The University of the State of New York

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

No. 24-140

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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to directly fund the provision of special education teacher support services (SETSS) by the parent's chosen provider upon proof of provision of services for the 2022-23 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The evidence in the hearing record concerning the student's educational history is sparse. A CSE convened on December 4, 2019 to develop an IESP with an implementation date of December 18, 2019 (Dist. Ex. 1 at pp. 1, 4, 6). The December 2019 CSE found the student eligible

for special education as a student with a speech or language impairment (id. at p. 1).[1] The December 2019 CSE recommended that the student receive three periods per week of direct group SETSS in English and delivered in a general education classroom (id. at p. 4).[2]

On September 1, 2023, the parent entered into an agreement with Empowered KFS (Empowered) for the provision of SETSS at a rate of $200 per hour "based on [the] IESP [and the p]arent's request for the 2023-24 school year" (Parent Ex. C at p. 2).

On November 30, 2023, the parent's private SETSS provider prepared a progress report for the 2023-24 school year (Parent Ex. E at pp. 1-4).

A. Due Process Complaint Notice

In a due process complaint notice dated November 1, 2023, the parent alleged that the district failed to convene a CSE to conduct the student's annual review for the 2023-24 school year and failed to locate an adequate provider to implement an April 10, 2018 IESP (Parent Ex. A at p. 2.) As a result, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2023-24 school year (id.). The parent also claimed that no SETSS provider was made available for the student for the 2023-24 school year and the parent was able to find a provider who was willing to provide the student with three hours per week of SETSS at a rate higher than the standard district rate (id.). The parent requested a pendency hearing, an impartial hearing, prospective payment, and compensatory education (id.). As relief, the parent sought an order for three "times per week" of SETSS "direct in a group in English," and two 30-minute sessions per week of individual speech-language therapy," an "[a]llowance of prospective payment to the student's SETSS provider" for three hours per week of enhanced rate SETSS for the entirety of the 2023-24 school year, and compensatory hours for any services the student missed while without a provider (id.).

B. Impartial Hearing and Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on February 8, 2024 (Tr. pp. 1-14). The parties submitted documentary evidence, which included a December 4, 2019 IESP (Tr. p. 4; Dist. Ex. 1). According to the transcript, the parent withdrew submitting into evidence a copy of the April 2018 IESP, asserted that she was "adopting" the district's December 4, 2019 IESP that the district submitted into the hearing record, and the parent withdrew her request for speech-language therapy as part of pendency (Tr. p. 4). The parties gave combined opening and closing statements (Tr. pp. 7-12). By decision dated March 15, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 and that the parent's requested relief was appropriate (IHO Decision at p. 3). The IHO further found that the parent had no burden of proof at the impartial hearing and that application of the Burlington/Carter analysis

[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] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

to this case was improper and that it was the district's burden to prove that the services obtained by the parent were inappropriate (id. at pp. 3-5). The IHO then determined that the district failed to provide the student with services on an equitable basis as compared to other students with disabilities attending public or nonpublic schools located within the school district (id. at p. 6). Next, the IHO found that the district failed to introduce evidence that the hourly rate requested by the parent's SETSS provider was inappropriate, that the services requested were unnecessary and because the district bore the burden of proof as to both issues, the IHO found the "failure [wa]s dispositive" (id. at p. 7). As relief, the IHO ordered the district to "pay a licensed/certified provider of [the p]arent's own choosing for the administration of 3 1-hour periods of SETSS in a group in English per week for the 10-month 2023-2024 school year at a rate not to exceed $200.00 per hour" and that "[p]ayment for the services [wa]s to be made within thirty (35) days of a submission to the [district] of any invoices for such services, together with an affidavit attached attesting to the provision of the services administered to [the s]tudent" (id. at pp. 7-8).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in failing to consider the appropriateness of the SETSS obtained by the parent. The district asserts that the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims. The district further contends that there was no documentary evidence or testimony that demonstrated how the student's services were implemented, what deficits they addressed, when and where they were provided, or how they were specially designed to address the student's unique needs. The district also asserts that there was no evidence of the student's progress. The district requests that the IHO's decision award of funding for the parent's unilaterally obtained services.

The parent did not interpose an answer.[3]

[3] As the parent has not interposed an answer, the parent has not cross-appealed from the IHO's failure to award compensatory education and has not cross-appealed from the IHO's order, which required the parent to produce specific proof to be entitled to direct funding (IHO Decision at pp. 7-8). A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Accordingly, those claims have been abandoned. The district also has not appealed from the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year, therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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]). 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.).[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

[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]).

[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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her August 28, 2023 due process complaint notice, the parent alleged that the district had not implemented the April 2018 IESP and the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). At the time of the impartial hearing, the parent's counsel indicated the parent was "adopting" the December 2019 IESP (Tr. p. 4). The parent unilaterally obtained private services 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 (Parent Ex. A at pp. 1-2). 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 SETSS. "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"]).[6]

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 utilized here in matters 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

[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 for the student (Educ. Law § 4404[1][c]).

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

Moreover, in fashioning appropriate relief, courts have interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of "related services" (see Burlington, 471 U.S. at 369; Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 31 [1st Cir. 2006]; M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1100 [11th Cir. 2006] [collecting authority]; see also Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's education . . . can, for example, 'pay for private services, including private schooling'"] [emphasis added], quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 [2d Cir. 2014]). In the present matter, the services at issue are SETSS, which 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 are included in the State's definition of "special education" (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 that as a result the parent has no obligation to demonstrate that 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 this 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 reasonable oversight over the proposed remedies. For example, although the school district could not contract with a teacher who was qualified as a special education teacher but 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 school and companies are incentivized to inflate costs for services for which parents do not have any financial liability and parents begin seeking the best private placements possible with little consideration given to what the child needs for 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 are 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.

A. SETSS from Empowered

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. §

1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

In this matter, while the IHO erred in declining to apply a Burlington/Carter analysis to the parent's request, I nonetheless find, on my independent review of the record, that the parent met her burden of proving that the SETSS she obtained for the student from Empowered were appropriate under Burlington-Carter and, accordingly, the IHO correctly awarded the parent direct funding for the unilaterally-obtained services at a rate not to exceed $200 per hour, upon submission to the district "of any invoices for such services, together with an affidavit attached attesting to the provision of the services administered to [the s]tudent" (IHO Decision at p. 8). The documentary evidence offered by the parent included a September 1, 2023 contract with Empowered, which demonstrated the parent's financial obligation for the services delivered to the student, a copy of the certification of the student's SETSS provider, and a November 30, 2023 progress report (Parent Exs. C-E).[7]

The district argues that the parent did not meet her burden of demonstrating that the SETSS provided by Empowered was appropriate. Although the parent submitted a progress report into evidence that was less than robust, the report is sufficient to demonstrate that the SETSS provided to the student constituted specially designed instruction tailored to meet his unique special education needs.

[7] The student's SETSS provider was certified to teach grades 1-6 (Parent Ex. D). Although the SETSS provider was not a certified special education teacher, this does not bar reimbursement under Carter (see Carter, 510 U.S. at 13-14).

The information in the hearing record regarding the student's needs included a December 4, 2019 IESP that recommended three periods per week of direct, group SETSS and a November 30, 2023 progress report (Parent Ex. E; Dist. Ex. 1).[8] The present levels of performance in the December 2019 IESP, developed when the student was in fifth grade, generally indicated that the student was "doing well in math," "reading at grade level" but had difficulty with reading comprehension and answering multiple choice questions about passages, and also had difficulty writing "literary essays" and "finding a theme" (Dist. Ex. 1 at p. 1). According to the IESP, the student became "flustered" when following directions, and had difficulty expressing himself in class (id.). The IESP did not reflect that the student exhibited social/emotional or physical development concerns (id. at pp. 1-2).

On November 30, 2023, the SETSS provider prepared an unsigned progress report regarding the student, who was in ninth grade at a nonpublic school (Parent Ex. E; see Parent Ex. A at p. 1). The progress report reflected that administration of the Fountas and Pinnell assessment to the student yielded an assessment score of "Q" (Parent Ex. E at p. 2). The progress report indicated that the student easily isolated the theme of the story, remembered details, and provided a clear summary; however, struggled to understand poems, and answer questions that asked why the author used specific phrasing or what was the author's intent (id.). The SETSS provider developed annual goals for the student to improve his ability to analyze character development, determine a theme/central ideal of a text and how it develops, and read and comprehend ninth and tenth grade stories, dramas, poems with varying levels of support (id.).[9]

In writing, the progress report indicated that the student was on a seventh-grade level and that he wrote clearly and "met most requirements of the essay" assessment by using proper grammar and spelling (Parent Ex. E at pp. 1, 2). The SETSS provider reported that the student "struggled with analysis and proofs for required points" and developed annual goals for the student to produce clear and coherent writing in which the organization and style are appropriate and on grade level, and produce "informative/explanatory texts to examine and convey complex ideas, concepts, and information clearly and accurately," while featuring a number of component requirements (id. at p. 3).

Regarding math, the progress report reflected that the student was on a seventh-grade level and he achieved 75 percent on a 10 example assessment of eighth grade level math that included algebraic terms, and how to set up algebra "examples" and solve them (Parent Ex. E at p. 1). According to the progress report, the student "did better" when solving the problems than he exhibited writing them out (id.). The SETSS provider reported that the student did "very well when he could visualize a certain scenario, and then slowly by scaffolding it" (id. at p. 2). The

[8] The parent's due process complaint notice indicated that the "last [IESP] meeting that was held during which services were recommended" occurred on April 10, 2018 (Parent Ex. A at p. 2). According to the parent, the April 2018 CSE recommended that the student receive three sessions per week of group SETSS, and two 30-minute sessions per week of individual speech-language therapy (id.). As previously discussed, at the impartial hearing, counsel for the parent indicated the parent was "adopting" the district's December 2019 IESP and as such, was only seeking three hours per week of SETSS (Tr. pp. 6, 8, 9).

[9] The November 2023 progress report included one instance of the student being referred to by the wrong first name, and to the student as both "he" and "she" multiple times throughout the report (see Parent Ex. E).

SETSS provider developed a goal for the student to be able to "write out a[n] algebra example that ha[d] a constant and a number with a variable" (id.).

In the area of language skills, the SETSS provider reported that the student easily understood spoken language, used English appropriately, and was on grade level (Parent Ex. E at p. 3). Annual goals for the student included improving his text analysis skills, ability to determine the meaning of words, phrases, and vocabulary related to social studies concepts, and compare the points of view of two authors (id.). Regarding social/emotional and interpersonal relationship skills, the progress report indicated that the student was a happy student but struggled with stress at times, and that he worked well with peers and was respectfully responsive to adults (id.). Goals in these areas included identifying stressful feelings and applying coping strategies, and initiating/participating effectively in collaborative discussions in a variety of situations (id.).

With respect to additional instructional strategies, the SETSS provider stated that he used "repetition, collaboration, visual aids and manipulatives" with the student (Parent Ex. E at p. 4).

Based on the foregoing, the parent's unilaterally-obtained SETSS were similar in frequency and duration to the SETSS recommended for the student in the December 2019 IESP. Moreover, the progress report describes the student's current needs and functioning, which differ little from the description of the student reflected in the December 2019 IESP, and contains specific annual goals and strategies to address those needs. Accordingly, although the IHO failed to apply the Burlington/Carter legal standard in evaluating the parent's requested relief, the IHO correctly held that the evidence in the hearing record established that the parent was entitled to direct funding for her unilaterally-obtained SETSS, upon proof of the student's attendance (IHO Decision at p. 8).[10]

[10] The final criterion for a reimbursement award pursuant to the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). The district has not raised any equitable factors that would warrant a reduction in the amount of funding the parent requested. Therefore, there is no basis to disturb the IHO's determination that the parent was entitled to funding at a rate not to exceed $200.

VII. Conclusion

Having found that the parent sustained her burden of demonstrating the appropriateness of the unilaterally-obtained services and no equitable considerations warrant a reduction in funding, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 15, 2024, is modified by reversing that portion which found that the parent did not have a burden to establish the appropriateness of her unilaterally obtained services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the SETSS delivered to the student by Empowered during the 2023-24 school year at a rate not to exceed $200 per hour, upon proof of provision of services and proof of the student's attendance.

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

CAROL H. HAUGE
STATE REVIEW OFFICER