The University of the State of New York

The State Education Department
State Review Officer
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No. 24-136

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which ordered it to fund respondent's (the parent's) daughter's private services delivered by AIM Educational Support Services (AIM) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-

c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student was parentally placed in a nonpublic school, and, on October 5, 2023, a CSE convened, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of

October 20, 2023 (Parent Ex. B at pp. 1, 16).[1] The CSE recommended that the student receive three periods per week of group special education teacher support services (SETSS), three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group counseling services (id. at pp. 13-14).

The parent executed a service contract with AIM on October 31, 2023 for the agency to deliver three periods per week of SETSS and three periods per week of speech-language therapy to the student at a specified rate for the 2023-24 school year (Parent Ex. C).[2]

In a due process complaint notice dated November 1, 2023, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) and "failed to locate a provider and implement [the student]'s IESP" for the 2023-24 school year (Parent Ex. A). The parent indicated she had found a provider to deliver the services but at "an enhanced rate" (id. at p. 2). The parent requested a finding that the student's pendency consisted of three hours per week of SETSS and three 30-minute sessions per week of speech-language therapy services (id.). For relief, the parent requested "[a]llowance of prospective payment to the student's SETSS and [s]peech[-language] provider/agency for three (3) hours of SETSS and [three 30-minutes sessions] of [s]peech[-language] services for the entirety of the 2023-2024 [s]chool [y]ear" (id.). The parent also requested a bank of compensatory education hours for any services the student had missed while without a provider (id.).

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

An impartial hearing took place on February 8, 2024 before the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-17).[3] The IHO entered all of the exhibits offered by the parent, both parties confirmed that they would not be calling any witnesses, and the parent's and the district's attorneys presented combined opening and closing arguments (Tr. pp. 5-15).[4] In its combined opening and closing argument, the district requested that if the IHO found the agency's SETSS provider was a qualified provider, the IHO must consider what the appropriate rate for the services provided was and further requested that the parent's relief be denied as the parent did not provide proof that services were taking place, how frequently the student was receiving speech-language therapy or whether the service was group or individual, or that the

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] AIM has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] At the hearing, the district's attorney indicated that the district had no position on pendency (Tr. p. 7).

[4] During the impartial hearing the district attempted to introduce one document, a copy of the student's October 2023 IESP, into evidence but it was withdrawn to prevent duplication (Tr. p. 4).

hourly rate charged by the agency was reasonable (Tr. pp. 8-9).[5] The parent's attorney argued that, when the district did not implement the student's IESP for the 2023-24 school year as it was required to do, the parent "did the only thing that [she] could do which was to try to implement these services on the IESP to the best of [her] ability" (Tr. p. 10). The parent's attorney argued that, although the district may argue to the contrary, this was not a unilateral placement matter as the parent was not requesting tuition reimbursement but rather the parent was trying to implement services to the best of her ability "since the [district] actively decide[d] not to service [the student]" (Tr. p. 13). The parent's attorney also argued that the IHO should not issue an order regarding the reasonable fair market rate for services because the district failed to explain how it determined $125.00 was the fair market rate (id.).

In a decision dated March 15, 2024, the IHO found that, because the parent was "simply finding providers for services the [district] deemed appropriate, the parent did not make the unilateral decision regarding the student's educational programming, unlike a situation in which a parent chooses to enroll their child in a private school that provides services to which the [district] has not consented," she was not requiring the parent to prove that the services provided by AIM were appropriate (IHO Decision at pp. 4-5). The IHO determined that applying the Burlington/Carter analysis to "failure-to-implement cases" forced parents into predicaments that were "contrary to the purposes of the IDEA and [S]tate law" and thus "the burden remain[ed] with the [district] to prove that the services provided were inappropriate" (id.). The IHO determined that there was no dispute the student was entitled to services pursuant to the October 2023 IESP, the district had the obligation to provide the services, and in failing to do so, the district failed to provide the student with "services on an equitable basis as compared to other students with disabilities attending public or nonpublic schools located within the school district" (id. at p. 6). Accordingly, the IHO ordered the district to "pay a licensed/certified provider of the Parent's own choosing for the administration of 3 1-hour periods of SETSS in a group in English per week for the 10-month 2023-2024 school year at a rate not to exceed $218.00 per hour" and "pay a licensed/certified provider of Parent's own choosing for the administration of 3 sessions of speech language therapy, individually, in English per week for the 10-month 2023-2024 school year at a rate not to exceed $250.00 per hour" (id. at p. 8). The IHO also found the student was entitled to pendency in this matter consisting of three one-hour periods of group SETSS at a rate not to exceed $218.00 per hour, three 30-minute sessions per week of individual speech-language therapy at a rate not to exceed $250.00 per hour, and one 30-minue session of group counseling per week (id. at p. 7).[6]

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in declining to assess the appropriateness of the SETSS purportedly delivered to the student by AIM during the 2023-24 school year. The district argues that the parent presented no evidence regarding when, where, how, by whom, or

[5] The district indicated that for the 2023-24 school year it set the maximum fair market rate for an independent special education teacher providing SETSS to a student at $125 an hour (Tr. p. 8).

[6] Neither party has appealed from the IHO's pendency determination.

even if the unilaterally-obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress.

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

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[7] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[8]

[7] 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]).

[8] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's parental placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from AIM for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[9] 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

[9] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from AIM (Educ. Law § 4404[1][c]).

Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The IHO articulated the basis for her view that the Burlington/Carter analysis was not appropriate. I will address the IHO's points seriatim. First, however, while I acknowledge that the Burlington/Carter framework is being utilized here for matters related to an IESP arising under State Education Law § 3602-c and rather than an IEP under the IDEA, there is no caselaw from the courts as to what other, more analogous framework might be appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

The IHO indicated these matters were distinguishable from the Burlington/Carter scenario because of the type of violation by the district (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and because the type of privately-obtained relief was different (i.e., services versus private school tuition) (IHO Decision at pp. 3-5).

As for the underlying violation, the fact that the Burlington and Carter cases were IEP disputes, that is, disputes over the adequacy of the programming design, is of little consequence. It just so happens that parties more often disagree about which type of programming is appropriate for a student with a disability, and the courts have explained that the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has also explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d

235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

As for supportive services versus school tuition, the IHO notes language in the State burden of proof statute referencing "tuition reimbursement" and the parent's burden to prove only the appropriateness of the "unilateral parental placement" (Educ. Law § 4404[1][c] [emphasis added]; IHO Decision at pp. 3-4).[10] In noting the Commissioner of Education's discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating students with disabilities, Education Law § 4401(5) defines tuition as "the per pupil cost of all instructional services" (Educ. Law § 4401[5]; Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach, 82 A.D.2d 993, 994, modified on other grounds, 56 N.Y.2d 518 [1982]). State guidance pertaining to a school district's authority to contract for the provision of core instructional services defines "core instructional services" as "those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education" including "both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations" ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Although the term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6), to the extent it comprises a special education service delivered by a certified special education teacher, it falls within the scope of this definition of instructional services and, therefore, of tuition, at least as defined in the Education Law.

Moreover, in fashioning appropriate relief, courts have interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of "related services" (see Burlington, 471 U.S. at 369; Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 31 [1st Cir. 2006]; M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1100 [11th Cir. 2006] [collecting authority]; see also Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's education . . . can, for example, 'pay for private services, including private schooling'"] [emphasis added], quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 [2d Cir. 2014]). In the present matter, the services at issue are SETSS and speech-language services, and while speech-

[10] In the pendency context, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed," not the bricks and mortar school location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]).

language pathology is specifically defined in State regulation as a related service (8 NYCRR 200.1[qq]), SETSS are not (see 8 NYCRR 200.1). However, SETSS has been defined in the past as a hybrid of resource room services and/or consultant teacher services (see Application of a Student with a Disability, Appeal No. 16-056), each of which is included in the State's definition of "special education," as are related services (Educ. Law § 4401[1]-[2]). Under these broad definitions, I do not agree with the IHO's interpretation that funding for a unilateral parental placement means only the costs of a student's tuition at a private school and, as a result, the IHO's finding that the parent has no obligation to demonstrate she obtained appropriate services from AIM was error.

Next, the IHO quotes the Supreme Court's decision in Burlington that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives" (IHO Decision at p. 4, quoting Burlington, 471 U.S. at 372). However, the IHO takes the statement out of context because the Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to a unilateral placement during the pendency of the proceedings (Burlington, 471 U.S. at 372). The Court did not find that placing a burden on the parent to prove the appropriateness of a unilateral placement defeated the objectives of the statute; to the contrary, the Court determined that if it was determined "that a private placement desired by the parents was proper under the Act," the IDEA authorizes relief in the form of tuition reimbursement (id. at 369). The Court went on to eventually hold that "[a]bsent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief" (Schaffer v. Weast, 546 U.S. 49, 57–58 [2005]). Accordingly, a state law placing the burden of production and persuasion on parents who seek reimbursement or public funding of private services that they acquired from private companies without the consent of school district officials does not offend the objectives in the IDEA.

These matters arising from Education Law § 3602-c, in which the district had already agreed to pay for private services, were originally presented by the parties as disputes over the rate to be paid to private providers devoid of any context or arguments over the appropriate legal standard. One decision addressing such a matter noted that the cases had "all of the hallmarks of what is approaching complete systemic dysfunction regarding the provision of special education services and the procedural safeguards that were supposed to protect the student" and that the "dysfunction ha[d] twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for" (Application of a Student with a Disability, Appeal No. 20-087). These disputes, as raised by the parties, originally tended to gloss over the district's underlying implementation failures, improper attempts to contract out for the delivery of instruction, and, further, the district's attempts to delegate its implementation duties to parents, and, instead, presented as "rate dispute[s]" year after year (id.). Given that the district was not authorized to contract for the provision of independent special education teachers, the idea that a "public rate for independent SETSS instruction" could be sanctioned in a policy of the district was itself flawed and, therefore, relief sought for private providers to deliver services in an IESP at an "enhanced rate" was similarly a fiction (see id.).

The Burlington/Carter framework was adopted in these matters to provide context, standards, and oversight over the remedies being sought. For example, although the school district could not contract with a teacher who was qualified as a special education teacher but who was

not certified in the State of New York, a parent could do so and seek reimbursement from the district (Application of a Student with a Disability, Appeal No. 20-087). Further, in the earlier incarnations of these cases, the parents had not taken on any liability or financial risk that is required in a Burlington/Carter framework. Without any requirement for parents to take the financial risk for such services, the financial risk was borne entirely by unregulated private schools and companies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district; this has practical effects because the private schools and companies are incentivized to inflate costs for services for which parents do not have any financial liability and parents may begin seeking the best private placements possible with little consideration given to costs or what the child needs for a merely appropriate placement (or services) as opposed to "everything that might be thought desirable by 'loving parents'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program were reasonable, at least absent contrary evidence in the hearing record.

While acknowledging the distinctions identified by the IHO, the most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

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

B. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (id. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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).

Initially, there is no challenge as to the design of the student's special education programming as both parties agree that, for the most part, for the 2023-24 school year, the student should receive the special education programming recommended in the October 2023 IESP. As noted above, the October 2023 IESP recommended that the student receive three periods per week of direct, group SETSS, as well as three 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of group counseling services (Parent Ex. B at pp. 13-14).[11]

The October 2023 IESP describes the student's special education needs (Parent Ex. B). According to the IESP, the student's cognitive skills were in the average range, indicating "age-appropriate cognitive development across all tested cognitive domains" (id. at p. 1). On a standardized measure of the student's academic skills, the student achieved reading and spelling scores in the average range with the exception of sentence reading fluency, which was low average (id. at p. 2). In math, the student's calculation skills were in the average range, and her applied problems and math facts fluency skills were in the low average range (id.).

Regarding speech-language skills, the October 2023 IESP indicated that the student demonstrated above average phonemic awareness and knowledge of orthographic rules for spelling (Parent Ex. B at p. 3). The student's ability to read non-words was in the average range, and she exhibited good comprehension of a story read to her including the ability to recall, explain concepts, apply information, and analyze/create new ideas (id.). In contrast, the student did not read for fluency or accuracy, and her narrative structure for retelling a story was "tremendously underdeveloped" in that she was unable to repeat a narrative with more than one story element without visual support (id.). The student also presented with "a very mild misarticulated /s/ sound" that, combined with her learning challenges, was causing her "a great deal of anxiety and stress" as well as "social problems" (id. at pp. 6, 7). No concerns about the student's physical development were reported as of the development of the IESP in October 2023 (id. at p. 8).

1. Specially Designed Instruction

In the parent's opening argument, counsel requested that the IHO order "three hours a week of SETSS" (Tr. p. 12). Despite the parties' seeming agreement that the student required SETSS as part of her special education program and to address her individualized needs, the only evidence in the hearing record regarding any SETSS purportedly delivered to the student during the 2023-24 school year is the contract between the parent and AIM, which indicated that AIM "intend[ed] to provide" the student with three periods per week of SETSS (see Parent Ex. C). The hearing record also includes a printout from the "Teacher Certification Lookup" for a named individual

[11] Although the parent did not challenge the appropriateness of the special education services recommended in the October 2023 IESP (see Parent Ex. A), the parent's attorney indicated during the impartial hearing that the parent was not interested in obtaining counseling services for the student (Tr. p. 7).

who holds a New York State Students With Disabilities (Birth – Grade 2) Internship Certificate that expires on August 31, 2024; however, nothing in the hearing record indicates that the named teacher delivered services to the student or where or when such services were purportedly delivered (Parent Ex. D).[12] Neither the parent, the provider, nor a representative from AIM testified at the impartial hearing (see Tr. pp. 1-17). There is no documentation that the services were delivered to the student. For example, there is no progress report, service records, or even invoices. Accordingly, the parent failed to meet her burden to prove that the SETSS were delivered to the student during the 2023-24 school year or that any services that may have been delivered were specially designed to meet the student's needs under the totality of the circumstances. With respect to speech-language therapy, the parent's contract with AIM, similarly indicated that AIM "intend[ed] to provide" the student with three periods of speech-language therapy per week (Parent Ex. C at p. 2).

In a November 30, 2023 report, a speech-language pathologist indicated that the student was then-currently receiving three individual sessions per week of speech-language therapy, although it did not indicate when services began (Parent Ex. F).[13] According to the report, the student exhibited expressive and receptive language delays characterized by difficulty with reading and listening comprehension, decoding accuracy and fluency, and sequencing and telling narratives (id. at p. 1). The student also demonstrated difficulty stating thoughts and ideas, retelling information and describing pictures, and using appropriate word and sentence structure (id.). Additionally, the report indicated that the student struggled to produce grade level written passages with accurate sentence structure, grammar, and spelling (id.). Regarding articulation skills, the report indicated that the student exhibited "lingual protrusion" during production of the "s" sound due to a mild tongue thrust (id.).

Regarding specially designed instruction, the November 2023 report indicated that the student relied on "extra repetitions of the text to help process and retain auditorily presented information more efficiently," and that "[u]se of explicit instructions and modeling [wa]s necessary to teach problem solving and verbal reasoning skills" (Parent Ex. F at p. 1). The speech-language pathologist reported that the student "learn[ed] best" when she could observe how to use language to infer messages, explain reasons behind certain events, draw conclusions, and problem solve (id.). Further, the report indicated that sessions "include[d] instruction on writing passages using modeling, visual aids, and graphic organizers" (id.). To address articulation skills, the speech-language pathologist indicated that the student could produce the "s" sound in the initial position of words "with modeling and visual cues" (id.).

According to the November 2023 report, "[t]reatment was designed to help [the student] improve comprehension of reading passages, understand and process "wh" questions, follow

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[12] The printout indicated that it was certified " solely for purposes of employment by the [district]" (Parent Ex. D).

[13] The hearing record includes a copy of the license to practice in New York of the speech-language pathologist whose name appears on the November 2023 report (Parent Ex. E). However, although the hearing record includes the report showing that pathologist delivered some services to the student, the hearing record does not include any evidence indicating that the speech-language pathologist was working for or with AIM, the company the parent is seeking funding for (Parent Exs. A-F; Tr. pp. 1-17).

directions with age appropriate concepts, and make inferences" (Parent Ex. F at p. 1). The speech-language pathologist reported that progress in meeting "previous goals" had been measured through informal assessment, observation, and data collection, and that "[r]esults revealed steady progress across all goals with residual deficits" (id.). She reported that the student had improved her ability to understand, process, and answer age-appropriate factual and inferential questions about instructional level stories (id.).

The speech-language pathologist developed annual goals for the student to improve her production of "s" in all positions of words, increase reading fluency, and improve her ability to use narrative language to retell a story with appropriate sequence of events, character introduction, and problem/resolution (Parent Ex. F at pp. 1-2).

In consideration of the above, the speech-language progress report provides some evidence that the student was receiving specially designed instruction to address her needs during the 2023-24 school year. For example, the speech-pathologist was addressing the student's identified articulation needs and was providing the student with modeling, visual aids, and graphic organizers to help in writing a passage (Parent Ex. F at p. 1). Additionally, the November 2023 report indicated that "[t]reatment was designed to help [the student] improve comprehension of reading passages, understand and process "wh" questions, follow directions with age appropriate concepts, and make inferences" (id.). However, as noted above, the hearing record provides little detail as to the extent the student received speech-language therapy services during the 2023-24 school year, as there is no identified starting date for the service and although the November 2023 report indicated that the student was receiving three individual sessions per week, there is no duration identified for those sessions (id.).

Moreover, there is no evidence that the student received SETSS during the 2023-24 school year, a service both parties agree was necessary to address the student's special education needs, and there is no evidence, or arguments, to support finding that speech-language services alone were appropriate to meet the student's unique needs. Accordingly, I find the parent failed to meet her burden to prove that the unilaterally obtained services were specially designed to meet the student's needs under the totality of the circumstances.

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the unilateral parental placement, which the parent contracted for with AIM for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of district funding or reimbursement for the costs thereof (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 15, 2024, is modified by reversing those portions which ordered the district to pay a provider of the parent's choosing for the costs of

delivering three one-hour periods of group SETSS and three 30-minute sessions per week of speech-language therapy for the 2023-24 school year at specified rates.

Dated: **Albany, New York**
May 17 , 2024

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STEVEN KROLAK
STATE REVIEW OFFICER