



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-149

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which in part denied her request for funding or reimbursement from the district for the unilaterally obtained special education services delivered to her son by Higher Level Education Resources (HLER) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's lack of a determination as to whether the private services delivered by HLER were appropriate for the student and from the IHO's determination that the parent was not barred from relief by the June 1st notice requirement. The appeal must be sustained. The cross-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 programming 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the CSE convened on March 21, 2022 and developed an IESP for the student with a projected implementation date of April 4, 2022 (see generally Parent Ex. B). The CSE found the student eligible for special education as a student with a learning disability and recommended five periods of direct group special education teacher support services (SETSS) per week (Parent Ex. B at pp. 1; 8).¹

In a letter dated April 27, 2023 the parent notified the district of her intent to place the student in a nonpublic school at her own expense for the 2023-24 school year and requested that the district "provide the educational services that [the student wa]s entitled to as a result of having an IEP/IESP" (Parent Ex. D).²

In a letter dated August 23, 2023, the parent advised the district that it had failed to assign providers for the services mandated for the student for the 2023-24 school year and also indicated that if the district "fail[ed] to assign a provider" she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. C).

The parent signed an enrollment agreement for the 2023-24 school year with HLER (Parent Ex. E at p. 1).^{3, 4} The agreement stated that the agency would provide special education services to the student "in frequency and duration as listed in the last agreed upon IEP/IESP" at a rate of \$192 for an individual 60-minute session of special education services, speech therapy, occupational therapy, counseling, and physical therapy or a rate of \$144 for a group session of the aforesaid services (Parent Ex. E at p. 1). The agreement indicated that the rates charged by the agency were "based on [the] reasonable market rate for similar agencies providing similar services to students in New York City, as well as on the rates approved and offered by the [district] to similar agencies providing similar services to [] students during the 2022-2023 school year" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 6, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year

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

² The district alleged it did not receive the April 27, 2023 letter (see Tr. pp. 52-53, 87-88; Answer with Cross-Appeal ¶¶ 13-15).

³ HLER has not been approved by the Commissioner of Education as a school or provider with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The enrollment contract does not include a date as to when the parent executed the contract (Parent Ex. E).

by failing to implement the student's IESP (see generally Parent Ex. A). The parent alleged that due to the district's failure to implement the student's IESP she "had no choice but to retain the services of an agency to provide the mandated services at an enhanced rate" (Parent Ex. A at p. 2). As relief, the parent requested an order awarding the student five periods of SETSS per week for the 2023-24 school year, directing the district to fund SETSS she unilaterally obtained for the student for the 2023-24 school year at an enhanced rate, awarding "related services set forth on the Student's last IESP for the 2023-2024 school year," and awarding a bank of compensatory education services to make-up for any mandated services not provided by the district (Parent Ex. A at p. 3).⁵

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 17, 2023 and concluded on February 20, 2024, after five days of proceedings inclusive of four status conferences (see Tr. pp 1-94).⁶ The district introduced three exhibits during the impartial hearing and the parent through her lay advocate objected to two of the exhibits (Tr. pp. 33, 42-45). The IHO admitted two of the three exhibits over the parent's objections (Tr. p. 45). The parent introduced eight documents which were admitted with no objections (Tr. p. 46). The parent's advocate indicated the parent was seeking reimbursement for five periods of SETSS per week at an enhanced rate and no related services (Tr. p. 47-48, 50). The parent's advocate also requested that if the IHO was to award reimbursement for SETSS that it not be at the district's rate (Tr. p. 51). In its opening, the district stated that the parent failed to timely request equitable services on or before June 1st pursuant to State education law (Tr. p. 51-52). The district also indicated that if the IHO determined that a June 1st letter was received by the district and the parent's private provider was qualified, the parent's relief should be denied or reduced because the rate charged by the private agency was unreasonable given the student was mandated for group SETSS and there was no evidence of the private providers' credentials that would warrant an enhanced rate (Tr. pp. 53-54). The parent presented two witnesses—herself, and an educational supervisor from HLER (see Tr. pp. 58, 68). Both parties made closing arguments summarizing their positions (see Tr. pp. 87-93). In its closing, the district maintained that although the parent testified a letter requesting services was sent prior to June 1st, there was no other evidence the parent sent the letter to the district and also argued that if funding is awarded, it should be at a rate lower than what the parent was requesting for the private group SETSS (Tr. pp. 87-90). During her closing argument the parent's advocate argued that the parent had proven the district failed to provide the student a FAPE for the 2023-24 school year, that the services provided by the private agency were appropriate, that the evidence supported the parent's request for SETSS to be awarded at the enhanced contracted rates of \$192

⁵ The parent also requested a pendency hearing and an order as to pendency (Parent Ex. A at p. 3). The hearing record includes a pendency implementation form signed by a district reviewer on December 6, 2023 offering the student five periods per week of SETSS during the pendency of this proceeding (Dec. 6, 2023 Pendency Implementation Form)

⁶ Neither the parent nor the attorney for the parent appeared at the November 15, 2023 status conference (see Tr. pp. 2, 6-12).

for individual SETSS and \$144 for group SETSS and there was evidence that the parent sent a timely June 1st letter (Tr. pp. 90-92).

In a decision dated March 18, 2024, the IHO found that the district did not offer the student a FAPE for the 2023-24 school year (see generally IHO Decision).⁷ The IHO addressed the parties disagreement over the June 1st letter noting the parent testified that she believed she had sent the June 1st letter but determined that even if the parent did not send the letter, as claimed by the district, the parent was not bound by her failure to submit the letter because there was no notice by the district to the parent requesting such a letter (IHO Decision at pp. 6-7). The IHO declined to reduce or deny relief based on the district's June 1st defense (id. at p. 7).

Next, the IHO addressed the credibility of the parent's evidence that the private services unilaterally obtained for the student were appropriate and the rate charged by the private agency was reasonable (IHO Decision at pp. 7-9). The IHO determined that the HLER educational supervisor's testimony was "confusing, evasive and not entirely credible" because the supervisor "lacked any real knowledge to testify at the hearing, as to the number of sessions and as to the educational certification of the two providers listed in the documents" (id.). The IHO also noted that the supervisor gave conflicting testimony regarding the rate HLER charged for group SETSS as the supervisor testified HLER was being paid \$105 an hour (\$85 for one student and an additional \$20 for the second student), yet the parent signed a contract for different amounts (id. at pp. 8-9). The IHO also determined that there was no evidence of how long a period was (id.). The IHO further determined that at least one of the private SETSS providers did not have a college degree and was therefore "not an appropriate person for special education services" (id. at p. 7). As for the reasonableness of the rate for the private SETSS, the IHO determined that appropriate payment would be \$110 an hour and stated that such rate was "[c]learly more than appropriate based on the paucity of evidence presented and the failure of credible testimony by the agency" (id. at p. 9). The IHO also determined that due to the lack of session notes for September 2022 and October 2022, "it c[ould] only mean the student did not receive those services for those months" (id. at p. 8).

For relief, the IHO ordered the district to pay HLER \$110 per period for five periods per week of SETSS beginning November 2023 until the end of the school year, except for the month of June 2024, for which he directed the district to pay for half of the services that month at a rate of \$110 per period based on the private school's calendar as to the number of school days in session during that month (IHO Decision at p. 9).⁸

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by determining the educational supervisor's testimony was not credible; by determining the private providers were not certified; by determining

⁷ Although the IHO did not specifically state the district denied the student a FAPE for the 2023-24 school year, based on the IHO's decision to partially award the parent's requested relief it is logical to conclude that the IHO also determined the district did not offer the student a FAPE for the 2023-24 school year.

⁸ In awarding a rate of \$110 per period, the IHO noted the periods were likely less than one hour and that the agency would likely receive more than \$110 per hour (IHO Decision at p. 9).

the SETSS services were not provided in September or October; and by reducing the hourly rate for SETSS.⁹

The district filed an answer with cross-appeal alleging that the IHO erred by failing to determine whether the SETSS delivered to the student by HLER during the 2023-24 school year were appropriate to address the student's special education needs and also erred by determining that the parent's failure to file a June 1st notification letter did not bar her from obtaining relief.

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 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

⁹ The parent submits additional evidence to be considered on appeal consisting of copies of the teaching certificates which are purportedly for the student's identified private SETSS providers and a copy of the student's session notes dated from September 11, 2023 to October 29, 2023 (see Proposed Parent Exs. A-C). The district in its answer with cross-appeal argues the additional evidence should not be considered because the documents were available at the time of the impartial hearing. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the parent concedes in her request for review that both teaching certificates were available at the time of the hearing but indicates that she did not know the certificates were required at the hearing. Although I could consider accepting these documents as they are printouts from a State Education Department website, the names indicated on the teaching certificates are not exactly the same as the SETSS providers indicated on the student's session notes (compare Proposed Parent Exs. A-B, with Parent Ex. H) and there is no information explaining why the names would be different on the certifications. Accordingly, without an explanation, they are not of sufficient weight to be relevant to the outcome of this proceeding and will not be considered on appeal. Regarding the session notes, the parent indicated the session notes "were not missing on purposes and should be included as additional documentary evidence as they are necessary to prove that the [s]tudent was receiving services" (Req. for Rev. at p. 5). Through the parent's own admissions on appeal, the additional evidence was available at the time of the hearing; however given the undersigned's determinations that HLER is appropriate and the IHO erred in reducing the rate awarded for SETSS, the proposed evidence is not necessary to render a decision in this matter as the parent is being awarded all her requested relief due to the district's denial of FAPE for the entire 2023-24 school year as discussed further below.

(Educ. Law § 3602-c[2]).¹⁰ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (*id.*).¹¹

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

Initially, I note that while the IHO did not specifically indicate in his decision that the district denied the student a FAPE (or equitable services) for the 2023-24 school year, he awarded the parent relief for the district's failure to implement the student's March 2023 IESP or to develop an IESP for the remainder of the 2023-24 school year; accordingly, by ordering the district to fund the parent's unilaterally-obtained SETSS for the 2023-24 school year, in part, the IHO decision impliedly determined that the district denied the student equitable services for the school year (see generally IHO Decision). As, the district has not cross-appealed from the IHO's finding that it bore responsibility for failing to provide the student a FAPE (or equitable services) for the 2023-24 school year, other than appealing the June 1st determination,, the district's failure to provide services to the student for the 2023-24 school will not be reviewed, other than as to the June 1st letter, and it has become final and binding on the parties (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]).

¹⁰ 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]).

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

A. Equitable Services – June 1st Deadline

As an initial matter, the district alleges in its cross-appeal that the IHO erred in determining that even if the parent had failed to submit a timely June 1st notification letter to the district, she was not barred from bringing a claim against the district for its failure to implement or recommend equitable services for the student for the 2023-24 school year because there was no notice from the district in the first instance notifying the parent of the June 1st notification requirement. Additionally, the district asserts that the parent's alleged June 1st letter that was admitted into evidence was not received by the district.

Initially, it should be noted that there is no requirement for the district to notify parents of students parentally placed in a private school of the June 1st deadline and thus the IHO erred by concluding the lack of a June 1st letter by the parent would not bar her IESP claims. The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1st statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1st deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at <https://www.counsel.nysed.gov/Decisions/volume44/d15195>; Appeal of Beauman, 43 Ed. Dep't Rep. 212, Decision No. 14,974 available at <https://www.counsel.nysed.gov/Decisions/volume43/d14974>). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

Therefore, a discussion of whether the parent timely sent a June 1st letter is necessary to determining whether the district was required to develop an IESP for the student for the 2023-24 school year.

The issue of the June 1st deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of

technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

In this instance, the district properly raised the issue of the June 1st deadline at the January 11, 2024 status conference and then again in its opening statement during the February 20, 2024 impartial hearing (Tr. pp. 28, 52).¹² Accordingly, the parent was on notice that if she sent a June 1st letter she should provide evidence showing that it was sent.

Regarding the June 1st notice requirement, the parent introduced a copy of a document that purported to be a June 1st notification letter, dated April 27, 2023 (Parent Ex. D). In the April 2023 letter, the parent indicated that she intended to place the student at a nonpublic school for the 2023-24 school year and requested that the district provide the student with special education services (*id.*). The parent testified on cross-examination that she created the April 2023 letter, signed it, and "believed" it was sent to the district but was "not sure" (Tr. pp. 59-60). Upon further questioning by the attorney from the district, the attorney asked if the document was sent to the district by mail or by email and the parent responded that the letter was sent via email (Tr. p. 61). The parent asserted that she "ha[d] a copy" of the letter and confirmed that she had given her advocate the email for the June 1st letter, further asserting again that she had a copy of the email (Tr. p. 61). When asked when the email was sent, the parent stated it was sent "4/27/2023" (*id.*). The advocate attempted to ask the parent during redirect if she wanted the opportunity to include proof of mailing for the June 1st notification, but the IHO interposed that the parent could not introduce any new documents at that time in the hearing because the district needed five days notice to review the documents (Tr. pp. 64-65). The advocate suggested the parties adjourn for five days to give the parent an opportunity to "follow up on that"; however, the IHO did not address the advocate's request to adjourn and proceeded to the next witness (Tr. pp. 65-66). In her closing statement, the advocate asserted that Education Law § 3602-c does not explicitly describe a complete bar to any services as a consequence for failing to provide a June 1st notification and that the parent sent a June 1st letter in addition to a 10-day notice letter to the district (Tr. pp. 92-93).

The district argues that it never received the April 2023 letter and according to the special education student information system (SE SIS) log submitted into the hearing record, the letter was not received by the district (see Dist. Ex. 3). The first entry for the 2023-24 school year was on September 9, 2023 and indicated that the parent "confirmed that [the student was] attending the fifth grade at YDE..., for the 2023-24 school year" (Dist. Ex. 3). According to the SE SIS log, the

¹² A district may, through its actions, waive a procedural defense (Application of the Bd. of Educ., Appeal No. 18-088). The Second Circuit has held that a waiver will not be implied unless "it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them" and that "a clear and unmistakable waiver may be found . . . in the parties' course of conduct" (N.L.R.B. v. N.Y. Tele. Co., 930 F.2d 1009, 1011 [2d Cir. 1991]). In this matter, there is no evidence to suggest the district waived its June 1st defense nor has the parent put forth an argument that the district through its conduct waived the June 1st requirement.

prior entry was on August 15, 2022 and related to the student's IESP for the 2022-23 school year (see id.).

Here, based on a review of the evidence available in the hearing record, the parent's testimony that a letter was sent by email weighed against the district's SESIS log without an explanation as to how the log is made, is marginally sufficient to indicate that the parent sent a letter to meet the June 1st notification requirement on or around April 27, 2023 (see Tr. pp. 59-61; Parent Ex. D; Dist. Ex. 3). While it would have been preferable to have a copy of the email to the district with the June 1st notification letter introduced into evidence, the parent testified that she created the June 1st notification letter, signed it and "believed" that she sent the letter via email to the district, further asserting that the email was sent on "4/27/2023" when the attorney for the district continued to question her (Tr. pp. 60-61). Therefore, a review of the evidence shows that it was more likely than not that the parent timely sent a June 1st notification letter to the district, which suffices for purposes of fulfilling the notice requirement. Accordingly, I concur with the IHO, on somewhat different grounds, that the district was obligated to develop an IESP for the student for the 2023-24 school year and the district failed to do so.

B. Unilateral Services

Prior to reaching the substance of the parties' remaining 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. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from HLER 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 that 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"]).¹³

¹³ 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 parent's request for privately obtained services must be assessed under this framework. That is, 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]). 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).

Here, the IHO acknowledged in his decision that for a district to be required to pay for educational services obtained for the student by his parent, the parent had to prove the services they selected were appropriate (IHO Decision at p. 5, [citing Burlington, 471 U.S. at 359, 369-70]), and made evidentiary findings regarding the SETSS provided by HLER during the 2023-24 school year; however, as correctly argued by the district in its cross-appeal, the IHO ultimately failed to make a determination as to whether the SETSS provided to the student were appropriate under the relevant legal standard (IHO Decision at pp. 5-9). Rather, the IHO noted the recommendation of the March 2022 CSE of five periods per week of SETSS in a group and went on to address the rate charged by HLER (see IHO Decision at pp. 6-9).

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]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see 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).

1. Student Needs

At the time the student began receiving services from HLER, his most recent IESP was over a year old, having been created by the district on March 21, 2022 to be implemented on or around April 4, 2022 (Parent Ex. B at p. 1). The March 2022 IESP indicated that administration of the Wechsler Intelligence Scale for Children- Fifth Edition (WISC-V) yielded a full scale IQ of 85, which fell in the "[l]ow [a]verage range of intelligence" (id. at p. 2). The student attained a standard score of 95 on the verbal comprehension index and a standard score of 80 on the fluid reasoning index (id.). In addition, the March 2022 IESP indicated that the Wechsler Individual Achievement Test- Fourth Edition (WIAT-4) was used to assess the student's academic functioning (id.). The IESP noted that the student scored in the high average range on the word reading subtest, the average range on the spelling and numerical operations subtests, and the low average range on the reading comprehension and math problem solving subtests (id.). According to the IESP, by teacher report, the student was decoding at a beginning second grade level while his reading comprehension skills were at a middle first grade level (id. at p. 3). The IESP stated that the student could read a simple sentence with moderate fluency but got stuck and was unfamiliar with more challenging words (id.). The student was able to answer basic literal

comprehension questions but had "an extremely hard time with comprehension," including inferencing, predicting, and drawing conclusions (*id.*). The IESP indicated that the student's writing and spelling skills were at a beginning second grade level and noted that the student could spell most basic words (*id.*). However, the student wrote simplistic sentences that were below grade level, capitalized mid-sentence and mid-word, did not begin writing from the margins and created lines of varying length, and had difficulty following writing instructions/prompts and generating ideas for writing (*id.*). In term of mathematics, the March 2022 IESP indicated that the student was performing calculations at an end of second grade level and his problem-solving skills were at a beginning first grade level (*id.*). The IESP noted that the student struggled to understand math word problems and was having a hard time catching up on multiplication and division (*id.*).

Turning to the student's social development, the March 2022 IESP described the student as "friendly and respectful" (Parent Ex. B at p. 4). The student was able to identify several means of advocating for himself including asking questions, raising his hand, and getting individualized help (*id.*). The IESP noted that the student was motivated to succeed but uncomfortable taking chances when unsure of his ability (*id.*). The IESP stated that the student was well-liked, had good social skills and many friends, and that he "d[id] not manifest any social-emotional issues or concerns" (*id.*). The IESP did not note any concerns with the student's physical development (*id.*).

The IESP identified the following strategies and resources needed to address the student's management needs: repetition and review, previewing materials, preferential seating when necessary, praise and encouragement, scaffolding and modeling, instructions and assignments broken down into smaller units, word wall to assist with spelling and vocabulary, multi-sensory lessons, graphic organizers and outlines, editing and revision checklists, sentence starters, rubrics, writing prompts, active reading strategies (annotating, color-coding, highlighting, and question generating), teacher/student check ins, aid with mathematical word problems, and a practical understanding of how subject matter relates to real life experiences (Parent Ex. B at p. 5).

An HLER assessment report, dated October 15, 2023 (fifth grade) indicated that the student was reading at "Reading A-Z level W" and, based on informal testing, performing math at a third grade-level (Parent Ex. G). The assessment report stated that, based on informal math probes, the student could not multiply one digit by one digit or higher and noted that he "ma[d]e careless mistakes and confused operations (*id.*). The assessment report described the student as "sweet and kind" and "eager to please his teachers" (*id.*). It further noted that the student was motivated to learn and would continue to try even when he failed (*id.*) The assessment report included goals that targeted the student's ability to understand new vocabulary based on context, understand cause and effect in a story, solve math operation problems with minimal errors, and understand word problems and which operation to use (*id.*). HLER session notes from October through December 2023 indicated that the student struggled with order of operations, solving word problems, multiplication and division, and fractions (Parent Ex. H at pp. 4-7). The student also had difficulty remaining focused (*id.*).

A February 2024 HLER progress report provided additional information regarding the student's needs during the 2023-24 school year (Parent Ex. F; *see* Tr. p. 46).). The progress report stated that the student grappled with challenges across many academic fronts, that his struggle to maintain focus often led to disruptions, resulting in occasional negative behaviors, and that, due to his lack of sustained attention, he required repeated reminders to follow classroom directions (*id.*).

In addition, the progress report noted that, academically, the student faced severe delays in reading and comprehension, which extended to his proficiency in solving math word problems; that processing new information was a struggle for him; and retention of previously taught material was a notable challenge for the student, as was applying acquired knowledge (id.). The HLER progress report indicated that the student's "instructional/functional" level for both reading and math was fourth grade (id.).

The progress report noted that reading was a tremendous struggle and challenge for the student, and that he had difficulty with decoding fluently, acquiring new reading skills, and comprehension (Parent Ex. F at p. 1). According to the progress report, the student's decoding was below grade level as demonstrated by his difficulty in pronouncing long words, as well as his lack of fluency and familiarity with the words being read (id.). Additionally, the student needed support and guidance to help him accurately understand what was being read, the authors' purpose, and identifying details and genres of stories or passages (id.). The progress report indicated that the student also needed prompting to answer questions relevant to what he had read or what was being read to him, and that his inability to focus had an effect on his reading progress (id.). The progress report noted that the student needed repeated reminders to stay on task and not be disruptive with or to his peers, as well as help formulating appropriate answers based on something he read and, aside from the actual context of the answer, the student needed to be reminded about spelling and grammar rules (id.). According to the progress report, the student's difficulty with reading also had an effect on his mathematical skills, mostly as it related to solving word problems (id.). The progress report noted that, due to his lack of comprehension the student did not properly understand what steps needed to be taken in order to solve problems accurately (id.).

With respect to writing skills, the progress report stated the student was facing challenges in learning and incorporating fifth-grade writing skills; while he displayed effort, he encountered difficulties in areas such as organization and sentence structure (Parent Ex. F at p. 2). The progress report indicated that the organization of the student's writing tended to lack a clear structure, making it challenging for the reader to follow the flow of ideas, and further, sentence structure remained a point of struggle, with the student working towards incorporating a wider variety of sentence types for a more engaging and polished writing style (id.).

According to the HLER progress report, the student faced challenges in the realm of math computation, particularly in processing and retaining information after it was taught (Parent Ex. F at p. 2). The progress report stated that, the student's "learning journey" was marked by difficulties in maintaining focus during lessons, and noted that he often required multiple reminders to stay engaged, and that his lack of focus "tremendously affect[ed]" his ability to learn new skills (id.). The student required constant repetition of concepts, and the progress report noted that, even after much practice, the student made careless mistakes and often forgot the skill needed to complete the problem (id.). According to the progress report, while the student could successfully complete simple mathematical operations immediately after a lesson, he encountered significant struggles when confronted with word problems, and understanding the context and deciphering what was being asked in the word problems proved to be a notable challenge for the student (id.). The progress report stated that despite providing a focused setting for the student, he continued to grapple with remaining engaged and attentive, often requiring reminders to stay on track, and, multiplication tables posed a persistent difficulty for him, impacting his ability to grasp division concepts (id.).

The HLER progress report stated that, with respect to social development, the student possessed positive social qualities, such as being sweet, kind, and well-liked by his peers; demonstrated leadership qualities; was eager to assist others; maintained good relationships with others; and was respectful to his teachers but was not hesitant to express concerns when he felt mistreated. (Parent Ex. F at pp. 1, 3). Further, the progress report noted that the student faced challenges in following classroom rules and occasionally found himself in trouble; however, despite this, he remained calm and did not easily frustrate (id. at p. 3). With respect to physical development, the progress report indicated that the student's handwriting was "somewhat legible," that he wrote "large and lightly," and that he seemed to have normal mobility, coordination, and overall good health (id.).

2. SETSS Provided by HLER

The February 2024 HLER progress report stated that "balancing support for [the student's] academic needs with recognizing and fostering his positive social attributes c[ould] contribute to a more well-rounded and supportive learning environment (Parent Ex. F at p. 1). The progress report further stated that identifying and implementing targeted strategies tailored to the student's learning style could help him overcome academic challenges and thrive both socially and academically at school (id.). According to the progress report, it was crucial that the student continue receiving SETSS to assist him in progressing further and reaching grade level (id.).

With respect to reading, the progress report stated that the student was taught in a small group setting for reading lessons to better address and focus on his needs, and that he received more individualized attention and accommodations in this environment (Parent Ex. F at p.1). Again, the progress report noted that continued SETSS were of the upmost importance to ensure that the student continued to learn and stay on par with appropriate reading and comprehension skills (id.). Session notes from October 2023 through December 2023 indicated that the student learned about the different structures authors used in informative texts by going through sample articles and identifying the different elements that showed which structure the author used (Parent Ex. H at p. 1).^{14, 15} According to the session notes, prompting was used to help the student decode correctly as he read informational texts and practiced reading aloud with accuracy, and the student learned to figure out the meaning of vocabulary words using their synonyms and antonyms within the same sentence through modeling and guided practice (id.). The session notes stated that an anchor chart and graphic organizer were used to help the student identify the elements of realistic fiction, and a visual anchor chart as well as practice were used to help the student with the skill of

¹⁴ Nine goals were included in the student's session notes that targeted the student's ability to answer reading comprehension questions by locating support for his answers in the text, as well as using context and semantic clues; decode words read with sufficient accuracy and fluency to support comprehension; and understand new vocabulary words based on context (Parent Ex. H at pp. 1-2). The session notes included additional goals that targeted the student's ability to identify and describe structural differences of written forms of imaginative literature (id. at pp. 2-3). Mathematic goals included in the session notes targeted the student's calculation skills, problem solving skills with word problems and multi-step word problems, ability to solve math operation problems, and ability to read and interpret graphs (id. at pp. 4-7).

¹⁵ The session notes stated that a reading comprehension assessment, that included short passages with multiple choice questions and a vocabulary section, was used to get a clearer picture of the student's strengths and difficulties (Parent Ex. H at p. 1).

making predictions (id. at p. 2). The session notes indicated that when learning about the elements of argumentative texts, a model passage was used to assist the student in identifying the elements, which the student then identified in a reading passage in his workbook, and when answering comprehension questions, articles were used to have the student read and answer questions based on it thereafter (id. at p. 2).

The HLER progress report noted that with respect to writing, tailored support, including focused lessons on organization and sentence structure, as well as consistent feedback, would be integral to the student's progress in overcoming writing difficulties and enhancing his overall fifth-grade writing proficiency (Parent Ex. F at p. 2). With continued dedication and targeted intervention, the report stated, the student would strengthen these skills and build a solid foundation for advanced writing in the future (id.).

To support the student's mathematical development, the HLER progress report stated that it was essential to explore strategies that catered to the student's learning style, fostered sustained attention, and enhanced his comprehension of word problems to ensure a more comprehensive grasp of mathematical concepts (Parent Ex. F at p. 2). The progress report noted that the student received individualized support for his math challenges through small group sessions, where he was one of two students, and to address his multiplication table challenges, the student benefitted from regular math drills, which provided him with repeated exposure to reinforce and retain these fundamental facts (id.). The progress report noted that the student tended to express uncertainty with phrases like "I don't know what to do," however, once provided with guidance or shown the solution, he quickly responded that he recognized and understood the process (id.). According to the progress report, this pattern suggested that the student may require additional support in building confidence and independence in his problem-solving skills (id.). By employing strategies that catered to his individual learning style and offering consistent reinforcement, the progress report stated that the student could make strides in overcoming his challenges and gaining proficiency in math concepts (id.).

According to the session notes from October 2023 through December 2023, when dividing two digits by three digits, the student required constant reminders to use the "DMSBR" method, so he could check off that he had completed each step and could move on to the next (Parent Ex. H at p. 4). The session notes stated that the student required prompting to look back and find key words that would help him figure out what the word problem was asking, and even after finding the key words, the student required additional assistance in understanding what the key words meant (id.). The student required reminders to refer back to "PEMDAS" while solving word problems, and the student was assisted by many practice examples and a hands-on approach (id.). The session notes indicated that the student was given manipulatives to attempt to find equivalent fractions, and reminders as well as breaking down information were used to assist the student (id. at pp. 6-7). The session notes stated that the student learned better in small groups (id. at p. 6).

According to the HLER progress report, understanding the student's learning style was crucial for tailoring effective strategies to support his academic progress, and the progress report noted that the student was a visual learner, who thrived when information was presented visually, either through drawings on the board or by creating visual representations himself (Parent Ex. F at p. 2). The progress report stated that the use of manipulatives and charts further enhanced the student's understanding, as they served as tangible and visual aids to reinforce concepts and, given

his difficulty in maintaining focus, a small group setting proved to be the most conducive environment for his learning (id.). In this setting the progress report noted that the student received the attention and support necessary to stay engaged, and constant repetition was a key element in the student's learning process, as it reinforced the importance of incorporating repetitive exercises and drills to solidify the student's understanding of mathematical concepts (id.). The progress report stated that by aligning teaching methods with the student's visual learning preferences, using manipulatives and charts, and providing a supportive small group setting with ample repetition, educators could enhance the student's learning experience and foster academic success (id.).

According to the HLER progress report, the student's academic success relied heavily on the ongoing assistance he received, and his difficulties in maintaining focus and processing information presented significant delays in achieving academic milestones (Parent Ex. F at p. 3). The progress report stated that the continued provision of support services, coupled with the benefits of working in smaller settings, ensured a tailored approach to address the student's specific needs, which would make it possible for the student to succeed and perform better academically (id.).

According to the October 2023 through December 2023 session notes, when presented with the task of identifying the elements of argumentative texts in a model passage, the student was able to do this in a reading passage in the student workbook, and when answering comprehension questions based on articles, the student was able to answer correctly most of the time (Parent Ex. H at p. 2). The session notes stated that the student "did well" when recognizing and categorizing realistic fiction, and, with respect to making predictions, the student "did well and was able to apply the skill learned" (id.). In addition, the session notes indicated that the student "was able to catch on" to complete the set of equivalent fractions with missing numbers after many practice examples and a hands-on approach by having the student work together with his peer on the board (id. at p. 4). The session notes stated that with respect to multiplying fractions, after completing a couple examples together on the board, the student was asked to complete 4 examples in his book, and initially, he needed a reminder of how to solve it, however, once reminded, the student completed three out of four problems correctly (id. at p. 7).

The educational supervisor for HLER testified that the student was at an "end of 3rd grade level, beginning of 4th grade" level of academic functioning prior to the start of the 2023-24 school year (Tr. pp. 69-70). She stated that the student's needs were addressed by having him work "in a small group environment and the provider g[ave] him more individualized attention, work[ed] with modified curriculum, br[oke] information down, repeat[ed], more -- more specified instruction" (id.). The educational supervisor further testified that as of the middle of the school year the student was "holding at beginning middle 4th grade level" (id.).

The educational supervisor testified that the student received SETSS in a group of two at the school on a pull-out basis (Tr. p. 73, 81). She stated that she believed the SETSS began to be provided to the student on or about September 11, 2023 (Tr. pp. 73-74). She testified that the student received a total of five hours of SETSS per week spread out over different "periods" of the school day which varied in length (Tr. pp. 81-82). More specifically she indicated that the student was pull-out two times per day Monday through Thursday, once for reading and once for math (Tr. pp. 81-82).

Accordingly, the HLER progress report and session notes indicate that the providers employed by HLER were aware of the student's needs, addressed them through specially designed instruction, and developed targeted goals for instruction. As such, the parent has met her burden of proof that the SETSS unilaterally obtained for the 2023-24 school year were appropriate in that they addressed the student's identified needs.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. 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"]).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed.

App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"].

The parent argues that the IHO improperly and arbitrarily reduced the rate of the SETSS provided to the student from the contracted rate of \$144 to \$110 per hour and that there was no evidence to support the reduced rate awarded by the IHO. The district argues the IHO properly reduced the rate after considering the amount HLER pays the provider for one student, the length of each session, the number of students provided SETSS in the group, and HLER's administrative costs.

An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

In analyzing equitable considerations, the IHO noted that, according to testimony, the student received services in a group of two and the SETSS provider was being paid \$85 an hour for one student and an additional \$20 per hour for a second student, for a total of \$105 an hour for two students (IHO Decision at p. 8). The IHO further noted that there was no testimony that a period of SETSS was an hour long but there was testimony that the periods of SETSS were different lengths of time (IHO Decision at pp. 7-8). The IHO also calculated that HLER's rate of \$144 per student for group SETSS yielded the agency \$183 per hour for administrative expenses, a rate that he questioned (*id.*). The IHO found that the statement in the enrollment agreement that the rates were based on the market rate was not persuasive without testimony of the person who wrote such statement (*id.* at p. 7). The IHO also considered that one of the SETSS providers may not have had a college degree at the time of service and thus was not an appropriate special education service provider (*id.*).¹⁶ Accordingly, the IHO determined that an appropriate payment

¹⁶ In his decision, the IHO found it relevant to the decision to reduce the direct funding because the SETSS provider did not appear to have a college degree or appropriate certifications at the time of service and thus was not an appropriate special education service provider (IHO Decision at p. 7). In this instance, the evidence does not show that the provider was not qualified to deliver services, rather the only testimony was by the HLER educational supervisor, who testified that she was not sure if one of the providers had graduated from college (Tr. p. 75). While it is certainly suspicious that the educational supervisor of the agency was not aware of the qualifications of the staff employed by the agency, the IHO appears to have overly relied on this lack of knowledge in finding the provider was not qualified. Additionally, as set forth above, 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). When assessing whether private services unilaterally obtained by a parent are appropriate, the private companies need not employ certified special education teachers or have their own IEP for the student (*id.* at 13-14). Accordingly, the SETSS provider's certification status is not a compelling equitable ground to find that direct funding of the privately obtained SETSS must be reduced or denied, nor is there sufficient evidence in the hearing record to find that the provider was not qualified—which would be more of a consideration as to the appropriateness of the service rather than an equitable consideration.

for the SETSS delivered by HLER to the student in a group of two was \$110 an hour (*id.* at p. 9). The IHO also noted that this rate was clearly appropriate based "on the paucity of evidence presented and the failure of credible testimony by the agency" (*id.*).¹⁷

Here, the parent is correct that the IHO erred in reducing the rate for SETSS. As indicated, the IHO did not base his determination on evidence of reasonable market rates for the same or similar services but rather on his own interpretation of the propriety of the rates charged by HLER, based on such factors as the number of students the agency provides services to, the credentials of the SETSS providers, and the calculated administrative expenses. While such factors are relevant to the reasonableness of the rate, they are meaningless without evidence in the hearing record as to what a reasonable rate would be for sake of comparison. As indicated in the enrollment agreement for the 2023-24 school year, the services provided to the student by HLER would be the same in frequency and duration as those listed in the "last agreed upon" IESP, which in this matter was the March 2022 IESP recommending 5 periods per week of direct group SETSS (Parent Exs. B at p. 8; E at p. 1).¹⁸ The enrollment agreement indicated HLER charged \$144 for group sessions (Parent Ex. E at p. 1).

While the district had the opportunity during the hearing to submit evidence concerning the current market rates for comparable private SETSS providers, the only evidence it had admitted into evidence on the rate issue was a letter from the general counsel of the New York City public schools dated November 1, 2023, which indicated the district had set a maximum fair market rate of \$125 an hour for an independent special education teacher providing SETSS (Dist. Ex. 1 at p. 4). The letter indicated the rate was based on an independent study using "NYCPS pay and compensation for special education teachers, Bureau of Labor Statistics data, and the Consumer Price index" which determined \$125 an hour was "more than fair compensation for providing SETSS to one child pursuant to their IESP" (*id.*). The district did not present a witness to explain

¹⁷ The parent argues that IHO erred in his determination that the SETSS supervisor who testified was not credible. The IHO in his decision, as indicated above, questioned the credibility of the SETSS supervisor given the inconsistent testimony and knowledge of the SETSS providers certifications and rates charged by HLER for SETSS (see generally IHO Decision at pp. 7-9). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; *P.G. v. City Sch. Dist. of New York*, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; *M.W. v. New York City Dep't of Educ.*, 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; *Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer*, 84 A.D.3d 795, 796 [2d Dep't 2011]; *Application of a Student with a Disability*, Appeal No. 12-076). Additionally, the parent argues that the IHO incorrectly determined that the SETSS providers were not certified. Here, there is no non-testimonial evidence in the hearing record that would compel a contrary conclusion and, as such, I decline to reverse the IHO's decision regarding the SETSS supervisor's testimony or the finding regarding the certifications of the SETSS providers. As indicated above, the parent's additional evidence has not been considered as it is unnecessary to render a decision nor is a determination necessary given the outcome below (see, e.g., *Application of a Student with a Disability*, Appeal No. 08-030; *Application of a Student with a Disability*, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

¹⁸ There is a question as to whether the services are in fact equal as the student received five hours per week of SETSS which was equivalent to eight periods (see Tr. p. 82). Nevertheless, having found that the services provided were appropriate to meet the student's needs, it does not appear that this is a sufficient basis to reduce the amount awarded on equitable grounds as an excessive amount of services.

the independent study further or to be available for cross-examination; without such testimony there was no explanation as to how the independent study was directly relevant to the current prevailing market rates for private SETSS providers and there is no indication from the IHO's decision that he relied on the letter in determining that the rate sought by the parent should be reduced (see Tr. pp. 33-94). Therefore, the hearing record does not contain sufficient evidence to support the IHO's rate reduction and that portion of the IHO's decision must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the parent's unilaterally obtained SETSS were appropriate and having found that the IHO erred by reducing the rate for direct funding and limiting the award to the time period of November 2023 to June 2024, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find them unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 18, 2024 is modified by reversing that portion which reduced the rate for the unilaterally-obtained SETSS for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of the unilaterally obtained five hours of SETSS per week delivered to the student for the entirety of the 2023-24 school year at a rate of \$144 per hour upon the parent's submission to the district of sufficient proof of delivery of services.

Dated: **Albany, New York**
 June 12, 2024

STEVEN KROLAK
STATE REVIEW OFFICER