The University of the State of New York

The State Education Department
State Review Officer
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No. 24-128

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 costs of respondent (the parent's) daughter's private special education services delivered by Empowered Kids for Success (Empowered) 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

A CSE convened on August 6, 2021, found the student eligible for special education as a student with a learning disability, and developed an IESP with a projected implementation date of

September 13, 2021 (Dist. Ex. 1).[1] The CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) and one 30-minute session per week of individual occupational therapy (OT) (id. at p. 9). The IESP reflects that for the 2021-22 school year, the CSE noted in its Placement Recommendation that the "Student is Parentally Placed in a Non-Public School" (id. at p. 12).

There is no evidence in the hearing record regarding the student's educational history between the August 2021 IESP and the 2023-24 school year. Turning to the 2023-24 school year at issue, the parent executed a service contract with Empowered, dated September 1, 2023, for the company to deliver five periods per week of SETSS to the student at a specified rate for the 2023-24 school year (Parent Ex. C).[2]

In a due process complaint notice dated October 24, 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).[3] In particular, the parent contended that the district failed to conduct an annual CSE meeting and "failed to locate an adequate provider for [the student]'s SETSS services" (id. at p. 2). 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 five hours per week of SETSS (id.). For relief, the parent requested "[a]llowance of prospective payment to the student's SETSS provider/agency for five (5) hours per week of SETSS services for the entirety of the 2023-2024 (School Year)" (id.).

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).

An impartial hearing convened on February 8, 2024 (see Tr. pp. 1-17). The IHO entered all of the exhibits offered by the parties, both parties confirmed that they would not be calling any witnesses, and the parent's and the district's attorneys presented closing arguments (Tr. pp. 4-14). In its closing argument, the district requested that the parent's relief be denied as the parent did not present "sufficient documentation or evidence to support their request for services, proof the

[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]).

[2] Empowered 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] The due process complaint notice indicated that the "last [IESP] meeting that was held during which services were recommended" occurred on April 23, 2021, and the parent only noted that the CSE recommended that the student receive "Five (5) hours per week of [SETSS] (Parent Ex. A at p. 2). However, during the impartial hearing, counsel for the parent indicated the parent was "adopting" the district's August 6, 2021 IESP and was only seeking SETSS and not the OT that was also recommended in the August 2021 IESP (Tr. p. 4; see Dist. Ex. 1 at p. 9). An April 23, 2021 IESP was not entered into evidence.

services are taking place, or that the hourly rate is reasonable" (Tr. p. 8). The district also asserted that the parent had not provided "invoices, affidavits, or even proof of payment, if that's applicable" (id.). The parent's attorney argued that, when the district did not implement the student's IESP for the 2023-24 school year, the parents had no choice but to "implement services to the best of their ability" (Tr. pp. 11). The parent's attorney argued that, although the district may argue to the contrary, the matter was "not a tuition reimbursement case" and, therefore, there was no burden on the parent to prove appropriateness of the private services or of the rate charged by Empower (Tr. pp. 11-12).

In a decision dated March 7, 2024, the IHO found that there was "no dispute that [the] Student [wa]s entitled to services pursuant to the IESP," the district "had the obligation to provide services to [the] Student in conformity with the IESP," and, "[i]n failing to do so, the [district] failed to provide [the] Student with services on an equitable basis" (IHO Decision at pp. 6, 7). 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. 4-5). Applying this standard, the IHO found that the district failed to present evidence that the parent's selected provider or the requested rate was inappropriate or that the services were unnecessary (id. at p. 7). 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 5 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). The IHO also found the student was entitled to pendency in this matter consisting of five one-hour periods of group SETSS at a specified hourly rate (id. at pp. 6-7).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in declining to assess the appropriateness of the SETSS purportedly delivered to the student by Empower 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 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]).

[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. Scope of Review

A review of the hearing record shows that the parent only sought reimbursement for SETSS, and, while the parties and IHO refer to "services," the only IESP entered into evidence shows that the CSE recommended that the student also receive one 30-minute individual session of OT per week (compare Parent Ex. A at p. 2, with Dist. Ex. 1 at p. 9). The district asserts on appeal that "[t]here [wa]s nothing in the record describing how Empowered implements SETSS, or OT," or that the "[p]arent signed the contract or that Empowered was currently providing the Student SETSS or OT" (Req. for Rev. at p. 5). Also, as noted above, parent's counsel, in "adopting" the August 2021 IESP acknowledged that the August 2021 IESP included a recommendation for OT but had the same SETSS recommendation as the earlier IESP referenced by the parent, "which is at issue in this case" (Tr. p. 4). As the IHO did not make any findings regarding OT, nor did she order the district to pay for the unilaterally obtained OT services, and as neither party has appealed from the lack of a finding regarding OT, any further claim for OT is precluded, and will not be further addressed below (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013] any decision or lack of decision by an IHO not appealed is final and binding).

B. 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 in the nonpublic school. Instead, the parent has 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 Empower 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, however, while I acknowledge that the Burlington/Carter framework is utilized here in matters related to an IESP arising under Education Law § 3602-c rather than an IEP under the IDEA, there is no caselaw from the courts as to what other, more analogous framework might be appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP 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 or IESP) 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 have more often disagreed 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 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]).

[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 for the student from Empowered (Educ. Law § 4404[1][c]).

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]; IHO Decision at pp. 3-4).[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 students 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,

[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).

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 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 are included in the State's definition of "special education" (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 that as a result the parent has no obligation to demonstrate that she obtained appropriate services from Empowered 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 this 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 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 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 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 school and companies 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 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 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. 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.

C. SETSS from Empowered

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).

Evidence in the hearing record regarding the student's needs included an August 2021 IESP and a November 27, 2023 SETSS provider report (Parent Ex. E; Dist. Ex. 1). According to results of a March 2021 administration of the Wechsler Intelligence Scale for Children-Fifth Edition reflected in the August 2021 IESP, the student's full scale IQ was 104, and the following index standard scores were obtained: verbal comprehension 98, visual spatial 108, fluid reasoning 100, working memory 110, and processing speed 108 (Dist. Ex. 1 at p. 1). The then-current classroom teacher reports, reflected in the August 2021 IESP, indicated that the student's academic performance was "inconsistent" in that she was a "poor reader," her reading rate was slow due to weak decoding skills, and she answered comprehension questions at times (id. at p. 2). Writing was reported to be an area of strength, she was creative, and she wrote sentences independently (id.). In math, the student's computation skills were "sometimes good," and she exhibited difficulty with place value, addition with regrouping, and solving word problems (id.). Additionally, the student had difficulty focusing which hindered her ability to attend to instruction (id.). The August 2021 IESP did not reflect that the student exhibited social/emotional or physical development needs, with the exception of needing OT to address her "hand speed" and "proprioceptive awareness" (id. at pp. 3-4).

On November 27, 2023 a certified special education teacher (SETSS provider) prepared a teacher progress report for the student (Parent Exs. D; E). According to the teacher progress report, at that time, the student was in fourth grade at a nonpublic school (Parent Ex. E at p. 1). The SETSS provider reported that reading was challenging for the student, she lacked fluency, and struggled with decoding (id.). Additionally, although the SETSS provider reported that the student "usually achieve[d] a relatively good basic understanding of a text from reading it once," she needed to reference the text to sequence the order of events, and struggled to accurately infer the motivations of characters and the underlying causes of events in texts (id.). In the area of writing, the SETSS provider reported that the student expressed herself "relatively well," and she was able to "craft interesting and imaginative pieces of writing" (id.). The teacher progress report reflected that the student needed help determining where to punctuate and capitalize, and how to spell words (id.). Regarding math, the SETSS provider reported that the student was "good at learning math procedures"; however, she "really struggle[d] with word problems" and it was "difficult for her to read the problem, analyze the language and translate it into mathematical terms" (id.). According to the teacher progress report, socially the student complied with school rules and related well to

peers and adults; physically, she had "beautiful handwriting," "good balance and [wa]s well co-ordinated," and was "in good health" (id. at pp. 1-2).

The teacher progress report indicated that in reading, the student had "spent time learning vowel combinations, syllable types and syllabication rules," strategies that "seem[ed] to help [the student] with decoding, but she still need[ed] a lot more practice implementing them" (id.). Further, the SETSS provider reported that the student needed "continued support with reading comprehension," "a lot of assistance with the mechanical aspects of writing," and that she had "successfully learned a few strategies for long multiplication this year" (id.).

Evidence in the hearing record regarding the SETSS delivered to the student during the 2023-24 school year includes the contract between the parent and Empower, which indicated that Empower would "make every effort to implement" five periods per week of group SETSS for the student, the November 2023 teacher progress report described above, and what appears to be a printout of a document reflecting that the SETSS provider was issued a "Students with Disabilities (Grades 1-6)" teacher certificate (see Parent Ex. C).

While the November 2023 teacher progress report provided some information about the student's educational needs, the evidence in the hearing record overall lacked sufficient information to show that the SETSS Empowered provided to the student constituted specially designed instruction. For example, in identifying the student's learning style, the progress report only provides a generic description, indicating that the student "benefit[ted] from a hands-on approach to learning with plenty of repetition of concepts and practice with strategies," and that she also enjoyed cooperative learning activities (Parent Ex. E at p. 1). However, the teacher progress report did not describe with any detail the specific strategies used for the student in reading other than some general concepts the student was learning to assist her in decoding, and any particularized description of the strategies and supports provided to the student to address her needs in math, an area in which the teacher progress report describes her as "below average" in terms of grade equivalent, is wholly absent from the report (id.). Accordingly, without more, the teacher progress report does not show that the instruction provided was specially tailored to the student and met her unique needs. Additionally, the evidence in the hearing record does not reflect where or when the services were purportedly delivered to the student and neither the SETSS provider nor a representative from Empowered testified at the impartial hearing. Despite the teacher progress report, there is no documentation regarding how the services were delivered to the student, including the frequency and duration of the SETSS sessions. For example, there are no service or attendance records, or even invoices.

Accordingly, the parent failed to meet her burden to prove that the SETSS were delivered to the student and that they were specially designed to meet her unique needs under the totality of the circumstances.[8]

[8] The district has not appealed the IHO's pendency determination and nothing in this decision should be deemed to relieve the district of its obligations under pendency.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the SETSS unilaterally-obtained from Empowered 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 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 five weekly one-hour periods of SETSS in a group for the 2023-24 school year at a specified rate.

Dated: **Albany, New York**
May 16, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER