The University of the State of New York

The State Education Department
State Review Officer
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No. 23-174

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 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 Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her request that respondent (the district) fund the costs of services delivered to her son by Budding Buds LLC (Budding Buds) at a specified rate for the 2022-23 school year. The district cross-appeals from the IHO's awarded relief. The appeal must be sustained in part, 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 detailed facts and procedural history of the case and the IHO's decision will not be recited in detail. Briefly, the CSE convened on November 30, 2021 for the student's annual review (Parent Ex. D). 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 SETSS in a group in Yiddish to begin December 9, 2021 (id. at pp. 1,6, 8). Prior written notice, dated November 30, 2021, indicated that the CSE developed an IESP for the student because the student was parentally placed in a nonpublic school and the parent was seeking equitable services from the district (Dist. Ex. 2 at p. 1).

On August 31, 2022, the parent signed a contract with Budding Buds, pursuant to which the parent authorized Budding Buds to provide "SETSS/SEITS at a rate of $175/hr" to the student (Parent Ex. G at p. 2). The agreement noted that the student was recommended for "5x60" SETSS and that the parent was requesting Budding Buds to "implement the [p]rogram to whatever extent possible" (id. at p. 1).

By written notice dated September 28, 2022, the parent consented to the services recommended in the November 2021 IESP but informed the district that the parent had no way of implementing the services with district providers at the district's standard rate and further informed the district that she would implement the recommended services at the private program the student attended "on my own and seek reimbursement or direct payment" from the district (Parent Ex. C). The district sent an acknowledgement to the parent that same day indicating that it received the letter (id. at p. 2).

In a due process complaint notice, also dated September 28, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) because the district failed to implement the services set forth in the November 2021 IESP during the 2022-23 school year (see Parent Ex. A). The parent requested an order that the district fund the providers located by the parent at their prevailing rate and an order that the district fund a bank of compensatory periods of SETSS for the 2022-23 school year or the parts of which were not serviced (id. at p. 3).[1]

An impartial hearing convened on March 13, 2023 and concluded on the same date after a single hearing date (Tr. pp. 1-36). In a decision dated July 7, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at pp. 12-13).[2] Initially, the IHO determined that the student's pendency program consisted of five hours of SETSS in a group in Yiddish, the same program in the November 2021 IEP and the unappealed April 2022 IHO decision (id. at pp. 4-6). Next, the IHO determined that the district failed to implement the November 2021 IESP (id. at pp. 12-13, 15).

After finding that the district failed to offer the student a FAPE, the IHO turned to the question of the appropriate remedy, noting that:

[1] The parent also requested pendency and argued that the services ordered in an IHO decision dated April 30, 2022, constituted the student's last agreed upon program (Parent Ex. A at p. 2).

[2] The hearing record contains two copies of the IHO Decision dated July 7, 2023, one electronically labeled "Findings of Fact and Decision" and the other labeled "Corrected Findings of Fact and Decision"; however, they both appear to be the same document titled "Corrected Findings of Fact and Decision" and I note there is no dispute as to the contents of the IHO decision on appeal.

> [I]n a case such as this, where the central issue is whether a third-party SETSS provider selected by a parent should be remunerated with an enhanced rate over what [the district] normally pays, the [p]arent's evidence must be scrutinized, consistent with my obligation and equitable authority to ensure that the remedy 'be appropriate in light of the purpose of the Act' . . . . [and] the evidence therefore must show that the SETSS providers' rates are reasonable and appropriate under the circumstances

(IHO Decision at pp. 13-14).

The IHO then analyzed the circumstances and found that certain factors "tend to justify the rate" such as the contract between the provider and the parent and the parent's attempts to locate a provider from the district (IHO Decision at pp. 14-15). The IHO next determined that "[w]eighing against the parent" were factors including the "insufficient qualifications of the providing instructor" and the "manner in which SETSS has been administered to the [s]tudent" meaning individual rather than group SETSS as called for in the November 2021 IESP (id. at pp. 15-16). The IHO determined that the SETSS provider's teaching certificate did not list the grade levels covered by the certificate and the certificate did not include a required "bilingual extension" in Yiddish as called for in the November 2021 IESP (id. at p. 15). The IHO noted that qualifications that are related to the student's deficits could justify a higher rate and determined that a "fifteen percent reduction in the rate" was appropriate (id.). With respect to the provision of individual rather than group SETSS the IHO noted that there was no explanation for the deviation from the IESP recommendation for a less restrictive group setting but that because the IESP was "two years old and the student has not had a new recommended program, which leaves her actual needs at least somewhat in doubt" it was appropriate under the circumstances to reduce the rate by a further five percent (id. at pp. 15-16).

For relief, the IHO ordered the district to provide the student's pendency program commencing with the filing of the due process complaint notice, and funding for the provision of SETSS at no more than five periods per week, less any amounts paid under pendency, at the reduced rate of $140 per hour beginning on the September 28, 2022 filing of the due process complaint notice (IHO decision at p. 16). For any dates of service between the first day of the 2022-23 school year and September 27, 2022 the IHO ordered funding to be "at [the district's] standard rate" (id. at pp. 16-17). Lastly the IHO ordered the district to conduct "triennial or other necessary evaluations" of the student and convene a CSE to develop an IEP for the student with specific timeframes (id. at p. 17).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's answer to the district's cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited in detail.[3]

[3] Initially, as the district has not appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year the IHO's finding is final and binding on the parties and will not be reviewed on appeal (Answer ¶ 4 n. 2; see also 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 crux of the parties' dispute on appeal is whether the IHO correctly awarded funding for the parent's unilaterally obtained services, and whether the IHO correctly reduced the parent's requested rates for her unilaterally obtained services. Additionally, the district's cross-appeal of the IHO's order regarding evaluations and a reconvene of the CSE must be addressed.

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]).[4] "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.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving

[4] 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]).

[5] 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.).

special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

Having reviewed the IHO's decision, the parent's appeal, and the district's cross-appeal, this matter must be remanded to the IHO for further proceedings. Specifically, the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims and ordered relief that may not have been consistent with his other findings. As a result, much of the parties' claims on appeal do not deal with the primary issue in this proceeding and it would be problematic to address the parties' appeal without addressing the appropriateness of the unilaterally obtained services in the first instance. Therefore, the IHO's decision must be vacated, and the matter remanded to the IHO for further administrative proceedings utilizing the correct legal analysis.

A. SETSS

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 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 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 provided by Budding Buds was 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 ¶ 4 [internal quotes omitted]).

The district contends that the bases the IHO cited as reasons to reduce the rate for reimbursement, specifically the qualifications of the private SETSS provider, the lack of a

bilingual extension, the provision of 1:1 SETSS rather than group and the "stale" IEP cannot support a reduction in the rate of reimbursement under the "Prong III" equities determination, but could support a finding that the unilateral SETSS was not appropriate under the "Prong II" portion of the correct legal standard.

The district requests a finding that the unilaterally obtained SETSS were not appropriate for the student. The district requests in the alternative that in the event it is found that the unilaterally obtained SETSS were appropriate, the matter should be remanded to allow for further development of the hearing record on the rate reduction issue.

The parent contends that the IHO "found that the [p]arent satisfied the Burlington/Carter analysis and implemented [p]arent's program"; however, review of the IHO's decision shows that although the IHO referenced the Burlington/Carter standard, the IHO did not make any 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. 13-14). 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 or reimbursement of 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 ¶¶11-13). 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

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 on appeal that the IHO's rate reduction was arbitrary because caselaw shows that unless there has been a showing that the rate charged was excessive to the market there is no basis to reduce it and no such evidence has been entered in this matter. With respect to the bases for rate reduction cited by the IHO, the parent contends that the parent should be afforded leeway on the provider's qualifications and the move from group to 1:1 SETSS because the parent was left in the position of cleaning up the district's failure to implement the IESP. The district argues that—while the IHO's bases for reducing the rate supported a finding that the services were inappropriate—the same reasons were not proper bases to reduce the rate of funding as explained above. The district further asserts that there were proper bases in the hearing record to reduce or deny reimbursement upon equitable grounds.

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 also 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. Relief-Evaluations and CSE Reconvene

Finally, the district cross-appeals from the IHO's order for the district to conduct "triennial or other necessary evaluations" and convene a CSE to develop an IEP for the student with specific timeframes, as the parent never requested such relief, and requests that the order to conduct evaluations and reconvene the CSE be annulled. The parent asserts that the IHO was within his authority to address any remedy for the district's denial of FAPE for the 2022-23 school year.

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO may not use this authority to order relief to remedy an issue that was not raised. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

Review of the parent's September 28, 2022 due process complaint notice reveals that the parent did not request an order for the district to conduct evaluations or an order for the district to reconvene the CSE (see generally Parent Ex. A). Additionally, as noted above, the parent has not disagreed with the district's educational programming for the student, at least as part of this proceeding, and was merely seeking that the services recommended in the November 2021 IESP be implemented (id.). Based on the foregoing, the IHO's award ordering the district to evaluate the student did not address issues raised in the present matter, and, therefore the district's cross-appeal on this point will be sustained.

Nevertheless, the district is reminded of its obligations in that generally a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional,

developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

D. 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.

VIII. 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 SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 7, 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 27, 2023

STEVEN KROLAK
STATE REVIEW OFFICER