The University of the State of New York

The State Education Department
State Review Officer
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No. 24-168

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.

Shehebar Law, PC, attorney for respondent, by Y. Allan Shehebar, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer appropriate equitable services to respondent's (the parent's) son and ordered it to fund a bank of compensatory educational services, consisting of special education teacher support services (SETSS), occupational therapy (OT), and counseling services for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The hearing record is sparse with regard to the student's educational history; but given the limited issues to be resolved on appeal, a complete recitation, even if available, is unwarranted. Briefly, in this matter the evidence reflects that on January 11, 2023, a CSE convened and, having

found that the student remained eligible for special education as a student with an other health-impairment, developed an IESP (January 2023 IESP) that included recommendations for the student to receive five periods per week of SETSS in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group to address his identified needs (see Parent Ex. C at pp. 1, 7-8).[1] In addition, the January 2023 IESP included approximately seven annual goals targeting the student's needs in the areas of attention; motor planning, sensory processing skills, and motor skills; self-regulation and coping strategies; writing a multiparagraph essay; solving mathematical word problems; and reading fiction and nonfiction texts (id. at pp. 5-7).[2]

By due process complaint notice dated January 18, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1).[3] According to the parent, the student struggled with motor planning, fine and gross motor skills, regulating his emotional skills, and managing his responses in social situations with teachers and peers (id. at p. 2). The parent indicated that the student's difficulties "inhibit[ed] [his] academic and educational progress and caus[ed] him to regress" and as a result, a CSE recommended that the student continue to receive the special education program set forth in his January 2022 IESP, which consisted of five hours per week of SETSS, two 30-minute sessions per week of counseling services, and two 30-minute sessions per week of OT (id.). According to the parent, the district failed to locate SETSS and related services providers to implement the student's program, the district failed to implement the student's program, and the parent "unilaterally secured [her] own providers to work" with the student "at an enhanced rate" (id.). The parent requested pendency services, based on the special education program set forth in the January 2022 IESP, and as relief for the alleged violations, the parent requested an order directing the district to directly fund or reimburse the parent for the SETSS and related services set forth in the January 2022 IESP at an enhanced rate (id. at p. 3). The parent reserved her right to seek compensatory educational services for any services not provided to the student by the district (id.).

On February 8, 2024, the district countersigned a pendency form, which indicated that the student's January 2023 IESP formed the basis for the student's pendency services consisting of five periods per week of SETSS, one 30-minute session per week of individual counseling, one 30-

[1] The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] The "Evaluation Results" section of the January 2023 IESP reflected an "OT progress report," dated May 22, 2022, and index composite scores obtained from an administration of the "Wechsler Intelligence Scales for Children—Fifth Edition" to the student on February 26, 2020 (Parent Ex. C at p. 1). At the time the CSE developed the January 2023 IESP, the student was attending fifth grade at a religious, nonpublic school (id.).

[3] It does not go unnoticed that, by the time the parent filed her due process complaint notice, the special education program recommended in the student's January 2023 IESP had expired, or was soon to expire; the hearing record is devoid of evidence that a CSE met to develop an IESP for the student in or around January 11, 2024, the date of the anticipated annual review noted in the January 2023 IESP (see Parent Ex. C at p. 1; see generally Parent Exs. A-C; Dist. Exs. 1-2; IHO Exs. I-II). Based on the parent's due process complaint notice, the parent made no allegations concerning the district's implementation, or lack thereto, of the recommendations contained in the January 2023 IESP (see Parent Ex. A).

mintue session per week of counseling in a group, and two 30-minute sessions per week of individual OT (see Pendency Imp. Form at pp. 1-2).

On February 22, 2024, the parent executed a contract with McDonald Learning to provide the student with SETSS and OT services for the 2023-24 school year (see Parent Ex. D at pp. 1-2).[4] The contract indicated that the entity charged $195.00 per hour for SETSS and $225.00 per hour for OT services (id. at p. 1).

On March 4, 2024, the parties proceeded to, and completed, an impartial hearing in this matter before the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-20). At the impartial hearing, the district's attorney presented an opening statement, within which she indicated that a Burlington/Carter analysis applied to the instant case (Tr. p. 7). The parent's attorney, in her opening statement, disagreed with the district's position that Burlington/Carter was the appropriate legal standard to apply (see Tr. pp. 13-14). In addition, the parent's attorney noted that, for relief, the parent sought an order for direct funding of the student's SETSS and OT services from McDonald Learning but requested a bank of compensatory educational services for counseling, as the parent had not unilaterally-implemented those services for the student (see Tr. pp. 12-13).

In a decision dated March 25, 2024, the IHO briefly described the background and procedural history of the matter, and then turned his attention to the legal framework and burden of proof (see IHO Decision at pp. 3-4, 7). When addressing the burden of proof, the IHO noted that "some authority" existed to support the "proposition that where a parent s[ought] reimbursement for private services obtained when the [district] fail[ed] to provide the services agreed to in an IESP, the burden shift[ed] to the parent to prove that those private services were appropriate" (id. at p. 3). However, the IHO found that this burden shifting went "against both the letter and the spirit" of State law establishing the burden of proof in an impartial hearing when a parent was "seeking tuition reimbursement for a unilateral parental placement" (id., citing Educ. Law § 4404 [emphasis in original]). The IHO explained that when "parents must resort to finding their own private providers due to the [district's] failure to provide the agreed upon services d[id] not involve tuition reimbursement for a unilateral parental placement," but instead, simply located providers to implement services the district "deemed appropriate" (IHO Decision at p. 3 [emphasis in original]). As a result, the IHO opined that the parent had not "made a unilateral decision regarding the student's educational programming," which was distinguishable from when a parent chose to "enroll their child in a private school" to deliver services with which the district "ha[d] not consented" (id. at pp. 3-4). Additionally, the IHO clarified that it would be "inequitable to permit the [district] to shift the burden of proof to the parent where, as here, the [district] recommended certain services and simply failed to follow through on its obligation to actually provide the services" (id. at p. 4 [emphasis in original]). Consequently, the IHO noted that he would not require the parent to "prove that the services provided were appropriate"; instead, the IHO found that the "burden remain[ed] with the [district] to prove that the services provided were inappropriate" (id.).

[4] McDonald Learning 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).

Thus, upon review, the IHO concluded that the district failed to "introduce evidence . . . regarding the propriety" of the student's services (IHO Decision at pp. 4-5). After briefly summarizing and rejecting the district's arguments concerning the parent's unilaterally-obtained services, the IHO turned to the district's contention that the hourly rates for the parent's providers were excessive and not in line with market rates (id. at pp. 5-6). Ultimately, the IHO determined that the hearing record lacked evidence to "dissuade [him] from ordering the [district] to fund [the s]tudent's services at the contracted rate listed" for the entire 2023-24 school year (id. at p. 6). As relief, the IHO ordered the district to fund a bank of compensatory educational services consisting of the following: 180 hours of SETSS at a rate of $195.00 per hour and to be delivered by McDonald Learning; 36 hours of OT services at a rate of $225.00 per hour and to be delivered by McDonald Learning; and 36 hours of counseling services (18 hours, individually and 18 hours, group) at a rate not to exceed $225.00 per hour and to be delivered by a provider selected by the parent (id. at pp. 6-7).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred by declining to assess the appropriateness of the SETSS and OT purportedly delivered to the student by McDonald Learning during the 2023-24 school year. The district argues that the parent presented no evidence regarding when, where, how, by whom, or even if the unilaterally-obtained services were delivered, how the services addressed the student's unique needs, or whether the student made progress. The district also contends that the IHO erred by failing to find the agency's rates for SETSS and OT were excessive. The district asserts that the IHO did not properly consider the AIR study report that it submitted as evidence into the hearing record when calculating the appropriateness of McDonald Learning's rates. Consequently, the district seeks to overturn the IHO's relief awarded, or alternatively, to remand the matter to the IHO for further administrative proceedings.

In an answer, the parent responds to the district's allegations and generally argues that the IHO properly declined to apply the Burlington/Carter analysis to the facts and circumstances of this matter, especially where, as here, the parent does not dispute the special education program recommended in the student's January 2023 IESP.[5] The parent further argues that, contrary to the district's assertion, the IHO conducted a thorough and detailed review of the AIR study report and properly found that McDonald Learning's rates were not excessive or unreasonable. As relief, the parent seeks to uphold the relief awarded by the IHO, or alternatively, if the district's appeal is sustained, then the matter should be remanded to the IHO to allow the parent to supplement the hearing record, as needed.

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];

[5] No signed verification by parent was at all in this proceeding, and the affirmation of service of the answer executed by the parent's attorney is not affirmed under penalties of perjury in the State of New York as required. Although I have recited the contents of the document, it is defective under Part 279. As noted above, the parent also did not appear at the impartial hearing, and it cannot be ascertained if the parent is even aware of the appeal. The attorney's actions are not compliant with the requirements of this forum and I may reject deficient filings made by the attorney in the future if they do not improve.

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 [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.).[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]).

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[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]).

[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 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.).

VI. Discussion

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's parental placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from McDonald Learning for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[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 his view that the Burlington/Carter analysis was not appropriate. While I acknowledge that the use of the Burlington/Carter framework is utilized here in matters related to an IESP arising under Education Law § 3602-c and rather than an IEP under IDEA, there is no caselaw from the courts as to what other, more analogous framework might be

[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 McDonald Learning (Educ. Law § 4404[1][c]).

appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO may disagree with the use of the Burlington/Carter standard, I find the alternative approaches adopted by some IHOs insufficient to address the factual circumstances in these cases. I address some of the reasons for this below.

The IHO indicated these matters were distinguishable from the Burlington/Carter scenario because the type of violation by the district was different (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and the type of privately-obtained relief was different (i.e., services versus private school tuition) (IHO Decision at pp. 3-4).

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

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

was improperly drafted (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

As for supportive services versus school tuition, the IHO notes language in the State burden of proof statute referencing "tuition reimbursement" and the parent's burden to prove only the appropriateness of the "unilateral parental placement" (Educ. Law § 4404[1][c] [emphasis added]; IHO Decision at p. 3).[9] In noting the Commissioner of Education's discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating student with disabilities, Education Law § 4401(5) defines tuition as "the per pupil cost of all instructional services" (Educ. Law § 4401[5]; Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach, 82 A.D.2d 993, 994, modified on other grounds, 56 N.Y.2d 518 [1982]). State guidance pertaining to a school district's authority to contract for the provision of core instructional services defines "core instructional services" as "those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education" including "both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations" ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Although the term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6), to the extent it comprises a special education service delivered by a certified special education teacher, it falls within the scope of this definition of instructional services and, therefore, of tuition, at least as defined in the Education Law.

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

[9] In the pendency context, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed," not the bricks and mortar school location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]).

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

While acknowledging the distinctions identified by the IHO, the most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).[10] In treating the requested relief as compensatory education, it is

[10] In arguing in their answer to uphold the IHO's decision and the specific relief granted, payment for future therapies that are unilaterally selected by the parents, the parents are effectively engaged in an end run around bearing the burden of proof for privately-obtained services. The undersigned has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court

problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

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

B. Unilaterally-Obtained SETSS and OT Services

Turning to a review of the appropriateness of the services that the parent purports to have unilaterally-obtained from McDonald Learning, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (id. 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 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

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or other authoritative body in this jurisdiction has addressed the topic to date (Application of the Dep't of Educ., Appeal No. 24-151; Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally-selected private special education services such as McDonald Learning, I find that even in those circumstances it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief.

Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

In this case, although the student's needs are not in dispute, a description thereof provides context to determine whether the parent's unilaterally-obtained SETSS and OT services were appropriate to address those needs. The hearing record includes two IESPs—the January 2022 IESP and the January 2023 IESP—describing the student's needs; the student's needs will be drawn from the January 2023 IESP, as it was more recently developed prior to the initiation of the parent's claims related to the 2023-24 school year.

According to the January 2023 IESP, the student was attending fifth grade at a religious, nonpublic school, and had received a diagnosis of an attention deficit hyperactivity disorder (ADHD); the IESP reflected that, at that time, it had been recommended that the student receive SETSS, OT, and counseling services (see Parent Ex. C at p. 1). The IESP also indicated that the student's cognitive skills, as measured in February 2020 through an administration of the WISC-V, all fell within the high average range with a full-scale intelligence quotient (IQ) of 111, within the high average range (id.). As reported by the parent, the student's "academic strength [wa]s reading," and the IESP indicated the student read "on grade level" (id. at pp. 1-2).[11] According to the January 2023 IESP, some information contained therein was based on the student's prior January 2022 IESP; for example, the January 2023 IESP indicated that the student's writing skills were below grade level, his writing was "messy and d[id] not stay straight on lines," he had difficulty holding a pencil, and his "spelling skills [we]re below grade level" (id. at p. 2; see Parent

[11] The January 2023 IESP indicated that, according to the "[p]rior IESP" developed in January 2022, the student's reading skills were "on an early [fourth] grade level, but his inferential reading skills [we]re lower," and he had difficulty focusing and thinking analytically about what he read (Parent Ex. C at p. 2). At that time in January 2022, the student needed to work on identifying the author's message and theme and retaining prior knowledge when reading chapter books (id.).

Ex. B at p. 2). Similarly, both the January 2022 IESP and the January 2023 IESP indicated that the student could express his ideas clearly, but not in sentences and paragraphs, and he needed to improve his writing mechanics, spelling, legibility, neatness, and sentence structure/punctuation (Parent Ex. C at p. 2; see Parent Ex. B at p. 2). In mathematics, both IESPs noted that the student's computational skills were at grade level, but his problem solving skills were at "a lower level," and he had difficulty breaking down a problem in order to take the steps necessary to solve it (Parent Exs. C at pp. 1-2; see Parent Ex. B at p. 2). Both IESPs also noted that the student needed to improve his ability to independently understand a problem and take the steps necessary to solve two-step and multi-step problems (see Parent Ex. C at p. 2; see also Parent Ex. B at p. 2).

Regarding the student's social development, the January 2022 and the January 2023 IESPs indicated that the student had "little stamina for classwork, especially any written work or following along with a class lesson" (Parent Exs. B at p. 2; C at p. 2). According to both IESPs, it was "extremely difficulty for [the student] to stay in one place or sit for very long with proper posture," and both IESPs reflected that the parent had expressed concern about the student's inability to sit still and remain focused in class (Parent Exs. B at p. 2; C at p. 2). Although he expressed that he wanted to do well on assessments, the student became frustrated and upset when he encountered "something he ha[d] refused to practice in class and need[ed] to figure out on an assessment for the first time" (Parent Exs. B at p. 2; C at p. 2). In January 2023, the parent reported that the student's "self confidence often relate[d] to how he [wa]s doing in school," and that at times, the student gave up "and w[ould] not persevere when a task [wa]s challenging" (Parent Ex. C at p. 2).

In the area of physical development, the January 2023 IESP reflected reports that the student was in overall good health, and he received OT services "to address his fine motor skills, gross motor skills, graphomotor skills, sensory processing, emotional regulation and time management skills" (Parent Ex. C at p. 3). Both the January 2022 IESP and the January 2023 IESP noted that the student had been seen for an OT evaluation "secondary to parental request to determine if his observed maladaptive behaviors were a result of sensory processing difficulty" (id.; see Parent Ex. B at p. 3). At the January 2023 CSE meeting, the parent reported concerns about the student's fine motor skills (id.).

In January 2023, the CSE recommended the following strategies to address the student's management needs: multisensory approach to learning, scaffolding, preview and review of material, use of word walls for spelling and vocabulary, checking for understanding throughout the day, using graphic organizers, providing verbal and visual prompts as needed, preferential seating near teacher, repetition, and verbal praise and encouragement (see Parent Ex. C at p. 4).

Notwithstanding the foregoing information about the student's needs in the hearing record, the only evidence in the hearing record regarding the SETSS and OT services purportedly delivered to the student during the 2023-24 school year is the contract between the parent and McDonald Learning, which indicated that McDonald Learning would "make every effort to implement the above referenced [p]rogram with suitable providers" and which indicated that that program consisted of SETSS "5" and OT "2x30" during the 2023-24 school year from September 1, 2023 through June 30, 2024 (Parent Ex. D at p. 1). The hearing record does not set forth the name of a providers who delivered services, his or her qualifications, or a statement of where or when the services were purportedly delivered (see generally Parent Exs. A-D; Dist. Exs. 1-2; IHO Exs. I-II). Neither the SETSS provider nor the OT provider nor a representative from the

McDonald Learning agency testified at the impartial hearing (see generally Parent Exs. A-D; Dist. Exs. 1-2; IHO Exs. I-II). There is no documentation that the services were delivered to the student (see generally Parent Exs. A-D; Dist. Exs. 1-2; IHO Exs. I-II). For example, there is no progress report, service records, or even invoices included in the hearing record (see generally Parent Exs. A-D; Dist. Exs. 1-2; IHO Exs. I-II). In addition, the hearing record indicates that the parent did not contract with the McDonald Learning agency to provide the student with counseling services, and the hearing record is devoid of evidence that the student received any counseling services (see generally Parent Exs. A-D; Dist. Exs. 1-2; IHO Exs. I-II). Accordingly, consistent with the district's arguments on appeal, the parent failed to meet her burden to prove that the SETSS, OT services or counseling services were delivered to the student and that they were specially designed to meet the student's needs under the totality of the circumstances. As a result, the IHO's decision granting funding for McDonald Learning must be reversed.

As a final point, nothing in this decision should be deemed to relieve the district of its obligations under pendency. The hearing record in this matter includes a copy of a pendency form executed by representatives for both parties (see Pendency Impl. Form). The district is required to provide the services, or make up the services if it has not been doing so. While the hearing record does not include any evidence to determine what services, if any, the student has received under pendency, the parties agreed that the student was entitled to receive five periods per week of SETSS, one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group, and two 30-minute sessions per week of individual OT (id.).

VII. Conclusion

Having determined that the parent failed to establish the appropriateness of the SETSS and OT services unilaterally-obtained from McDonald Learning, as well as that the student did not receive counseling services, for the student for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of equitable considerations (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 25, 2024, is modified by reversing that portion which ordered the district to fund a bank of compensatory educational services by McDonald Learning, consisting of 180 hours of SETSS at a rate of $195.00 per hour, 36 hours of OT services at a rate of $225.00 per hour, and 36 hours of counseling services at a rate of $225.00 per hour.

Dated: **Albany, New York**
June 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER