The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-138

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which ordered it to fund the costs of respondent (the parent's) son's privately obtained special education services delivered by Empowered Kids for Success (Empowered) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§ 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

In this matter, the evidence reflects that on January 26, 2017, a CSE convened and, having found the student eligible for special education as a student with a learning disability, developed an IESP that recommended four periods per week of group special education teacher support services (SETSS) and two 30-minute sessions per week of individual occupational therapy (OT)

services (see Parent Ex. B at pp. 1, 9).[1] At that time, the IESP indicated that the student was a "third grader in a private school for boys" (id. at p. 1).

Approximately six years later, on April 23, 2023, the parent executed a district form, which advised the district that the student would be parentally placed at her own expense for the 2023-24 school year and which further indicated that the parent was requesting that the district deliver special education services to the student in the nonpublic school he would be attending (see Dist. Ex. 2).

On September 1, 2023, the parent executed a contract with Empowered, which indicated that the agency would "make every effort to implement" the four periods of SETSS per week, by "suitable qualified providers," and at a specified rate (Parent Ex. C at pp. 1-2).[2]

In a due process complaint notice dated October 30, 2023, the parent, through her attorney, alleged that the district had last convened a CSE meeting for the student on January 26, 2017 (see Parent Ex. A at pp. 2-3). The parent indicated that the district had "failed to locate an adequate provider" for the student's SETSS, and the parent further indicated that the district had failed to "conduct an annual IESP [meeting] to determine what [the student's] educational needs" were for the 2023-24 school year (id. at p. 2). As a result, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) (id.). As relief for the alleged violations, the parent requested, in part, a bank of compensatory educational services for "any services" the student did not receive (id.). In addition, the parent indicated that she had located a "provider who [wa]s willing to work with [the student]" to deliver SETSS, but at a "higher rate than the going [district] rate" (id.). Therefore, the parent also requested that the district prospectively fund the student's SETSS at an enhanced rate (id.).

In a decision dated March 12, 2024, an IHO with the Office of Administrative Trials and Hearings (OATH) found that there was "no dispute that [the] Student [wa]s entitled to services pursuant to the IESP," the district "had the obligation to provide services to [the] Student in conformity with the IESP," and, "[i]n failing to do so, the [district] failed to provide [the] Student with services on an equitable basis" (IHO Decision at pp. 6, 8).[3] The IHO found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead of requiring the parent to prove that the unilaterally-obtained services were appropriate, the IHO determined that the "burden remain[ed] with the [district] to prove that the services provided were inappropriate" (id. at pp. 3-5). Applying this standard, the IHO found that the district failed to present evidence that the parent's selected provider or the requested rate was inappropriate or that

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

[3] In an email dated November 13, 2023, with the subject line "omnibus scheduling First Step Advocacy," the IHO 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).

the services were unnecessary (id. at pp. 7-8). Accordingly, the IHO ordered the district to, upon submission of an invoice with an affidavit "attesting to the provision of the services," "pay a licensed/certified provider of the Parent's own choosing for the administration of [four] [one]-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 $200.00 per hour" (id. at p. 8). The IHO also found the student entitled to pendency in this matter consisting of "[four] [one]-hour periods of group SETSS in a group in English" at a specified maximum rate "and [two] 30-minute periods of [OT] individually in English" (id. at p. 7).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred by declining to assess the appropriateness of the SETSS purportedly delivered to the student by Empowered during the 2023-24 school year. The district argues that, even if the IHO had assessed the appropriateness of the agency's services, the hearing record failed to include any evidence regarding when, where, or how the unilaterally-obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress. The district also contends that a remand to the IHO is unwarranted in this matter, where the parent "affirmatively chose not to argue about the appropriateness of the provider, but focused their case on the provider's rate and the [p]arent's entitlement to funding of the services." As relief, the district seeks to overturn the relief ordered by the IHO.

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

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]).

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

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

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

VI. Discussion

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, the parent unilaterally obtained private SETSS from Empowered 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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, 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.

placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[6] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

The IHO indicated these matters were distinguishable from the Burlington/Carter scenario because of the type of violation by the district (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and the type of privately-obtained relief (i.e., services versus private school tuition) (see IHO Decision at pp. 4-5).

As for the underlying violation, the fact that the Burlington and Carter cases were IEP disputes, that is, disputes over the adequacy of the programming design, is of little consequence.

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

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

However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

As for supportive services versus school tuition, the IHO notes language in the State burden of proof statute referencing "tuition reimbursement" and the parent's burden to prove only the appropriateness of the "unilateral placement" (Educ. Law § 4404[1][c] [emphasis added]; IHO Decision at p. 4).[7] In noting the Commissioner of Education's discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating student with disabilities, Education Law § 4401(5) defines tuition as "the per pupil cost of all instructional services" (Educ. Law § 4401[5]; Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach, 82 A.D.2d 993, 994, modified on other grounds, 56 N.Y.2d 518 [1982]). State guidance pertaining to a school district's authority to contract for the provision of core instructional

[7] In the pendency context, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed," not the bricks and mortar school location (Concerned Parents, 629 F.2d at 753, 756).

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/contracts forinstruction/qa.html). Although the term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6), to the extent it comprises a special education service delivered by a certified special education teacher, it falls within the scope of this definition of instructional services and, therefore, of tuition, at least as defined in the Education Law.

Moreover, in fashioning appropriate relief, courts have interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of "related services" (see Burlington, 471 U.S. at 369; Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 31 [1st Cir. 2006]; M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1100 [11th Cir. 2006] [collecting authority]; see also Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's education . . . can, for example, 'pay for private services, including private schooling'"] [emphasis added], quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 [2d Cir. 2014]). In the present matter, the services at issue are SETSS, which are not included in the State continuum of services but have been defined, at times in the past, as a hybrid of resource room services and/or consultant teacher services (see Application of a Student with a Disability, Appeal No. 16-056), each of which is included in the State's definition of "special education," as are related services (Educ. Law § 4401[1]-[2]). Under these broad definitions, the IHO's interpretation that funding for a unilateral placement means only the costs for a student's tuition at a private school and, as a result, that the parent has no obligation to demonstrate she obtained appropriate services from AIM was error.

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

These matters arising from Education Law § 3602-c, in which the district had already agreed to pay for private services, were originally presented by the parties as disputes over the rate

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

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

While acknowledging the distinctions identified by the IHO, the most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief

perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

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

B. SETSS Delivered by Empowered

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; 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).

Initially, a review of the IHO's prehearing order reflects that each party was given the same opportunity to introduce evidence in support of their respective positions in this matter (see IHO Ex. I at pp. 3-4). At the impartial hearing, the IHO admitted both the parent's and the district's evidence into the hearing record without objections (see Tr. pp. 4-6). In its combined opening and closing statement, the district representative argued that the parent had not provided sufficient documentation or evidence to support the request for SETSS, including that the SETSS were actually being implemented, that the services were provided by a licensed or qualified service provider, or identifying the specific person who was providing the services (see Tr. pp. 8-9). The district representative also indicated that, if the IHO found that the parent established the SETSS provider was qualified, then the IHO should only award service at a fair market rate as a matter of equitable considerations (see Tr. pp. 7-8). In addition, the district representative stated that the parent had not submitted any evidence, such as invoices, affidavits, or proof of payment, or why the hourly rate sought was reasonable (see Tr. pp. 8-9).

In the parent's combined opening and closing statement, the parent's attorney represented that the February 2017 IESP was the last agreed-upon IESP, and, despite the parent notifying the district prior to June 1, 2023 that she sought to have special education delivered to the student, the district failed to implement the services in the IESP (see Tr. p. 9). According to the parent's attorney, the parent entered documents into the hearing record as evidence of the provider's certification, and thus, the parent was entitled to an order directing the district to fund four hours per week of SETSS at a specified hourly rate (see Tr. pp. 10-11; Parent Exs. D-E). The parent's attorney further stated that the district's "Implementation Unit ha[d] everyone jumping through hula hoops and fire to put [in] affidavits as well as credentials, as well as contracts, [in] absolutely every single case" (Tr. p. 11). In addition, the parent's attorney noted that the district had "all the

information that they [we]re concerned about at this [impartial] hearing, all the information that they[we]re going to need, [and that the district's] Implementation Unit, which [wa]s currently their new legal department, [wa]s going to be the one that[wa]s going to receive everything the [district] need[ed]" (id.). With regard to the request for the particular hourly rate for SETSS, the parent's attorney indicated that there was no other evidence in the hearing record concerning a rate to award such funding (see Tr. pp. 11-13).

At the conclusion of the combined opening and closing statements, the IHO confirmed that the parties did "not intend to submit any additional evidence or call any witnesses" (Tr. pp. 13-14). The IHO questioned whether the parties had "anything else they want[ed] to add," to which the parties replied "[n]othing," and the impartial hearing concluded (Tr. p. 14).

During the 2023-24 school year the student attended tenth grade at a nonpublic school and received four hours of SETSS per week from a teacher who held an initial certification as a teacher of students with disabilities grades 1-6 (SETSS provider) (Parent Exs. A at p. 1; D; E at pp. 1, 7, 8). Although the student's needs are not in dispute, a description thereof provides context to determine whether the unilaterally-obtained SETSS was appropriate to address those needs. Notably, while in this case the hearing record includes a copy of the student's February 2017 IESP, that IESP indicated that the student was in the third grade at that time (see Parent Ex. B at p. 1). Therefore, given that the student was attending 10th grade during the 2023-24 school year, the student's needs as described in the February 2017 IESP provide little, if any, relevant or current information about the student's present needs and will not be relied on for that purpose. Instead, the hearing record includes a copy of the student's October 2023 teacher progress report created by the SETSS provider, who described the student's academic, language, social, and physical functioning levels and organizational skills and needs during the 2023-24 school year; as such, the October 2023 progress report provides a more reliable basis upon which to glean information concerning the student's needs (see Parent Ex. E at pp. 1-4).

In reading, the October 2023 progress report reflected that the student's decoding skills were on a mid-tenth grade level, and that at times the student "guess[ed] the rest of the word, instead of decoding using the sounds within the word" (Parent Ex. E at p. 1). Regarding reading comprehension, the report indicated that the student's skills were on a mid-ninth grade level, were "deficient," and that the student "require[d] additional concrete information to visually process the paragraphs or chapters which he reads" (id.). Additionally, the SETSS provider reported that the student had difficulty "organizing responses to his reading in a structured or written format within a group setting," "remembering facts and associating connections to text," and responding "to abstract questions," which limited his ability to read for comprehension (id. at p. 2).

In writing, the October 2023 progress report indicated that the student's written language, spelling, and organizational skills were at a beginning ninth-grade level (Parent Ex. E at p. 1). According to the report, the student often made "grammatical errors, resulting in incomplete sentences, run on sentences, and lack of written structure," and due to his lack of "spelling consistency," he "often depend[ed] on words he c[ould] find on the page or teacher feedback" (id.). Further, the progress report indicated that the student had difficulty "planning for written responses" and "getting his thoughts down on paper," he wrote "as little as possible," and although legible, his "[h]andwriting show[ed] much need for remediation" (id. at p. 2, 4).

With regard to mathematics, the SETSS provider reported that the student's calculation and problem solving skills were at an end-of-ninth grade level (Parent Ex. E at p. 1). According to the report, the student's basic arithmetic skills "seem[ed] to be ok when giving support," but he became "stuck" on problems requiring "higher order thinking" skills, by not trying to figure out the steps needed (id.). The SETSS provider reported that the student "show[ed] a lot of weakness in math," including difficulty solving multi-step problems; he stated he finished the problem when he still had "a lot more to complete," he stated he knew the work when he still "needed to practice the skill to master it," he "avoid[ed] doing his math work," and did "his best to cause distractions when presented with math work to complete" (id. at pp. 2-3). Additionally, the progress report reflected that the student had "difficulty with geometric rules and patterns," "problems involving abstract concepts requiring more than one step," and "knowing the steps needed in order to complete the problem" (id. at p. 3).

Regarding the student's language, social, and organizational skills, the October 2023 progress report indicated that, receptively, the student understood basic instructions but "struggle[d] greatly with recall or follow up after the instruction ha[d] been given," and he "tend[ed] to leave out [the] steps needed" (Parent Ex. E at p. 4). Additionally, when asked a question, the student "show[ed] delays" by "taking time to plan out his response and process the question" (id.). Expressively, the student "articulate[d] his thoughts clearly," but at times "ha[d] difficulty allowing others to speak in a group setting" (id.). The student "use[d] age appropriate vocabulary," and "interact[ed] with people who he fel[t] safe with," but "ha[d] a hard time" with people he thought "may embarrass him or call him out on something" (id.). At times, the student "yell[ed] out about others in a negative way" (id.). According to the progress report the student was organized; however, he was "always . . . missing important supplies" and "need[ed] reminders for what he need[ed] for each class" (id.). The "[s]tudent require[d] a lot of assistance when completing multi step tasks and longer assignments," he tended to "give up and ask for help," and if the task became "too complicated he w[ould] give up the whole thing and need redirections" (id.).

The October 2023 progress report reflected that the student received SETSS four times per week (Parent Ex. E at p. 7). In a section of the progress report entitled "Specially Design Instruction," the SETSS provider reported that the student was "receiving individual special education instruction," which included "support in the way of redirection, coaching for self esteem and grit, [and] providing easier examples to increase confidence, visuals guides, [and] video tutorials" (id. at p. 5). The SETSS provider indicated that "[t]hese [we]re different than the programs and materials being used in the classroom, as these [we]re catered to [the student's] specific needs, based on informal assessment" and that he "ha[d] the space to express himself without others there" (id.). According to the report, management tools or strategies used with the student included manipulatives, extra paper, picture clues, flash cards, highlighters, differentiated classwork, reteaching, and repeated directions (id.).

In arguing that the parent failed to establish that the SETSS obtained for the student for the 2023-24 school year were appropriate, the district argues that there is no evidence demonstrating how Empowered delivered SETSS, what deficits the services addressed, when and where they were provided, or how they were specially designed. Contrary to the district position, while the evidence is not robust, the October 2023 teacher progress report identified several areas of

academic need which SETSS were designed to address through identified strategies and accommodations (see Parent Ex. E).

The district also argues that the hearing record does not demonstrate the student's progress as a result of the SETSS; however, it is well settled that, although a relevant factor (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Here, although sparse, the October 2023 progress report sufficiently identifies the student's needs, demonstrates that the student received SETSSS, and identifies the strategies used to address the student's needs, and thus, supports a finding that the unilaterally-obtained SETSS were appropriate for the student.

In light of the foregoing, there is no need to disturb the IHO's order directing the district to, upon submission of an invoice with an affidavit "attesting to the provision of the services," "pay a licensed/certified provider of the Parent's own choosing for the administration of [four] [one]-hour periods of SETSS in a group in English per week for the 10-month 2023-2024 school year" at as specified maximum rate (IHO Decision at p. 8).

VII. Conclusion

In summary, an independent review of the hearing record demonstrates that the parent sustained her burden to prove that the unilaterally-obtained SETSS delivered by Empowered were appropriate to meet the student's special education needs. The district has not raised any equitable considerations that would warrant a reduction or denial of the relief sought. Accordingly, there is no reason to disturb the IHO's order requiring the district to fund the privately-obtained SETSS.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 14, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER