The University of the State of New York

The State Education Department
State Review Officer
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No. 24-119

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 a decision of an impartial hearing officer (IHO) which ordered it to fund the respondent's (the parent's) son's private services delivered by AIM Educational Support Services (AIM) for 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 student was parentally placed in a nonpublic school, and, on December 16, 2015, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student that recommended 10 periods per week of group special education teacher support services (SETSS) in Yiddish, three 45-minute

sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual occupational therapy (OT) in English (Parent Ex. B at pp. 1, 5, 7).[1]

There is no evidence in the hearing record regarding the student's educational history between the December 2015 IESP and the 2022-23 school year. Turning to the 2023-24 school year at issue, the parent executed a service contract with AIM on August 15, 2023, for the agency to deliver 10 periods per week of SETSS to the student at a specified rate for the 2023-24 school year (Parent Ex. C).[2]

A CSE convened on September 20, 2023 and noted that, at that time, the student was in the seventh grade and was parentally placed at a nonpublic religious school and was receiving "10 hours of Special Education services in a pull-out and push-in setting," further noting he was mandated to receive speech-language therapy and OT (Dist. Ex. 1 at pp. 8, 9). The CSE found the student continued to be eligible for special education as a student with a speech or language impairment and developed an IESP with a projected implementation date of September 26, 2023 (id. at p. 1). The CSE recommended that the student receive seven periods per week of group SETSS in Yiddish, two 30-minute sessions per week of group speech-language therapy in Yiddish, two 30-minute sessions per week of group physical therapy (PT) in English, two 30-minute sessions per week of group OT in English, and one 30-minute session per week of group counseling in Yiddish (id. at pp. 18-19).

In a due process complaint notice dated October 20, 2023, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) and failed to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. A). The parent alleged that a CSE had last convened to develop an IESP for the student in December 2015, and that the December 2015 IESP recommended 10 hours per week of SETSS and related services for the student (id. at p. 2). The parent contended that, for the 2023-24 school year, the district did not conduct an annual IESP review and "failed to locate an adequate provider for [the student]'s SETSS " (id.). The parent indicated she had found a provider to deliver the services but "at a rate higher than the going [district] rate" (id.). The parent requested a finding that the student's pendency consisted of 10 hours per week of SETSS (id.). For relief, the parent requested "[a]llowance of prospective payment to the student's SETSS provider/agency for ten (10) hours a week of one on one enhanced rate SETSS [] for the remainder of the 2023-2024 [School Year]" (id. at p. 3).

In an email dated November 13, 2023, with the subject line "omnibus scheduling First Step Advocacy," an IHO with the Office of Administrative Trials and Hearings (OATH) listed 42 case numbers and informed the parties that the matters were "slated for Omnibus settlement conferences and to have hearings scheduled" (IHO Ex. I at p. 1). The email further set forth expectations for the impartial hearing (id. at pp. 1-7).

[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] AIM 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).

An impartial hearing took place on February 2, 2024 (see Tr. pp. 1-35). During the impartial hearing, the parent's attorney indicated she had not seen the September 2023 IESP prior to the district's disclosure for the purposes of the hearing and there was a discussion about which IESP controlled both for pendency purposes and for the merits of the parent's claims (see Tr. pp. 4-24). The IHO noted that the parent seemed to challenge, not only the district's failure to implement services, but also the recommendations in the September 2023 IESP (see Tr. p. 22). The parent's attorney maintained that the matter was "not a unilateral placement," opining that:

> if this was [a] case where the [district] recommended seven hours of SETSS and the Parent said, I don't agree with that, I'm giving my kid ten. That's different. That is unilateral placement. That's not what's happening here, IHO. What's happening here, we have an IESP with District, at one point, recommended ten. Then I don't know what happened between 2015 and 2023. I don't have those IESPs. Then on one point, [the district], in 2023, got together and made an IESP. And in that IESP, they went against their old IESP, and they said this child need seven now.
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> So it's not unilateral placement, IHO. Now, it's on the District to explain why would they -- why did they feel it was warranted to lower this child's amount of SETSS hours. And if the District is not going to be able to do that, then I think that's why -- the burdens are still the same burdens, IHO. It still doesn't fall under Burlington -- it still doesn't fall under a unilateral placement . . .

(Tr. pp. 22-23). The IHO indicated he was not suggesting that the matter "falls under unilateral placement" but noted it would be "smart for both parties, if they wanted to present a little bit more evidence in this case" (Tr. pp. 23-24).

The IHO entered all of the exhibits offered by the parties, neither party presented witness testimony, and the parent's and the district's attorneys presented closing arguments (Tr. pp. 26-33). In its closing argument, the district requested that the parent's relief be denied, as the parent did not present evidence to "prove SETSS services [we]re taking place, or that the hourly rate charged by the service provider [wa]s reasonable" (Tr. pp. 27-28). Further the district argued that the September 2023 IESP was "controlling" and, therefore, should dictate "what, if any relief, is awarded" (Tr. p. 28). The parent's attorney argued that the December 2015 IESP was "the last agreed-upon IESP" and that the district was required to implement the "mandated services" in that IESP but failed to do so (Tr. pp. 28-29, 31). Further, the parent's attorney indicated that the September 2023 IESP "should not be accepted as the last agreed-upon IESP" absent evidence from the district to demonstrate why the CSE reduced the student's SETSS mandate from 10 hours to seven hours per week (Tr. p. 29). The parent's attorney reiterated her position that the matter was "not a Burlington/Carter unilateral placement case," noting that the 10 hours of SETSS sought by the parent "was the District's recommendation at one point in time" and that it was not the case that the parent was "just unilaterally changing the child's designation" (Tr. pp. 29-30). Regarding the unilaterally-obtained services, the parent's attorney indicated that the parent did not have a burden to prove that the rate charged was a reasonable or fair market rate (Tr. p. 32). After the

parties' respective statements, the IHO gave the parties "one last opportunity" to add anything further, and both parties rested (Tr. pp. 33-34).

In a decision dated March 1, 2024, the IHO found that the district failed to implement either the December 2015 IESP or the September 2023 IESP during the 2023-24 school year and that, "[i]n failing to do so, the [district] failed to provide Student with services on an equitable basis as compared to other students with disabilities attending public or nonpublic schools located within the school district" (IHO Decision at pp. 7, 8).[3] The IHO indicated that the next issue to be decided was "whether the number of hours of SETSS provided in the 2023 IESP [we]re reasonably calculated to enable the student to receive educational benefits" and found that the district did not present evidence to explain the decrease in SETSS (id. at p. 8). The IHO also found that the district denied the student equitable services by failing to implement the student's educational program (id.). The IHO found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead of requiring the parent to prove that the unilaterally-obtained services were appropriate, "the burden remain[ed] with the [district] to prove that the services provided were inappropriate" (id. at pp. 3-5). Applying this standard, the IHO found that the district failed to present evidence that the parent's selected providers or the requested rates were inappropriate or that the services were unnecessary (id. at p. 8). Accordingly, the IHO ordered the district to, upon submission of an invoice with an affidavit "attesting to the provision of the services," "pay a licensed/certified provider of the Parent's own choosing for the administration of 10 1-hour periods of SETSS in a group in English per week for the 10-month 2023-2024 school year" at the rate set forth in the contract in evidence (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in declining to assess the appropriateness of SETSS purportedly delivered to the student by AIM during the 2023-24 school year. The district argues that the parent presented no evidence regarding when, where, how, by whom, or even if the unilaterally-obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress.

The parent did not file an answer to respond to the district's appeal.

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

[3] For purposes of pendency, the IHO found that because there was a dispute about the September 2023 IESP, the "last agreed upon program" was that set forth in the December 2015 IESP and included 10 hours per week of SETSS in Yiddish at a specified hourly rate (IHO Decision at p. 7).

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 individualized education program" (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 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]).

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[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.

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 placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from AIM for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [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]).[6] 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. I will address the IHO's points seriatim. First, I acknowledge that the use of the Burlington/Carter framework, for a matter involving an IESP developed pursuant to State Education Law § 3602-c rather than an IEP developed pursuant to the IDEA, is not based on direct

[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 that the parent obtained from AIM (Educ. Law § 4404[1][c]).

authority from the courts, there is also no authority as to what other, more analogous framework might be appropriate when a parent privately obtains special education services that a school district failed to provide and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

The IHO indicated these matters were distinguishable from the Burlington/Carter scenario because of the type of violation by the district (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 (i.e., services versus private school tuition) (IHO Decision at pp. 4-5).

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. 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).

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" (Educ. Law § 4404[1][c] [emphasis added]; see IHO Decision at p. 4).[7] In noting the Commissioner of Education's discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating student with disabilities, Education Law § 4401(5) defines tuition as "the per pupil cost of all instructional services" (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]). 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 and, therefore, of tuition, at least as defined in the Education Law.

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 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, the IHO's interpretation that funding for a unilateral placement means only the costs for a student's tuition at a private school and, as a result, that the parent has no obligation to demonstrate she obtained appropriate services from AIM was error.

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

[7] 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, 629 F.2d at 753, 756).

Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to a 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 the appropriateness of a unilateral placement defeated 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," 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 seek 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.

These matters arising from Education Law § 3602-c, in which the district had already agreed to pay for private services, were originally presented by the parties as disputes over the rate to be paid to private providers devoid of any context or arguments over the appropriate legal standard. 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, originally 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 oversight over the remedies being sought. For example, although the school district could not contract with a teacher who was qualified as a special education teacher but who was 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 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 companies 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 schools and companies are incentivized to inflate costs for services for which parents do not have any financial liability and parents may begin seeking the best private placements possible with little consideration given to costs or what the child needs for merely an 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 were 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. 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]). 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). 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.

Based on the foregoing, I find that the IHO erred in the legal standard applied to assess whether the parent was entitled to the relief sought.

B. SETSS from AIM

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

The student's needs are described in the September 2023 IESP (Dist. Ex. 1). The IESP noted information from a formal evaluation that the student's dominant language was Yiddish and that, therefore, the evaluation results were to be interpreted with caution (id. at p. 1). According to the IESP, the evaluator described the student as distracted and unable to sit still (id. at p. 4). The IESP reported results of cognitive testing, which indicated that the student's overall intelligence quotient (IQ) was in the extremely low range, with verbal comprehension in the very low range and visual spatial, fluid reasoning, working memory, and processing speed skills in the extremely low range (id. at pp. 4, 5, 7). The IESP also reported information from the formal evaluation indicating that the student's reading was "of a slow rate, choppy, stilted, and lacked inflection and

intonation" (id. at p. 1). On informal measures of oral narrative development, the student demonstrated "severely inadequate narrative generation skills including comprehending story grammar elements of predicting outcomes, theory of mind, and inferencing skills" and used short phrases and basic sentences that lacked complexity (id. at pp. 1-2). According to the IESP, on the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5), the student demonstrated "severe" and "significantly" deficient skills in the areas of understanding relationships between words, following directions, formulating sentences, recalling sentences, interpreting sentences with semantic relationships, and verbal and nonverbal pragmatics (id. at pp. 2-4, 5).

In the area of reading, the IESP reported that the student demonstrated weaknesses in decoding and comprehension in both Yiddish and English, struggling in particular with "words with silent 'e,'" blending sounds, "decoding r controlled vowels," diphthongs, common prefixes and suffixes, multisyllabic words, and punctuation, as well as accuracy and fluency (Dist. Ex. 1 at p. 5). The student also struggled with answering inferential questions, differentiating between fact and opinion, "identifying the theme, main idea, or genre, comparing and contrasting characters or situations, connecting text to text or text to self, and identifying the author's purpose" (id. at pp. 5-6). In writing, the IESP indicated that the student's skills were "extremely below grade level" (id.). The student's handwriting was difficult to read for which the student was recommended to receive OT (id. at p. 6). The IESP reflected that the student "ha[d] difficulty constructing proper sentences in any language," demonstrated very weak encoding skills, tended to write run-on sentences as well as fragments, and struggled with using punctuation marks and grammar rules (id.). In mathematics, the student demonstrated below grade level skills, particularly struggling with converting decimals and fractions, money sense, reading an analog clock, and grasping pre-algebra or early geometry concepts (id.).

The IESP indicated that the student presented with " significant and severe deficiencies in expressive language, receptive language, decoding, reading comprehension, pragmatic- social skills, as well as severe deficits in attention maintenance" and auditory processing (Dist. Ex. 1 at p. 5, 6-7). The student's "limited receptive language skills [we]re characterized by limited understanding of inferences, analogies, complex story plots and negatives in sentences" and a tendency to "get[] confused from longer statements and needs" (id. at p. 7). The student's expressive language skills were "characterized by a limited expressive vocabulary, weak syntax, and difficulty comprehending advanced language," as well as weaknesses in his "ability to inference and reason logically" (id.).

In the social/emotional realm, the IESP described the student as "anxious, impatient and impulsive," he displayed sensory seeking behavior, became frustrated when he did not comprehend, and could not effectively problem solve conflicts with peers (Dist. Ex. 1 at p. 9). Physically, the student "need[ed] assistance with balance, coordination, proprioception and motor planning" and "need[ed] to improve safety awareness and increased fluidity when negotiating obstacles increased focus and less prompting and redirection" (id.). The student demonstrated weaknesses in gross motor strength and postural reactions (id.).

Despite the foregoing information about the student's needs, the only evidence in the hearing record regarding the SETSS purportedly delivered to the student during the 2023-24 school year is the contract between the parent and AIM, which indicated that AIM "intend[ed] to provide"

the student with 10 periods per week of SETSS (see Parent Ex. C). The hearing record also includes a document reflecting the certification of a special education teacher (see Parent Ex. D) but does not reflect that the named teacher delivered services to the student or where or when such services were purportedly delivered. Neither the parent, the provider, nor a representative from the AIM testified at the impartial hearing. There is no documentation that the services were delivered to the student. For example, there is no progress report, service records, or even invoices. There is also no indication that the student received any related services during the 2023-24 school year. Accordingly, the parent failed to meet her burden to prove that SETSS were delivered to the student during the 2023-24 school year or that any services that may have been delivered were specially designed to meet the student's needs under the totality of the circumstances.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the SETSS she contracted for with AIM 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 SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 1, 2024, is modified by reversing that portion which ordered the district to pay a provider of the parent's choosing for the costs of delivering 10 weekly one-hour periods of SETSS in a group for the 2023-24 school year at a specified rate.

Dated: **Albany, New York**
May 9, 2024

STEVEN KROLAK
STATE REVIEW OFFICER