The University of the State of New York

The State Education Department
State Review Officer
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No. 24-133

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 (Budding Buds) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilaterally-obtained SETSS were appropriate and that equitable considerations weighed in favor of the parent's requested relief. The appeal must be dismissed. The cross-appeal must be sustained in part.

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, which remanded the matter to the IHO for further proceedings (see IHO Ex. V). 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 November 30, 2021 (November 2021 IESP), which included a recommendation for the student to receive five periods per week of SETSS in a group in Yiddish (see Parent Ex. D at pp. 1, 6).[1] The November 2021 IESP reflected a projected implementation date of December 9, 2021 and a projected date of annual review on November 30, 2022 (id. at p. 1). As noted in the IESP, the November 2021 CSE relied, in part, on an updated progress report, dated November 9, 2021, to develop the IESP (November 2021 progress report) (id.; see generally Dist. Ex. 3). On or about August 31, 2022, the parent executed a contract with Budding Buds for the provision of five hours per week of SETSS to the student for the 2022-23 school year, at a rate of $175.00 per hour (see Parent Ex. G at pp. 1-2).[2] The parent, through her attorney, filed a due process complaint notice dated September 28, 2022 alleging that the district failed to implement the student's SETSS as mandated in the November 2021 IESP (see Parent Ex. A at pp. 1-2). As relief, the parent requested an order directing the district to fund the unilaterally-obtained SETSS provider for the 2022-23 school year "at their prevailing rate," and to award a bank of compensatory educational services for SETSS not delivered to the student during the 2022-23 school year (id. at p. 3). In a separate letter to the district, also dated September 28, 2022, the parent notified the district of her intention to unilaterally obtain SETSS for the student at an enhanced rate and to seek reimbursement or direct funding for the costs of the SETSS at public expense, as she was unable to locate SETSS providers at the district's standard rate (see Parent Ex. C).

On March 13, 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 July 7, 2023, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, due in part, to the district's

[1] The student is eligible for special education as a student with a speech or language impairment, which 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 28, 2022 (Parent Ex. E ¶¶ 5-6 [emphasis added]). Additionally, the parent testified in her affidavit that she had been unable to locate SETSS providers to implement the recommended services in the student's November 2021 IESP (id. ¶¶ 3-4).

failure to implement the SETSS recommended in the student's November 2021 IESP during the 2022-23 school year (see IHO Decision at pp. 19-23).[3]

Next, the IHO examined whether the parent was entitled to reimbursement or direct funding for the costs of the unilaterally-obtained SETSS Budding Buds provided to the student during the 2022-23 school year (see IHO Decision at pp. 20-23). 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 pp. 20-21). Weighing the evidence in light of certain factors, the IHO determined that the SETSS provider's teaching certificate did not list the grade levels covered by the certificate, and the certificate did not include a required "bilingual extension" in Yiddish, as called for in the November 2021 IESP (id. at p. 15). Therefore, the IHO concluded that, although the parent was entitled to be reimbursed for, or for the district to directly fund, the SETSS, the lack of a grade level qualification and a bilingual extension in Yiddish resulted in a "[15] percent reduction in the rate" (id. at p. 22). 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 IESP was "two years old and the student ha[d] not had a new recommended program, which le[ft] her actual needs at least somewhat in doubt" (id. at pp. 22-23).

As relief, the IHO ordered the district to 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 September 28, 2022, less any amounts paid pursuant to pendency (see IHO Decision at pp. 23-24). In addition, the IHO ordered the district to fund the costs of the student's SETSS at its "standard rate," "for any dates of service between the first day of the [10]-month school year and September 27, 2022" (id. at p. 24). The parent appealed and the district cross-appealed the IHO's July 7, 2023 decision. An SRO issued a decision on the parties' appeals on November 27, 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. V).

Following remand, no further hearing dates were scheduled and no additional evidence was received into the hearing record, other than the November 2023 SRO decision (IHO Ex. V).

After remand, on March 11, 2024, the IHO issued a decision in which he 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 delivered by Budding Buds was 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 section 3602-c

[3] The IHO's original July 7, 2023 decision is incorporated within the IHO's March 11, 2024 decision following remand (IHO Decision at pp. 6, 13-24).

(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, 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 pp. 11-12). For example, according to the IHO, the absence of any evidence establishing whether the SETSS provider was qualified to instruct at the student's grade level or whether the SETSS provider possessed a bilingual extension in Yiddish, as "deficiencies" in the parent's case, would not have been sufficient to "declare the Agency's services inappropriate" (id. at p. 12). Instead, 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, the IHO indicated that the parent's untimely 10-day notice of unilateral placement, dated September 28, 2022, and the filing of the due process complaint notice on the same day "would not have affected" his conclusion under "Prong 2," but under equitable considerations, the untimely 10-day notice "would have provided a basis to equitably reduce the payment obligation to the base rate" (id.). And finally, 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 November 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.).

[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. Rather, 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]).

Based on the foregoing, the IHO awarded the same relief to the parent as in the previous decision, to wit: 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 September 28, 2022, less any amounts paid pursuant to pendency; and the district must fund the costs of the student's SETSS at its "standard rate," "for any dates of service between the first day of the [10]-month school year and September 27, 2022" (compare IHO Decision at p. 13, with IHO Decision at pp. 23-24).

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 did not schedule additional appearances or attempt to obtain any additional evidence from either party. As a result, the parent submits additional documentary evidence for consideration on appeal, which purportedly demonstrates that the student's unilaterally-obtained SETSS was provided by a certified, bilingual (Yiddish) individual and that the parent could not locate a suitable SETSS group to accommodate the student, and thus, the SETSS was appropriately delivered in a 1:1 setting. In addition, the parent contends that the IHO, while disregarding the directives on 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 for the entire 2022-23 school year.

In an answer, the district responds to the parent's allegations, and asserts, as a cross-appeal, that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS and that equitable considerations weighed in favor of the parent's requested relief. The district argues that the IHO erred by conflating the factors related to finding whether SETSS was appropriate with factors related to finding whether equitable considerations weighed in the parent's favor. The district submits additional documentary evidence—the "American Institutes for Research ('AIR Study')"—for consideration on appeal as an alternative basis upon which to conclude that equitable considerations do not weigh in favor of the parent's requested relief.

In a reply and answer to the district's cross-appeal, the parent initially points out that the district concedes that the IHO ignored the directives on remand by failing to seek and consider additional evidence. With respect to the district's cross-appeal, 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 should not be considered as it is unreliable and irrelevant.

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

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

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

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

VI. Discussion

A Preliminary Matters—Conduct of the Impartial Hearing on Remand

The parent contends that, on remand, the IHO ignored the directive of the SRO to complete the hearing record by seeking additional evidence. The parent argues that if the IHO complied with the SRO's directives, the IHO's decision would have been different. For example, the parent asserts that, consistent with the additional documentary evidence submitted for consideration on appeal, a supplemented hearing record would have established that the Budding Buds SETSS provider was properly credentialed as a bilingual, Yiddish instructor, as attested to in the attached educational director's affidavit, and as evidenced by the provider's bilingual certification.[7] In addition, the parent argues that if the IHO complied with the SRO's directives, the evidence—as set forth in the educational director's attached affidavit—would have established that the parent attempted to locate a suitable group within which to deliver the student's SETSS, but could not locate a similarly situated group to enable delivery of SETSS in a group.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Upon review, neither the hearing record nor the IHO's decision on remand indicates why the IHO did not seek additional evidence, as instructed by the SRO. Nevertheless, the additional documentary evidence now submitted by the parent was available at the time of the impartial hearing and is not now necessary to render a decision. As a result, I decline to exercise my

[7] Contrary to the parent's assertion, the request for review did not include a copy of the proffered certification (see generally Req. for Rev.).

discretion to accept such evidence now on appeal. However, as a final point, it must be noted that even if the additional evidence was accepted and considered, it would not alter the conclusion that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained SETSS, as explained below.

B. Legal Standard and Unilaterally-Obtained SETSS

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 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).

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. As noted above, to qualify for reimbursement under the IDEA, parents must 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 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, as well as the parent's contentions and her additional documentary evidence submitted for consideration on appeal, 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 bilingual extension or was certified to instruct the student at her grade level would not carry the day 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 were appropriate to address those needs. Overall, a review of the hearing record reveals that there is little, if any, evidence of the student's needs, other than the November 2021 IESP and the November 2021 progress report, which was used to develop the IESP (see generally Tr. pp. 1-36; Parent Exs. A-C; E-H; Dist. Ex. 2; IHO Ex. V).[8] In the November 2021 IESP, the CSE described the student as having "extreme cognitive delays," which "impede[d] her functioning in the general[ ]ed[ucation]

[8] As reflected in the November 2021 progress report, during the 2021-22 school year, the student was in fifth grade and receiving SETSS for three 60-minute sessions per week (see Dist. Ex. 3 at p. 1). The November 2021 progress report was executed by an individual who, based on the evidence in the hearing record, was not the same SETSS provider delivering services to the student during the 2022-23 school year at issue (compare Dist. Ex. 3 at p. 2, with Parent Exs. F ¶ 12, and Parent Ex. H).

classroom" (Parent Ex. D at p. 2). According to the IESP, the student was then-currently receiving three hours per week of SETSS and therefore, "a very minimal amount of academics ha[d] been addressed" (id.).

With respect to the student's academic needs, the November 2021 IESP reflected that, in the area of reading, the student read "at a second grade level," and despite having received one-to-one "reading instruction," the student's progress had been "minimal" (Parent Ex. D at p. 2). In addition, the student's reading comprehension was characterized as "very poor," and while [c]omprehension strategies were embedded within the decoding instruction," there had been little emphasis on reading comprehension "due to time constraints" (id.). The IESP also indicated that, in spelling, the student could "spell simple words when she applie[d]" previously taught phonics rules (id.). In the area of writing, the student could "formulate the letters of the English alphabet correctly," but she had difficulty organizing her thoughts into more than a few written sentences (id.). In the area of mathematics, the November 2021 IESP reflected that the student "really struggl[ed]" but could "compute simple addition, [and] subtraction exercises"; however, multiplication and division problems were "difficult for her" (id.). The IESP also indicated that the student's difficulties with "reading and understanding what she read[]" affected her ability to do problem solving, and her "poor" working memory further affected her ability to problem solve because she had a "difficult time remembering steps . . . to complete the exercise" (id.).

With regard to the student's language needs, the November 2021 IESP indicated that the student could "articulate her words correctly, however, she sometimes ha[d] difficulty expressing her thoughts in a complete logical sentence"; she presented with a "strong word retrieval difficulty"; and she had difficulty following teacher directions without seeking "reassurance" or observing peers for guidance (Parent Ex. D at p. 2). As parent concerns, the IESP noted that the parent had "share[d that the student wa]s lagging behind in all core subjects, reading spelling and writing," and while verbal expression was an "area of strength" for the student, she was "behind grade level in all areas" (id.).

Turning to the student's social/emotional needs, the November 2021 IESP indicated that the student "usually interact[ed] appropriately with peers," she could take turns and share with others, and she attempted to carry on a conversation with peers (Parent Ex. D at p. 3). It was also reported that the student was "aware of her poor academic functioning" and she was "often dejected and disappointed with herself" (id.). However, it was also noted that the student was "doing very well" socially and was a "happy child who ha[d] friends in the classroom" (id.).

To address the student's needs, the November 2021 CSE recommended, in part, strategies to address her management needs, including the use of visuals and manipulatives, breaking down complex tasks into smaller steps, check-ins to clarify difficult information, using positive reinforcement, providing prompts, and providing preferential seating (see Parent Ex. D at p. 3). The CSE also developed annual goals targeting the student's needs in the areas of reading, writing, and mathematics (id. at pp. 4-5). As previously noted, the November 2021 IESP also included recommendations for the student to receive five periods per week of SETSS in a group (id. at p. 6).

In her direct testimony by affidavit, the parent testified that the student "struggle[d] in many academic and social/emotional areas and require[d] a lot of extra assistance" in order to "maintain her mainstream placement" (Parent Ex. E ¶ 2). The parent entered into a contract with Budding Buds, dated August 31, 2022, in which Budding Buds agreed to "make every effort to implement [the November 2021 IESP] with suitable qualified providers" (Parent Ex. G). According to the February 2, 2023 testimony of the educational director of Budding Buds, the agency was providing the student with five periods per week of SETSS during the 2022-23 school year (Parent Ex. F at ¶ 11). The Budding Buds educational director testified that the student's SETSS was delivered to her in her "mainstream school," "outside of the classroom," and "goals" had been created for the student for the 2022-23 school year (Parent Ex. F ¶¶ 1, 3, 14-16). In addition, the educational director's testimony by affidavit indicated that the SETSS provider worked 1:1 with the student, and "prepare[d] for sessions, create[d] goals, wr[ote] progress reports, and m[et] with teacher and parents" (id. ¶ 13). The educational director further testified that the student's "individual sessions . . . include[d] a great deal of specialized instruction" and her 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" (id. ¶¶ 16-17). In addition, the educational director testified that the student had "already shown signs of progress," but continued to require services due to her "academic and social delays" (id. ¶ 18).

Here, the evidence in the hearing record, as described above, lacked sufficient information to show that the SETSS Budding Buds provided to the student constituted specially designed instruction sufficient to meet the student's identified needs. Notwithstanding the testimony referencing quarterly assessments to measure the student's progress, progress reports prepared by the SETSS provider, and daily session notes regarding the student's progress, the hearing record is devoid of any such evidence pertaining to the 2022-23 school year when Budding Buds provided SETSS to the student (see generally Tr. pp. 1-36; Parent Exs. A-H; Dist. Exs. 1-3; IHO Ex. V). In particular, although there is some general indication that the student received five periods per week of SETSS, the hearing record lacks information describing the specific strategies used with the student or how the instruction provided was tailored to the student or met her unique needs. While the SETSS provider did not testify at the impartial hearing, the educational director of Budding Buds appeared on the parent's behalf (see Tr. pp. 12-17; Parent Ex. F). However, the educational director's direct testimony via affidavit—described above—and her cross-examination did not include any discussion about the student's special education needs or how the SETSS provider addressed those needs (see Tr. pp. 12-17; Parent Ex. F).

Accordingly, the parent failed to meet her burden to prove that the SETSS delivered to the student was instruction that was specially designed to meet the student's needs under the totality of the circumstances.

VII. Conclusion

Having found that the parent failed to sustain her burden to demonstrate that the unilateral parental placement was appropriate to meet the student's special education needs, the necessary inquiry is at an end and there is no need to reach the district's cross-appeal concerning whether equitable considerations weighed in favor of the parent's requested relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 11, 2024, is modified by reversing that portion which determined that the parent was entitled to an order directing the district to fund the costs of the student's unilaterally-obtained SETSS provided by Budding Buds for the 2022-23 school year.

Dated: **Albany, New York**
June 24, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER