The University of the State of New York

The State Education Department
State Review Officer
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No. 24-132

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

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) issued after remand which denied her request for respondent (the district) to fully fund the costs of her daughter's unilaterally-obtained special education teacher support services (SETSS) delivered by Budding Buds, LLC for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilaterally-obtained SETSS and speech-language therapy services were appropriate and that equitable considerations weighed in favor of the parent's requested relief. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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, as part of the same due process proceeding, has been the subject of a prior State-level administrative appeal before another SRO, who remanded the matter to the IHO for further proceedings in Application of a Student with a Disability, Appeal No. 23-165 (see IHO Ex. VI). The current appeal arises from the IHO's decision after remand based on the same hearing record that was available at the time of the initial appeal; accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will only be repeated as relevant to this appeal.

Briefly, the hearing record in this matter includes an IESP developed on April 22, 2021 (April 2021 IESP), which included a recommendation for the student to receive five periods per week of SETSS in a group (Yiddish) and two 30-minute sessions per week of individual speech-language therapy (Yiddish) (see Parent Ex. D at pp. 1, 7).[1] The April 2021 IESP reflected a projected implementation date of September 7, 2021, that continued through the projected date of the annual review on April 22, 2022 (id. at p. 1). On or about August 31, 2022, the parent executed a contract with Budding Buds, LLC, for the provision of five periods per week of SETSS ($175.00 per hour) and two 30-minute sessions per week of speech-language therapy ($225.00 per hour) to the student for the 2022-23 school year (see Parent Ex. G at pp. 1-2).[2] The parent, through her attorney, filed a due process complaint notice dated September 23, 2022 alleging that the district failed to convene a CSE meeting to develop an individualized education program (IEP) for the 2022-23 school year, and noted that the April 2021 IESP was "outdated and expired"; the parent attempted to locate providers through the district's resources, but could not do so due to the "low standard rate" or the "general dearth of providers"; and thus, the parent located and secured service providers for the 2022-23 school year at "their prevailing rates" (Parent Ex. A at pp. 1-2). As relief, the parent requested an order directing the district to continue to fund the "program outlined" in an IHO's decision, dated July 3, 2022, and fund a bank of compensatory educational services for pendency services not delivered (id. at p. 2).[3] In a separate letter to the district also dated September 23, 2022, the parent notified the district of her intention to unilaterally-obtain SETSS and related services for the student at an enhanced rate and to seek reimbursement or direct funding for the costs of the SETSS and related services at public expense, as she was unable to locate service providers at the district's standard rate (see Parent Ex. C at p. 1).

On March 31, 2023, the parties proceeded to, and completed, an impartial hearing in this matter before an IHO with the Office of Administrative Trials and Hearings (OATH) and, in a decision dated June 30, 2023, the IHO determined that the district failed to offer the student a free

[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] In her direct testimony by affidavit, the parent testified that she contacted Budding Buds to "facilitat[e] SETSS" for the student after she provided the district with her 10-day notice letter, dated September 23, 2022 (Parent Ex. E ¶¶ 5-6 [emphasis added]). Additionally, the parent testified in her affidavit that she had been unable to locate service providers to implement the recommended services in the student's April 2021 IESP (id. ¶¶ 3-4).

[3] The parent also requested pendency services consisting of the program set forth in an IHO's decision, dated July 3, 2022: five periods per week of SETSS in a group (Yiddish) and two 30-minute session per week of individual speech-language therapy services (see Parent Ex. A at p. 2; see also Parent Ex. B at pp. 3, 5-6).

appropriate public education (FAPE) for the 2022-23 school year due to the district's failure to implement the SETSS and speech-language therapy services recommended in the student's April 2021 IESP during the 2022-23 school year (see IHO Decision at pp. 18-21).

Next, the IHO examined whether the parent was entitled to reimbursement or direct funding for the costs of the unilaterally-obtained SETSS and speech-language therapy Budding Buds provided to the student during the 2022-23 school year (see IHO Decision at pp. 21-26). Here, the IHO examined the facts and circumstances of the matter, noting that the parent's "evidence must be scrutinized, consistent with [the IHO's] obligation and equitable authority to ensure that the remedy 'be appropriate in light of the purpose of the Act' . . . . [and] the evidence therefore must show that the SETSS providers' rates [we]re reasonable and appropriate under the circumstances'" (id. at p. 22). Weighing the evidence in light of certain factors, the IHO determined that, although the hearing record included sufficient evidence to justify the agency's hourly rate for SETSS, the hearing record lacked sufficient evidence of the SETSS provider's qualifications and the "manner in which SETSS ha[d] been administered" to the student (id. at pp. 22-24). More specifically, the IHO found that the SETSS provider's teaching certificate for students with disabilities (Birth-Grade 2) had "expired on January 31, 2023," and there was no evidence that the "instructor was re-certified after that date" (id. at p. 24). In addition, the IHO found that the hearing record lacked evidence that the SETSS was provided to the student in Yiddish, as called for in the April 2021 IESP, or that the SETSS provider "had (or ever had) the NYS certification in Yiddish bilingual extension" (id.). Therefore, the IHO concluded that, although the parent was entitled to be reimbursed for, or for the district to directly fund the SETSS, the absence of a "proper certification" resulted in a "[20] percent reduction in the rate" for SETSS delivered after January 31, 2023, and the absence of a Yiddish bilingual extension resulted in additional "[15] percent" reduction in the SETSS hourly rate (id. at pp. 24-25). Next, the IHO further reduced the hourly rate awarded to the parent based on the fact that the SETSS had been delivered to the student on an individual basis, rather than in a group setting, and the hearing record lacked any explanation for the deviation from the IESP recommendation for a less restrictive group setting; however the IHO noted that the reduction would be limited to an additional five percent, because the student's IESP was "over two years old and the [s]tudent ha[d] not had a new recommended program, which le[ft] his (sic) actual needs at least somewhat in doubt" (id. at p. 25).

As relief, the IHO ordered the district to fund the costs of the student's SETSS at a rate not to exceed $105.00 per hour for the period beginning on the date of the due process complaint notice (September 23, 2022) through January 30, 2023; and for the period extending from January 31, 2023 through the end of the 2022-23 school year, the IHO ordered the district to fund the costs of the student's SETSS at a rate not to exceed $140.00 per hour (see IHO Decision at p. 25). The IHO further noted that these reductions did not apply to the rate for the speech-language therapy services, because the evidence in the hearing record demonstrated that the agency paid the speech-language provider the "majority" of the hourly rate, the speech-language provider held an "appropriate, current certification and bilingual extension," and the April 2021 IESP mandated the delivery of individual speech-language therapy services (id. at pp. 25-26). The parent appealed and the district cross-appealed the IHO's June 30, 2023 decision. Another SRO issued a decision on the parties' appeals on November 29, 2023, remanding the matter to the IHO to address the parent's claims using the Burlington/Carter legal standard to determine the extent to which the parent was entitled to the requested relief (see IHO Ex. VI).

Upon remand, the IHO initially discussed the SRO's decision, and while noting the instructions therein to apply the legal standards as part of the Burlington/Carter analysis to determine whether the SETSS and speech-language therapy services delivered by Budding Buds were appropriate to meet the student's needs and to further examine equitable considerations, the IHO disavowed its application to cases such as this involving equitable services under Education Law § 3602-c (see IHO Decision at pp. 4-11). Nevertheless, the IHO indicated that, "[r]egardless of how inconsistent, ill-advised, or illogical [he] found the SRO's approach in attempting to force Burlington/Carter on equitable basis claims, [he] must, consistent with the Commissioner's rules, 'make additional findings,' as [he] was ordered to do in the remand" (id. at p. 11). The IHO further questioned the SRO's jurisdiction to "compel [him] to apply its holdings on the law";[4] however, the IHO determined that "regardless of whether [he] appl[ied] the Burlington/Carter Prong 2 appropriateness standard or [his] reasonableness test, [he] would come to the same conclusions that [he] did in the original [decision] below" (id.).

Therefore, in making his additional findings in the decision on remand, dated March 11, 2024, the IHO explained that, based "[o]n the [hearing] record already establish[ed]," the "positive reasonableness factors" in his original decision would have "constituted [the] appropriateness [standard] under the Burlington/Carter test, and the negative reasonableness factors [he] found would have represented the [] equitable considerations [standard] for reducing the rates, but only to the amounts" he had already set forth in the original decision (IHO Decision at p. 11). For example, the IHO indicated, "consistent with Gagliardo appropriateness," he had previously provided—as "positive factors"—a "detailed explanation for why the Agency's Educational Director's credited testimony justified the Agency's overhead costs, and other expenses"; "a rationale for why [he] would not limit the rate to only what the instructor earned"; and the "'cottage industry' [wa]s of the [district's] own making by failing to implement its IESP programs" (id. at pp. 11-12). In addition, the IHO indicated that, "under the totality of circumstances," that the parent entered into a contract that ultimately obligated her financially to the agency; the parent made sufficient attempts to locate a provider who accepted the district rates before engaging agency services at higher rates; and there was "no delay in filing" the due process complaint notice, which allowed the district ample time to implement the IESP services (id. at p. 12). In contrast, the factors weighing against the parent receiving an award of the contracted hourly rate for SETSS, the IHO pointed to the insufficient evidence of the SETSS provider's teaching qualifications and

[4] To the extent that the IHO questions the SRO's jurisdiction to compel him to use the Burlington/Carter analysis in this matter, the IHO is mistaken. The IHO must apply the Burlington/Carter analysis because the SRO's determination constitutes the law of the case, which is separate and distinct from the SRO's jurisdiction, the precedential authority of SRO decisions, or whether the IHO agrees or disagrees with the law of the case. As a reminder to the IHO, the law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (Perreca v. Gluck, 262 F. Supp. 2d 269, 272 [SDNY 2003], quoting Arizona v. California, 460 U.S. 605, 618 [1983]). "Administrative agencies are no more free to ignore the law of the case doctrine than are district courts" (Ankrah v. Gonzales, 2007 WL 2388743, at *7 [D. Conn. July 21, 2007]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]). For the law of the case doctrine to be a bar, the issue must have been actually considered and decided by the higher court (see Ms. S. v. Regl. Sch. Unit. 72, 916 F.3d 41, 47 [1st Cir. 2019]).

bilingual extension; however, the IHO clarified that these deficiencies were not sufficient, alone, to find the SETSS that Budding Buds delivered to student was not appropriate (id.). Instead, the IHO found that these factors would have been weighed in equitable considerations to reduce the award, which, as noted by the IHO, he had done in the original decision (id.). Similarly, with regard to the IHO's previous reduction of the hourly rate awarded to the parent due to the delivery of SETSS in a 1:1 setting when the April 2021 IESP included a recommendation for group SETSS, the IHO noted that this had been equitably factored into his findings and weighed against the district's failure to evaluate the student for a new program "in over two years" (id.).

Based on the foregoing, the IHO awarded the same relief, to the parent as in the previous decision, but with a minor correction to a date, to wit: the district must fund the costs of the student's SETSS at a rate not to exceed $105.00 per hour and for no more than five periods per week, from September 23, 2022, less any amounts paid pursuant to pendency, through January 30, 2023; and the district must fund the costs of the student's SETSS at a rate not to exceed $140.00 per hour and for no more than five periods per week, from January 31, 2023 through the conclusion of the 2022-23 school year (less any amounts paid under pendency) (compare IHO Decision at pp. 12-13, with IHO Decision at p. 25 [emphasis added to correct date]). In addition, the IHO ordered the district to fund the costs of the student's speech-language therapy services at a rate not to exceed $225.00 per hour for two 30-minute sessions per week for the 10-month school year (see IHO Decision at p. 13).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by ignoring the directives on remand to complete the hearing record and seek additional evidence to properly analyze the matter under the appropriate legal standard. The parent contends that the IHO failed to schedule additional appearances or attempt to obtain any additional evidence from either party, and noted that, if the IHO had properly developed the hearing record as directed, the outcome would have been different. In addition, the parent contends that the IHO, while disregarding the directives upon remand, made strong arguments against using a Burlington/Carter analysis in matters involving equitable services. As relief, the parent seeks an order directing the district to fund the parent's unilaterally-obtained SETSS at the contracted rate of $175.00 per hour and the speech-language therapy services at $275.00 per hour for the entire 2022-23 school year. The parent submits additional evidence from Budding Buds which is discussed below.

In an answer, the district responds to the parent's allegations, and asserts that, as the law of the case, the IHO was required to apply the Burlington/Carter analysis to the facts of this matter. Next, and as part of the district's cross-appeal, the district contends that that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services. The district similarly argues that equitable considerations do not weigh in favor of the parent's requested relief, and in support of this contention, the district also submits additional evidence the form of a study from the "American Institutes for Research ('AIR Study')" as evidence supporting an alternative basis upon which to conclude that equitable considerations do not weigh in favor of the parent's requested relief.

In a response to the district's answer and cross-appeal, the parent initially points out that the district concedes that the IHO ignored the directives on remand by failing to reconvene the

hearing to provide a further opportunity to submit evidence. With respect to the district's cross-appeal, the parent asserts that the district stresses the need for a more fully developed hearing record with respect to whether the unilaterally-obtained services were appropriate to meet the student's needs. Additionally, the parent contends that the delivery of 1:1 SETSS, rather than in a group setting, should not be held against the parent, when the evidence reflects that she could not locate an appropriate group for the student's SETSS. Additionally, the parent contends that, with regard to equitable considerations, the district's AIR study report merits little, if any weight, afforded to the information contained therein as it unreliable and irrelevant. The parent also asserts that the district's cross-appeal is not properly notarized and should be disregarded.[5]

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that

[5] In the request for review, the parent appears to now seek an award on appeal to fund the student's unilaterally-obtained speech-language therapy services at a rate of $275.00 per hour (see Req. for Rev. at p. 7). However, the parent's contract with Budding Buds reflects that the agency charged $225.00 per hour to provide speech-language therapy services and the IHO's award ordered the district to fund the unilaterally-obtained speech-language therapy services at the contracted rate of $225.00 per hour (compare Req. for Rev. at p. 7, with Parent Ex. G at p. 2, and IHO Decision at p. 13). Subsequently, the parent, in her response to the district's answer and cross-appeal, indicates that she seeks an award of $225.00 per hour to fund the student's unilaterally-obtained speech-language therapy services (see Reply & Answer to Cr. App. At p. 10). Generally, the parent is not aggrieved by the hourly rate awarded by the IHO for the unilaterally-obtained speech-language therapy services, and the district has not challenged the hourly rate the IHO awarded, to wit, $225.00 per hour. Therefore, other than making a determination regarding whether the unilaterally-obtained speech-language therapy services were appropriate to meet the student's needs, no discussion is warranted regarding the hourly rate for such services, if appropriate.

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

special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

Both parties agree that the IHO erred in failing to reconvene the impartial hearing to provide for the further development of the hearing record; however, after submitting additional evidence on appeal, neither party seeks to further remand the matter to correct the IHO's deficiencies in the hearing process. Upon review, neither the hearing record nor the IHO's decision on remand indicates why the IHO did not reconvene the proceeding, as instructed by the SRO and as the parties were expecting.

Upon receiving the additional evidence of the parties, and especially the direct testimony by affidavit of the Budding Buds educational director that was attached to the request for review, I considered remanding the matter once again to allow for the opportunity for cross examination. The district objected to its consideration on appeal, but not for lack of the opportunity to cross examination and instead because the district did not feel the testimony was adequately addressed in the parent's request for review. However, upon closer examination of the direct testimony by affidavit that was proffered from the educational director of Budding Buds, I find that remand is not necessary because the information contained in the affidavit pertains to the 2023-24 school year, not the 2022-23 school year at issue in this appeal. Therefore, even if the evidence was accepted and considered, the facts and events therein post-dates the school year in question and is therefore not relevant to the issues to be resolved in this proceeding.[8] The remaining documentary

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

[8] The evidence may be relevant to a dispute involving a different school year, just not this one.

evidence for consideration on appeal relates to equitable considerations and I will turn to that evidence after addressing the parties' remaining disputes over the appropriateness of the services from Budding Buds.

A. Legal Standard: Unilaterally-Obtained SETSS and Speech-Language Therapy

The parent contends that, if the IHO had reopened the impartial hearing and more fully developed the hearing record, the evidence would have demonstrated that the SETSS provider was a "native Yiddish speaker who read and write Yiddish fluently." The parent also asserts that she would have provided the IHO with evidence that she had attempted to locate a suitable group within which to deliver the student's SETSS, but that she could not locate a similarly situated group. Thus, it was appropriate to deliver the SETSS individually to the student in this matter.

In its cross-appeal, the district argues that the IHO should have determined that the unilaterally-obtained SETSS and speech-language therapy Budding Buds provided to the student were not appropriate. Overall, the district's arguments in support of this conclusion focus primarily on the lack of evaluative information describing the student's needs. For example, the district asserts that the hearing record lacked evidence regarding how Budding Buds determined the student's needs, including that the agency failed to conduct an evaluation. Additionally, the district alleges that the parent failed to demonstrate that Budding Buds provided specially designed instruction to the student, such as providing evidence that reflected what methods were used to deliver the student's spelling, writing, mathematics, or speech-language instruction, and also arguing that the goals developed were not measurable. The district asserts that Budding Buds did not provide services in accordance with the student's April 2021 IESP—which it argues was "stale"— as the student's SETSS was delivered individually rather than in a group, the parent failed to establish that the student's SETSS provider had a bilingual extension, and the student's SETSS provider's special education certification expired in the middle of the 2022-23 school year. Further, the district argues that the evidence in the hearing record did not reflect that the student was making progress.

In the prior State-level administrative review decision remanding this matter, the SRO discussed the appropriate legal standard to be applied to the parent's request for services obtained for the student during the 2022-23 school year. As the SRO in the prior decision noted, in this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that she unilaterally-obtained SETSS and speech-language therapy services from Budding Buds for the student and then commenced due process to obtain remuneration for the services provided by Budding Buds. Accordingly, the issue in this matter is whether the SETSS obtained by the parent, as a self-help remedy, constituted appropriate unilaterally-obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Budding Buds upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so.

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. "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"]).

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

For convenience I will repeat the standard set forth by the SRO in Application of a Student with a Disability, Appeal No. 23-165. As for review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (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).

On remand, the IHO explained how his initial analysis of the facts and circumstances would not change if directly applying the Burlington/Carter analysis, as instructed by the SRO. The IHO also explained that this was true where, as here, his initial analysis fit squarely within the appropriateness standard (prong 2) and the equitable considerations standard (prong 3) of the Burlington/Carter analysis; as a result, the IHO reaffirmed his initial findings and the relief ultimately awarded to the parent.

After reviewing the IHO's decision on remand, although the IHO believed that his initial analysis led to the same results when analyzed under Burlington/Carter standards, the IHO's rationale was error.[9] As noted above, to qualify for reimbursement under the IDEA, parents must

[9] One of the chief distinctions lies in the burden of production and persuasion. The undersigned has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden

demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). The aforementioned are generally considered to be the factors of the "appropriateness" standard—or prong 2—under the Burlington/Carter analysis, which when applied to the instant matter, leads to a determination of whether the SETSS and speech-language therapy services Budding Buds delivered to the student met her needs. To conduct this analysis, it is initially necessary to describe the student's needs, and thereafter, to review the instruction delivered to the student to determine if the methods and strategies used constitute specially designed instruction. Contrary to the IHO's findings, it is well settled that a parent need not engage the services of a certified special education teacher—or, as here, a SETSS provider—in order to qualify for reimbursement or direct funding of those services. Therefore, whether the SETSS provider held a current teaching certificate or a bilingual extension would not be determinative in this matter.

With that in mind, although the student's needs are not in dispute, a description thereof provides context to determine whether the parent's unilaterally-obtained SETSS and speech-language therapy services constituted specially designed instruction and addressed the student's needs. Overall, the hearing record contains little evidence of the student's needs, other than the April 2021 IESP, which for all intents and purposes, expired several months (April 2022) before the parent filed the September 2022 due process complaint notice (compare Parent Ex. B at p. 1, with Parent Ex. A at p. 1). However, the hearing record fails to contain any evidence that the district evaluated the student or engaged in educational planning leading up to the 2022-23 school year at issue. Thus, to the extent the district now contends on appeal that Budding Buds failed to establish the student's needs prior to delivering services or failed to conduct its own evaluation of the student to determine the student's needs prior to delivering services, it is well settled that it is the district's responsibility to identify the student's needs through the evaluation process and its burden to present evidence regarding the student's needs during the impartial hearing (see Parent Ex. A at pp. 1, 3; see also A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). The district cannot shift the responsibility to evaluate the student onto the parent or Budding Buds, neither of which have that responsibility under IDEA. Consequently, the district's assertion that Budding Buds' failure to establish the student's needs in this matter, by evaluation or

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of proof regarding compensatory education relief on the district in all administrative due process proceedings, and I note that no court or other authoritative body in this jurisdiction has addressed the topic to date (Application of the Dep't of Educ., Appeal No. 24-168; Application of the Dep't of Educ., Appeal No. 24-151; Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally-selected private special education services such as Budding Buds, I find that in such circumstances it would be appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief in the form of parentally selected private services. In most case when fashioning equitable relief, if the parent has already obtained the private services, the courts have addressed such relief under a Burlington/Carter analysis and conducted a compensatory education analysis when the services have not yet been obtained for the student.

otherwise, weighs against finding that the unilaterally-obtained SETSS and speech-language therapy services were appropriate, is inapposite and must be dismissed.

Turning, then, to the April 2021 IESP, the CSE determined the student was eligible for special education as a student with a speech or language impairment (Parent Ex. D at p. 1). At the time the IESP was developed, the student was almost five years old and presented as a monolingual Yiddish speaker (id. at p. 2). The student also presented with mild receptive/expressive language delays, including difficulty following multi-step commands, and with critical thinking, problem solving, basic categorization, conceptual knowledge, and pragmatic language skills (id.). Although delayed as a younger child, the IESP indicated that at the time it was developed, the student's speech intelligibility was within normal limits and she communicated easily with peers (id.). However, according to the IESP, the student exhibited difficulty with social language and "often resort[ed] to crying and mild meltdowns" (id.). The IESP indicated that the student had made progress with conceptual development and her general memory skills appeared to be average; however, she continued to show difficulty with inferencing, cause and effect, and following multi-step directions (id.). Academically, it was reported that the student knew the "majority of the Hebrew alphabets" and "some of the primary shapes and colors," but she had not mastered rote counting and was not able to identify numbers (id.). Due to the student's "difficulty with grasping pre-academic" skills, the April 2021 CSE determined that she benefitted from the provision of SETSS (id. at p. 4).

With respect to the student's social development, the April 2021 IESP described the student's socialization skills as emerging; in addition, the IESP indicated that she interacted with peers, used her imagination when playing, played cooperatively with other children, and was beginning to engage in make-believe activities (Parent Ex. D at p. 3). According to the IESP, the student did not always show a desire to please others, preferred to play alone, was generally quiet around others, and did not "demonstrate friendship seeking behaviors" (id.). Due to the student's difficulty grasping social pragmatic skills, the April 2021 CSE determined that she benefitted from speech-language therapy (id. at p. 4). The IESP did not reflect then-current concerns regarding the student's physical development (id. at p. 3). The CSE identified strategies to address the student's management needs, including redirection and prompts to remain on task; small group instruction; 1:1 teacher check-ins; a highly structured and nurturing environment; modeling of appropriate social skills; repeating, simplifying and modifying directives; providing positive reinforcement for motivation and engagement; and verbal, visual, and physical prompts and cues (id. at p. 4).

Turning to the unilaterally-obtained services, the evidence in the hearing record shows that, during the 2022-23 school year, the student attended a "mainstream," religious, nonpublic school, and Budding Buds provided five hours per week of SETSS and two 30-minute sessions per week of speech-language therapy to the student (Parent Exs. E ¶¶ 2, 6-7; F ¶¶ 3, 10-11, 15). The educational director of Budding Buds (educational director) testified that the provider of the student's SETSS held New York State certification to teach students with disabilities and was "trained and experienced to teach literacy and comprehension to school aged children and adolescents" (Parent Exs. F ¶ 12; I). Additionally, the educational director testified that the student's speech-language therapy provider held New York State licensure as a speech-language pathologist (Parent Ex. F ¶ 13). The educational director testified that both the SETSS provider and the speech-language pathologist provided "direct 1:1 service," "prepare[d] for sessions,

create[d] goals, wr[ote] progress reports, and me[t] with teachers and parents" (id. ¶ 14). Further, the educational director testified that goals were developed for the student to work on during the 2022-23 school year, which were "reviewed quarterly" (id. ¶ 16). Regarding the sessions, the educational director testified that the student's services were "typically provided outside of the classroom" and that they were "individualized sessions that include[d] a great deal of specialized instruction" (id. ¶ 17; see Tr. p. 32).[10] According to the educational director, the student's progress was measured through "quarterly assessments, consistent meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes" (Parent Ex. F ¶ 18).

On January 20, 2023 the student's SETSS provider and speech-language pathologist prepared an updated educational progress report (January 2023 progress report or progress report) (see Parent Ex. H at p. 1). According to the progress report, the student was in first grade and was receiving five 60-minute sessions per week of SETSS and two 30-minute sessions of speech-language services "to address her cognitive and language deficits" (id.). In reading, the progress report indicated that the student "had difficulty acquiring the letter names and sounds" and with the use of an Orton-Gillingham approach, the student had developed the ability to identify letters and letter-phoneme relationships in both English and Hebrew (id.). At the time the progress report was prepared, the student could blend simple consonant vowel consonant (CVC) words, was learning the rules for blends, and would soon be introduced to long vowel combinations (id.). The progress report indicated that all of the phonics instruction taught in the general education setting was revisited with the student in a 1:1 setting so she could gain mastery of the concepts taught (id.). Additionally, the providers reported that comprehension strategies, such as context clues, were embedded within the decoding instruction (id.). Literacy goals developed for the student targeted her ability to read CVC and simple one-syllable long vowel words, identify 50 new sight words, and respond to "wh" questions after reading a passage (id. at p. 3).

With regard to spelling, the January 2023 progress report indicated that the student could spell simple CVC words when she applied the phonics rules she was taught, "[s]ight words [we]re a relative strength," and that she had "no difficulty keeping up with the class sight word curricula" (Parent Ex. H at p. 1). In the area of writing, the providers reported that the student formulated simple four-to-five word sentences, and although her vocabulary usage was described as "pretty simple," the student's sentences were grammatically correct when provided with support (id.). The providers developed a goal for the student targeting her ability to formulate a legible sentence with correct punctuation (id. at p. 3).

Regarding mathematics, the January 2023 progress report indicated that the student could add and subtract single digits up to 12, and "comprehend[ed] math concepts taught and acquired fluency in both addition and subtraction of single digits" (Parent Ex. H at p. 1). Goals developed for the student included identifying the correct operation in simple word problems using a graphic organizer, adding single and double digits up to 20, subtracting from 10, and identifying place value for numbers in the 1s, 10s, and 100ths column (id. at p. 3).

In the area of language skills, the January 2023 progress report reflected that the student presented with expressive and receptive language delays (Parent Ex. H at p. 2). Receptively, the

[10] At the impartial hearing, the parent testified that the student received SETSS in the classroom, and the student's speech-language therapy was provided to the student outside of the classroom at school (see Tr. pp. 17, 21).

student followed two-step directions; however, she had difficulty with three-step directions in the correct sequence and sought reassurance (id.). The student was reported to have difficulty with word retrieval skills and thinking of words that belonged to different word classes (id.). She had difficulty making inferences and predictions and retelling the main idea of a short passage she listened to, but the student was showing improvement responding to questions (id.). Expressively, the student had difficulty starting conversations, asking for help when needed, telling and retelling stories and events in a logical order, and telling what to do in complex situations (id.). The student's ability to describe similarities and differences of objects had improved, and she showed potential for ongoing improvement in speech-language skills with ongoing services (id.). Goals developed for the student to improve in her listening skills were attending during group lessons without cues for 10 minutes and following teacher's directions to have the correct materials for the lesson (id. at p. 3). The providers reported that socially, the student usually interacted appropriately with peers, was not aggressive, and liked to please (id. at p. 2). Further, the student took turns, shared, and tried to carry on conversations with peers (id.). The providers recommended that the student continue with her current "mandate" to target her academic challenges in the classroom (id.).

Contrary to the district's arguments, the evidence in the hearing record, while sparse, sufficiently demonstrates that Budding Buds' providers identified the student's academic, language, and pragmatic/social skill needs, and delivered instruction to meet those needs (see Parent Exs. F ¶¶ 14, 16-18; H). To the extent the district argues that Budding Buds inappropriately delivered the student's SETSS individually rather than according to the April 2021 IESP mandate for group services, the January 2023 progress report indicated that, in the classroom, the student had difficulty acquiring letter names and sounds and often became lost during math instruction (Parent Ex. H at p. 1). However, in "therapy," which was delivered individually, the student developed letter identification and identification of letter-phoneme relationships (id.). Additionally, in a 1:1 setting, the student comprehended mathematics concepts and acquired fluency in both addition and subtraction of single digits (id.). Therefore, the evidence in the hearing record does not support a finding that it was inappropriate for Budding Buds to deliver the student's SETSS on an individual basis, rather than in a group setting as recommended in the April 2021 IESP.

Next, with regard to the SETSS provider's teaching certification, the IHO and the parties discussed status of the SETSS provider's special education certification during the March 2023 impartial hearing. The educational director testified that while it had expired on January 31, 2023, the SETSS provider remained certified, but needed to submit her "updated" special education certification to the agency (see Tr. pp. 27-29; Parent Ex. I at p. 1). Regardless, as noted above, teachers and providers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the student's providers of the unilaterally-obtained services who have reasonable qualifications that are specifically related to the student's deficits. Further, to the district's argument that the providers did not show that they held bilingual extensions, the January 2023 progress report indicated that the student identified letters and letter sound relationships in both English and Yiddish (see Parent Exs. D at p. 7; H at p. 1). However, the evidence does not reflect whether the student's SETSS was delivered in Yiddish, consistent with the recommendation in the April 2021 IESP, which had described the student at that time as a monolingual Yiddish

student (see Parent Ex. D at pp. 2, 7; see generally Parent Exs. E-F; H). On the other hand, at the time the IESP was generated in April 2021, the district indicated that the student had not learned English (Parent Ex. D at p. 2), but as described above, the student was identifying letters in both languages and the sound relationships during the 2022-23 school year, which is indicative of instruction and progress in this area. While this topic would have benefitted from further development of the hearing record, the evidence is not so infirm as to require a finding that Budding Buds was inappropriate.

As a final point and contrary to the district's assertion in its cross-appeal that the hearing record lacked evidence of the student's progress, the educational director testified that the student "ha[d] already shown signs of progress with her SETSS and [s]peech-[l]anguage [t]herapy" (Parent Ex. F ¶ 19). While the hearing record does not provide more specific examples of the student's progress related to the SETSS and speech-language therapy Budding Buds delivered to her during the 2022-23 school year, it is well settled that progress is merely one relevant, but nondispositive, factor to be considered when evaluating the appropriateness of unilaterally-obtained services, and such discrepancies in viewpoint as to progress do not undercut the overall evidence in the hearing record that the unilaterally-obtained SETSS and speech-language therapy services in this matter were appropriate (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see also M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; Frank G., 459 F.3d at 364).

In light of the foregoing, the hearing record contains sufficient evidence to conclude that the SETSS and speech-language therapy services Budding Buds provided to the student during the 2022-23 school year were appropriate to meet her needs.

B. Equitable Considerations

Having determined that the SETSS and speech-language therapy services delivered by Budding Buds were appropriate to meet the student's needs, the next inquiry is whether equitable considerations weigh in favor of the parent's requested relief to fund the unilaterally-obtained SETSS at a rate of $175.00 per hour for the 2022-23 school year.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied

when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In the decision, the IHO reduced the SETSS provider's hourly rate due to the lapse of the teacher's certification, the absence of evidence demonstrating that the SETSS provider held a bilingual extension to deliver services in Yiddish, and because the SETSS had been delivered individually, as opposed to in a group. Now that these factors have been properly addressed within the analysis of whether the SETSS was appropriate to meet the student's needs, the only remaining basis upon which to potentially reduce or eliminate the parent's requested relief is to determine whether the hourly rate of $175.00 for SETSS was excessive (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"]).[11]

The district contends that the "independent SETSS rate study issued in October 2023"—that is, the AIR study report—provides a proper, alternative basis upon which to uphold the IHO's rate reductions for the unilaterally-obtained SETSS. According to the district, the AIR study represents "objective evidence of the market rate for SETSS," and thus, demonstrates that Budding Buds contract rate of $175.00 per hour was excessive. Based on the AIR study report, the district

[11] To be clear, the district does not challenge the parent's request for direct funding of the student's unilaterally-obtained speech-language therapy services at $225.00 per hour (see Answer & Cr. App. ¶ 12).

argues that the SETSS hourly rate for elementary school-age students ranges between $71.51 per hour and $150.55 per hour. Additionally, the district argues that a further reduction of the hourly rate for SETSS is warranted because the parent failed to timely provide her 10-day notice of unilateral placement and then falsely claimed in her testimony that she had contacted Budding Buds agency after providing her 10-day notice. In light of the foregoing, the district argues that equitable considerations justify an hourly rate reduction, or denial in full, of the parent's award.

The parent contends that the AIR study report is unreliable because the district should have presented a witness to explain its relevance and that its application to the facts in the instant matter should be accorded diminished weight if it should be given any weight at all. The parent contends that the study is premised upon a "fully static market" with price(s) that are "fixed in perpetuity." The parent asserts that the AIR study report is flawed, due in part to the fact that the sample data was obtained from geographic regions outside of New York City and that prices of all kinds can vary within New York City, even from a "neighborhood-to-neighborhood basis." Next, the parent contends that the AIR study report uses economic data that is "fundamentally non-comparable to the financial realities of providers" like Budding Buds. The parent argues that a district teacher is a "fundamentally different class of worker" than an independent itinerant provider such as those at Budding Buds, who are not similarly paid for items such as professional development or continuing education or "even as they eat." The parent also contends that the study improperly relies on cost-reduction measures and economies of scale to approximate the indirect costs borne by agencies, such as Budding Buds.

Turning first to the district's concerns about the parent's 10-day notice, the evidence reflects that, consistent with the district's assertion, the parent contracted with Budding Buds on August 31, 2022, prior to sending her 10-day notice, which was dated September 23, 2022 (compare Parent Ex. G at p. 2, with Parent Ex. C at p. 1). The evidence further reveals that, consistent with the district's assertion, the parent's testimony did not accurately recount the chronology of these events, but instead, indicated that the parent contacted Budding Buds after providing the district with her 10-day notice, dated September 23, 2022 (see Parent Ex. E ¶¶ 5-6). The hearing record does not indicate when Budding Buds began delivering SETSS to the student (see generally Tr. pp. 1-36; Mar. 31, 2023 Tr. pp. 1-11; Parent Exs. A-I; Dist. Exs. 1-4). However, the district's arguments ignore the fact that, based on the evidence in the hearing record, it failed to develop an IESP, or an IEP for that matter, for the student after April 2021, for the 2022-23 school year at issue (see Answer & Cr. App. ¶¶ 12-13). It does not go unnoticed, however, that the parent's testimony does not align with the documented chronology of events in this matter, and in the future, more care must be taken or an administrative hearing officer could be justified in making a finding that the parent's testimony was not credible.

Next, with respect to whether $175.00 per hour is an excessive rate, the district appears to agree in its pleadings that, at a minimum, the higher hourly rate of $140.00 per hour awarded by the IHO should be upheld, as it falls within the range of rates established in the AIR study report. Upon review, the AIR study report is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Answer & Cr. App. Ex. 1 at p. 1). The district commissioned the report from AIR to "[d]evelop an approach to using data from the [United States Bureau of Labor Statistics (USBLS)] to calculate hourly rates for independently contracted providers" and to "[c]alculate hourly rates for special education teachers in the region that [the district] c[ould] use to determine a fair market rate for its [SETSS]

special education teachers" (id. at p. 4). The report describes a five step methodology starting with USBLS' Occupational Employment and Wage Statistics (OEWS) data for occupations that resemble the positions in the district (steps one and two), using the district's collective bargaining agreements to convert the salaries into hourly rates (step 3) and then using adjustments from the district's financial reports factor in fringe benefits and indirect costs (step 4) and, last, using the consumer price index to address inflation over time (step 5) (id. at pp. 4-6).

The AIR study report offers a secondary adaptation to this methodology for hourly rate adjustments for the district to take into account different combinations of educational attainment ("measured as a combination of degree, earned college credits, and/or other professional development accomplished, such as obtaining a certificate from the National Board for Professional Teaching Standards") and/or experience (number of years teaching within the district) (Answer & Cr. App. Ex. 1 at pp. 6-7, 9-10, 19-24). This adaptation in the methodology was clearly designed to address the fact that the collective bargaining agreement between the district and the United Federation of Teachers that represents the school district's employee teachers contains salary schedules for special education teachers that function similarly in that district employees such as SETSS teachers who have greater educational attainment such as a master's degree versus a bachelor's degree, additional credits that relate to four differentials depending on the types of credits and other criteria (first, intermediate promotional, and second), and certifications and/or experience are entitled to higher salaries under the labor agreement's salary schedules (Answer & Cr. App. Ex. 1 at pp. 6-8).[12] However, the AIR report does not specifically factor State certifications in describing hourly rate adjustments, likely because it would be violative of State law to employ a teacher in a public school in contravention of the State's certification requirements, thus dispensing with any need to collectively bargain that factor (see generally Answer & Cr. App. Ex. 1).

Given the published date of the AIR study report, the district did not present any witnesses at the impartial hearing held in this matter to explain how it specifically relates to this matter which, if the IHO had provided the parties with an opportunity to be heard, would have provided the opportunity to further develop the record. However, at the impartial hearing, the parent did have the opportunity to present evidence and the educational director of Budding Buds testified with respect to how the agency arrived at the hourly rate of $175.00 per hour for SETSS, which the educational director explained as a flat rate for SETSS and as set forth in the contract between the parent and Budding Buds (see Tr. p. 30; Parent Ex. G at p. 2). However, according to the witness, SETSS cost the agency a range of rates because "each provider [wa]s different" and "[e]ach student need[ed] a different amount of materials, a different amount of resources, [and] different amounts of supervision" (Tr. p. 30). In this case, the SETSS provider was an employee of the agency and received $85.00 per hour out of the flat rate charged by the agency (id.). With respect to the agency's operational costs, the educational director explained that the difference between the $85.00 per hour paid to the SETSS provider and the $175.00 per hour flat rate charged by the agency—or, $90.00 per hour—covered the costs of "materials," "supervision," "collaboration," "training," "overhead expenses of [the agency's] secretaries running the office, office equipment," "payroll expenses," and "loan interests" (Tr. p. 31). The educational director testified that the agency had been forced to take out loans to cover the agency's costs because of delayed

[12] The 2022-2027 salary schedules for district teachers from the district-UFT agreement are cited in the report.

reimbursement payments from the district (see Tr. pp. 32-33). For example, the educational director testified that she had "outstanding invoices" from as far back as 2019 (Tr. p. 33).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report does not suffer from all of the infirmities that the parent claims but, at the same time, not all of the report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like Budding Buds. First the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013]; Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the USBLS is relevant to the question of how much special education teachers are paid in the New York City metropolitan region in a given year in which the data is published.[13] It was not inappropriate for the AIR to use such government-published data in its report. The parent's argument that the data from USBLS is dispersed over too wide a geographic area because it is from areas as far away as Pennsylvania is a misreading of the report and does not preclude use of the USBLS data. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2022 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/2022/may/oes_35620.htm). Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

When calculating the SETSS rates in the AIR study report, operational costs were approximated at 8.3 percent (Answer & Cr. App. Ex. 1 at p. 11). Here, the amount attributed to the agency's operational costs, based on the hourly rate for SETSS, is $90.00 per hour or approximately 51 percent of the hourly rate charged by Budding Buds. The agency also collects operational costs via the rate charged for speech-language therapy services (see Tr. p. 31). The agency charged $225.00 per hour for speech-language therapy services and, in this matter, paid the provider $175.00 per hour, with the remaining $50.00 per hour put towards operational costs—or approximately 22 percent of the hourly rate charged by Budding Buds (see Tr. pp. 31-32).

A valid concern raised by the parent with respect to the type of worker bears on some aspects of the AIR report that warrant further discussion. The AIR report appears to address a

[13] The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data, which shortly preceded the 2022-23 school year at issue in this proceeding and would be relevant thereto (see https://www.bls.gov/oes/tables.htm); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Answer & Cr. App. Ex. 1 at p. 1). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees.

However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose— they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district special teachers. The USBLS indicated that in May 2022 data annual salaries for "Special Education Teachers, All Other" ranged from $49,000 in the 10th percentile, $63,740 in the 25th percentile, $97,910 in the median, $146,200 in the 75th percentile, to $163,670 in the 90th percentile. In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and for private industry such educational services costs were 28.4 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For Employee Compensation (ECEC) - March 2022, available at https://www.bls.gov/news.release/archives/ecec_06162022.pdf).[14]

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six

[14] The ECEC covers the civilian economy, which includes data from both private industry and state and local government.

and seven hours long. When using the USBLS data relied upon in the AIR report, a calculation leads to the conclusion that the $175.00 per hour rate falls within the data at slightly less than the 90th percentile of salary, using indirect and fringe benefit costs of 28.4 percent. While the contract cost between the parent and Budding Buds is likely high, it is not excessively so as the district argues. If the district wanted to curtail costs further, it should have done so by providing the SETSS instruction to the student itself. I find that the IHO's decision limiting the cost of the SETSS to $140 per hour must be upwardly modified because it was based upon factors that were not relevant to a unilateral placement.

VII. Conclusion

Having found that the evidence in the hearing record supports a finding that the parent's unilaterally-obtained SETSS and speech-language therapy services were appropriate to meet the student's needs, and that equitable considerations weigh in favor of the parent's requested relief, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 11, 2024, is modified by reversing the IHO's award of funding for SETSS; and

IT IS FURTHER ORDERED that the district is ordered to fund the costs of the student's SETSS at a rate not to exceed $175.00 per hour upon proof of attendance and delivery of services to the student for the 2022-23 school year.

Dated: **Albany, New York**
June 28, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER