The University of the State of New York

The State Education Department
State Review Officer
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No. 24-097

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 Toni L. Mincieli, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's privately-obtained special education services delivered by Ed Achievers for the 2023-24 school year. The district cross-appeals from the IHO's decision arguing that the IHO applied an incorrect legal standard. The appeal must be dismissed. 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

The student was parentally placed in a nonpublic school, and, on December 19, 2018, a CSE convened and, having found the student eligible for special education as a student with a speech or language impairment, developed an IESP that recommended the student receive three

periods per week of group special education teacher support services (SETSS) in Yiddish (Parent Ex. B at pp. 1, 5, 7).[1]

Approximately four and a half years later, on April 30, 2023, the parent signed a form stating that the student would be parentally placed for the 2023-24 school year and requesting special education services be delivered by the district (Parent Ex. D).

On August 24, 2023, the parent executed a contract with Ed Achievers, which provided that the company would "make every effort to implement" three hours per week of SETSS in Yiddish at a specified rate (Parent Ex. G).[2]

In a letter to the district dated October 5, 2023, the parent, through her advocate, informed the district that it had not assigned the student a provider to deliver the services and that the parent had been unable to locate providers to deliver the services set forth in the December 2018 IESP "at the [district]'s standard rate" (Parent Ex. C at p. 1). The parent notified the district of her intent to seek "funding or reimbursement for the services implemented by parents' provider" or, alternatively, to "request make-up services at a future time" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated November 26, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the district had failed to conduct mandated triennial evaluations of the student and had not convened a CSE to engage in educational planning for the student since December 2018 (id. at p. 2). The parent also alleged that the district offered "no support or contact" in obtaining a provider to deliver the student's SETSS (id. at p. 3). As relief, the parent requested that the district pay for the SETSS that was privately-obtained by the parent at "the provider's rate," as well as reimbursement for the costs of the student's travel to the Ed Achiever's location at which he received the private SETSS (id.).[3] The parent also invoked pendency and asserted that the student's stay-put placement lay in the December 2018 IESP (id. at p. 4). The parent requested that the district fund the Ed Achievers program during the pendency of the proceedings (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 25, 2024 (Tr. pp. 1-19). In a decision dated February 7, 2024, the IHO found that there was "no dispute that [the] Student [wa]s entitled to services pursuant to the" December

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] Ed Achievers has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Although the parent had already entered into the contract, the parent did not identify Ed Achievers in the due process complaint notice.

2018 IESP and that the district failed to meet its burden to prove that it implemented the SETSS mandated therein (IHO Decision at p. 3). The IHO further found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead, "a compensatory services approach" should be applied when a parent alleges that the district failed to implement an IESP (id. at pp. 4-7). Nevertheless, the IHO found that the parent had the burden to "explain the plan [she] suggest[ed] was appropriate" and that such plan had to be "reasonably calculated to provide appropriate services" (id. at p. 7).

Turning to the evidence in the hearing record regarding the privately-obtained SETSS, the IHO found "little evidence as to the appropriateness of the program" (IHO Decision at p. 7). The IHO noted that the contract for services did not specify that the SETSS would be delivered bilingually and that the special education teacher did not possess certification for delivering instruction to the student's grade level (id.). In addition, the IHO found that the undated progress report included in the hearing record was "clearly two or three years old" and had "clearly been cut and pasted" (id.). The IHO found the progress report unreliable for the purposes of stating the student's levels or progress (id.). Accordingly, the IHO concluded that the parent failed to establish that the proposed plan of compensatory education was appropriate (id.). The IHO further indicated that, if applying the Burlington/Carter approach, the rulings regarding the appropriateness of the privately-obtained services would be the same (id.). Accordingly, the IHO denied the parent's request for district funding of the privately-obtained SETSS (id.). The IHO also found no evidence presented regarding the parent's request for reimbursement of the costs of transportation (id.).

The IHO ordered the district to conduct an evaluation of the student and convene a CSE to develop an appropriate individualized education program (IEP) or IESP for the current school year (IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals through a lay advocate, alleging that the IHO erred in denying her request for direct funding to the SETSS provider for the costs of SETSS delivered to the student during the 2023-24 school year.[4] The parent alleges that "in an equitable services case under

[4] There were significant deficiencies in the parent's appeal filing in this matter. 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]). The Office of State Review's website provides further elaboration of this requirement along with an Affidavit of Service form that a party can use to demonstrate proof of service (see https://www.sro.nysed.gov/book/serve-and-file-request-review#Affidavit). Initially, the parent's lay advocate did not file a copy of the notice of intention to seek review. Regarding service of the notice of intention to seek review, the lay advocate filed what appears to be an email communication from a process server, dated March 1, 2024, including a photograph of a building and a note setting forth directions from a receptionist for serving the district at a different location. The lay advocate also filed an email from the advocate to recipients with the school district email domain, dated March 1, 2024 at 5:01pm, that appears to have documents attached. These submissions do not satisfy the requirement for proof of service of the notice of intention to seek review. In addition, although the lay advocate filled out the form for electronic filing with the Office of State Review indicating that the district had been served on March 18, 2024 and that she included an affidavit of service of the request for review with the filing, no proof of service of the request for review was actually filed with the appeal. 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

Education Law § 3602-c, the burden [of] proof and persuasion lies entirely with [the district]." The parent argues that, unlike matters falling under the Burlington/Carter framework, here, "there is no disputed placement" as the parent agreed with the last IESP developed by the district. The parent also contends that any lack of progress by the student would be attributable to the district for its failure to update the IESP and for shifting the burden to the parent to locate providers. Nevertheless, the parent argues that her sworn affidavit submitted during the impartial hearing demonstrated the student's progress during the 2023-24 school year. In addition, the parent asserts that the IHO should not have weighed concerns about the provider's certification since private providers need not be certified to be found appropriate. The parent argues that the IHO inappropriately failed to provide the student a remedy for the 2023-24 school year and should have directed the district to fund the privately-obtained SETSS or, "at the very least," required the district to continue the services outlined in the December 2018 IESP until a new IESP could be developed or to provide any services recommended in a new IESP retroactively in the form of compensatory education.

In an answer with cross-appeal, the district argues that the IHO erred in finding that the Burlington/Carter analysis did not apply but asserts that, nevertheless, the IHO properly concluded that the parent did not meet her burden to prove that SETSS provided by Ed Achievers were appropriate. As alternative equitable basis to deny the relief sought by the parent in part or in full, the district asserts that the parent did not provide the district with 10-day notice of her intent to unilaterally obtain services and seek district funding until after the 2023-24 school year was underway. Finally, the district argues that the parent's alternative request for compensatory education should be denied as the parent did not raise such a request during the impartial hearing.

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

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). In future matters, the lay advocate should submit proof of service in the form of an affidavit, in which the individual who served the documents describes what papers were delivered and where, when, how, and to whom the papers were delivered, and swears under penalties of perjury that the information is true.

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

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

VI. Discussion

A. Legal Standard

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 parental placement. Instead, the parent alleged that the district failed to engage in educational planning or 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 Ed Achievers for the student without the consent of the school district

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

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

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 [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

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

The IHO articulated the basis for her view that the Burlington/Carter analysis was not appropriate. While I may ultimately disagree with the IHO's view on the appropriate legal standard to apply, it is clear that she wrestled with the question. I will address the IHO's points seriatim. First, however, while I acknowledge that the use of the Burlington/Carter framework is adopted by analogy given that the matters here involved Education Law § 3602-c and not the IDEA, there is no direct authority from the courts as to what other standard might be appropriate when a parent privately obtains special education services that a school district failed to provide and then retroactively seeks to the costs of such services from the school district. I also note that IHOs have not approached the same question with consistency. Some have applied a Burlington/Carter framework. Others have disagreed with the use of the Burlington/Carter standard and taken differing approaches, I have found the alternative approaches adopted insufficient to address the factual circumstances in these cases. I address some of the reasons for this in greater detail below.

[7] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Ed Achievers (Educ. Law § 4404[1][c]).

The IHO noted that the district's statutory failures in this matter fall under State law, specifically Education Law § 3602-c, which "does not have a corollary in the IDEA or other federal statutes" (IHO Decision at p. 4). While the IHO is correct insofar as the due process hearing requirements for a parentally placed student fall under a State law, Education Law § 3602-c nevertheless carries out the federal mandate that school district expend a proportionate share of their federal IDEA grant to fund the provision of special education services to students with disabilities who have been parentally placed in nonpublic schools (Educ. Law § 3602-c[2-a]; see 20 U.S.C. § 1412 [a][10][A]). Thus "states are provided federal funds, and local school districts are required to allocate a proportional share of those funds to privately placed children with disabilities in an amount determined by the number of such children compared with the total number of disabled children in the district as a whole" (J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665 (S.D.N.Y. 2011]).

It is clear that, under federal regulations alone, a student with a disability has no individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school (see 34 CFR 300.137[a]). However, the states themselves are not precluded from providing a higher level of educational services provided it does not conflict with the IDEA (see Special Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M., 861 F.3d 769, 773 [8th Cir. 2017]; Fowler v. Unified Sch. Dist. No. 259, Sedgwick Cnty., Kan., 128 F.3d 1431, 1439 [10th Cir. 1997]). To be sure, there has been no judicial interpretation to date of the language in the State's dual enrollment statute in which the Legislature required school districts to "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" (Educ. Law § 3602-c[2][b][1]).[8] But the statute is not bereft of guidance because it invokes similar procedures and protections as set forth in the IDEA in that it provides that a district of location's CSE must review a parent's request for dual enrollment 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]" and that "[r]eview of the recommendation of the [CSE] 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]). Thus I disagree with the IHO that the provisions of § 3602-c are entirely a creature of State law and that there is no corollary between the district's failures under State law and the IDEA.

The IHO also indicated these matters were distinguishable from the Burlington/Carter scenario because the type of violation by the district was different (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and the type of privately-obtained relief was different (i.e., supportive services versus private school tuition) (IHO Decision at p. 4).

As for the underlying violation, the fact that the Burlington and Carter cases were IEP disputes, that is, disputes over the adequacy of the programming design, is of little consequence.

[8] If it is not a FAPE precisely it appears to be something similar, taking into account that the student has been dually enrolled in the nonpublic school by the parent as well as the public school.

It just so happens that parties more often disagree about which type of programming is appropriate for a student with a disability, and the courts have explained that the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has also explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

Nor has the approach been different in cases in which the parents have already obtained unilateral services in lieu of the public services and challenge the district's capacity to implement the student's programming. In instances where a parent has alleged nonspeculative challenges to a district's implementation or capacity to implement the provisions in the IEP, courts have found parents entitled to relief in the form of tuition reimbursement applying the Burlington/Carter standard (see, e.g., W.W. & D.C. v. New York City Dep't of Educ., 160 F. Supp. 3d 618, 628-29 [S.D.N.Y. 2016]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 679-80 [S.D.N.Y. 2012]; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd A.S. v. New York City Dep't of Educ., 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

As for supportive services versus school tuition, the IHO notes language in the State burden of proof statute referencing "tuition reimbursement" and the parent's burden to prove only the appropriateness of the "unilateral placement" and opines the plain meaning of tuition means the cost for enrollment in a school and, further, that placement means a school, not services (Educ. Law § 4404[1][c] [emphasis added]; IHO Decision at p. 5).[9, 10] Regarding the definition of tuition, the IHO cited Education Law § 4401(5), which defines tuition as "the per pupil cost of all instructional services," but then went on to conclude, without citation, that instructional services did not include related services and that SETSS was a related service, not an instructional service (see IHO Decision at p. 5). In the statute, the phrase "cost of all instructional services" is qualified by the phrase "as determined by the commissioner" and is meant to give the Commissioner of Education discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating student with disabilities (Educ. Law § 4401[5]; Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach, 82 A.D.2d 993, 994, modified on other grounds, 56 N.Y.2d 518 [1982]). It is not clear how this definition would impact the interpretation of tuition for purposes of examining a district's obligation to fund a unilateral placement as a remedy for a denial of a FAPE, which need not be approved by the Commissioner. Moreover, State guidance pertaining to a school district's authority to contract for the provision of core instructional services defines "core instructional services" as "those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education" including "both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations" ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Although the term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6), to the extent it comprises a special education service delivered by a certified special education teacher, it falls within the scope of this definition of instructional services.

Moreover, in fashioning appropriate relief, courts have interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of "related services" (see Burlington, 471 U.S. at 369; Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 31 [1st Cir. 2006]; M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1100 [11th Cir. 2006] [collecting authority]; see also Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's

[9] The State guidance cited by the IHO only refers to the language in the statute and does not add any analysis supporting the IHO's interpretation of the statutory language (see "New York State Law, Regulations and Policy Not Required by Federal Law/Regulation/Policy," at p. 12 [Mar. 2024], available at https://www.nysed.gov/sites/default/files/programs/special-education/nys-608-analysis-updated-march-2024_0.pdf).

[10] The IHO cites one provision of the federal regulations referencing students that are parentally placed in nonpublic schools to support the suggestion that "placement" means school (IHO Decision at p. 5, citing 34 CFR 300.130); however, that provision does not use the word placement let alone define it. Further, at least in the pendency context, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed," not the bricks and mortar school location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]).

education . . . can, for example, 'pay for private services, including private schooling'"] [emphasis added], quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 [2d Cir. 2014]). In the present matter, the services at issue are SETSS, which are not included in the State continuum of services but have been defined at times in the past as a hybrid of resource room services and/or consultant teacher services (see Application of a Student with a Disability, Appeal No. 16-056), each of which is included in the State's definition of "special education," as are related services (Educ. Law § 4401[1]-[2]). Under these broad definitions, I do not agree with the IHO's interpretation that funding for a unilateral placement means only the costs for a student's tuition at a private school.

The IHO quotes the Supreme Court's decision in Burlington that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives" (IHO Decision at p. 4, quoting Burlington, 471 U.S. at 372). However, the IHO takes the statement out of context because the Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to unilateral placement during the pendency of the proceedings (Burlington, 471 U.S. at 372). The Court did not find that placing a burden on the parent to prove appropriateness of a unilateral placement was defeating the objectives of the statute; to the contrary, the Court determined that if it was determined "that a private placement desired by the parents was proper under the Act," that the IDEA authorizes relief in the form of tuition reimbursement (id. at 369). The Court went on to eventually hold that "[a]bsent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief" (Schaffer v. Weast, 546 U.S. 49, 57–58 [2005]). Accordingly, a state law placing the burden of production and persuasion on parents who seeks reimbursement or public funding of private services that they acquired from private companies without the consent of school district officials does not offend the objectives in the IDEA.

Next, the IHO, countering language set forth in a prior State-level administrative review decision, indicated that hearing officers are equipped to consider rate disputes and that resolution of disputes such as the present matter are easily addressed with an award of compensatory services (IHO Decision at p. 4). The language from a State-level administrative review decision referenced by the IHO states as follows:

> As a practical matter, this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated industry of independent special education teachers whom parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place. The attempts to resolve such cases that do not use a Burlington/Carter style of analysis have tended to lead to chaos. All IHOs should use a Burlington/Carter style analysis when deciding cases in which a parent requests a school district to directly fund or reimburse costs incurred by the parent on behalf of a student when obtaining private services without the consent of public school officials.

(Application of a Student with a Disability, Appeal No. 23-217).

The language above arose in Education Law § 3602-c disputes in which the district had already agreed that the private services were appropriate, but the parties disputed the rate to be paid private companies; however, the parties in those cases did not provide any context or arguments over the appropriate legal standard that guide the resolution of such disputes. One decision addressing such a matter noted that the cases had "all of the hallmarks of what is approaching complete systemic dysfunction regarding the provision of special education services and the procedural safeguards that were supposed to protect the student" and that the "dysfunction ha[d] twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for" (Application of a Student with a Disability, Appeal No. 20-087). These disputes, as raised by the parties, tended to gloss over the district's underlying implementation failures, improper attempts to contract out for the delivery of instruction, and, further, the district's attempts to delegate its implementation duties to parents, and, instead, presented as "rate dispute[s]" year after year (id.). Given that the district was not authorized to contract for the provision of independent special education teachers, the idea that a "public rate for independent SETSS instruction" could be sanctioned in a policy of the district was itself flawed and, therefore, relief sought for private providers to deliver services in an IESP at an "enhanced rate" was similarly a fiction (see id.).

The Burlington/Carter framework was adopted in these matters to provide context, standards, and reasonable oversight over the proposed remedies . For example, although the school district could not contract with a teacher who was qualified as a special education teacher but not certified in the State of New York, a parent could do so and seek reimbursement from the district (Application of a Student with a Disability, Appeal No. 20-087). Further, in the earlier incarnations of these cases, the parents sought direct public funding and had not taken on any liability or financial risk that is required in a Burlington/Carter framework. Without any requirement for parents to take the financial risk for such services, the financial risk was borne entirely by unregulated private schools and agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district; this has practical effects because the private school and agencies are incentivized to inflate costs for services for which parents do not have any financial liability and parents begin seeking the best private placements possible with little consideration given to what the child needs for a merely appropriate placement (or services) as opposed to "everything that might be thought desirable by 'loving parents'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

While acknowledging the distinctions identified by the IHO, the most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past

harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. This is the factual scenario present in the decision cited by the IHO for the proposition that compensatory education is the appropriate category of relief and, therefore, it is distinguishable from the present matter where the parent has already secured the private services (see Application of a Student with a Disability, Appeal No. 23-065). While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]).[11] In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).[12] In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

With that said, although the IHO considered the relief in this matter compensatory education, she placed the burden on the parent to demonstrate the appropriateness of the unilaterally-obtained special education services (IHO Decision at p. 7). Thus, the compensatory education framework, at least as applied by the IHO in the present matter, has some similar standards and controls but lacks others, such as the requirement of financial risk, and therefore, if adopted, risks returning the system to the disarray acknowledged in the earlier decisions of this pedigree and opening the doors to fraud and cost inflation by the private agencies and schools.

Although the IHO found that the Burlington/Carter standard should not apply and that, instead, the relief sought by the parent should be considered a request for compensatory education, ultimately, the IHO placed the burden on the parent to demonstrate the appropriateness of the privately-obtained services (see IHO Decision at pp. 4-7). Accordingly, any error on the part of

[11] The IHO noted that the Second Circuit in Doe v. East Lyme Board of Education, 790 F.3d 440, 454 (2d Cir. 2015) examined reimbursements for supportive services owed under pendency (IHO Decision at p. 5); however, services pursuant to pendency are not subject to an appropriateness analysis and the Second Circuit found that hour for hour compensatory education was warranted. The question of the parent's unilaterally obtaining services is not so clear cut in the cases at issue here where, at times, the services the parents purport to "implement" originated in IESPs that are several years old and/or don't align exactly with the services mandated in the IESPs in terms of frequency, group size, location for delivery, and purpose (i.e., annual goals).

[12] The undersigned has questioned whether it is appropriate to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). The problem has become far worse in instances when parties attempt to blend compensatory and reimbursement relief together (id.).

the IHO in setting forth the incorrect legal standard was harmless, and the district was not aggrieved thereby. Therefore, there is no reason to disturb the IHO's decision on this ground and the district's cross-appeal is dismissed.

B. SETSS Delivered by Ed Achievers

Turning to the parent's appeal and a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement 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). 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.

> 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).

The only descriptions of the student's needs are set forth in the December 2018 IESP, which was almost five years old at the time that the parent unilaterally obtained the services at issue in this matter, and the undated SETSS progress report (see Parent Exs. B; H).[13] At the time of the December 2018 IESP, the student was nine years old and presented with "significant graphomotor and spatial integration issues"; "age-appropriate receptive and expressive language skills" with "mildly reduced speech intelligibility"; relative strengths in the areas of vocabulary and number usage; struggles with reading accuracy and comprehension and spelling; and social/emotional needs related to poor self-image and limited self-awareness (Parent Ex. B at pp. 1-2).

As the IHO noted, the undated SETSS progress report indicated that the student was 12 years old and in the sixth or seventh grade,[14] which based on the student's birthday, meant that the undated SETSS progress report was prepared two or three years prior to the 2023-24 school year at issue in this matter (compare Parent Ex. H at p. 1, with Parent Ex. A at p. 1; see IHO Decision at p. 7). The undated SETSS progress report indicated that, at that time, the student was performing at a fourth grade level in reading and math, at a third grade level in writing, and also demonstrated deficits in language and social/emotional skills (Parent Ex. H at pp. 1-3). In math, the progress report indicated the student had made progress with multiplication and division fluency but struggled to apply these skills to word problems and had difficulties rounding multi-digit whole numbers (id. at p. 1). In reading, the progress report noted the student's difficulties applying skills learned in isolation to in-text reading, answering basic questions related to a passage that he read, and reading irregularly spelled words (id.). The progress report indicated that the student did "not enjoy writing," had difficulty formulating his thoughts and putting them onto paper, and made spelling and grammatical mistakes in his writing (id. at p. 2). As for language skills, the progress report indicated the student could follow directions given in English but had difficulty comprehending when higher vocabulary words were used and struggled expressing himself in English (id.). In the social/emotional realm, the progress report noted that the student could lose interest and "become defiant toward his classwork" when the material was difficult (id. at p. 3).

[13] Given that there was no current IESP in place for the student for the 2023-24 school year, this was not, as the IHO described, a situation where the district and the parent agreed on what services the student required for the school year at issue. To be sure, the district, by failing to convene a CSE for the 2023-24 school year, has not spoken on the issue; however, the district also did not affirmatively stipulate or concede that the student's needs had remained unchanged for several years.

[14] In bold at the top of the document, the progress report lists the student's grade as sixth; however, in the first paragraph, the progress report indicates that the student was in the seventh grade (Parent Ex. H at p. 1).

Evidence in the hearing record regarding the services unilaterally-obtained for the 2023-24 school year includes the contract between the parent and Ed Achievers, which stated only that the company "would make every effort to implement" three hours per week of SETSS to the student in Yiddish (Parent Ex. G). In her affidavit testimony the parent stated that the student "ha[d] been receiving private [SETSS]" from a named special education teacher and that the student "ha[d] made much progress" (Parent Ex. E ¶ 3); however, this testimony alone is insufficient to describe how the services were delivered and what needs of the student were addressed. The hearing record also includes the undated SETSS progress report, as well as a document indicating that the teacher who completed the progress report was certified for the education of students with disabilities grades one through six (see Parent Exs. F; H); however, there is no clear evidence that the named teacher delivered services to the student during the 2023-24 school year.[15] Neither the teacher nor a representative from Ed Achievers testified at the impartial hearing. There is no progress report pertaining to the 2023-24 school year, service records, or even invoices. While the undated SETSS progress report reflects strategies and modifications used and annual goals for the student to work on during the sixth or seventh grade, there is no indication that such approaches and goals were used or appropriate for the student for the 2023-24 school year (see Parent Ex. H).

In arguing that the IHO erred in finding the hearing record insufficient to establish the appropriateness of the unilaterally-obtained SETSS, the parent primarily contends that, because the district did not present evidence and conceded that it did not provide the student a FAPE, she is entitled to the relief sought. The parent argues that "there is no disputed placement here" (Req. for Rev. ¶ 4). However, an outright default judgment awarding reimbursement or direct funding for the unilaterally-obtained SETSS—or all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]).[16]

Accordingly, the IHO correctly determined that the parent did not meet her burden to prove that the SETSS from Ed Achievers were delivered and that they were specially designed to meet the student's needs under the totality of the circumstances. As to the parent's request for alternative

[15] While the parent correctly argues that a private school or company need not employ certified special education teachers (Carter, 510 U.S. at 13-14) and that, therefore, the teacher's grade level certification compared to the student's grade should not, on its own, be weighed against a finding of appropriateness, the parent's evidence is more fundamentally flawed in that there is not even any evidence that the teacher delivered the servcies.

[16] Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation arising from the failure to respond, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jones v. Dist. of Columbia, 2018 WL 7286022, at *23 [D.D.C. Sept. 5, 2018], adopted 2019 WL 532671 [D.D.C. Feb. 11, 2019]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). As in those cases, here, the parent had the opportunity to present evidence and testimony regarding her claims at the impartial hearing, despite any deficiencies in the district's defense, and, therefore, a "default judgment in these circumstances 'would have subverted the administrative process' and provided relief 'without a full examination of the record or [the Student's] needs.'" (Jones, 2018 WL 7286022, at *23 [alterations in the original], quoting Sykes, 518 F. Supp. 2d at 267).

relief in the form of a new IESP with services recommended retroactively to the beginning of the 2023-24 schoolyear as compensatory education, I decline to address such relief raised for the first time on appeal.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the SETSS unilaterally-obtained for the student for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of district funding or reimbursement for the costs thereof (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 8, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER