The University of the State of New York

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

No. 24-103

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, 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 district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse the respondent (the parents) or directly fund their daughter's special education services provided by Alpha Student Support (Alpha) during the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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 parties' familiarity with this matter is presumed and, therefore, a detailed recitation of the facts and procedural history of the case and the IHO's decision is not necessary. Nevertheless, due to the limited nature of the evidence included as a part of the hearing record, what is available is described here.

A CSE convened on December 5, 2019 to formulate an IESP for the student with an implementation date of the same day (see generally Parent Ex. B at p. 1). The December 2019 CSE found the student eligible for special education and related services as a student with a

learning disability (id.).[1] The December 2019 IESP included the results of the student's then most recent cognitive testing, which placed the student's full-scale IQ in the average range (id. at pp. 1-2). It also included the student's then most recent academic testing, which placed the student in the below average range for reading comprehension and in the math composite score (id. at pp. 2-3). The December 2019 CSE formulated goals to address reading, writing, and math and recommended that the student receive four periods per week of direct, group special education teacher support services (SETSS) in English in a separate location (id. at pp. 5-8).

The hearing record contains no information as to what occurred between the December 2019 IEP and the now current 2023-24 school year (Tr. pp. 1-23; Parent Exs. A-C).

On September 5, 2023, the student's father signed a service contract with Alpha) (Parent Ex. C). The service contract indicated that the parent was obtaining four periods of direct, group SETSS per week for the student at a rate of $195 per hour for the 2023-24 school year (id.). According to the terms of the contract Alpha agreed to "make every effort to implement the recommended services mentioned-above with suitable qualified providers for the 2023-24 school year" (id.). The service contract further indicated that the parent agreed to retain counsel and file a due process complaint notice to obtain funding from the district for the student's SETSS but ultimately the parent was responsible to pay the full amount owed to Alpha (id.).

According to a due process complaint notice, dated December 3, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parents claimed that the student was entitled to pendency based on the December 2019 IESP recommending four periods per week of direct, group SETSS in English (id. at pp. 2-3). Turning to the substance of the parents' claims, the parents argued that the district had an obligation to ensure the student had an appropriate program at the start of the 2023-24 school year and that it failed to implement the student's December 2019 IESP (id. at p. 2). The parents further alleged that they were unable to locate a SETSS provider at the "[district] rate" and "unilaterally secured" their own provider to work with the student at "an enhanced rate" (id.). As relief, the parents requested an order directing the district to fund or reimburse the parents for the SETSS they obtained for the student at an enhanced rate and compensatory education for any service that was mandated but not provided to the student due to the district's failure to implement the student's IESP (id. at p. 3).

An impartial hearing convened on January 18, 2024, and concluded on the same day (Tr. pp. 1-23). In its opening statement, the district representative indicated that the parents had the burden to prove that the SETSS unilaterally obtained for the student during the 2023-24 school year were specifically designed to meet the student's unique needs (Tr. p. 9). The parents' attorney stated in his opening statement that "[t]he appropriate analysis [wa]s not necessary in this case, and based on the evidence and the undisputed fact that the [student] [wa]s entitled to [SETTS] and that the [d]istrict failed to implement these services, the parents are entitled to their relief requested" (Tr. p. 10). During the district's closing, the representative again stated that the district's position was that the parents had the burden to prove that Alpha provided the student with SETSS specifically designed for her and that the parents failed to meet that burden (Tr. p. 18). The parents'

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

attorney also reiterated during his closing statement that "the Burlington/Carter analysis [wa]s not appropriate in this matter" and cited to Application of a Student with a Disability, Appeal No. 21-138 to argue that when the same services that are recommended in an IESP are those implemented by the parents' private service provider, the appropriateness of the services themselves cannot be in dispute (Tr. pp. 19-20). The parents' attorney further stated they "disagree[d] with the contention that the [p]arents need[ed] to demonstrate the appropriateness" of the SETSS provided by Alpha (Tr. p. 21).

On February 7, 2024, the IHO sent an email requesting clarification of a term included in the contract with Alpha (IHO Ex. I). In response, the parents submitted a letter from Alpha indicating that the contractual term meant that Alpha would "secure suitable providers for SETSS and related services to children that are mandated such services through their IEP/IESP" and further indicated that Alpha implemented four periods per week of SETSS for the student (IHO Ex. IV).

In a decision dated February 16, 2024, the IHO determined that the district was obligated to create an IESP and deliver services to the student for the 2023-24 school year and failed to establish that it did so, therefore, the district failed to provide the student with equitable services under Education Law Section § 3602-c (IHO Decision at p. 7). The IHO then noted that the parents agreed with the services recommended in the December 2019 IESP and wanted them implemented for the 2023-24 school year, that the parents alleged that the district failed to deliver services that the district "itself determined were appropriate," that the district challenged the appropriateness of the services delivered by Alpha, and that Alpha confirmed it was "administering the services mandated by the IESP" (id. at pp. 7-8). The IHO then found that "[w]hen the same services recommended in an IESP are those implemented by the parent's private service provider (e.g., SETSS), the appropriateness of the services themselves is not in dispute" (id. at p. 8). As relief, the IHO ordered the district to reimburse the parent and/or directly fund the cost of the student's SETSS provided by Alpha at a rate of $195 per hour for the 2023-24 school year (id. at p. 9).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review is presumed and, therefore, the specific allegations and arguments will not be recited here. In this matter the district appeals and the parents did not file an answer to the district's request for review.[2] The sole issue presented on appeal that must be resolved in order to render a decision in this matter is whether the IHO erred in determining that Alpha provided the student with services which were appropriate to address the student's needs.[3]

[2] According to the district's two affidavits of service for the notice of intention to seek review, the notice of request for review, the request for review, and verification, the parents' attorney confirmed with the district representative that he would accept petitioners' papers on respondents' behalf and, also, that the parents' attorney waived personal service on the parents and agreed to accept service by electronic mail on the respondents' behalf.

[3] The district also appeals from the relief awarded by the IHO as to the rate for the awarded SETSS; however, this argument need not be addressed as for the reasons set forth below, the parents are not entitled to recover the cost of the privately obtained SETSS in this matter.

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

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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (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.

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., 694 F.3d at 184-85).

VI. Discussion

The district does not appeal from the IHO's finding that it failed to provide the student with equitable services for the 2023-24 school year (IHO Decision at pp. 3-4, 6-9). Accordingly, this determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS unilaterally obtained by the parent and delivered to the student by Alpha during the 2023-24 school year.

A. Unilateral Placement

Prior to reaching the substance of the parties' arguments regarding the parent's unilaterally obtained SETTS services, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. Rather, the parent seeks public funding of the costs of the private SETSS. "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"]).[6]

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

[6] 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 services that the parents obtained from Alpha for the student (Educ. Law § 4404[1][c]).

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).

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, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

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

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

Here, the district is correct in its argument that the IHO did not apply the correct legal standard when determining if an award for the SETSS provided by Alpha during the 2023-24 school year was appropriate. In this instance, the parent objected to the district's failure to implement an educational program for the student for the 2023-24 school year, the parent then indicated that the December 2019 IESP, developed more than three years prior to the start of the current school year, constituted an appropriate program for the student (see generally Parent Ex. A.). The IHO determined that when the same services recommended in an IESP are those implemented by the parents' private service provider (e.g., SETSS), the appropriateness of the services themselves cannot be not in dispute (IHO Decision at p. 8). The IHO relied on Application of a Student with a Disability, Appeal No. 21-138 to argue such point, however, such reliance is misplaced.[7] In Application of a Student with a Disability, Appeal No. 21-138, it was determined that the appropriateness of the SETSS delivered to the student by the private agency "[wa]s not seriously in dispute in th[at] matter as it [wa]s the same type of service recommended on the [student's] January 2020 IESP" (Application of a Student with a Disability, Appeal No. 21-138 at p. 9). In that case, the IESP was for the school year at issue; i.e., the IESP was created in January 2020 with an implementation date also in January 2020 and the parent was requesting funding for services delivered to the student during the 2019-20 school year (id. at p. 3), while in this case the parent is attempting to implement a December 2019 IESP for the 2023-24 school year (see Parent Ex. A). Furthermore, in Application of a Student with a Disability, Appeal No. 21-138, the district did not contest the appropriateness of the services, which is not the case for this matter (Application of a Student with a Disability, Appeal No. 21-138 at p. 5). Though the services unilaterally obtained by the parent in this matter were the same services recommended in the December 2019 IESP, the district has alleged claims that Alpha did not provide SETSS specifically designed to meet the student's unique needs, thus the appropriateness of the services delivered by Alpha during the 2023-24 school year was directly in dispute in this matter and the IHO erred when she failed to address the appropriateness of the unilaterally obtained SETSS under the Burlington/Carter unilateral placement framework (see Tr. p. 9; IHO Decision at pp. 3-9).[8]

In this instance, the parents declined to introduce any evidence that showed the SETSS provided by Alpha was specially designed instruction tailored to meet the student's unique needs. During the impartial hearing, the parents through their attorney maintained that the Burlington/Carter unilateral placement framework did not apply in this matter and that they did not need to introduce evidence to prove the appropriateness of the unilaterally obtained services

[7] As identified above, the parents through their attorney during the impartial hearing also relied on Application of a Student with a Disability, Appeal No. 21-138 in arguing that the Burlington/Carter unilateral placement framework did not apply in this matter (Tr. pp. 19-20).

[8] 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 or reimbursement policies for what has grown into a completely unregulated cottage industry of independent special education teachers whom parents within the New York City Department of Education are increasingly reliant upon; namely, an industry that is not authorized by the State in the first place. Attempts to analyze these matters that do not use a Burlington/Carter 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 parents on behalf of a student when obtaining private services without the consent of public school officials.

(see Tr. pp. 9-10, 18-21). As such, there is no information in the hearing record as to the student's current educational needs and no information to determine if the educational program as recommended in the December 2019 IESP is still an appropriate program for the student. The lack of information regarding the student's needs is the fault of the district as the district is responsible for evaluating the student; however, in deciding to continue the student's services from the more than three-year old IESP, the parents attempted to remedy the district's failure by unilaterally obtaining services for the student and took on the burden of establishing that any private programming that they acquired without the consent of school district officials was appropriate. Accordingly, as the hearing record fails to identify what the student is working on educationally for the 2023-24 school year, whether there are any goals being addressed by the SETSS provider, whether the student is making progress in any areas of unique need for the student, or how the provision of SETSS might be promoting the student's participation and progress in the general education curriculum, an award of district funding of SETSS is not supportable. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington/Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).[9] Here, the parents have failed to satisfy the appropriateness element of that test.

It is further noted that there is no indication in the hearing record where the student was receiving the SETSS services. In fact, there is no evidence regarding what nature of the services the parents unilaterally obtained for the student, beyond that they are called SETSS. Even considering the additional evidence sought by the IHO after the completion of the hearing, which is of more limited reliability as it was not subjected to cross-examination or any possible objection, the hearing record only indicates that Alpha provided the student with four periods per week of SETSS (Parent Ex. C; IHO Exs. I; IV). Further, the term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of

[9] Although the standard employed is commonly referred to as the Burlington/Carter test and is based on two Supreme Court decisions, and dual enrollment special education services under an IESP are provisions based on State law, the provisions permitting due process proceedings for dual enrollment cases specifically reference State law, which provides that "a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law 4404[c]; see Educ. Law 3602-c[2][b][1]). Accordingly, although there could, at some point, be separate federal and State tests for the appropriateness of unilaterally obtained services, at this point in time, the federal standard is instructive in review of the appropriateness of unilaterally obtained services. Additionally, although the State statute references "reimbursement," (Educ. Law 4404[c]), the original Burlington/Carter framework also initially only addressed reimbursement for the cost of private school tuition but was expanded to include a direct payment remedy (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023]).

"SETSS" does not exist within the district; accordingly, unless the parties and the hearing officer take the time to develop a record in each proceeding with respect to what the SETSS in question actually consisted of, it becomes problematic to determine what type of instruction a particular student has received and whether such instruction addressed his or her unique special education needs (see generally Application of the Dep't of Educ., Appeal No. 20-125). Without more information, the IHO incorrectly determined that the parent met her burden of demonstrating that the unilaterally obtained services were appropriate for the student. Accordingly, the IHO's decision must be reversed.

Lastly, the parties have agreed to pendency in this case (see Dec. 5, 2023 Pendency Implementation Form). Therefore, to the extent the district has not provided the student with pendency services, the district is required to effectuate pendency through the date of this decision using district employees, unless the parties agree otherwise.

VII. Conclusion

Based on the foregoing, I find that the IHO erred in finding that that the unilateral SETSS provided by Alpha during the 2023-24 year was appropriate, thus the IHO erred in ordering the district to fund the unilaterally obtained SETSS provided by Alpha for the 2023-24 school year and such determination must be reversed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 16, 2024, is modified by reversing those portions which ordered the district to directly fund and/or reimburse the parent for the SETSS provided to the student by Alpha during the 2023-24 school year; and

IT IS FURTHER ORDERED that to the extent the district has not provided the student with pendency services, the district is required to effectuate pendency through the date of this decision by providing the student with compensatory SETSS using district employees for any missed periods of SETSS under pendency, unless the parties agree otherwise.

Dated: **Albany, New York**
April 26, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER