing record regarding the SETSS provider's qualifications to teach the student in Yiddish although the evidence establishes that was identified among the student's needs (IHO Decision at p. 15; Parent Ex. E at p. 7).

Neither of the providers, which the director indicated delivered services to the student, testified at the impartial hearing. The director testified in her affidavit that the student received services on a 1:1 pull-out basis at the school and that sessions were "individualized" and "include[d] a great deal of specialized instruction" (Parent Ex. H ¶¶ 14-15, 17). The parent confirmed that the SETSS were delivered at the school (Tr. p. 31). However, despite the director's affidavit testimony that the student received services in the mainstream school, testimony from both the director and the parent at the impartial hearing indicated that student traveled to the occupational therapist to receive OT at a different location, which was a distance from the student's home, and was why the occupational therapist was delivering one 60-minute session per week instead of two 30-minute sessions per week (compare Parent Ex. H ¶ 15, with Tr. pp. 21-22, 31).

The director testified that, in addition to delivering 1:1 services to the student, the providers prepared for sessions, developed goals that were reviewed quarterly, wrote progress reports, and met with teachers and parents (Parent Ex. H ¶¶ 14, 16). Further, the director testified that the student's progress was measured through quarterly assessments, consistent meetings with the provider and support staff, and observation of the student in the classroom in addition to daily session notes (id. ¶ 18). However, during the impartial hearing the parent did not provide evidence of any goals, quarterly assessment reports, or session notes as referenced by the director. Generally, the director stated, without elaboration, that the student showed "signs of progress" with her SETSS and OT but needed to continue services in both areas (id. ¶¶ 19-20).

The IHO's concerns raised in his analysis of equitable considerations regarding the certification and qualifications of the SETSS provider and the manner in which the services were delivered actually go to the question of whether or not the parent met her burden to prove that the unilaterally obtained services were specially designed to meet the student's needs (see IHO Decision at pp. 14-16). Overall, there is some indication in the hearing record that the parent attempted to arrange delivery of a program for the student similar to that set forth in the September 2022 IESP, and conversely that the district did not meaningfully dispute that the student required some level of services from a special education teacher, as well as OT; while such factors might be relevant, 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. However, the hearing record does not explain how the services from Budding Buds 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]). The hearing record does not objectively explain what Budding Bud's providers did to specifically address the student's unique needs and how the services provided by teacher and occupational therapist specifically benefitted the student, other than the limited, generic statements that SETSS and OT were provided on a 1:1 basis and were somehow "individualized," which is not useful evidentiary material and does not explain how the Budding Buds providers were meeting the student's special education needs. Although the evidence shows that Budding Buds apparently creates substantive educational records that are specific to the services being provided to the student, the parent did not submit such evidence to the IHO for examination and instead focused heavily on how much the district should be made to pay for the unilateral services.

Consequently, I decline to find that the parent did meet her burden to establish the appropriateness of the services provided to the student by Budding Buds during the 2022-23 school year.

VII. Conclusion

Having found that the parent did not sustain her burden of demonstrating the appropriateness of her unilaterally-obtained services, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support the parent's request for relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated June 30, 2022, is modified by reversing those portions which found that the parent met her burden to prove that the services delivered to the student by Budding Buds during the 2022-23 school year were appropriate and ordered the district to fund the private services at specified rates.

Dated: Albany, New York
October 3, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER