The University of the State of New York

The State Education Department
State Review Officer
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No. 24-076

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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) directly fund the costs of her son's special education teacher support services (SETSS) delivered by Future Plus Services (Future Plus) at a specified rate for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision that ordered the district to directly fund the costs of the student's SETSS services at a capped rate. The appeal must be sustained in part. The cross-appeal must be dismissed.

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 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections 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

A CSE convened on May 18, 2023 and developed an individualized education program (IEP) for the student for the 2023-24 school year (Dist. Ex. 4). Via a letter dated August 21, 2023, the parent notified the district that she was rejecting the May 2023 IEP and intended to unilaterally

place the student at a religious nonpublic school and seek tuition funding from the district (Dist. Ex. 3).

Thereafter, the parent notified the district, via an email dated September 12, 2023 that, "[d]ue to various circumstances," she decided to enroll the student at a different religious nonpublic school for the 2023-24 school year (Dist. Ex. 2). The parent requested that a CSE convene "and consider [the student's] needs for equitable services as a parentally placed student" (id.). A CSE convened on September 22, 2023, found the student eligible for special education as a student with a speech or language impairment, and formulated an IESP with a projected implementation date of October 6, 2023 (see generally Parent Ex. B).[1, 2] The September 2023 IESP recommended that the student receive five periods per week of direct/group SETSS in Yiddish; one 30-minute session per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of group speech-language therapy in Yiddish; one 30-minute session per week of individual occupational therapy (OT) in English; one 30-minute session per week of group OT in English; one 30-minute session per week of group counseling services in Yiddish; and one 30-minute session per week of individual counseling services in Yiddish (id. at pp. 16-17).

In a letter to the district dated November 13, 2023, the parent, through a lay advocate, stated agreement with the recommendations contained in the September 2023 IESP but asserted that she "ha[d] been unsuccessful in locating a provider for the mandated services in the IESP at the [district's] standard rate" and that the district had not notified the parent of providers who would deliver the related services (Parent Ex. C). The parent notified the district of her intent to unilaterally secure the services recommended in the IESP privately and seek funding or reimbursement for the costs thereof from the district (id.). The parent indicated that, if she could not locate providers, she would request make-up services from the district (id.).

In a due process complaint notice dated November 11, 2023, the parent, through a lay advocate, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year in that the district failed to ensure the delivery of the services mandated in the September 2023 IESP (see Parent Ex. A). The parent requested that the district fund the services set forth in the September 2023 IESP as the student's stay-put placement during the pendency of the proceedings (id. at p. 3). For relief, the parent requested that the district reimburse the parent for or directly fund the costs of the services privately obtained by the parent at the providers' rates (id. at pp. 4-5).

An IHO appointed by the Office of Administrative Trials and Hearing (OATH) convened an impartial hearing on January 18, 2024, which concluded on January 26, 2024, after two days of proceedings (Tr. pp. 1-55). In a decision dated January 27, 2024,[3] the IHO determined that the

[1] The hearing record includes two copies of the September 2023 IESP (compare Parent Ex. B, with Dist. Ex. 1). For purposes of this decision, only the parent's exhibit will be cited.

[2] 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]).

[3] Although the decision is dated January 27, 2023, it is undisputed that this was a typographical error (see Req. for Rev. at p. 1; Answer at p. 1 & n.1); accordingly, the date of the decision shall be referred to as January 27, 2024.

district failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 4). The IHO characterized the relief sought by the parent as compensatory education (id. at pp. 4-6). Regarding the privately-obtained SETSS, the IHO found that the services delivered by a teacher with Future Plus were appropriate, but that the rates charged by Future Plus were excessive, and, therefore, ordered the district to directly fund the costs of five periods per week of SETSS at a rate not to exceed $75 per hour for the 2023-24 school year (id. at pp. 7, 8). The IHO noted that the parent had been unable to locate a provider to deliver related services for the 2023-24 school year but directed the district to, upon submission of "a valid contract between Parent and provider" and invoices, directly fund the speech-language therapy, OT, and counseling delivered to the student during the 2023-24 school year at the frequencies and durations set forth in the September 2023 IESP from a "qualified provider of Parent's choosing . . . at a reasonable market rate" (id. at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals.[4, 5] The parent argues on appeal that the IHO erred in ordering the district to fund the services delivered by Future Plus at a reduced rate of $75 compared to the rate set forth in the parent's contract with Future Plus. The parent contends that the IHO inappropriately relied on the details of SETSS provider's teacher certification to find that a reduction was warranted.

The district cross-appeals the IHO's decision, arguing that the IHO applied an incorrect legal standard and that the parent did not meet her burden to prove that the SETSS delivered by Future Plus were appropriate. The district argues that the IHO erred by not applying the Burlington/Carter standard. The district contends that, applying the Burlington/Carter standard, the parent failed to meet her burden to prove the appropriateness of the SETSS services obtained for the student from Future Plus. The district asserts that the evidence in the hearing record regarding the student's receipt of SETSS was "scant" and did not provide "details as to the strategies, teaching methodology, or specific goals or objectives that the [s]tudent was being

[4] State regulation provides that a petitioner shall file proof of service of the notice of intention to seek review and of the request for review (8 NYCRR 279.4[d]). Although the parent's advocate filed proof of service of the notice of intention to seek review, the appeal filing did not include proof of service of the request for review. This is notwithstanding that the lay advocate filled out the form for electronic filing with the Office of State Review indicating that she included an affidavit of service of the request for review with the filing. Ultimately, the district does not allege that service of the documents in this matter was defective. Nevertheless, the parent's advocate is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an advocate's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

[5] The district concedes that it failed to serve a notice of intention to cross-appeal, but requests that its cross-appeal be heard as there is no prejudice to the parent. As an exercise of my discretion, the district's cross-appeal will be considered (see 8 NYCRR 279.8[a]).

taught." The district additionally argues that "the IHO accurately pointed out that the service provider was not certified in the age range/educational level of the [s]tudent."

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]).[6] "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.).[7] 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

[6] 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]).

[7] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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 guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

As an initial matter, neither party has appealed the portions of the IHO's decision which found that the district denied the student a FAPE and which directed the district to directly fund any speech-language therapy, OT, or counseling delivered by qualified provider(s) of the parent's choosing during the 2023-24 school year at market rate (see IHO Decision at pp. 4, 8-9). Accordingly, these findings have become final and binding on the parties and will not be further discussed (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]).

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 from the district for the cost of the student's attendance there. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Future Plus for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "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]; 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."]).

The parent's request for district funding of the privately-obtained SETSS at issue here 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]).[8] 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).

A. Unilaterally Obtained Services

Turning to a 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). 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 (id. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. 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 Bd. 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] ["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.

[8] 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 Future Plus (Educ. Law § 4404[1][c]).

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

Although not in dispute, a description of the student's needs is necessary to determine the issue on appeal; namely, whether the parent met her burden to show that the unilaterally-obtained SETSS constituted specially designed instruction. Based on the hearing record, the student's needs at the start of the 2023-24 school year can best be gleaned from the September 2023 IESP (Parent Ex. B). According to the September 2023 IESP, the student was eligible for special education as a student with a speech or language impairment, was 14 years of age, and spoke English and Yiddish but was considered to be Yiddish dominant (id. at pp. 1-2). The IESP reflected that a cognitive assessment of the student in 2020 yielded verbal comprehension, fluid reasoning, and working memory index scores and a full scale IQ in the low average range, and visual-spatial skills in the average range; the student's processing speed skills were not assessed at that time (id. at p. 1). According to the IESP, the student had "a hard time being attentive to higher order cognition," and exhibited deficits in working memory (id. at p. 2).

Academically, the September 2023 IESP reflected that, in April 2023, a representative from the nonpublic school the student attended at that time reported that in reading the student was "good with phonetic concepts," and that he had a hard time applying word attack skills, made careless mistakes, and struggled to make meaning from context and with "the main facts during reading" (Parent Ex. B at p. 2). Teacher reports developed during the 2022-23 school year indicated that the student presented with "significant delays in reading skills," and, although he decoded "multiple texts with moderate success," he often made mistakes (id. at p. 3). The student read at a reduced pace and struggled to "read for effective meaning," use text features to locate facts efficiently, ask and answer questions to show understanding, determine the meaning of words and phrases, and show adequate deductive reasoning skills (id.).

In writing, the September 2023 IESP indicated that the student had a hard time expressing his thoughts and feelings (Parent Ex. B at p. 2). The student reportedly had difficulty using language effectively and efficiently (id.). The IESP documented that the student presented with "various deficits in graphomotor ability," such as difficulty persisting at writing tasks, reduced manuscript legibility, and need for "significant practice" to improve age-appropriate graphomotor skills, and directionality and letter formation skills (id. at p. 4).

In math, the student was learning multistep procedures but struggled with that skill; becoming frustrated and upset when challenged (Parent Ex. B at p. 2). He needed intervention to comprehend multiplication equations as comparisons, complete multiplication and division numerical and word problems, and demonstrate understanding of place value in multi-digit numbers (id. at p. 3). The IESP indicated that the student had difficulty focusing which impeded his ability to remain on task and attend to new lessons and he required "significant repetition and review to master and gain fluency in multiple math procedures (id.).

According to the September 2023 IESP, the student presented with receptive, expressive, and pragmatic language deficits (Parent Ex. B at pp. 2, 4). Specifically, the student had difficulty organizing language-based information, thinking critically to answer questions involving higher-order thinking skills, retelling stories in order with sufficient detail, relating past experiences accurately, and using descriptive skills (id. at pp 2, 4). The student presented with poor auditory comprehension and processing skills demonstrated by difficulty answering questions requiring reasoning or inferences, processing information effectively, following two to three step directions in class, memorizing and using new vocabulary (id. at p. 2). Expressively, the student exhibited difficulty formulating grammatically correct sentences, answering questions that required reasoning or inferences, using expressive vocabulary, and communicating feelings, beliefs, and thoughts (id. at p. 4). The student's pragmatic deficits were described as difficulty seeing others' points of view, showing interest, and sharing thoughts with others, interpreting verbal and nonverbal social cues, and understanding figurative language (id. at pp. 2, 4).

Regarding whether the unilaterally-obtained SETSS constituted specially designed instruction, the parent testified in an affidavit that, after the September 2023 CSE meeting, she contracted with Future Plus to provide the student's SETSS and speech-language therapy (Parent Ex. D ¶ 5).[9] The owner and executive director of Future Plus Services (director) testified that he was familiar with the student and, since the beginning of the 2023-24 school year, his agency provided five hours of "direct 1:1" SETSS to the student in his "mainstream school," outside of the classroom (Tr. p. 43; Parent Ex. E ¶¶ 4, 11, 12, 14, 15, 18).[10] According to the director, the student's SETSS provider was certified by New York State to teach students with disabilities and "trained and experienced to teach literacy and comprehension to school aged children and adolescents" (id. ¶ 13).[11]

[9] The owner and director of Future Plus testified during the impartial hearing that Future Plus was not providing the student's speech-language therapy services (Tr. pp. 38-39).

[10] During the impartial hearing, the director testified that he was not sure whether the student had "a summer program" (Tr. pp. 33-34).

[11] The director testified that the student's SETSS provider was "certified by [the district]" and the evidence shows that effective January 13, 2022, the SETSS provider was issued "Students With Disabilities (Grades 1-6), Emergency COVID-19" certification, with an "Original Exp. Date" of January 31, 2024 (Tr. pp. 35-36; Parent Ex. G). The director testified that SETSS providers at his agency received training to "understand how to specialize and help the student" (Tr. p. 32; Parent Ex. E ¶ 10). I note that in an analysis of unilaterally-obtained services, the agency need not employ certified special education teachers (Carter, 510 U.S. at 13-14), and, therefore, the details of the provider's certification, including the grade level and the expiration date therefor, in and of themselves, would not be a bar to relief.

The director testified that, in addition to providing SETSS, the SETSS provider also prepared for sessions, created goals, wrote progress reports, and met with teachers and parents (Parent Ex. E ¶ 14). The director further testified that goals were developed for the student to work on during the school year, which were reviewed on a quarterly basis (id. ¶ 16). The student's progress was measured through quarterly assessments, consistent meetings with the provider and support staff, observation of the student in the classroom, and daily session notes (id. ¶ 19). The hearing record does not include the aforementioned quarterly assessments, notes from meetings with staff, classroom observation reports, or the daily session notes. However, according to the director, the progress report in evidence was an accurate representation of what the student was working on during the "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 17). The director testified that he did not know what materials were used with the student, but that the SETSS provider assisted the student with reading, writing, math, and social skills (see Tr. p. 31).

Turning to the January 2024 progress report, the SETSS provider reported that the student's reading skills were at a fifth grade level and, while the student decoded texts with "moderate success," challenges persisted with reading multisyllabic words, maintaining an appropriate reading pace, and comprehending texts effectively (Parent Ex. H at p. 1). Areas of additional concern included "advanced question comprehension and deductive reasoning," which required "intervention for enhanced literacy skills" (id. at pp. 1-2). According to the SETSS provider, the student would be "directly taught comprehension skills such as sequencing, story structure using the plot mountain, how to make an inference and draw a conclusion, and the different types of figurative language" (id. at p. 2). Further, the student would have the opportunity to use the skills with text the teacher read aloud, and then with text the student read independently at his level (id.).

The SETSS progress report indicated that the student's writing skills were at a fifth grade level, and that, while the student's writing strengths were in basic sentence structure and advanced grammar skills, he "face[d] obstacles in graphomotor ability, sustained writing tasks, and manuscript legibility" (Parent Ex. H at p. 1). Additional challenges requiring "targeted intervention" included "persisting at writing tasks, manuscript legibility, and deductive reasoning" (id. at p. 2). According to the report, the student's graphomotor deficits necessitated "formal auditory cues for improvement," and use of the "Writing Workshop program" aimed to "amplify [the student's] writing skills through creative expression" (id.).

According to the progress report, the student's math skills were on a sixth grade level, and he excelled in rote procedures for addition, subtraction and multiplication operations, coupled with "progress in identifying quantitative terminology," but he encountered challenges in comprehending multiplication equations and using properties of operations (Parent Ex. H at p. 1). The SETSS provider reported that "intervention [wa]s warranted in interpreting multiplication equations and representing verbal statements, underscoring the need for targeted support and repetition" (id.).

In the area of social skills, the progress report indicated that the student "excel[led] in social dynamics, forming positive connections with peers and seeking additional friendships," and that "areas for improvement" included "picking up social cues and navigating academic settings" (Parent Ex. H at p. 2). The student also exhibited challenges with self-consciousness, confidence, and adjusting to changes, which required "support" (id.). The student also required information to be broken down due becoming overwhelmed with tasks, and "targeted support" due to challenges

with emotional regulation (id.). Additional areas of improvement included "sensitivity and social nuances, especially facial expressions" and the SETSS provider indicated that "[t]ailored special education services, including consistent interventions, sensory breaks, and targeted instruction, [we]re recommended to address these challenges" (id.).

The SETSS provider concluded the progress report by recommending that the student continue to receive special education services, including "consistent interventions and visual aids," and "[s]pecialized interventions" to improve academic skills (Parent Ex. H at p. 2).[12]

Next, regarding whether the evidence in the hearing record shows that the student made progress, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Although not dispositive, regarding the district's allegation that the evidence did not indicate that the student made progress, the parent testified that the student had made "much progress and continue[d] to . . . mak[e] progress" with the SETSS provided to her son (Parent Ex. D ¶ 7; see Tr. pp. 44-45).[13] The SETSS provider reported that the student "demonstrate[d] noteworthy academic progress, showcasing strengths in various domains while also presenting specific areas requiring targeted attention" (Parent Ex. H at p. 1). The director also testified that the student had "already shown signs of progress" with the SETSS provider but continued to require five periods per week of SETSS (Parent Ex. E ¶¶ 20, 21). Comparison of the grade levels the student was performing at during the 2022-23 school year (reading: mid-fourth grade, math: beginning fourth grade) with the Future Plus progress report developed in January 2024 during the 2023-24 school year (reading: fifth grade, math: sixth grade) also shows that the student was making progress (compare Parent Ex. B at pp. 2, with Parent Ex. H at p. 1).

Based on the foregoing, the unilaterally-obtained SETSS were similar in frequency and duration to the SETSS recommended for the student in the September 2023 IESP, and the parent established through documentary and witness testimony that the SETSS were delivered to the student during the 2023-24 school year by Future Plus, that they constituted instruction specially

[12] The parent testified that the SETSS provider was "working on a lot of speech and language concerns" with the student, that included "[a] lot of breaking down information into smaller parts so that it's easier for [the student] to understand," which "carrie[d] over into all subjects" (Tr. p. 44).

[13] The parent testified that she had not received "session notes" from the SETSS provider and that she "would hope" that the student's progress had been recorded (Tr. p. 45).

designed to meet the student's unique needs, and that the student made progress during the 2023-24 school year. Although the IHO failed to apply the Burlington/Carter legal standard in evaluating the parent's requested relief, the IHO correctly held that the evidence in hearing record established that the unilaterally-obtained SETSS delivered to the student were appropriate (IHO Decision at p. 7).

B. Equitable Considerations

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"]).

Thus, among the 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]). An IHO may consider evidence regarding the reasonableness of the costs of the program or whether any segregable costs exceeded 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).

Regarding the cost of the SETSS delivered by Future Plus, the director indicated that the hourly rate of $195 set forth in the contract with the parent included $100 per hour paid to the provider, as well as "one-on-one supervision, educational resources and support, professional development and materials, employment taxes, administrative costs and overhead costs" (Parent Ex. E ¶¶ 7, 9; see Tr. pp. 31-32; Parent Ex. F). In response to cross-examination by the district regarding whether the rate charged was comparable to other agencies, the director testified that "[e]verybody charge[d] these rates" (Tr. p. 30).

During the impartial hearing, the district argued that a "fair reasonable market rate" for SETSS could be gleaned from a report conducted by the American Institutes for Research (AIR report) and that the rate set forth in the contract with Future Plus "would be more than a fair market

rate" (Tr. pp. 10-11). The district also asked that "ancillary fees that d[id]n't go directly towards the education . . . be reduced" from the rate awarded (Tr. p. 49).

The AIR report included in the hearing record is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Dist. Ex. 5). The district commissioned the report to "[d]evelop an approach to using data from the Bureau of Labor Statistics (BLS) to calculate hourly rates for independently contracted providers" and to "[c]alculate hourly rates for special education teachers in the region that [the district] c[ould] use to determine a fair market rate for its Special Education Teacher Support Services (SETSS) special education teachers" (Dist. Ex. 5 at p. 4). The report describes its methodology of using Bureau of Labor Statistics salary data for occupations that resemble the positions in the district and converting the salaries to hourly rates with adjustments for fringe benefits, indirect costs, inflation, and the teachers' educational attainment and experience (id. at pp. 6-12).

In reducing the rate at which he ordered the district to fund the services from Future Plus, the IHO found "the SETSS provider d[id] not have the proper certifications to teach" at the student's grade level and that the "SETSS provider's certifications [we]re due to expire" soon (IHO Decision at p. 7).[14] The SETSS provider held a "Students With Disabilities (Grades 1-6), Emergency COVID-19" certification that was set to expire at the end of January 2024 (Tr. pp. 35-36; Parent Ex. G). The AIR report describes methodology for hourly rate adjustments to take into account different combinations of educational attainment ("measured as a combination of degree, earned college credits, and/or other professional development accomplished, such as obtaining a certificate from the National Board for Professional Teaching Standards") and/or experience (number of years teaching within the district) (Dist. Ex. 5 at pp. 6-7, 9-10, 19-24). However, the AIR report does not factor State certifications in describing hourly rate adjustments (see generally Dist. Ex. 5). The hearing record does not reflect the teacher's educational background or experience, and is not developed regarding how a teacher's State certifications might impact the reasonableness of an hourly rate charged for services. Accordingly, the evidence in the hearing record does not support the IHO's reduction of the rate ordered for the services delivered by Future Plus based on the teacher's certification.

[14] The parent argues that, in considering the teacher's certification, the IHO comingled consideration of whether the unilaterally obtained services were reasonably calculated to enable the child to receive educational benefits with equitable considerations including the question of whether the rate of pay for the services were excessive. The Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations within the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). As set forth above, the IHO did not apply a Burlington/Carter analysis; accordingly, the legal standards adopted and applied by the IHO were lacking in a more fundamental respect. However, the IHO set forth his rationale for a reducing the rate for services awarded on equitable grounds, which are discussed herein.

The IHO also weighed the amount of overhead included in the total rate charged by Future Plus compared to the limits on non-direct care costs described by the State Education Department (SED) for reimbursement of providers for students with disability, finding the source to be "a reasonable benchmark for assessing reasonableness of rates charged" (IHO Decision at p. 7, citing "Tuition Rate Setting Methodology for 2022-23 Rates for School-Age Providers Serving Students with Disabilities," Rate Setting Unit [updated Mar. 2023], available at https://www.oms.nysed.gov/rsu/Rates_Methodology/MethodLetters/documents/2022-23%20School-Age%20Methodology%20MemoFINALupdated3-23-23.pdf). On appeal, the parent does not challenge the IHO's reliance on the SED memorandum for comparison purposes in finding a ratio of 30/70 for non-direct care/direct care costs to be reasonable and the overhead charged by Future Plus to be excessive (IHO Decision at p. 7). Accordingly, I find no reason to depart from the IHO's finding that, putting aside the issue of the provider's certification discussed above, "an appropriate reimbursement of approximately $142.86 dollars per hour" would be warranted (id.).

Besides arguing that the parent's requested SETSS reimbursement rate was excessive, the district did not raise any other equitable grounds supporting the IHO's reduction of the SETSS rate.[15] For the reasons set forth above, the evidence in the hearing record does not support the IHO's equitable determination to reduce the rate for funding of the unilaterally-obtained SETSS services during the 2023-24 school year based on the provider's certification; however, the parent does not dispute that portion of the IHO's rationale related to the overhead costs incorporated in the rate charged by Future Plus. Accordingly, the IHO's order will be modified to require the district to fund the SETSS delivered by Future Plus during the 2023-24 school year at the rate of $142.86 per hour.

VII. Conclusion

The parent sustained her burden of demonstrating the appropriateness of her unilaterally-obtained services. As for equitable considerations, the evidence in the hearing record does not support the IHO's reduction of the rate to be paid Future Plus for SETSS as excessive based on the teacher's State certification; however, as the parent does not challenge the portion of the IHO's rationale related to overhead costs charged by the agency, the district will be required to fund the SETSS delivered by Future Plus at the reduced rate of $142.86 per hour.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

[15] For example, during the impartial hearing, the district argued that the parent was not entitled to the services for the full 10-month school year given the timing of the parent's request for equitable services and the CSE meeting (see Tr. p. 48); however, in its cross-appeal, the district did not allege that the IHO erred in ordering relief for the full 10-month school year. In addition, the district does not raise any allegations pertaining to the timing of the parent's notice to the district of her intent to privately obtained services and seek district funding. Accordingly, these issues are deemed abandoned and will not be further discussed (see 8 NYCRR 279.8[c][4]).

IT IS ORDERED that the IHO's decision dated January 27, 2024, is modified by reversing that portion which directed the direct to fund the SETSS delivered to the student by Future Plus during the 2023-24 school year at a rate not exceed $75.00 per hour; and

IT IS FURTHER ORDERED that the district shall directly fund the SETSS delivered to the student by Future Plus during the 2023-24 school year at a rate not to exceed $142.86 per hour.

Dated: **Albany, New York**
May 3, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER