The University of the State of New York

The State Education Department
State Review Officer
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No. 24-139

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 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[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 September 23, 2022, a CSE convened and, having found the student eligible for special education as a student with a speech or language impairment, developed an IESP (September 2022 IESP) that recommended five periods per week of special education teacher support services (SETSS) in a group, two 30-minute sessions per week

of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) services (see Parent Ex. B at pp. 1, 9).[1]

On September 1, 2023, the parent executed a contract with Empowered, which indicated that the private company would "make every effort to implement" the five periods of SETSS per week, by "suitable qualified providers," and at a specified rate during the 2023-24 school year (Parent Ex. C at pp. 1-2).[2]

In a due process complaint notice dated October 30, 2023, the parent, through her attorney, informed the district that it had last convened a CSE meeting for the student on September 23, 2022 (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 "rate higher 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 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).

Following a hearing on February 8, 2024, an IHO with the Office of Administrative Trials and Hearings (OATH) issued a decision dated March 12, 2024, which 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" (Tr. pp. 1-20; IHO Decision at pp. 6, 9). In reaching this conclusion, the IHO found that the Burlington/Carter analysis was not an appropriate standard to apply and, 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 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 [five] [one]-hour periods of SETSS

[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] 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).

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"; "pay a licensed/certified provider of the Parent's own choosing for the administration of [two] 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"; and "pay a licensed/certified provider of the Parent's own choosing for the administration of [two] sessions a week of [OT] 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 pp. 8-9). The IHO also found the student entitled to pendency in this matter consisting of "[five] [one]-hour periods of SETSS in a group in English at a rate not to exceed $200 per hour, [two] 30-minute sessions a week of speech language therapy individually at a rate not to exceed $250 per hour, and [two] 30-minute sessions of [OT] individually in English at a rate not to exceed $250 per hour" (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, how, by whom, or even if the unilaterally-obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress. Additionally, the district contends that the hearing record is devoid of evidence to support the IHO's award of OT and speech-language therapy services, as the parent failed to provide any evidence of a contract for those services and the parent abandoned her claims for OT and speech-language therapy services at the impartial hearing. The district contends that, as a result, the IHO's order directing the district to fund the student's speech-language therapy and OT services must be vacated. The district also contends that a remand to the IHO is unwarranted in this matter, where the parent "affirmatively chose not to present evidence of Empowered's appropriateness and argued that they d[id] not have any burden." 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]).[3] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] 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, 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

[3] 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]).

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

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]).[5] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The IHO articulated the basis for her view that the Burlington/Carter analysis was not appropriate. I will address the IHO's points seriatim. First, however, while I acknowledge that the Burlington/Carter framework is 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-

[5] 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]).

obtained relief was different (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. 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 p. 4).[6] In noting the Commissioner of Education's discretion to determine

[6] 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]).

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/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 generally 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 are generally defined as a hybrid of resource room services and/or consultant teacher services, which are 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 Empowered was error.

The IHO quotes the Supreme Court's decision in Burlington that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives" (IHO Decision at p. 4, quoting Burlington, 471 U.S. at 372). However, the IHO takes 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 any 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 an appropriate placement (or services) as opposed to "everything that might be thought desirable by 'loving parents'" (Walczak, 142 F.3d at 132, 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 (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 ensure 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 SETSS

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 (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 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).

In this case, although the student's needs are not in dispute, a description thereof provides context to determine whether the parent's unilaterally-obtained SETSS was appropriate to address those needs.[7] Here, the September 2022 IESP indicated that an administration of the Wechsler Intelligence Scales for Children—Fifth Edition (WISC-V) to the student resulted in scores that fell within the average range on the "Full, Fluid Reasoning, Working Memory, Processing Speed, and the Verbal Comprehension Scales," with the "latter being most predictive of school success" (Parent Ex. B at p. 1). The September 2022 IESP also reflected that, on the "Visual Spatial Scale," the student scored within the "superior" range (id.). On the Kaufman Test of Educational Achievement—Third Edition (KTEA-3), the student scored "at or above grade level on reading, math, and spelling subtests" (id.). He scored "slightly low" on writing fluency because he "crossed out and rewrote a number of times," and scored in the high average range on visual-motor skills, and in the superior range on immediate recall for designs (id.).

The September 2022 IESP noted that the student's fifth grade teacher described his decoding skills as "'ok,' but [further] noted [that] he struggled with comprehension" (Parent Ex. B at p. 1). The student's fifth grade teacher also reported that the student could answer "'wh' questions, but 'fell short' when answering questions requiring higher order skills" (id.). In addition, the September 2022 IESP reflected that, while the student wrote in "complete sentences," he had difficulty "construct[ing] a multi-paragraph essay" (id.). The IESP further noted that the student's

[7] At the impartial hearing, the parent's attorney clarified that, as a final order, the parent was only seeking an "enhanced rate for SETSS," and with regard to the speech-language therapy and OT services recommended in the September 2022 IESP, the parent's attorney stated that the student should have received those services via pendency (Tr. pp. 10-15).

mathematics computation skills were "adequate, but [indicated that] he could not solve word problems" (id.). At that time, the student could "add, subtract and multiply, but division was challenging for him" (id.). It was also noted in the IESP that the student was "upset by his inability to keep up with the pace of classroom instruction" (id.).

With regard to the student's speech-language skills, the September 2022 IESP reflected that, while improvements had been observed in his "comprehension" and "verbal expression," he "continue[d] to struggle with specific verbal and written expression skills" (Parent Ex. B at p. 2). The student also resisted "writing and struggle[d] to put his thoughts and ideas into coherent and comprehensive paragraphs," and his "written sentences often contain[ed] syntactical and grammatical errors" (id.). In terms of expressive language, the student demonstrated "inconsistent topic maintenance and inaccurate inclusion of details" (id.). His "speech intelligibility [wa]s negatively affected" by articulation errors, which included an "interdental lisp resulting in a distorted production of /s/, weak articulation of his tongue and palate resulting in a distorted /l/, and a rapid rate of speech" (id.). The IESP indicated that the student's "low level of frustration and difficulty completing tasks before becoming overwhelmed" added to his difficulties (id.).

In describing the student's social development, the September 2022 IESP noted that he was "cooperative, chatty, and sociable" during his evaluation (Parent Ex. B at p. 3). The student "worked with perseverance, concentration, and effort," and was "especially motivated" with moments of anxiety and perfectionism "if he w[as] not doing well on an item" (id.). The IESP further noted that the student was "impulsive a few times," which manifested as "starting to work or touch materials before the examiner had finished giving him directions" (id.). According to the IESP, the student had friends and "gave mostly positive responses on personality measures, including those indicating good self-esteem"; conversely, the student "also gave a few slightly negative ones about school, and wanting to do better" (id.). As reported by the student's fifth grade teacher, he was a "good, well behaved" student who "got along with peers, and had friends in class" (id.).

With respect to the student's physical development, the September 2022 IESP indicated that he "manipulate[d] a pencil with an awkward and inefficient grasp pattern," which caused "pain in his dominant hand and wrist," and ultimately prevented him from "complet[ing] handwritten assignments or copy[ing] from the board in a timely manner" (Parent Ex. B at p. 4). The IESP identified that the student's "low score on the Beery Test of [M]otor [C]oordination" resulted from his "pencil grasp/manipulation issues," as he scored in the "average ranges on other Beery tests" (id.). As reflected in the IESP, the student also had "sensory processing deficits" for tactile, proprioceptive, and gustatory stimuli, which may have been "related to his sensory processing deficits" and which appeared to "contribute to his poor organization/planning/executive function skills" (id.).

To address the student's special education needs identified in the September 2022 IESP, the CSE recommended five periods per week of SETSS in a group, as well as two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (see Parent Ex. B at p. 9). In addition, the September 2022 CSE recommended the following strategies to address the student's management needs: praise and encouragement, use of graphic organizers for writing assignments, review and repetition, modeling, and scaffolded instruction (id. at p. 4). In addition, the CSE created approximately nine annual goals targeting

the student's skills in the areas of writing, mathematics, verbal and written expression, speech intelligibility and articulation, writing legibility, and attention needs (id. at pp. 5-7).

In addition to the student's needs as described in the September 2022 IESP, the hearing record includes a November 2023 school progress report (November 2023 progress report) prepared by the student's SETSS provider during the 2023-24 school year, which further describes the student's needs and the strategies used to address those needs (see Parent Exs. D; E at pp. 1-3).[8] According to the November 2023 progress report, the student was attending seventh grade and was receiving four sessions per week of SETSS, although it does not identify when services were initiated (see Parent Ex. E at p. 1).[9]

As reflected in the progress report, in the area of mathematics, the student "had shown progress in completing math problems and using computations to solve equations with various operator signs" (Parent Ex. E at p. 1). As of the time of the report, the student could "solve simple algebraic equations but often ma[d]e careless mistakes and omissions" (id.). When the student was "focused on [a] task," he could "follow directions to solve simple equations and inequalities; he could also find the solutions to mathematics problems with "clear step by step instructions" (id.). However, the SETSS provider indicated, in the progress report, that the student "require[d] visual modeling and extra time" to complete classwork, he was "easily distracted" and lost focus, and his "[c]oncentration typically last[ed] only a couple of minutes," which "affect[ed] his overall performance and understanding of the class and [the] steps needed to solve math problems" (id.). The student also "require[d] support to analyze and comprehend a word problem" and had "difficulty identifying keywords within a problem and organizing the relevant information required to form and solve the equation" (id.). The student needed "exercise and review" to compute at "grade level" and required "[e]xtra time to finish his work" (id.). The progress also included goals the SETSS provider was working with the student on, such as identifying equivalent linear expressions, identifying equivalent linear expressions using algebra tiles, factoring linear expressions, solving multi-step problems with positive and negative rational numbers, and applying properties of operations (id. at p. 3).

In the area of reading, the November 2023 progress report indicated that the student "enjoy[ed] reading and could "verbalize his thoughts," orally participate in discussion, and answer questions posed; however, he demonstrated weaknesses in "low attention span and ability to independently focus on problem solving" (Parent Ex. E at p. 1). At that time, it was reported that the student could "read at grade level with minor support," he recalled "main ideas and themes from the passage" read, he answered "general WH questions," and he demonstrated "verbal abilities . . . at grade level as he [wa]s able to answer macro questions and express his thoughts"

[8] According to the evidence in the hearing record, the student's SETSS provider holds a professional certificate as a teacher of students with disabilities "(Birth-Grade 2)" issued by the New York State Education Department (Parent Ex. D).

[9] The November 2023 progress report does not indicate whether the student received SETSS in a group or individually (see generally Parent Ex. E). Additionally, although the hearing record identifies the provider who delivered SETSS to the student, the hearing record does not include any evidence indicating that the SETSS provider was working for or with Empowered, the company the parent is seeking funding for (Parent Exs. A-E; Tr. pp. 1-20).

(id. at pp. 1-2). However, according to the SETSS provider, the student "struggle[d] with finding direct quotes to compile his sentences," he tended to "overlook specific details from a story" when reading aloud, and he had difficulty making inferences (id. at p. 2).

Turning to the student's writing and graphomotor skills, the November 2023 progress report indicated that the student exhibited "handwriting . . . below grade level," and it was "often difficult to understand his handwriting along with misspelling of words, bad grammar, and punctuation" (Parent Ex. E at p. 2). In addition, the student had difficulty "transferring oral speech to form complete, well thought-out paragraphs," and his writing "lack[ed] basic structure and details" (id.).

In terms of the student's language, social/emotional skills, and interpersonal relationships, the November 2023 progress report indicated that the student received instruction in English and could "comprehend and reply in dialogue form" (see Parent Ex. E at p. 2). The student was "easily . . . frustrated and discouraged," which was "often due to a lack of attention causing him to lose his place in the lesson," and according to the SETSS provider, he required "[d]irect prompts and cues" to "stay on task and pay attention" (id.). Next, although the student "enjoy[ed] interacting with peers," the SETSS provider noted that he was "commonly picked on" (id.). In addition, the student "communicate[d] with adults appropriately," but tended to "interrupt or talk over the teacher" (id.).

In addition to the foregoing information, the November 2023 progress report included a section entitled "Intervention" (Parent Ex. E at p. 3). Here, the SETSS provider identified strategies attempted with the student, which included the use of "visual and verbal prompts/cues" with the student to "continually [be] reminded to stay on task and keep focus"; and "[d]uring independent work," the student was given "step by step instruction to help him finish his work and at a faster pace" (id.).

Here, the evidence in the hearing record, as described above, lacked sufficient information to show that the SETSS Empowered provided to the student constituted specially designed instruction sufficient to meet the student's identified needs. In particular, in identifying interventions used with the student, the progress report only provides generic descriptions indicating that the student was "continuously reminded to stay on task," using "visual and verbal prompts/cues" and that during independent work the student was given "step by step instructions" (Parent Ex. E at p. 3). The progress report did not describe any specific strategies used for the student and, without more, the report does not show that the instruction provided was tailored to the student and met her unique needs. Additionally, the hearing record does not set where or when the services were purportedly delivered to the student and neither the SETSS provider nor a representative from Empowered testified at the impartial hearing. Despite the teacher progress report, there is no documentation regarding how the services were delivered to the student, including the duration of SETSS sessions. Further, although the progress report indicated the student had needs in the areas of reading—in that he overlooked details and had difficulty making inferences, and writing—in that he misspelled words and had poor grammar and punctuation, his assignments lacked basic structure and details, and he need practice with organizing his ideas and completing paragraphs, the progress report only included goals for the provider to work with the student in math (Parent Ex. E). Finally, the September 2022 IESP also indicated that the student had needs requiring the support of speech-language therapy and OT (Parent Ex. B at pp. 2, 4, 9);

however, the hearing record does not provide any information as to how these needs were being addressed during the 2023-24 school year.[10]

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

VII. Conclusion

Having found that the parent failed to sustain her burden to demonstrate that the unilateral parental placement was appropriate to meet the student's special education needs, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 12, 2024, is modified by reversing that portion which ordered the district to pay for SETSS, OT, and speech-language therapy services for the student for the 2023-24 school year.

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

STEVEN KROLAK
STATE REVIEW OFFICER

[10] During the hearing counsel for the parent noted that the parent was only "seeking enhanced rate for SETSS as per their evidence of record, as per complaint" and that the student would be entitled to all of the other recommended services, speech-language therapy and OT, pursuant to pendency (Tr. p. 12; see Parent Ex. A). However, the hearing record in this matter does not include an interim decision on pendency or a pendency implementation form (see generally Tr. pp. 1-20; Parent Exs. A-E; IHO Ex. I). Moreover, the hearing record is devoid of evidence concerning what, if any, services the student may have received pursuant to pendency (see generally Tr. pp. 1-20; Parent Exs. A-E; IHO Ex. I). As it is not clear that the student received any other services during the 2023-24 school year, without evidence that the parent was trying to arrange for necessary services for the student or that there was some agreement for the provision of those services through pendency, the failure to address the student's identified needs weighs against finding that the educational program offered to the student, as a whole, was appropriate. Nevertheless, nothing in this decision should be deemed to relieve the district of its obligations under pendency.