The University of the State of New York

The State Education Department
State Review Officer
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No. 24-141

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 respondents' (the parents') son's private special education services delivered by AIM Educational Support Services (AIM) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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

A CSE convened on May 9, 2022, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of September 1, 2022 and a projected date of annual review of May 9, 2023

(Dist. Ex. 1).[1] The IESP reflected that, at the time of the meeting, the student was five years old and attended a class of 15 students with a teacher and an assistant at a nonpublic, religious school and received four 60-minute sessions of special education itinerant teacher (SEIT) services and two 30-minute sessions of speech-language therapy (id. at p. 1). The CSE recommended that for the 2022-23 school year the student receive four periods per week of group special education teacher support services (SETSS) in Yiddish in the general education classroom and two 30-minute sessions per week of individual speech-language therapy in Yiddish in a separate location (id. at p. 7). Neither party described or provided evidence related to any events that occurred in the 12 months following the May 2022 CSE meeting.

In a letter dated May 29, 2023, the parents notified the district that they were parentally placing the student in a nonpublic school at their own expense but were requesting that the district "continue" to provide the student special education services for the 2023-24 school year (Dist. Ex. 2).

On August 10, 2023, the parent executed a contract with AIM, which provided that the company "intend[ed] to provide" the student with four periods of SETSS per week at a specified rate for the 2023-24 school year (Parent Ex. C).[2]

In an amended due process complaint notice dated October 30, 2023, the parents, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) and failed to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. G).[3] In particular, the parents asserted that the district had failed to convene a CSE to conduct an annual review for the 2023-24 school year (id. at p. 2). In addition, the parents contended that the district "failed to locate an adequate SEIT/Speech provider for [the student] for the 2023-2024 school year" (id. at p. 2). The parents indicated they had found a provider to deliver the SEIT and speech-language therapy services to the student but "at a higher rate than the [district's] standard rate" (id.). The parents requested a finding that the student's pendency consisted of services set forth in a January 9, 2020 individualized education program (IEP): four hours per week of SEIT services in Yiddish and two 30-minute sessions of speech-language therapy in Yiddish (id.). For relief, the parents requested "[a]llowance of prospective payment to the student's SEIT provider/agency for Four (4) hours per week of SEIT and 2 x 30 of Speech services for the entirety of the 2023-2024 [School Year]" (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 the IHO's hearing

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

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

[3] The original due process complaint notice was dated October 19, 2023 (Parent Ex. A).

procedure practices and expectations of the parties' conduct with regard to the impartial hearing (id. at pp. 1-7).

Two extensions of the decision timeline were granted and an impartial hearing convened on February 8, 2024 and resumed on March 6, 2024 (Tr. pp. 1-39). The IHO entered all of the exhibits offered by the parties, both parties confirmed that they would not be calling any witnesses, and the parents' attorney and the district's representative presented closing arguments (Tr. pp. 16-38; Parent Exs. A; C; E-H; Dist. Ex. 1-2).[4]

In its closing argument, the district's representative stated that the district was mandated to provide the services in the May 2022 IESP to the student for the 2023-24 school year but argued that this "d[id] not open up Parent[s] to get any provider they want at any rate they want" (Tr. pp. 22-23). The district's representative argued that the "Burlington/Carter style analysis" should apply and that the parents did not meet their burden to show the services were appropriate and did not demonstrate the rate charged was reasonable (Tr. pp. 23-24). The parents' attorney argued that the district did not implement the student's IESP for the 2023-24 school year and that all the parents were "seeking to do [wa]s to implement the services" from the IESP (Tr. pp. 27-28). The parents' attorney stated her view that the matter was not "a Burlington/Carter case" but argued that, even "if the IHO want[ed] to utilize such a framework," the parents had presented sufficient evidence regarding the private SETSS (Tr. pp. 28-32). The parents' attorney acknowledged that the parents had no contract for the speech-language therapy services and, therefore, stated that the IHO should order a "fair mark[et] rate for the speech services by the provider the Parent[s] ha[d] found" (Tr. pp. 33-34, 36). As to the rate charged by AIM, the parents' attorney contended that the district had presented no evidence that the rate was excessive (Tr. pp. 31, 34).

In a decision dated March 15, 2024, the IHO found that there was "no dispute that Student [wa]s entitled to services pursuant to the IESP," the district "had the obligation to provide services to Student in conformity with the IESP," and, "[i]n failing to do so, the [district] failed to provide Student with services on an equitable basis" (IHO Decision at pp. 6, 7). The IHO found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead of requiring the parents to prove that the unilaterally obtained services were appropriate, "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 parents' selected provider or the requested rate was inappropriate, or that the services were unnecessary (id. at p. 7). 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 Parent's own choosing for the administration" of four one-hour periods per week of SETSS in a group at the rate set forth in the contract in evidence (id. at pp. 7-8).

[4] On January 10, 2024, the district executed a pendency agreement reflecting that the student's pendency placement consisted of the SETSS and speech-language therapy mandated in the May 2022 IESP (Pend. Implementation Form).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in declining to assess the appropriateness of the SETSS purportedly delivered to the student by AIM during the 2023-24 school year. The district argues that the parents presented no evidence regarding when, where, or how the unilaterally obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress. The district argues that compared to the May 2022 IESP, the SETSS program report reflect that the student regressed.

The parents did not file an answer to respond to the district's appeal.[5]

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]).[6] "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

[5] The district has not appealed the IHO's determination that it denied the student a FAPE for the 2023-24 school year. In addition, the parent has not cross-appealed the IHO's decision to the extent it did not order district funding for private speech-language therapy. Accordingly, these findings have 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]).

[6] 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]).

nonpublic schools located within the school district (id.).[7] 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 parents do not seek tuition reimbursement from the district for the cost of the student's placement in the nonpublic school. Instead, the parents 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, they unilaterally obtained private services from AIM and a private speech-language provider for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parents are 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]

[7] 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.

[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 parents' 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]).[8] 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, while I acknowledge that the use of the Burlington/Carter framework is utilized here in matters that are related to an IESP arising under Education Law § 3602-c rather than an IEP under 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 in this matter may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some other IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

The IHO in this matter distinguished the Burlington/Carter scenario factually based on the type of violation by the district (i.e., a failure to implement an IESP that the parents agreed with versus failure to develop an appropriate IEP) 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 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 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

[8] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from AIM and the private speech-language therapy provider for the student (Educ. Law § 4404[1][c]).

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; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

The IHO quotes the Supreme Court's decision in Burlington that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives" (IHO Decision at p. 4, quoting Burlington, 471 U.S. at 372). However, the IHO takes the statement out of context because the Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to unilateral placement during the pendency of the proceedings (Burlington, 471 U.S. at 372). The Court did not find that placing a burden on the parent to prove appropriateness of a unilateral placement was defeating 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," that the IDEA authorizes relief in the form of tuition reimbursement (id. at 369). The Court went on to eventually hold in a later decision 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 seeks 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.

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 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 agencies 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 agencies 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.

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 the burden to prove the adequacy of the services that the parent privately obtained without the consent of school district officials. 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 to the student in question. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, these 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 (see 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 at 76; R.E., 694 F.3d at 184-85). In a case such as this one, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has

unilaterally selected the private company and purportedly obtained the services and is, therefore, the party in whose custody and control the evidence resides. Therefore, the parent has the burden to establish whether the private company, AIM, provided appropriate special education services to the student.

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

B. SETSS Delivered by AIM

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (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).

Although the student's needs are not in dispute, a description of thereof provides context to determine whether the unilaterally obtained services were appropriate to address those needs. The May 2022 IESP reflected that, according to a January 2022 SEIT report, the student demonstrated delays in expressive and receptive language, cognitive skills, and social/emotional skills (Dist. Ex. 1 at p. 1). The SEIT report also provided that the student had difficulty staying focused in the classroom and often lost interest after a few minutes and needed prompts and reinforcement to stay focused for an entire lesson or activity (id.). The IESP related information from the SEIT report that the student could "state functions" but had difficulty identifying categories and explaining the association between items that go together (id.). The student could answer simple questions about a story or lesson and sequence a small story of three to four cards, but needed prompts to answer more complex questions and to sequence a longer story of five to six cards (id.). The student could count by rote up to ten, give up to ten objects on request, and complete a simple pattern (id.).

Speaking to the student's speech-language needs, the IESP noted information from the SEIT report that the student spoke Yiddish, expressed himself in full sentences, and was able to express his wants and needs though his articulation could be unclear at times (Dist. Ex. 1 at pp. 1-2). He could answer yes/no questions and simple "wh" questions and use location words (near, behind, between) and correct pronouns (id. at p. 2). The student could follow two step related directions but had difficulty following directions involving time (before/after) and quantity (most, some, both, all, except, either, or) (id.).

Regarding the student's social/emotional development, the IESP included information from the SEIT report that the student was friendly and enjoyed playing with peers, but needed "prompts and cues to interact appropriately," to sustain interactions with peers, and to engage in more elaborate pretend play (Dist. Ex. 1 at p. 2). According to the IESP, the student had difficulty staying seated and focused (id.). He could follow directions but had difficulty complying and required prompts to finish a non-preferred task (id.). The IESP reflected that, according to the parent, the student "like[d] to be in charge, the boss" and liked playing alone (id.). He tended to tantrum if things didn't go his way or if he was frustrated and had challenges with "focusing and

respecting authority" (id. at pp. 2-3). The IESP noted that the student often hurt or bothered peers while playing with or near them (id. at p. 2).

In terms of the student's physical development, the IESP reported information from the SEIT report that the student could copy strokes and an "x" and attempted a circle (Dist. Ex. 1 at p. 3). He was able to make an eight-block tower, copied simple block designs, completed a 12-piece puzzle, held a crayon in a tripod grasp, held scissors correctly, and cut a paper in half (id.). The IESP noted that the student's gross motor skills were age appropriate (id.).

The May 2022 IESP included seven annual goals focused on the student's speech-language, reading, and social skills needs and identified supports for the student's management needs including verbal and visual cues, repetition, positive reinforcement, modeling, visual charts, and prompting (Dist. Ex. 1 at pp. 3-6).

Turning to the 2023-24 school year in question, the November 2023 AIM special education progress report (progress report) described the student's then-current functioning (Parent Ex. F). The progress report related that the student could identify "some alphabet and some of the sounds" but "need[ed] prompting to identify many letters of the alphabet" (id. at p. 1). The student's phonemic awareness was poor, and he did not divide words into syllables or rhyme simple words (id.). The student needed prompting to answer questions related to a story (id.). According to the progress report, the student could not sequence three picture cards of a snowman being built and had difficulty matching non-identical pictures (id. at pp. 1-2). The student exhibited delays in comprehension skills and struggled to state the main idea of a story after listening (id. at p. 2). The student also had difficulty responding to "why" questions and identifying cause-and-effect concepts and relationships (id.). With respect to writing, the progress report related that the student used a poor pencil grip and held the pencil "in the wrong place" (id.). He had difficulty forming letters, and his letters were often illegible (id.). In addition, the student's writing was "slow and often mixed up," and although he copied simple words from the board, he did not write "simple cvc words" independently (id.).

In the area of math skills, according to the progress report, the student "had shown improvement in his numbers" and "c[ould] now add numbers within five" but "relie[d] on manipulatives when adding and subtracting numbers over five" (Parent Ex. F at p. 2). The student was confused when asked to count "a large number" of manipulatives (id.). The progress report further related that the student had difficulty "answering real life" math problems (id.). He could not identify what operation was necessary to complete basic word problems and needed problems broken into "very small parts" with explicit instructions (id.). The student also "struggle[d] to understand and use quantitative concepts and words related to amount, such as many, little, one, two, none" (id.).

Speaking to the student's expressive and receptive language skills, the progress report related that the student followed one-step directions but had difficulty with two-step directions that included a new step, which made participation in classroom activities difficult (Parent Ex. F at p. 3). The SETSS provider related that the student "demonstrate[d] continuous challenges with participating in general classroom activities" (id.). The student had difficulty answering higher order thinking questions and had difficulty "filtering out the noise of the environment" when in a "large group setting," which resulted in the student not follow directions or processing information

accurately (id.). The progress report also related that expressively, the student could answer simple questions but had difficulty responding to more complex, higher thinking questions (id.). According to the progress report, the student often gave one-word answers and did not speak in complete sentences or use "an appropriate variety of age appropriate vocabulary words" (id.).

Finally, speaking to the student's social/emotional and behavior skills, the progress report noted that the student's weaknesses in these areas affected his "ability to interact appropriately with his peers and to form relationships" (Parent Ex. F at p. 3). The student had difficulty with cooperative play with peers, and had difficulty initiating and maintaining play and other social interactions (id.). The SETSS provider noted that the student needed adult intervention to resolve disputes with peers, and "reminders not to use his hands and to use either gestures or words to express disappointment" (id.). While the student was able to use an emotion chart, he still needed reminders not to react "aggressively or impulsively" (id.). According to the progress report, the student did not have meaningful conversations with peers or sustain eye contact during a conversation (id.). When conversing with peers, the student would only repeat what his peers said and could not contribute new topics or build on a peer's topic (id. at pp. 3-4).

The evidence in the hearing record regarding the SETSS delivered to the student during the 2023-24 school year includes the contract between the parent and AIM, which provided that the company "intend[ed] to provide" the student with four periods of SETSS per week, information in the November 2023 teacher progress report, and a printout reflecting that the SETSS provider held the Students with Disabilities (Birth to Grade 2) professional certificate and a Bilingual Education Extension professional certificate (see Parent Exs. C; E; F).

The AIM progress report identified the student's "mandate" of four 60-minute sessions of SETSS per week and stated that the student should continue to receive services at this frequency and duration on a "one on one" basis to address his identified deficiencies (Parent Ex. F at pp. 1, 4). The progress report noted that the SETSS provider used "explicit phonics instructions, visual aids and multisensory methods" to improve the student's writing skills (id. at p. 2). Further, the progress report noted that the SETSS provider used "a variety of multisensory interventions" to help increase the letters the student could write and improve the legibility of his writing (id.). In particular, the progress report related that the SETSS provider used multisensory manipulatives, which included modeling clay, sand, and salt (id.). For math, the progress report related that the SETSS provider intended to start with six objects to help the student develop counting skills and, once mastered, would move on to higher numbers (id.). To address the student's receptive language deficits, the SETSS provider worked with the student in small groups, used prompting and modeling, and reviewed and repeated the previous lesson to "bridge it with the new lesson being taught" (id. at p. 3). To address the student's expressive language deficits, the SETSS provider worked with the student one-on-one "using images to help him answer simple questions" (id.). Finally, to address the student's social/emotional and behavioral needs, the progress report noted that the SETSS provider used social stories, encouragement, modeling, self-regulation techniques and alternative coping methods (id. at pp. 3-4). The SETSS progress report listed 12 "active goals" that were "currently being addressed" with the student in the area of reading, writing math, language, and social/emotional skills (id. at pp. 4-5).

In arguing that the parent failed to establish that the SETSS obtained for the student for the 2023-24 school year were appropriate, the district argues that there is no evidence demonstrating

how AIM delivered SETSS at the nonpublic school, what deficits the services addressed, when and where they were provided, or how they were specially designed to address the student's needs. While the evidence is not as comprehensive as one might prefer, "[t]he test for the private placement is that it is appropriate, and not that it is perfect" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 (2d Cir. 2016]), and contrary to the district position, the November 2023 teacher progress report identified numerous areas of academic need which SETSS were designed to address through identified strategies and accommodations, as well as specific goals and I find that the objectives and strategies employed tip in favor of the parent with respect to whether the privately obtained SETSS was reasonably calculated to enable the student to receive educational benefits (see Parent Ex. E; T.K., 810 F.3d at 877).

The district also argues that the hearing record does not demonstrate the student's progress as a result of the SETSS; however, it is well settled that, although a relevant factor (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). Further, the district compares the student's discrete skills described in the IESP to those described in the SETSS progress report to argue the student regressed and attributes this to AIM; however, I am not persuaded by the district's argument. Even assuming the skills were comparable for purposes of examining the student's progress, the hearing record is not developed regarding the degree of support the student received between January 2022 (the date of the SEIT report relied upon by the May 2022 CSE) and the beginning of the 2023-2024 school year at issue, and, as noted above, the CSE did not appear to have conducted an annual review prior to the school year in question in this proceeding and the hearing record was otherwise silent regarding events related to the student's education during the preceding 2022-23 school year that would have been the subject of an annual review by the CSE. Therefore, it is not possible on this hearing record to attribute any regression experienced by the student to the SETSS delivered by AIM during the 2023-24 school year.

Based on the foregoing, I find that there is sufficient evidence to show that the student received SETSS specially designed to meet his needs as identified in the May 2022 IESP and the November 2023 progress report during the 2023-24 school year. Thus, the evidence in the hearing record shows that the parent met her burden to prove that the SETSS delivered by AIM during the 2023-24 school year were appropriate.

VII. Conclusion

In summary, an independent review of the hearing record demonstrates that the parent met her burden to demonstrate that the privately obtained SETSS obtained from AIM were appropriate. The district has not raised any equitable considerations that would warrant a reduction or denial of

the relief sought. Accordingly, there is no reason to disturb the IHO's order requiring the district to fund the privately obtained SETSS.

THE APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER